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Tomasz Zygmunt*

An intuitive approach to judicial expertise

Research shows that expert performance in many fields of activity is embodied in an expert level of intuition. This appears to be true in predictable domains with fixed rules. However, evidence suggests that this type of expertise also exists among representatives of more naturalistic domains, such as firefighters or art specialists. This paper considers whether a kind of expertise embodied in expert intuition can occur in judges. It supports the thesis that it is possible to achieve expert intuition in the scope of some types of court situations consisting of legal problems with an objective legal standard for solving them. However, legal intuition is ineffective in cases involving legal problems with no such standard, and thus it cannot be developed to the expert level in this respect. The paper discusses two model examples of comparable legal problems: those that generate a completely novel normative issue for judges, and those that create a conflict between judicial intuitions, frequently regarding the relation between law and morality. In both of these situations there are no visible environmental regularities (repetitive patterns of legal practice) to adapt, and hence, it is impossible to perform a deliberate practice – a form of training indispensable for developing expert intuition – for legal decision-making. Legal intuitive expertise, therefore, appears to be powerless in determining the holistic answers to some legal court cases, despite the skills and experience of the judge.

Keywords: expertise, expert intuition, legal reasoning, hard cases, easy cases

1 INTRODUCTION

Psychological research on human intuition has shown that in the majority of everyday choice situations human beings make their decisions using heuristic intuitive thinking rather than by employing fully analytical reasoning.[1] One of the most curious examples of the ability to perform an expert performance – an extraordinarily effective process of decision-making, professional activity, or finding a correct answer or solution to a problem – is that of expert intuition.[2] Intuitive skills developed to the expert level are observed in domains with fixed

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1 For a general review on the psychology of intuitive decision-making, see Gilovich et al. 2002, and Kahneman 2012, with the literature cited therein. For the role of affective emotions in human decision-making see also Clore et al. 2014: 323-417, and Loewenstein et al. 2001: 267-286.

2 For a general review on intuition as a foundation of expertise, see inter alia Gigerenzer et al. 1999, Hoghart 2001, Ross 2006, Klein & Kahneman 2009, Harteis & Billett 2013, Horvath & Wiegmann 2016. Notably, expertise can be conceptualized differently than as based on intuitive skills – see Gobet 2017. Compare with Harteis & Billett 2013: 153-154 and the intuitive-skeptical approach of Cappelen: 2012: 17-20.

rules ensuring high predictability of the outcomes, such as games, sports, or playing musical instruments.[3] However, when those conditions are lacking, expert intuition appears to be hard to master. Researchers have pointed out several environmental characteristics, as well as the specific form of training needed, to ensure intuitive expertise. These include, among other things, the regularity and predictability of the decisive domain, the repetition of tasks as a form of training, and the timely reception of adequate feedback.[4] Under the perspective of expert intuitive skills, therefore, the decisive domain of court judges remains unique. On one hand, there are no fixed objective legal standards for every court situation allowing for the retrieval of the positive or negative evaluation of the concrete action. On the other hand, judges are somehow trained to conduct a complete trial, which ends with the final decision. Moreover, legal education and the following legal practice is perceived as a source of judicial expert intuition by many researchers.[5] The question of whether there are kinds of court cases in which this intuition can be developed to the expert level, therefore arises.

The main thesis of this article is that judicial expert intuition – although likely to be found – cannot be achieved in every type of legal court case. In particular, intuitive expert performance cannot function as a comprehensive decision-making process for novel legal problems or legal problems that generate conflicting judicial intuitions. The reason for this lies in the environmental features of the decisive domain of court cases, which cannot provide the proper habitat for intuitive expert training in every type of legal problem.[6] The proper cultivating of expert intuition requires patterns to be learned through repetitive training with adequate critical evaluation of performances.[7] Judges, therefore, can perform intuitive judgments at an expert level in simple cases – those in which the retrieval of the feedback knowledge happens and provides a possibility to learn on its basis– but not in atypical ones, where no objective legal standard sets the framework for ruling.[8]

The present analysis attempts to compare the current knowledge on expert intuition with judicial decision-making from the perspective of task-doing or

3 For a general review, see Ericsson et al. 2018: 535-673.

4 Hogarth 2001: 68-99, 214-247, Ross 2006: 68-71, Klein & Kahneman 2009: 524-525 – compare with Ericsson et al. 1993: 367-373 and Guthrie et al. 2007: 29-33.

5 See e.g., Hutcheson 1929: 276, Richards 2016, Brożek 2019: 23 – compare with Berger 2013, Stelmach 2017: 153-159, and Crowe 2018: 82-86.

6 The legal domain is considered herein as two inseparably intertwined realms of normativity and practice. However, the present analysis limits its scope to the borders of the question "how judges actually judge" rather than "how they should judge" or other normatively embodied issues. Therefore, not omitting its uniqueness, the area of legal court situations is perceived as a field of activity of trained legal professionals and potential experts.

7 Detailed information on intuition and expert training are provided in section 2.

8 The term "legal standard" has two basic meanings in this paper. The first meaning pertains to the external, objective pattern of solving legal problems, whereas second refers to internal intuitive pattern judicial minds have produced on the basis of the encountered external standards.

problem-solving activity. To do so, the article juxtaposes the psychological requirements of intuitive expertise with the structural characterization of tasks judges have to solve in courts. In the following section (section 2), the crucial concepts of intuitions, expert performance, and deliberate practice – a form of training indispensable for achieving expert intuition – are introduced and briefly described. In section 3, the models of judicial decision-making processes in simple cases are juxtaposed with models of expert intuitive decision-making. In section 4, judicial expert intuition is evaluated on the basis of the comparison between the structurer of atypical legal problem solving procedures delivered by judicial mind, and the requirements indispensable for achieving intuitive expertise. In particular, two exemplar models of atypical court situations are discussed from the perspective of developing expert intuitive decision-making skills.

The thesis in question requires certain introductory remarks. First, the article concentrates on the judicial intuition, understood herein as referring to the decision-making process made by court judges during a trial.[9] The legal domain consist of many interdependent realms of activity.[10] It is thus difficult to describe a strict set of general characteristics of overall legal intuition. The chosen limitation enables a level of coherence and robustness suitable for utilizing concrete psychological concepts, especially deliberate practice.[11] Second, the activity of court judges – that is delivering the judgment over a legal case – is considered a decision-making procedure.[12] The illustration of judicial work considered herein is viewed from the perspective of psychological models made from experimental research on human beings performing various tasks and solving problems. The conceptualization of key terms and depicting judicial court activity in a form of problem(case)-solution(judgment) structure allows for the comparison of different types of court cases with the chosen psychologi-

9 Judicial intuition is understood herein from the psychological perspective as presented by Brożek (2019: 5-29).

10 Legal decision-making revolves not only around courts and court judges, it also pertains to many different professions such as lawyers, attorneys, administrative and police officers, and many more. To connect them all through the usage of normative rules they must all employ is likely to result in a fuzzy image.

11 Notably, experimental research juxtaposing different legal professional activities have already been made – for instance Strömwall, and Granhag analyzed the presumed expert skills in detecting deception by police officers, prosecutors, and court judges. The research has revealed that none of these professions have superior abilities in detecting deception over ordinary people, despite the fact that all three groups shared a strong belief that they are specialists or experts on that matter, which may being an example of the overconfidence bias (See Strömwall, & Granhag 2003). For a general overview on detecting deceptions, see also Vrij 2008. On the matter of overconfidence, see section 2 of this analysis.

12 Decision-making does not deplete all of kinds of legal activities. The different types can be legal advising, lawmaking, or choosing the proper wording for argumentation. That being said, legal court cases can be also depicted as a task for a judicial mind. This is the main perspective utilized in presented analysis.

cal structurization of environments in which expert intuition was observed.[13] Third, the chosen separation of easy and atypical legal cases differs from the traditional theoretical account in that it focuses on the difference in the structure of real court problems from the psychological perspective.[14] Easy and atypical cases are not used here to simply cover the whole area of legal activity, but to expose certain features of judicial decision-making processes.[15]

To summarize, for the purpose of this work, legal court cases are perceived from the holistic perspective: as tasks based on initial input of facts and rules driving the legal procedure. Here, the goal of a task-solver – the judge – is to deliver a judgment in accordance with concomitant normative assumptions. Adopting such perspective allows for inputting the intuitive criterion of division, that is, the possibility to perform an expert intuitive training.[16] Finally, it must be emphasized, the article attempts to answer the question of whether court judges can develop expert intuitive skills based on deliberate practice.[17] The empirical and theoretical background of intuition and intuitively-based expertise, together with the specification of the structure of problems in which expert intuitive skills were observed or denied, is utilized for the comparative analysis concerning judicial court activity.[18] However, the article does not try to state that expertise is completely impossible in law. The sole term "expertise" or "expert" is scientifically complicated and includes many different characterization apart from those intuitively-based or rooted in deliberate practice.[19] Moreover, the legal realm consists of a vast number of activities and problems not always involving decision-making process. The scope of the thesis presented here should therefore not be freely expanded beyond the goals of the present

13 As from the legal perspective wherein the task-to-solve model of court cases is applied, the differences between legal systems, legal branches, or legal cultures are implied as an environmental structure of a concrete decision-making domain. This by no means suggests that they have no significance for the presented matter. Rather, the presented analysis focuses on situations where the judicial area of expertise is to some extent specified. The prior concretization, while significantly limiting the scope of alleged judicial legal knowledge and skills, allows for the subsequent classification of judge's holistic judgments. This issue is discussed further in sections 3 and 4.

14 The legal theoretical background of easy and hard case conceptualization is briefly presented in section 4.

15 They should therefore be perceived by the prism of the scope of the article – as kinds of concrete legal problems solved by judicial minds.

16 See Ericsson et al. 1993, Hogarth 2001, Klein & Kahneman 2009, and compare with Hambrick et al. 2014. More details are provided in section 2.

17 See Ericsson et al. 1993, Hambrick et al. 2014, Macnamara et al. 2016, Ericsson et al. 2016 and Ericsson 2018. More details are provided in section 2.

18 See section 3 and 4.

19 Intuitive expertise is, however, scientifically well-based and to some extent has already been introduced to the domain of law – see Guthrie et al. 2007: 29-33, Richards 2016: 249, 252-253, Crowe 2018: 76, 79-82, 85-86, Brożek 2018: 28-29, 45-46, and Brożek 2019: 12-23.

analysis– that is, beyond answering the question of the kinds of structures of legal court cases wherein a judge can rely on her expert intuition.

2 EXPERT INTUITION AND DELIBERATE PRACTICE

The term "intuition" refers to a complex and complicated area of the multitude of mechanisms responsible for non-analytical decision-making processes.[20] A considerable number of human activities and decisions are at least partially embodied in intuitive mechanisms.[21] In this article, judicial expertise is viewed from the intuitive perspective, with a few exceptions included for a general review and comparison.[22] The term "expert" stands for a person who gains a set of special intuitive skills through the long-term, continuous performance of their actions and the testing of their effectiveness.[23] A judicial expert in court is, therefore, a judge with expert intuition.

Expert intuition is characterized by the outstanding performance of actions of the best specialists in their respective domains.[24] It allows experts to obtain extraordinary results in their respective areas of activity. Experts can not only choose the right option while solving a concrete task, but they also can find an answer to a complicated problem much faster than other specialists in the field.[25]

20 The most well-known model of intuitive thinking is found in the description of System 1 and System 2 thinking – see Stanovich & West 2002: 436, Kahneman & Frederick 2002: 49-81, and Kahneman 2012: 19-49. The pure division between the deliberative and intuitive systems of thinking has been met with a robust critique, especially regarding interdisciplinary research – see inter alia Glöckner & Witteman 2010: 1-25, and Kruglanski & Gigerenzer 2011: 97-109.

21 Kahneman 2012: 19-23, 89-105, 109-128, 269-333. See also: Tversky & Kahneman 1974, Thaler 1980, Jolls et al. 1998, Kahneman 2003, Gigerenzer 2006, Hodgkinson et al. 2008, Glöckner & Witteman 2010, and the literature provided in these works. Notably, intuition does not exclude analytical thinking from action, as in the majority of intuitive decisions the analytical processes play a supervisory role to ensure the maximum accuracy of the preferred choice – see Kahneman 2012: 39. Intuitive decision-making processes have been also confirmed in legal practice – see inter alia Pogarsky & Babcock 2001, Gigerenzer & Engel 2006, Englich et al.2006, Guthrie et al. 2007, and Danziger et al. 2011.

22 While the terms "expertise" and "expert intuition" are connected, the entire discussion pertaining the former covers many different perspectives. This article, however, aims to address the issue of judicial expert intuition by the prism of empirically well-founded analyses of environmental conditions of the decision-making realm. See the literature reviewed in Kahneman & Klein 2009 and, Ericsson et al. 2018; see also Klein et al. 2019. Compare the aforementioned literature with the legal perspectives on judicial non-analytical expertise – see e.g. Brennan 1988, Modak-Truran 2001, and Richards 2016.

23 Kahneman & Klein 2009: 518-521, Harteis & Billett 2013: 153, Ericsson 2018: 746-747, and Billett et al. 2018: 112.

24 For a general characterization of expert performance see e.g., Harteis & Billett 2013: 145-157, and Ericsson et al. 2018: 151-253, 331-673, with the literature cited therein.

25 The term "specialist" in this article refers to a person who is educated, trained, and experienced in their field of activity, but who has not achieved an expert level. The specialist can

This is possible because they recognize the multitude of patterns in the structural connections in their decision-making area, and in the blink of an eye they can adapt those patterns to a concrete situation they currently find themselves in.[26]

Research has exposed intuitive mechanisms as a core of expert performance in several domains. For instance, intuitive expertise is widely recognized as an explanation of the superiority of chess masters. Among others, Chase and Simon concluded that not only do expert chess players fail to show superior abilities of "foreseeing" the strategy of their opponents, but they also do not construct a "long forward" strategy formed upon the investigation of potential subsequent moves. Instead, they visually recognize the right setup of pieces on the chessboard.[27] Those findings show that chess masters apply non-analytic, memory based decision-making alongside (or in place of) calculation.[28] Chess experts, after years of training in conditions that fulfill certain requirements, acquire a tremendous set of patterns they can utilize in a real game – and thanks to that, the probability of making a right move by means of their intui-

perform the actions in her or his domain as a professional or, to put it differently, much better than the ordinary person. However, their performance is not extraordinary within the domain and among their similarly educated and trained colleagues. Only a small number of specialists will eventually gain an expert level. What firmly argues for the separation of an 'expert' and a 'specialist' is the fact that to actually define an expert, some researchers use so-called 'peer judgment' – that is the consensus of the specialists on the field that the certain person is above their own professional skills, alongside objective (e.g., statistical) measure factors. In other words, all experts are specialists but not all specialists are experts. Compare with Cole 1989: 163-170, 164, English et al. 2006: 190, and Brożek 2019: 13-16. For more about peer judgment, see Kahneman & Klein 2009: 519 and compare with Shanteau 1992: 255.

26 Gobet 1997 and Gobet & Chassy 2009.

27 Chase &. Simon 1973: 215-281. See also De Groot 1964, Simon & Barenfeld 1969, and Ross 2006.

28 This strategy can be called a "heuristic". While it can lead to a mistake because of the lack of wholly analytical reasoning of every possible choice, it is simultaneously very effective within the scope of "ecological rationality", which regards the time and effort necessary to perform an action. Ecological effectiveness (or rationality) prefers an adequately high probability of a success over certainty. Thanks to that, the ecologically rational process of decision-making can save an immense number of resources – such as time, effort, brain activity etc. – indispensable for the satisfactory outcome. For a more diligent explanation of ecological rationality, see Todd & Gigerenzer 2007: 167-171. Notably, the ecological rationality of intuitive decision-making is sometimes juxtaposed with the more subjective-pointed perspective of Herbert Simon's bounded rationality. On this matter, see Simon 1955: 99–118, Simon 1986: S209-S224, and Simon 1990: 15-18. Various findings have shown the importance of an ecological rationality – for instance, Lee Green and David Mehr have found that in coronary care units (CCU) in Michigan, the qualification of patients by means of a system called 'Heart Disease Predictive Instrument', although based on the scrupulous investigation of the patient's condition, works significantly less effectively than the simple 'yes or no' formula of a patient examination. See Gigerenzer 2006: 24-28, and Green &. Mehr 1997: 219-226. See also Meehl 1954, Breiman et al. 1984, and Kahneman 2012: 222-233.

tion is very high.[29] Expert intuitive skills are not, however, limited to chess-like areas.[30]Analyses like those of Klein (*et al.*) have revealed the possibility of expert performance in a so-called "natural environment" – his team characterized the decision-making process of fire station commanders.[31] Their expert intuition has, in some areas, been expanded through their experience in the real environment of their work.[32] Another example of the intuitive skills of experts is the question that arose around the authenticity of the Getty Kouros statue from the J. Paul Getty Museum in Los Angeles. Several art experts expressed their doubts about its genuineness whilst being unable to precisely describe what it was that caused their concerns – they merely claimed "there is something wrong" with it.[33] Those instances do not come from a game-like environment (such as chess) but from a more "natural" domain of human activity – that is with no artificially created, predictable effects of the usage of the realm's rules.[34]

The abovementioned examples show that expert performance in many different instances is derived from exceptional intuitive skills.[35] Thus, the question of whether intuition can be developed to the expert level in the judicial domain, arises. The area of solving legal court cases, although covered by normative rules, is more similar to naturalistic environments than to sports, music, or games because law is the derivative of reality. Court situations are potentially limitless, and it is judges' role to properly adapt them to the proper set of legal regulations. Moreover, the retrieval of the knowledge after delivering the judg-

29 According to the research, chess masters adapt approximately between ten and one hundred thousand set patterns that they can immediately recognize on a chessboard – see Simon & Barenfeld 1969: 473-483, 481-482. Compare with Hambrick et al. 2014: 43.

30 Among other "predictable domains", expert performance was well-analyzed in areas such as sport or music – see Lehmann et al. 2018 and Williams 2018 with the literature cited therein.

31 Klein et al. 1986: 576-580, Klein and his team revealed that experienced firefighters in a dangerous decision-making situation only analyze and modify one option, instead of comparing two or more actions. As a result, they were able to rapidly adjust their plans and perform the appropriate actions in the blink of an eye. The initial hypothesis, on the other hand, had assumed that fire commanders compare two options of action and choose the better one – see Klein 1993: 139. See also the recent research on the decision-making of experienced firefighters: Okoli et al. 2016: 89-103.

32 Some researchers suggest that findings on firefighting expert intuition need to be interpreted with caution. First, they should not suggest that firefighters' expertise refer to an entire field of activity but rather to its specific areas – and that is similar to the situation in the legal domain presented here. Second, the bias of overconfidence can arise in areas where "partial" expertise is possible. Compare with Minei & Bisel 2013: 7-32. More details on overconfidence are provided further in the article.

33 Gladwell 2005: 5.

34 Compare with Mosier et al. 2018.

35 Intuitive decisions also make up a considerable part of everyday actions, such as understanding simple sentences, basic area orientation, or typical car driving – see Kahneman 2012: 19-23; compare with Billet et al. 2018, and Mosier et al. 2018: 454 - 456.

ment in the legal case is usually slow.[36] From the perspective of the process of decision-making, therefore, it appears to be hard to recognize regularities and memorize patterns of action in such an environment. However, to answer directly whether judges can have an expert intuition in particular types of cases is to firstly establish whether an expert intuition can be trained there.[37]

Psychological research on expertise has resulted in a multitude of conceptualizations illustrating various aspects of expert intuition.[38] Nevertheless, there are certain vital points they agree on, such as that expert intuition has to be trained.[39] However, to gain expert intuition, one not only has to possess certain features and proper training, but primarily the possibility to learn has to arise. The foundation for expertise is always rooted in the environmental conditions of the domain of an activity. Experience can only be accumulated in realms with a certain amount of regularity and predictability. Conversely, there are fields of activities in which there is simply no chance of achieving expert intuitive skills, regardless of the level of personal endeavor because such domains are unpredictable. Klein and Kahneman have analyzed the environmental features of realms wherein expert performance is possible.[40] They distinguished two necessary conditions without which there is no possibility to achieve expert intuition in a particular field of knowledge. The first is for the environment to be regular and predictable, at least to some extent. The second condition requires the regularities of the domain to be possible to learn – that is, to be perceptible and memorable.[41] To become an expert, therefore, one must master the cues of her or his realm of activity, which is equal not only to being able to recognize them, but also to adapt and use them in various practical tasks. The predictability of the domain is vital in this context because there is only a subsequent possibility to distinguish effective and ineffective solutions if a certain amount

36 Hogarth 2001: 208, Guthrie et al. 2007: 31-33, Richards 2016: 258.

37 It is fundamental for this analysis to distinguish between expert intuition as a process of thinking and as an effect or outcome of deliberate practice. In this context, Richards defines a judicial "hunch" as "the conscious result of an unconscious process" of a System 1 type of thinking and recalls Sinclair's distinction between "intuition" (outcome) and "intuiting" process – see Richards 2016: 250-251, Sinclair 2010: 379. Expert intuition can therefore be illustrated as the outcome of deliberate practice, as it is in most of the examples within this work (more details on the distinction between the process and the outcome are provided in section 4). Additionally, Sinclair provides interesting arguments supporting the occurrence of "rational" legal analysis even considering holistic intuitive judgments – see Sinclair 2010: 382.

38 Compare inter alia Hogarth 2001: 100-136, Farrington-Darby & Wilson 2006: 17-32, Ericsson 2014a: R508-R510, and Feltovich et al. 2018: 59-83.

39 This notion does not diminish the importance of various "modal" factors influencing the development of an expert intuition – such as talent or physical abilities. However, even the most talented person cannot be born an expert in a concrete field. See on that matter Hambrick et al. 2014: 43.

40 Kahneman & Klein 2009: 517.

41 Kahneman & Klein 2009: 519-520.

of regularity occurs. Conversely, irregular and unpredictable domains cannot serve as a proper field for forming experts.[42]

The environmental suitability of the domain, as described by Klein and Kahneman, is necessary for the occurrence of expert intuition, but it is not sufficient. To achieve an expert level of performance, a considerable amount of practical training is necessary, not only for recognizing and memorizing the regularities of the area of activity, but also to be able to adapt practical experience to various tasks. Ericsson (*et al.*) named this kind of training "deliberate practice".[43] Two substantial features of this expert training are: conducting multiple exercises of similar tasks, and adapting their design to the specific needs of the task-doer.[44] Deliberate practice also requires supervision and feedback pointed toward concrete areas for improvement.[45] To reach the level of an expert – that is to surpass the skill level of a specialist – long-term deliberate practice is essential. Also of crucial importance is that this type of expert training requires a response that describes the effectiveness of the task-doer's results and provides information on what can be done better. As Ericsson (et al.) writes:

> In the absence of adequate feedback, efficient learning is impossible and improvement only minimal even for highly motivated subjects. Hence mere repetition of an activity will not automatically lead to improvement in, especially, accuracy of performance (…).[46]

Deliberate practice is, therefore, only effective if properly adapted to the cues of the concrete domain and constructed around a learning methodology that enables constant improvement of the performance. Even this type of training, however, does not guarantee that one will become an expert. On the other hand, researchers underline the fact that deliberate practice, although not always sufficient, is indispensable for achieving expert intuition.[47] Under this assumption, to answer the question of whether judges can have expert intuition in delivering judgments, it first has to be established if deliberate practice is actually possible in the judicial domain of solving court cases. This type of training requires certain conditions to be effective.[48] The absence of these conditions prevents the concrete domain of decision-making from being considered a potential environment for intuitive expert performance. The following question arises: which

42 Kahneman 2012: 239, and Shanteau 1992: 258.

43 Ericsson et al. 1993: 364-367, 368.

44 See the literature cited in Ericsson et al. 1993.

45 Ericsson et al. 1993: 363-406. For a general overview on the basic psychological discussion regarding the features and the usefulness of the concept of the deliberate practice see also: Macnamara et al. 2014: 1608-1618, Hambrick et al. 2014: 34-45, Macnamara et al. 2016: 355-358, and Ericsson 2016: 351-354.

46 Ericsson et al. 1993: 367. Compare with Guthrie et al. 2007: 31-35.

47 See Hambrick et al. 2014: 41. Compare with Ericsson's reply: Ericsson 2014b: 81-103.

48 Ericsson et al. 1993: 365-368. Compare with Kahneman & Klein 2009.

kinds of court situations are suitable as decisive fields in which deliberate practice can occur, and which are not? Put differently, are there any types of legal cases suitable for developing expert intuition?

The prevailing opinion among legal scholars who include psychological accounts in their analyses seems to be that there are intuitive legal experts, brilliant and extraordinary minds capable of solving legal cases at a different level than "simple" legal specialists. For instance, Brożek claims that it is true that there are outstanding legal minds, just as there are outstanding mathematicians or detectives.[49] Some researchers, however, offer a different view. For instance, Shanteau includes court judges in his lists of poor expert performers.[50] Klein and Kahneman, who appear to support Shanteau's claim, additionally warn that the common acceptance of "experts' existence" may be an effect of a bias of overconfidence.[51] The present analysis takes a different approach – it does not answer the question of whether judges are, or can be, experts. Rather, the two main issues here concern determining when judges solving court cases can deliver an expert intuitive holistic judgment, and when they fail to do so.[52]

3 EXPERT INTUITION IN LEGAL PRACTICE OF COURT JUDGES

It is hard to compare different domains and deliberate practices of legal professionals because of the differences in particular roles and purposes that various legal officers fulfill. The present article, therefore, focuses on the role of a court judge, with her purpose of delivering a judgment. However, legal systems differ, not only in their various normative assumptions – as between civil and common law – but also concerning various legal cultures. Those differences likely influence judges' legal intuitions.[53] Finally, the legal specialization can

49 Brożek 2019: 12-16. See also Hage et al. 1993: 113-114, Richards 2016: 257-258, Crowe 2018: 85-86.

50 Shanteau 1992: 252-266, 258. Compare with Guthrie et al. 2007: 31-33.

51 Kahneman & Klein 2009: 523-525, Kahneman 2012: 199-265. Overconfidence bias is not only the preserve of legal specialists. There are many instances from inter alia clinical care, the stock markets, or sports, which not only show the fallacy of presumably expert performance but also the powerful tendency to defend "the honor of the domain" even when presented with empirical findings. See as an exemplar: Meehl 1954, Gilovich et al. 1985: 295-314, Shanteau 1992: 256-259, Kahneman & Klein 2009: 521-523, and Kahneman 2012: 199-265, with the literature cited therein. See also Moore & Healy 2008: 502-517, with the literature cited therein.

52 By the judicial holistic judgment, I understand intuitive cues a judge receives during the process of her reasoning, in a way similar to Crowe – see Crowe 2018 with the literature cited therein. More details on holistic judgments are provided in the following section.

53 It appears to be experimentally proven that intuitive mechanisms are in many cases an inseparable part of judicial decision-making processes – see e.g., Pogarsky & Babcock 2001, Guthrie et al. 2007, Englich et al. 2006, Danziger et al. 2011, and Bystranowski et al. 2021.

create various intuitive skillsets, as an expert judge in criminal law will probably share a part but not the whole of her expertise of with her colleague from contract law.[54]

This paper takes a different perspective: it perceives the activity of court judges as solving the given legal problem, and the role of the judge as a task-solver. Judicial reasoning is illustrated as the reasoning of a task-doer. This provides an adaptive model of the legal case with the initial factual input, the concrete rules derived from a normative background and the satisfactory final judgment as a requested as answer or solution to a given task. The present approach allows for answering the question: what is required in the legal court case to enable deliberate practice and allow expert intuition to develop?[55]

To answer this question is to create categories of legal court cases distinguished by the criterion of deliberate practice.[56] Currently, among analyses made by legal researchers there are examples of utilizing intuition as a distinction criterion for different types of legal cases, such as those provided by Crowe and Brożek.[57] Those analyses further distinguish between hard and easy legal cases, driving on the well-known traditional separation from legal theory as found in the discussion between Hart and Dworkin.[58] Interestingly, this distinction appears to have an implicit psychological background.

Lon Fuller has deliberately criticized Hart's theory in a manner strongly in tune with current research on human intuition. Fuller states that Hart misses some vital aspects of legal cases, such as the purpose of the applicable rule of law and the contextual background of the considered situation.[59] Such factors are crucial for the development of intuitive skills, but Fuller goes even further – he outlines the "wrongness" of Hart's conceptualization of the mental processes that underpin legal decision-making:

> If in some cases we seem to be able to apply the rule without asking what its purpose is, this is not because we can treat a directive arrangement as if it had no purpose. It is rather because, for example, whether the rule be intended to preserve quiet in the

54 For instance, criminal court judges may have superior abilities in assessing the credibility of witnesses with strong emotional expression than judges specialized in economic law – see Wessel et al. 2006 and compare with Strömwall, & Granhag 2003.

55 The adaptation of this conceptualization enables the comparison of judicial decision-making with the psychological findings on expert problem solving, including empirical research.

56 The criteria of domain predictability and regularity are primarily included, since deliberate practice requires receiving feedback based on preexisting knowledge – see Ericsson et al. 1993: 367-369.

57 Crowe 2018: 75-76, Brożek 2019: 29-34.

58 See Hart 1958: 593-629, 607, Hart 2012/1961, Dworkin1978, and Dworkin 1986. Interesting conceptualizations of hard cases in legal theory are given by, inter alia: Gardner 1984: 38-66, Susskind 1993: 196, and Hage et al. 1993: 120, 148-150.

59 Fuller 1958: 662-664.

park, or to save carefree strollers from injury, we know, 'without thinking', that a noisy automobile must be excluded.[60]

According to Fuller, therefore, the "simple" cases are driven by mental mechanisms that are similar to intuitive thinking. Fuller indicates that the solution to such cases is a derivative of a previous belief that a proposed concrete answer is obviously right and will undoubtedly be accepted – for instance by a court judge. This conviction is not based on the literal interpretation of the legal rule, but on a strong belief that a concrete proposition stands for the right solution in the legal case and can be made upon the practical experience of a lawyer. Fuller's case of a "noisy automobile" not only refers to the simplest logic or tacit justification of legal prescription – it also shows that there are categories of legal problems for which there is a stable and convincing normative standard for their solving. Fuller, therefore, provides a picture of legal cases that fulfill the criteria necessary for expert intuition. The court case, which has an objective legal standard for its solving – i.e., the reference point – can be repetitive.[61] Judicial practice with such legal problems involves the exercise of decision-making in similar cases and the supervision and feedback of higher courts, including their previous judgments.[62] The similarities between particular cases will eventually develop intuitive patterns of task-solving. Were they formed in a way that fulfilled the requirements of deliberate practice, expert judicial intuition could possibly arise.

Fuller arguably enriches legal theory with the example of intuitively solved court cases. In this context, the works of Bartosz Brożek and Jonathan Crowe provide a particularly useful conceptualization, as they deliberately introduce intuition into the judicial domain of decision-making. Brożek uses intuition to deliver an epistemological model of the legal mind. In his work, intuitive legal thinking is one of three components of legal reasoning – the others include language and legal imagination, used, *inter alia,* to verify potential answers to

60 Fuller 1958: 663.See also recent experimental research suggesting that the folk understanding generally prefers the literal over the context-embodied meaning of the rule – but these two approaches are much more interlaced than is reflected in legal theory: Struchiner et al. 2020: 312–329.

61 Richards 2016: 252. Notably, judicial decision-making is also shaped by legal procedural rules enabling additional levels of regularity and predictability.

62 The reliability of appeal feedback is controversial. Guthrie et al. consider it fallacious, mainly because the appeal judgments usually take over a dozen of months to arrive. On the one hand, this argument can be countered within the categories of cases where there is a stable objective legal standard for solving the case, usually in the form of a coherent line of previous judgments. Also, an objective legal standard of solving cases can be developed by legal theory and adapted in the process of legal education. On the other hand, the unreliability of appeal feedback can be additionally supported by the results of Guthrie et al.'s "Cognitive Reflection Test", where they found negligible differences between judges with different experience levels. See on that matter Guthrie et al. 2007: 31-32. The reliable feedback, although in a very narrow spectrum of cases is accepted by Richards – see Richards 2016: 252.

legal cases.[63] For Brożek, legal expertise is perceived as a derivative of expert intuition.[64] Court judges, therefore, utilize expert intuitive thinking to reach a potential solution to a legal problem, and then they use legal imagination to verify its consequences and accept or reject it – within some cases their intuition can find a legal standard for solving that they have previously adapted.[65] Crowe, on the other hand, divides legal cases into easy ones (those fully solved by intuition), not-so-easy ones (partially solved by intuition), and hard ones (impossible to solve by intuition).[66] According to Crowe's theory, judicial reasoning in easy cases is based on so-called "holistic intuitive judgments" – that is, the mechanisms of retrieving a behavioral pattern, stored in the memory of an experienced lawyer, and adapting it to a new case.[67] Apparently, this is in accordance with Fuller's cases where the judge "knows without thinking". Such mechanisms, however, are futile in hard cases because they cannot deliver a full, final answer to an atypical legal problem.[68]

Both of the abovementioned authors agree on the fact that there is category of legal problems in which intuitive thinking delivers holistic answers to judicial minds.[69] From the perspective of psychological research on expert intuition, their characterization of such legal court cases appears to fulfill the environmental conditions necessary for developing expert intuition.[70] Fuller's, Crowe's, and Brożek's categories of "easy" cases do not induce discrepancies in

63 Brożek 2019: 5, 39-67. Compare with Jakubiec 2021: 1-19.

64 For Brożek, there are better and worse legal experts, but someone educated and specialized in the domain can count as one – Brożek 2019: 16.

65 Brożek 2019: 53-61. Legal cases are composed of several normative problems, but only some of them are challenging for the legal mind, in the sense that they require judges to personally decide upon an indeterminate issue. When facing such problems in a case where judicial intuition provides answers, a holistic solution can be found, and the additional work necessary to ensure the production of a judgment (e.g., adjusting concrete legal provisions) can additionally enrich the judge's intuitive experience. Conversely, if the partial normative problem included in the case cannot be solved by judicial intuition, nor deliberatively, then holistic judgment is also impossible to achieve. This is not to say that such cases cannot be solved at all, or with the help of quasi-intuitive mechanisms – see e.g., the remarks on legal insight provided in section 4.

66 Crowe 2018: 75-86.

67 Crowe 2018: 78. Importantly, legal intuitive judgments are not on the same level as legal analysis. In other words, intuitive expertise does not substitute for legal analysis, even in easy cases – just like the intuitive System 1 does not negate the need for the deliberative System 2 (Kahneman 2012: 19-49). Rather, legal intuitive expertise and holistic judgments should be perceived in a way such that they provide strong and reliable support for making effective and accurate judicial decisions.

68 In other words, in atypical cases there is no previous holistic pattern of judicial performance to adapt – Crowe: 82-84.

69 Whereas, among legal scholars, the issue of judicial intuitive expertise is disputable on many levels, the sole occurrence of judicial intuition appears to be widely accepted – see e.g., Gigerenzer & Engel 2006, Guthrie et al. 2007, Pietrzykowski 2012, Richards 2016, Stelmach 2017, Crowe 2018, Brożek 2018 and Brożek 2019.

70 Compare with Klein & Kahneman 2009: 524-525.

terms of their legal background but instead usually show one robust manner for their solution. This in turn allows for proceeding relatively quickly while ensuring the vital stages leading to the presumptive final judgment are completed. Every positive outcome of those steps – such as the satisfactory decision of a court or an approval of a teacher or supervisor –can arguably provide feedback for the legal intuition of the practitioner. This robust manner for their solution can originate from a university or practical education, where legal apprentices complete various theoretical or practical tasks (examples of cases) and, after finishing them, the outcome is evaluated by the more experienced specialist (or compared with the existing solutions of similar judgments).[71]

Within the scope of the presented examples, it seems arguably possible that in certain kinds of legal cases the environmental structure allows for the development of objective legal standards for holistic judgments. Those standards could enable a predictable form of legal education and practice (training), which – if repetitive – can provide a proper habitat for deliberate practice, and thus for expert intuition to arise. Nevertheless, both environmental predictability and deliberate practice are indispensable to, but insufficient conditions for, the development of expert intuition. Therefore, for legal cases to be considered potential ground for developing expert judicial intuition, a set of criteria is needed. The first necessary criterion is a stable, objective, legal standard of solving cases, which allows for the necessary feedback. Second is a high level of the repetitiveness or similarity of the concrete types of cases. Third is the sole number of encountered cases, sufficient for internalizing patterns of judicial decision-making. It seems probable that judges can develop expert intuition in delivering holistic judgments for court situations if these three criteria have been fulfilled.

4 THE INEFFECTIVENESS OF JUDICIAL EXPERT INTUITION

The consequence of lacking one or more of the previously mentioned conditions is most likely a type of legal case upon which there is no possibility of achieving judicial expert intuition. Without a legal standard for solving the case, high repetitiveness, or a sufficient number of encountered cases, the con-

71 Legal education is considered broadly in the present article as a form of training for legal specialists. The characterization of legal practice education differs in kinds and levels of specific branches of law. Another difference lies in the diversity of various legal systems, and it is the main concern considering general legal education. The differences between various systems of legal education should eventually be juxtaposed not with each other but with deliberate practice as a final reference. A very different problem concerns the role of universities in legal education – for instance whether the education they provide should be as practical as possible, or conversely, if the emphasis should be on what is frequently called an "academic education" (see on this matter Zoll 2004).

crete area of court judicial decision-making cannot be considered predictable or regular. Legal cases from an irregular and unpredictable normative area cannot provide an appropriate environment for deliberate practice – hence, there is no possibility to become an intuitive judicial expert on such legal problems in sense of mastering their holistic solving.[72] This section depicts the exemplar structures of tasks laying behind such legal cases and the process of reasoning concomitant to judicial decision-making. Such structures can be juxtaposed with the requirements of legal deliberate practice provided above.

The goal of characterizing exemplar models of atypical cases is to ensure an empirically embodied conceptualization.[73] To depict the intuitive mechanisms of a judicial mind in such a way, legal reasoning in court cases can be illustrated by the prism of psychological concepts. Taking a task-solving perspective, the judge encounters a factual situation, while simultaneously having a legal background embodied in her experience of legal education and practice. This first step can be called an initial mental image of the problem, created by intuitive mechanisms.[74] The next step is deriving a consequence of applying legal rules to the factual situation, creating a new conclusion, and using it as a premise for the next argument in the ladder-like reasoning.[75] If such a process can lead to the final solution of the case, provided that it was properly evaluated with fast and reliable feedback given upon the objective standard, a form of deliberate practice is arguably performed.[76] However, if neither intuitive nor deliberative reasoning can develop a satisfactory holistic answer – that is, an answer, which is eventually evaluated positively by a task-solver – then the required adequate feedback cannot be followingly delivered.

The main problem regarding legal cases in which judicial expert intuition cannot provide holistic judgments lies within the differences between their particular structures. Such cases are most likely unique, and their task-structures

72 As was stated previously, this does not equal the statement that judges cannot become experts, even considering atypical cases, since there are perspectives on legal expertise other than intuitive. On the other hand, Klein and Kahneman strongly underline the problem of overconfidence in their work, which they characterize as the issue of "false experts" – persons believing in their own judgments, despite scientific evidence which shows that their domain is unpredictable and impossible to master. This statement can arguably refer to parts of the legal domain, although it should be viewed as giving a notion rather than objective and universal judgment. See Kahneman & Klein 2009: 521-523, Kahneman 2012: 116-117, 212-221, 261-265. Compare with Shanteau 1992: 258, English et al. 2006: 191, 193-194, 197.

73 That also stands for providing models based on psychological research on intuition and possible to be empirically challenged.

74 Ohlsson 2011: 76, Zander et al. 2016: 8-9.

75 Ohlsson 2011: 73-78, Brożek 2019: 53-61. Parts of such reasoning, regular and already adapted, can be intuitive, while the rest can be resolved by analytical or deliberative thinking – see section 2 and 3.

76 To achieve an appropriate deliberate practice the repetition of similar tasks is also indispensable.

can therefore also vary.[77] This raises the question of in which structures of legal cases judicial expert intuition cannot be formed, in the sense of delivering holistic judgment, despite the accumulation of experience in other, partially similar legal problems. In other words, if a judge is an intuitive expert in solving a specific type of court case, which structures of different legal problems will be similar enough to ensure the effectivity of judicial expert intuition? And conversely, which structural differences make a legal case impossible to solve by an expert judicial mind, despite having an ability to solve other ones?[78]

The answers to those questions are not easy to find. This is due to the fact that legal problems are complex – even if legal intuition cannot deliver a holistic judgment, it is highly probable that some parts of the judicial decision-making procedure are done intuitively. However, within the case there can be a normative issue that a judge cannot solve using her experience, and where there is no objective legal standard for solving this kind of problem to find.[79] Such normative issues can constitute an atypical legal case if a court situation cannot be ended without previously resolving controversial legal problem. Similarities between such cases and typical court situations described in section 3 are not sufficient to ensure the effectiveness of expert legal intuition, for they are not providing a legal standard for solving for all the normative issues that are indispensable for the final judgment.

Many examples of atypical legal cases come with different problems: literal and contextual meanings, advanced technology, or a completely novel situation.[80] In this analysis, two model types are put forward as examples. First, there

77 Such cases are traditionally labelled by Crowe as hard cases – see Crowe 2018: 82. For some examples considered hard cases by legal theorists, see inter alia: Riggs v. Palmer case (Riggs v. Palmer, 115 N.Y. C. App. 506 (1889) [hereinafter Riggs v. Palmer]; Hart 1961: 79-99, 107, Dworkin1978: 19-31, 81, 280, and Dworkin 1986: 15-20), Henningsen v. Bloomfield Motors, Inc., 32 N.J. Sup. C. 358, 161 A.2d 69 (N. J. 1960), Donoghue v. Stevenson, UKHL 3 (1931), SC (HL) 31 (1932), UKHL 100 (1932), AC 562 (1932), Re Wünsche Handelsgesellschaft/Solange II, BVerfGE 73, 339 (1986). Compare with the discussion on Gustav Radbruch's formula: Bix 2011: 45-57.

78 As Ohlsson writes: "(…) a failure to solve a problem is no great mystery if the person lacked the knowledge or competence necessary for solving it" (Ohlsson 2011: 91). Judges, however, are trained specialists, and hence they should have the necessary abilities to solve most legal cases. Those in which they cannot utilize their knowledge in a typical manner are most likely impossible to master on an expert intuitive level.

79 In such situations it is not only that expert intuition cannot deliver a final answer, but deliberate practice also cannot be performed. If the legal standard for solving the case is created in the future and embodied by legal education, while the proper number of similar cases are simultaneously solved in such a way, judicial expert intuition will arguably be achievable in the that type of case. However, every requirement indispensable for achieving legal expert intuition must be fulfilled – see section 2.

80 See, e.g., California v. Carney, 471 U.S. No. 83-859, 386 (1985) (compare with Brożek 2018: 29-31), United States of America v. Microsoft Corp., 253 F.3d 34, (D.C. Cir. 2001), Miller & Anor, R (on the application of) v. Secretary of State for Exiting the European Union, UKSC

are instances of legal cases that cannot be measured with experience, simply because there has been no such normative problem before. In such situations, the main issue concerns the similarities between the new case and cases that have generated intuitive experience accumulated by the judicial expert.[81] The problem occurs when within the case there is a normative issue that cannot be determined considering both judicial experience and available legal sources.[82] If solving this issue is indispensable for making the judgment, then there can be neither expert intuition nor deliberate practice before the answer is achieved and solidified. The regularity of performance must be previously established to unlock the domain for future intuitive experts.

An instance of a novel and indeterminate legal problem can be found in the case connected to the United Kingdom leaving the European Union.[83] The main issue of the case was the question of whether the United Kingdom could unilaterally revoke their notification of leaving European Union while the formal process of leaving had already been started.[84] As European Union law has not provided a regulation on this matter, particular basic analogies from international law were raised by the Court of Justice of the European Union (CJEU).[85] However, the similarities were highly disputable.[86] On the one hand, legal international experience has provided several opinions that article 68 of the Vienna Convention should apply, and the right for revocation should be granted, as in international law of treaties. On the other hand, however, there were voices pointing out that during the process of leaving, the United Kingdom could not unconditionally revoke their notification because of the new obligations taken on during the negotiations, the lack of the written prescription in the EU

5 (2017), and C-621/18 Wightman and Others, Court of Justice of the European Union, ECLI:EU:C: 999 (2018) [hereafter Wightman and Others].

81 Such experience can arguably be active in every court situation. See Crowe 2018: 82-83.

82 Judicial experience consists of knowledge and skills in utilizing legal sources. Judges can find the answer to legal cases in memory or in external references. Both methods can provide the pattern of intuitive performance; however, if the case is undetermined in both mentioned examples, the stable pattern must first be created to ensure deliberate practice in the future. On legal indeterminacy, see Berman & Hafner 1987: 1-35, and Leiter 1995: 481-492.

83 The case, Wightman and Others.

84 Wightman and Others, para. 2.

85 See article 68 of the Vienna Convention on the Law of Treaties, of 23 May 1969: United Nations Treaty Series, Vol. 1155, p. 331.

86 Wightman and Others, para. 38-42. The mere system of the Union Law combined with the unique characteristic of the European Union and the multilateral obligations of member states was claimed unique and providing a new legal order by many judgments of the CJEU – see e.g., Wightman and Others, para. 44, Les Verts v Parliament, 294/83, EU:C:1986:166, para. 23, van Gend & Loos, 26/62, EU:C:1963:1, para. 12, and Costa, 6/64, EU:C:1964:66, para. 593. The uniqueness of EU law is, hence, normative, and deriving analogies from international law before the CJEU must proceed with respect to that fact.

Treaties, and for several other reasons.[87] The case resulted in a new normative precedent in the case of the United Kingdom – eventually the CJEU ruled that the United Kingdom could unconditionally revoke their notification of leaving the European Union.

Building on the previous section, legal experts in international treaty law could find in *Wightman and Others* the objective legal standard for solving the case provided by the Vienna Convention; and this line was chosen by the CJEU. However, there were renowned legal professionals in the EU Council and Commission with their own expert opinions and consistent lines of argumentation, even though their answers differed. Therefore, whereas it is highly possible that intuitive legal judgements were available within the considered case, since legal experts from exiting international agreements or contracts were involved, the normative issue of unilateral revocation could not be considered as having an objective legal standard for solving it within the EU order. This raises the question of whether *Wightman and Others* was similar enough to utilize the pattern of legal standard from Vienna Convention. Considering the indeterminate argumentation, and the novel normative issue of leaving the unique legal order of European Union, the case in question can be better viewed as creating the fundaments for new deliberate practice, rather than holistically building on an existing one. Expert intuition can arguably provide the way to answers for new, unpredicted cases, but only if there is a consistent area of regularities which *per analogiam* enables utilizing already existing legal standards. Put differently, novel cases are those within which particular normative issues require establishing new legal standards, since the existing ones does not provide solidified patterns for solving them.

Despite their embodiment in existing systems of law, novel cases cannot provide an environment for legal expert intuition to act at its finest because there is no existing pattern to utilize in the situation of a new legal problem when existing analogies are insufficient to ensure a solution.[88] There are also different types of atypical cases in which legal expert intuition cannot provide holistic judgments. One of them occurs where it is possible to extrapolate more than one pattern of judgment, and those patterns conflict with each other.[89] These types of legal problems produce intuitive answers, but those answers are mutually contradictory. The cause of such hard cases appears to be rooted *inter alia* in the multi-faceted matter of the relation between law and morality.

87 Wightman and Others, paras. 39-41.

88 That, of course, changes when the objective legal standard is put forward by the highest court, and the deliberate practice can begin. See Wightman and Others, para. 75.

89 Such situation varies from deciding whether a legal standard can be utilized in the sense that both intuitive answers are considered legally valid, but their consequences are visualized and valued differently. However, the line of separation between the mentioned types of cases can be opaque in many concrete instances.

To outline the problem, the judgement in *Owens v. Owens* can be juxtaposed with *Riggs v. Palmer*. In *Owens v. Owens* the judges of the Supreme Court of North Carolina had to decide whether the wife of Mr. Owens was legally authorized to receive her dower after her husband was murdered.[90] The legal provisions stated that Mrs. Owens was entitled to the assets at issue, but the problem came from the moral realm – Mrs. Owens had participated in the homicide of her husband. The final judgment stated that the dower should be granted to Mrs. Owens because there was no rule provided otherwise, including the fact that she was sentenced in the criminal procedure. As the Justices state:

> We are unable to find any sufficient legal ground for denying to the petitioner the relief which she demands, and it belongs to the lawmaking power alone to prescribe additional grounds of forfeiture of the right which the law itself gives to a surviving wife.[91]

If the answer in *Owens v. Owens* was intuitive, it was congruent with the positivist normativity at the time, while simultaneously strongly opposed by the judges.[92] Interestingly, a similar normative difficulty appeared in *Riggs v. Palmer,* where the grandson murdered his grandfather to obtain an inheritance.[93] The case was judged in 1889 – only a year after *Owens v. Owens* – by the Court of Appeals of New York. Arguably, the positivist approach should lead to Elmer Palmer being entitled to the inheritance as well, since there was no legal provision or stated rule of denying it to people who had murdered their devisor. However, in this case the Justices decided otherwise, using the developed moral-based rule, which generally held that "nobody shall gain profits from their own action of malice".[94] Despite the factual and normative similarities, these two cases were judged differently.

This difference can arguably be explained on the intuitive level. The Justices of the Supreme Court of North Carolina and of the Court of Appeals of New York both contained experienced lawyers, educated in the positivist tradition, which predominated in the United States' legal system at that time.[95] It can be supposed that, considering the rules of the US legal system, the Justices had been trained in law in a manner in which particular legal areas would fulfill the requirements of deliberate practice – and hence expert intuition might have been achieved by them, considering, for instance, the practical usage of the general normative background of positivism. However, none of the mentioned cases were solved quickly or effortlessly. The justification of the *Owens v. Owens* judgment shows the discussion around the different yet possible verdict of depriving Mrs. Owens of her rights because of her wrongdoing; and conversely, there were

90 Owens v. Owens, 6 S.E. 794, 100 S.C. N. C. 240 (1888) [hereafter Owens v. Owens].

91 Owens v. Owens, 204.

92 Owens v. Owens, 204.

93 Riggs v. Palmer, 514.

94 Compare the legal arguments in Owens v. Owens, 241 with Riggs v. Palmer, 514.

95 See on that matter e.g., Austin 1832, Hart 1958.

dissent opinions in *Riggs v. Palmer* entitling him to the inheritance.[96] In both of those cases, therefore, judges had a conflict of two contradictory solutions, which, assuming their experience, might be based on their expert intuitive cues.

The cause of that conflict was arguably rooted in the mental resistance to the answer provided by legal expert intuition. The latter probably suggested a rule-based solution supported by previously internalized legal values, such as "the judge should follow the literal meaning of the rule", "the court cannot substitute lawmakers", or "no morality shall influence judicial decisions". While such answer, within the scope of judicial experience, usually provides ways to the best legally possible judgments, its consequences were evaluated negatively in both of the considered cases. Since "positivistic" intuitive judgment led to rewarding the perpetrator, there was also a place for "moral" intuitions to arise.[97] Those intuitions were also legal and probably of expert nature because they were rooted in adjudicative standards judges internalize as axiological foundations of their respective system of law.[98] Such intuitions, since they provide the judicial mind with what is "good" and what is "bad", can be labeled as "moral", not omitting the fact that they are derived from legal reasoning.[99]

While legal analyses are usually concentrated around normative or philosophical conceptualizations of morality, from the psychological perspective the mental mechanisms responsible for the decision-making process of lawyers are of prime importance. Applying psychological concepts, during her education and practice a lawyer creates his or her own intuitive model of legal morality – based on the adaptation of patterns of legal decision-making – and follows it in their future performance, while, of course, being constantly supervised by the "rationality" of a legal mind.[100] From this perspective, therefore, the collision of

96 Owens v. Owens, 203-204, Riggs v. Palmer, 515-520.

97 As research suggests, moral and ethical decisions can also be based on intuitive mechanisms (see Haidt 2001: 814-834, and Haidt 2007: 998-1002). Apparently, presumable moral experts – philosophers with a specialization in ethics – have also been prone to cognitive biases and overconfidence. On that matter, see Tobia et al. 2013: 629-638, and Schwitzgebel & Cushman 2015: 127-137.

98 Compare with Dworkin 1986: 217-219.

99 The relation between morality and the law remains vital for legal researchers – for a general review see inter alia Bentham 1781, Finnis 2011, Raz 1985: 295-324, and Dickson 2001, with the literature cited therein. The practical sphere of law also provides vital examples of the importance of the impact of morality and values expressed in judgments (compare Plessy v. Ferguson, 163 U.S. 537 (1896), and Brown v. Board of Education of Topeka, 347 U.S. 483; 1954). As research suggests, moral racial biases can occur in courts – see inter alia Levinson et al. 2017, and Armour 2018.

100 Hence, an important legal issue can concurrently change (or substitute) the outcome of an intuitive judgment – see inter alia: Kahneman 2012: 39-49, Kruglanski & Gigerenzer 2011: 97-109, and Zander et al. 2016: 2-3. Therefore, the proper perspective for intuitive cues, including expert ones, should be to perceive them as tools of judicial decision-making, not as its material end results. Simultaneously, as the present analysis suggests, the intuitive influ-

two contrary intuitive answers – the "positivist" and "moral" – can constitute the intuitive models of judicial decision-making processes in *Owens v. Owens* and *Riggs v. Palmer*.

The models in question are based on two legal standards that provide contradictory intuitive holistic judgments. The first requires the judge to act according to the literal meaning of the rules despite the effect being morally repugnant. The second promotes an unwritten general legal standard, embodied in the moral foundations of the legal domain. In both cases it can be assumed that the initial mental representation of the case involved the basis of legal background, such as the separation of legal decision-making and moral judgments, or the claim to not use the law against its own goals. This initial mental representation is the starting point for legal expert intuition. Here, judicial intuition utilizes a multitude of adapted patterns to create a path to the solution of the normative task and to evaluate the visualized consequences of the latter.[101] In *Owens v. Owens* and *Riggs v. Palmer,* the two provided answers were intertwined with the legal domain, as in both cases judges were considering them in their argumentation.[102] Since they also pertain to the basic assumption of the legal system in which the judges were educated and trained practically, it can be arguably assumed that intuitively proposed solutions could be the effect of judicial expert intuition.[103] In the first scenario, one of the solutions excludes the other, and there is no objective legal standard for choosing the proper option.[104]

The two presented models of legal cases – but likely not only those – are exemplar illustrations of legal cases in which neither judicial expert intuition can provide holistic intuitive judgments, nor deliberate practice can be produced to ensure future judicial expertise. This is because of the lack of a stable point of

ence on judicial decision-making should not be underestimated – see experimental research mentioned in section 3 and 4.

101 Ohlsson 2011: 73-85, 91-93, Brożek 2019: 12-14, 45-61.

102 Owens v. Owens, 203-204, Riggs v. Palmer, 511-514. It is, therefore, plausible that the legal mind can simultaneously hold two or more deliberate practices connected to legal decision-making – assuming the sufficient number of necessary resources (see section 2). Furthermore, as some skills can arise concomitantly to the "main" activity (for instance, an increased sensitivity of listening as a side effect of training on a musical instrumental – see Lehmann et al. 2018: 543), the same can arguably be said about moral intuition being constantly trained by both legal education and everyday social challenges. However, as was mentioned, some research about morality appears to suggest otherwise (Tobia et al. 2013, Schwitzgebel & Cushman 2015).

103 The process of reasoning could involve one expert intuitive path being changed because of the unacceptability of its effects – compare with Ohlsson 2011: 92, 113-116.

104 The vital question about intuitively indetermined cases regards what eventually determines a judge's final decision. To answer that question is equal to resolving the problem of different judgments in similar cases – such as in the comparison of Owens v. Owens and Riggs v. Palmer, where despite core resemblances, the final decisions were significantly different. While intriguing, this question remains outside the scope of this analysis, the main goal of which is to propose a set of criteria for legal cases to separate those with possible legal expert intuition and those where such a phenomenon cannot occur.

reference – an objective legal standard of adjudication, being established by either legal theory or judicial practice. In the first scenario the standard could not be established because of the novelty of the normative task to resolve. If judicial reasoning fails to properly adapt similar standards – for instance because the case in question differs significantly – expert intuition is insufficient for creating a path to the solution. In the second scenario of conflicting legal (or legal and moral) intuitions, it can be the expert intuition itself that causes the solution to the legal case to be indeterminate. The path to an intuitive holistic solution is blocked by a negative mental evaluation provided by another strong intuitive response. And since there is no objective legal standard for solving the conflict, the intuitive judicial answer for this part of the legal case cannot be adapted at hand.[105] If a judge encounters legal cases similar to these problematic models, then she can expect that the conditions for deliberate practice are not fulfilled within the considered area of legal decision-making, and that it is therefore probable that current judicial expert intuitions are not fully prepared to provide their best performance.

Given these remarks, the legal realm appears to be at least partially incapable of developing expert intuition – in the sense of holistic judgments.[106] In some types of legal cases, where there is currently no stable and objective legal standard for solving them, judicial deliberate practice cannot be started, and hence expert intuition cannot be created. The reason lies in the lack of regularities and feedback necessary for expert training. The absence of a legal standard for a concrete type of legal case does not mean that there never will be expert intuition in that area of law, nor that experienced judges will be wholly incapable of addressing this type of problem with their legal intuitive expertise. Conversely, by using their intuitive cues, together with the various means of legal analysis, the new objective legal standard can be established for future judicial experts. However, as expert intuition requires time, effort, and prior environmental conditions,

105 The lack of adaptive pattern touches both the development of and having judicial expert intuition, but it does not stop judicial intuitive mechanisms. For instance, Crowe states that in hard cases (where judicial intuition is not fully effective) the judge has to use the her deliberative legal reasoning (Crowe 2018:83-86). Apparently, Crowe omits one of quasi-intuitive mechanisms that can arguably explain judicial reasoning solving hard cases on an intuitive level. This mechanism is called insight and it involves receiving a sudden flash of understanding after a mental impasse. In the case of two conflicting expert intuitive alternatives, the occurrence of legal insight might be probable – see on this matter Ohlsson 2011: 87–93, Zander et al. 2016, Brożek 2019: 29-34, and Zygmunt 2020.

106 Expert intuition developed through deliberate practice is not a mere accumulation of knowledge and experience; it is the peak of an adaptive toolbox, capable of effectively adjusting to different types of tasks (compare with Gigerenzer & Todd 1999b: 3-34). Not being able to deliver holistic judgments in certain types of cases does not exclude legal intuition or legal expert intuition from action. Conversely, it is highly probable that intuitive legal specialists and experts can find a multitude of helpful intuitive cues for solving even atypical, e.g., novel or contradictory, cases. On the other hand, not knowing the limits of their own expertise can lead judicial intuitive experts to the bias of overconfidence – see on that matter Liu & Li 2019.

judges should be aware of the possibility of overconfidence in their search for complete and satisfactory answers to tasks imposed on them during a court trial.

5 CONCLUSION

This analysis has proposed conceptual tools for describing the criteria a category of legal cases must fulfill to enable the development of judicial expert intuition. The first criterion is a stable and objective legal standard for solving concomitant normative problems. The second is a high similarity between the cases in question. The third is a sufficient number of cases to allow for internalizing intuitive patterns. When these criteria are fulfilled, deliberate practice can arguably be performed. However, as mentioned, since the criteria are environmental, the occurrence of legal expert intuition is possible, but not certain.

Assuming that judicial intuitive experts exist, they can utilize a range of helpful legal skills in every part of the legal domain. That being said, considering the model examples discussed in section 4 – cases with novel normative problems or generating conflicting intuitions – judges in atypical court situations should employ an extra level of care. As research suggests, with a great amount of experience comes the chance of being overconfident.

Finally, it should be noted that the inability of expert intuitive holistic judgement in a particular type of legal case does not equal the inability of being a legal expert, even in scope of the same case. Expert judges have a variety of tools for legal analysis, making them highly effective in solving all kinds of legal issues. A problem may arise when an expert judge wrongly decides to rely on her intuition instead of those other appropriate tools. The purpose of this paper, therefore, has been to remark that from the psychological point of view, expert intuition is an result of a multitude of features – and if those features are not matched, intuitive holistic judgments can be misleading. Thus, we have a sketch of a conceptual model, challengeable on the theoretical and empirical level. The experimental analysis of judicial expert intuition appears to be highly desirable at this stage.

Bibliography:

Armour, J. (2018). Where Bias Lives in the Criminal Law and Its Processes: How Judges and Jurors Socially Construct Black Criminals. *American Journal of Criminal Law, 45*, 203-252. https://heinonline.org/HOL/LandingPage?handle=hein.journals/ajcl45&div=9&id=&page=

Austin, J. (1995). *The province of jurisprudence determined.* E. Wilfrid Rumble (Ed). Cambridge University Press. ISBN: 9780521447560

Bentham, J. (1781). *An Introduction to the Principles of Morals and Legislation.* McMaster University Archive for the History of Economic Thought. https://econpapers.repec.org/RePEc:hay:hetboo:bentham1781

Berman, D. H., & Hafner, C. D. (1987). Indeterminacy: A Challenge to Logic-based Models of Legal Reasoning. *International Review of Law, Computers & Technology, 3*(1), 1-35. https://doi.org/10.1080/13600869.1987.9966251

Billett, S., Harteis, C., & Gruber, H. (2018). Developing Occupational Expertise through Everyday Work Activities and interactions. In K. A. Ericsson, R. R. Hoffman, A. Kozbelt & A.

M. Williams (Eds.), *The Cambridge handbook of expertise and expert performance*. (2nd ed., pp. 105-126) Cambridge University Press. https://doi.org/10.1017/9781316480748

Bix, B. H. (2011). Radbruch's Formula and Conceptual Analysis. *American Journal of Jurisprudence, 56*(1), 45-57. https://heinonline.org/HOL/LandingPage?handle=hein.journals/ajj56&div=5&id=&page=

Breiman, L., Friedman J., Stone, C. J., & Olshen, R. A. (2017). *Classification and regression trees*. Taylor & Francis Group. https://doi.org/10.Ž1201/9781315139470

Brennan, William J Jr. (1988). Reason, Passion, and the Progress of the Law. *Cardozo Law Review, 10*, 3-24. https://heinonline.org/HOL/LandingPage?handle=hein.journals/cdozo10&div=12&id=&page=

Brożek, B. (2018). *Umysł prawniczy* [Eng. 'The Legal Mind']. Copernicus Center Press. https://ruj.uj.edu.pl/xmlui/handle/item/60052

Brożek, B. (2019). *The Legal Mind: A New Introduction to Legal Epistemology*. Cambridge University Press. https://doi.org/10.1017/9781108695084

Bröhmer, J., & Hill, C. (2010). 60 Years German Basic Law: The German Constitution and its Court. Landmark Decisions of the Federal Constitutional Court of Germany in the Area of Fundamental Rights. *The Malaysian Current Law Journal*. https://hdl.handle.net/1959.11/7659

Bystranowski, P., Janik, B., Próchnicki, M., & Skórska, P. (2021). Anchoring effect in legal decision-making: A meta-analysis. *Law and Human Behavior, 45*(1), 1-23. http://dx.doi.org/10.1037/lhb0000438

Cappelen, H. (2012). *Philosophy without intuitions*. Oxford University Press. https://doi.org/10.1093/acprof:oso/9780199644865.001.0001

Chase, W. G., & Simon, H. A. (1973). The mind's eye in chess. In W. G. Chase (Ed.), *Visual information processing* (pp. 215-281). Academic Press/Elsevier. https://doi.org/10.1016/c2013-0-10487-4

Clore, G. L., Schwarz, N., & Conway, M. (2014). Affective causes and consequences of social information processing. In R. S. Wyer, Jr. & T. K. Srull (Eds.), *Handbook of social cognition. Volume 1: Basic processes,* (2nd ed., pp. 323-417). Psychology Press. https://doi.org/10.4324/9781315807102

Cole, L. R. (1989). Training the Mentor: Improving the Ability of Legal Experts to Teach Students and New Lawyers. *New Mexico Law Review, 19*(1), 163-170. https://heinonline.org/HOL/P?h=hein.journals/nmlr19&i=171

Crowe, J. (2018). Not-So-Easy Cases. *Statute Law Review, 40*(1), 75-86. https://doi.org/10.1093/slr/hmy027

Danziger, S., Levav, J., & Avnaim-Pesso, L. (2011). Extraneous factors in judicial decisions. *Proceedings of the National Academy of Sciences, 108*(17), 6889-6892. https://doi.org/10.1073/pnas.1018033108

De Groot, A. (1964). Chess playing programs. *Proceedings Koninklijke Akademie van Wetenschappen (Series A), 67*, 385-398. https://doi.org/10.1037/e685262012-115

Dickson, J. (2001). *Evaluation and legal theory*. Hart Publishing. https://doi.org/10.5040/9781472562364

Dworkin, R. (1978). *Taking Rights Seriously*. Harvard University Press. ISBN: 0674867114

Dworkin, R. (1986). *Law's Empire*. Harvard University Press. ISBN: 0674518357

Englich, B., Mussweiler, T., & Strack, F. (2006). Playing dice with criminal sentences: The influence of irrelevant anchors on experts' judicial decision making. *Personality and Social Psychology Bulletin, 32*(2), 188-200. https://doi.org/10.1177/0146167205282152

Ericsson, K. A., Krampe, R. T., & Tesch-Römer, C. (1993). The role of deliberate practice in the acquisition of expert performance. *Psychological review, 100*(3), 363-406. https://doi.org/10.1037/0033-295x.100.3.363

Ericsson, K. A. (2014a). Expertise. *Current Biology, 24*(11), 508-510. https://doi.org/10.1016/j.cub.2014.04.013

Ericsson, K. A. (2014b). Why expert performance is special and cannot be extrapolated from studies of performance in the general population: A response to criticisms. *Intelligence, 45*, 81-103. https://doi.org/10.1016/j.intell.2013.12.001

Ericsson, K. A. (2016). Summing up hours of any type of practice versus identifying optimal practice activities: Commentary on Macnamara, Moreau, & Hambrick (2016). *Perspectives on Psychological Science, 11*(3), 351-354. https://doi.org/10.1177/1745691616635600

Ericsson, K. A., Hoffman, R. R., Kozbelt, A., & Williams, A. M. (2018). *The Cambridge handbook of expertise and expert performance* (2nd ed.). Cambridge University Press. https://doi.org/10.1017/9781316480748

Ericsson, K. A. (2018). The Differential Influence of Experience, Practice, and Deliberate Practice on the Development of Superior Individual Performance of Experts. In K. A. Ericsson, R. R. Hoffman, A. Kozbelt & A. M. Williams (Eds.), *The Cambridge handbook of expertise and expert performance* (2nd ed., pp. 745-769). Cambridge University Press. https://doi.org/10.1017/9781316480748

Farrington-Darby, T., & Wilson, J. R. (2006). The nature of expertise: A review. *Applied Ergonomics,*

37(1), 17-32. https://doi.org/10.1016/j.apergo.2005.09.001

Feltovich, P. J., Prietula, M. J., & Ericsson, K. A. (2018). Studies of Expertise from Psychological Perspectives: Historical Foundations and Recurrent Themes. In K. A. Ericsson, R. R. Hoffman, A. Kozbelt & A. M. Williams (Eds.), *The Cambridge handbook of expertise and expert performance* (2nd ed., pp. 59-83). Cambridge University Press. https://doi.org/10.1017/9781316480748

Finnis, J. (2011). *Natural law and natural rights* (2nd ed.). Oxford University Press.

Fuller, L. L. (1958). Positivism and fidelity to law-A reply to Professor Hart. *Harvard Law Review, 71*(4), 630-672. https://doi.org/10.2307/1338226

Gardner, A. von der Lieth. (1984). *An artificial intelligence approach to legal reasoning* (Doctoral Dissertation). Stanford University.

Gigerenzer, G., Todd, P. M., & ABC Research Group (1999). *Simple heuristics that make us smart*. Oxford University Press.

Gigerenzer, G., & Todd, P. M. (1999b). Fast and frugal heuristics: The adaptive toolbox. In G. Gigerenzer, P.M. Todd. & ABC Research Group, *Simple heuristics that make us smart* (pp. 3-34). Oxford University Press.

Gigerenzer, G., & Engel, C. (Eds.) (2006). *Heuristics and the Law*. The MIT Press. https://doi.org/10.7551/mitpress/3488.001.0001

Gigerenzer, G. (2006). Heuristics. In G. Gigerenzer & C. Engel (Eds.), *Heuristics and the law* (pp. 17-44). The MIT Press. https://doi.org/10.7551/mitpress/3488.001.0001

Gilovich, T., Vallone, R. & Tversky, A. (1985). The hot hand in basketball: On the misperception of random sequences. *Cognitive Psychology, 17*(3), 295-314. https://doi.org/10.1016/0010-0285(85)90010-6

Gilovich, T., Griffin, D., & Kahneman, D. (2002). *Heuristics and biases: The psychology of intuitive judgment*. Cambridge University Press. https://doi.org/10.1017/CBO9780511808098

Gladwell, M. (2005). *Blink: The Power of Thinking Without Thinking*. Little, Brown & Co.

Glöckner, A., & Witteman, C. (2010). Beyond dual-process models: A categorisation of processes underlying intuitive judgement and decision making. *Thinking & Reasoning, 16*(1), 1-25. https://doi.org/10.1080/13546780903395748

Gobet, F. (1997). A pattern-recognition theory of search in expert problem solving. *Thinking & Reasoning, 3*(4), 291-313. https://doi.org/10.1080/135467897394301

Gobet, F. (2017). Three views on expertise: Philosophical implications for rationality, knowledge, intuition and education. *Journal of Philosophy of Education, 51*(3), 605-619. https://doi.org/10.1111/1467-9752.12253

Gobet, F., & Chassy, P. (2009). Expertise and intuition: A tale of three theories. *Minds and Machines, 19*(2), 151-180. https://doi.org/10.1007/s11023-008-9131-5

Green, L., & Mehr, D. R. (1997). What alters physicians' decisions to admit to the coronary care unit?. *Journal of Family Practice, 45*(3), 219-226. https://psycnet.apa.org/record/1997-30170-001

Guthrie, C., Rachlinski, J. J., & Wistrich, A. J. (2007). Blinking on the bench: How judges decide cases. *Cornell Law Review, 93*, 1-43.

Hage, J. C., Leenes, R., & Lodder, A. R. (1993). Hard cases: A procedural approach. *Artificial intelligence and law, 2*, 113-167. https://doi.org/10.1007/BF00871759

Haidt, J. (2001). The emotional dog and its rational tail: a social intuitionist approach to moral judgment. *Psychological review, 108*(4), 814-834. https://doi.org/10.1037/0033-295x.108.4.814

Haidt, J. (2007). The new synthesis in moral psychology. *Science, 316*(5827), 998-1002. https://doi.org/10.1126/science.1137651

Hambrick, D. Z., Oswald, F. L., Altmann, E. M., Meinz, E. J., Gobet, F., & Campitelli, G. (2014). Deliberate practice: Is that all it takes to become an expert?. *Intelligence 45*, 34-45. https://doi.org/10.1016/j.intell.2013.04.001

Hart, H. L. A. (1958). Positivism and the Separation of Law and Morals. *Harvard Law Review, 271*(4), 593-629. https://doi.org/10.2307/1338225

Hart, H. L. A. (2012). *The concept of law* (3rd ed.). Oxford University Press.

Harteis, C., & Billett, S. (2013). Intuitive expertise: Theories and empirical evidence. *Educational Research Review 9*, 145-157. https://doi.org/10.1016/j.edurev.2013.02.001

Hartman, G. R., Mersky, R. M., & Tate, C. L. (2004). *Landmark Supreme Court cases: the most influential decisions of the Supreme Court of the United States*. Facts On File, Inc.

Hodgkinson, G. P., Langan-Fox, J., & Sadler-Smith, E. (2008). Intuition: A fundamental bridging construct in the behavioural sciences. *British Journal of Psychology, 99*(1), 1-27. https://doi.org/10.1348/000712607x216666

Hogarth, R. M. (2001). *Educating intuition*. The University of Chicago Press.

Horvath, J., & Wiegmann, A. (2016). Intuitive expertise and intuitions about knowledge. *Philosophical Studies, 173*(10), 2701-2726. https://www.jstor.org/stable/44122369

Jakubiec, M. (2021). Legal Concepts as Mental Representations. *International Journal for the Semiotics of Law,* 1-19. https://doi.org/10.1007/s11196-021-09853-7

Jolls, C., Sunstein, C. R., & Thaler, R. (1998). A Behavioral Approach to Law and Economics.

Stanford Law Review, 50(5), 1471-1550. https://doi.org/10.2307/1229304

Kahneman, D. (2003). Maps of Bounded Rationality: Psychology for Behavioral Economics. *American Economic Review, 93*(5), 1449-1475. https://www.doi.org/10.1257/000282803322655392

Kahneman, D. (2012). *Thinking, Fast and Slow*. Penguin Books.

Kahneman, D., & Frederick, S. (2002). Representativeness Revisited: Attribute Substitution in Intuitive Judgment. In T. Gilovich, D. Griffin, & D. Kahneman (Eds.), *Heuristics and Biases: The Psychology of Intuitive Judgment* (pp. 49-81). Cambridge University Press. https://doi.org/10.1017/CBO9780511808098.004

Klein, G. A., Calderwood, R., & Clinton-Cirocco, A. (1986). Rapid decision making on the fireground. *Proceedings of the Human Factors Society Annual Meeting, 30*(6), 576-580. https://doi.org/10.1177%2F154193128603000616

Klein, G. A. (1993). A recognition-primed decision (RPD) model of rapid decision making. In G. A. Klein, J. Orasanu, R. Calderwood & C. E. Zsambok (Eds.), *Decision Making in Action: Models and Methods* (pp. 138-147). Ablex Publishing. https://psycnet.apa.org/record/1993-97634-000

Klein, G., & Kahneman, D. (2009). Conditions for intuitive expertise: a failure to disagree. *American Psychologist, 64*(6), 515-526. https://psycnet.apa.org/doi/10.1037/a0016755

Klein, G., Shneiderman, B., Hoffman, R. R., & Wears, R. L. (2019). The war on expertise: Five communities that seek to discredit experts. In P. Ward, J.M. Schraagen, J. Gore & E.M. Roth (Eds.). *The Oxford handbook of expertise* (pp. 1157-1192). Oxford University Press. https://doi.org/10.1093/oxfordhb/9780198795872.001.0001

Kruglanski, A. W., & Gigerenzer, G. (2011). Intuitive and deliberate judgments are based on common principles. *Psychological Review, 118*(1), 97-109. https://doi.org/10.1037/a0020762

Lehmann, A. C., Gruber, H., & Kopiez, R. (2018). Expertise in music. In K. A. Ericsson, R. R. Hoffman, A. Kozbelt & A. M. Williams (Eds.), *The Cambridge handbook of expertise and expert performance* (2nd ed., pp. 535-549). Cambridge University Press. https://doi.org/10.1017/9781316480748

Leiter, B. (1995). Legal Indeterminacy. *Legal Theory, 1*(4), 481-492. https://doi.org/10.1017/s1352325200000227

Levinson, J. D., Bennett, M. W., & Hioki, K. (2017). Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes. *Florida Law Review, 69*, 63-114.

Liu, J. Z., & Li, X. (2019). Legal techniques for rationalizing biased judicial decisions: Evidence from experiments with real judges. *Journal of Empirical Legal Studies, 16*(3), 630-670. https://doi.org/10.1111/jels.12229

Loewenstein, G. F., Weber, E. U., Hsee, C. K., & Welch, N. (2001). Risk as feelings. *Psychological Bulletin, 127*(2), 267-286. https://doi.org/10.1037/0033-2909.127.2.267

Macnamara, B. N., Hambrick, D. Z., & Oswald, F. L. (2014). Deliberate practice and performance in music, games, sports, education, and professions: A meta-analysis. *Psychological science, 25*(8), 1608-1618. https://doi.org/10.1177/0956797614535810

Macnamara, B. N., Hambrick, D. Z., & Moreau, D. (2016). How important is deliberate practice? Reply to Ericsson (2016). *Perspectives on Psychological Science, 11*(3), 355-358. https://doi.org/10.1177/1745691616635614

Meehl, P. E. (1954). *Clinical versus statistical prediction: A theoretical analysis and a review of the evidence*. University of Minnesota Press. https://doi.org/10.1037/11281-000

Minei, E., & Bisel, R. (2013). Negotiating the Meaning of Team Expertise: A Firefighter Team's Epistemic Denial. *Small Group Research, 44*(1), 7-32. https://doi.org/10.1177%2F1046496412467830

Modak-Truran, M. (2001). A Pragmatic Justification of the Judicial Hunch. *University of Richmond Law Review, 35*, 55. https://heinonline.org/HOL/LandingPage?handle=hein.journals/urich35&div=12&id=&page=

Moore, D. A., & Healy, P. J. (2008). The trouble with overconfidence. *Psychological Review, 115*(2), 502-517. https://doi.org/10.1037/0033-295X.115.2.502

Mosier, K., Fischer, U., Hoffman, R. R., & Klein, G. (2018). Expert professional judgments and" naturalistic decision making". In K. A. Ericsson, R. R. Hoffman, A. Kozbelt & A. M. Williams (Eds.), *The Cambridge handbook of expertise and expert performance* (2nd ed., pp. 453-475). Cambridge University Press. https://doi.org/10.1017/9781316480748

Ohlsson, S. (2011). *Deep learning: How the mind overrides experience*. Cambridge University Press. https://doi.org/10.1017/cbo9780511780295

Okoli, J. O., Weller, G., & Watt, J. (2016). Information processing and intuitive decision-making on the fireground: towards a model of expert intuition. *Cognition, Technology & Work, 18*(1), 89-103. https://doi.org/10.1007/s10111-015-0348-9

Pietrzykowski, T. (2012). *Intuicja Prawnicza. W stronę zewnętrznej integracji Teorii Prawa* [Eng. 'Legal Intuition. Towards an External Integration of the Theory of Law']. Difin.

Pogarsky, G., & Babcock, L. (2001). Damage caps, motivated anchoring, and bargaining impasse. *The Journal of Legal Studies, 30*(1), 143-159. htt-

ps://doi.org/10.1086/468114
Raz, J. (1985). Authority, law and morality. *The Monist, 68*(3), 295-324. www.jstor.org/stable/27902922
Richards, D. (2016). When Judges Have a Hunch-Intuition and Experience in Judicial Decision-Making. *Archiv für Rechts-und Sozialphilosphie/ Archives for Philosophy of Law and Social Philosophy, 102*(2), 245-260. https://www.jstor.org/stable/24756844
Ross, P. E. (2006). The expert mind. *Scientific American, 295*(2), 64-71. https://www.jstor.org/stable/26068925
Schwitzgebel, E., & Cushman, F. (2015). Philosophers' biased judgments persist despite training, expertise and reflection. *Cognition, 141*, 127-137. https://doi.org/10.1016/j.cognition.2015.04.015
Shanteau, J. (1992). Competence in experts: The role of task characteristics. *Organizational behavior and human decision processes, 53*(2) 252-266. https://doi.org/10.1016/0749-5978(92)90064-E
Simon, H. A. (1995). A Behavioral Model of Rational Choice. *The Quarterly Journal of Economics, 69*(1), 99–118. https://doi.org/10.2307/1884852
Simon, H. A., & Barenfeld, M. (1969). Information processing analysis of perceptual processes in problem solving. *Psychological Review, 76*, 473-483. https://doi.org/10.1037/h0028154
Simon, H. A. (1986). Rationality in Psychology and Economics. *The Journal of Business, 59*(4), S209-S224. https://www.jstor.org/stable/2352757
Simon, H. A. (1990). Bounded Rationality. In J. Eatwell, M. Milgate & P. Newman (Eds.), *Utility and Probability* (pp. 15-18). Palgrave Macmillan. https://doi.org/10.1007/978-1-349-20568-4_5
Sinclair, M. (2010). Misconceptions about intuition. Psychological Inquiry, 21(4), 378-386. https://doi.org/10.1080/1047840X.2010.523874
Stanovich, K., & West, R. (2002). Individual Differences in Reasoning: Implications for the Rationality Debate?. In T. Gilovich, D. Griffin, & D. Kahneman (Eds.), *Heuristics and Biases: The Psychology of Intuitive Judgment* (pp. 421-440). Cambridge University Press. https://doi.org/10.1017/CBO9780511808098.026
Stelmach, J. (2017). Legal Instinct. *Polish Law Review, 3*(1), 153-159. https://polishlawreview.pl/resources/html/article/details?id=157559
Strömwall, L., & Granhag, P. A. (2003). How to detect deception? Arresting the beliefs of police officers, prosecutors and judges. Psychology, *Crime and Law, 9*(1), 19-36. https://doi.org/10.1080/10683160308138
Struchiner, N., Hannikainen, I., & Almeida, G. (2020). An experimental guide to vehicles in the park. *Decision Making, 15*(3), 312–329.
Susskind, R. E. (1989). *Expert systems in law: a jurisprudential inquiry*. Oxford University Press.
Thaler, R. (1980). Toward a positive theory of consumer choice. *Journal of Economic Behavior & Organization, 1*(1), 39-60. https://doi.org/10.1016/0167-2681(80)90051-7
Tobia, K., Buckwalter, W., & Stich, S. (2013). Moral intuitions: Are philosophers experts? *Philosophical Psychology, 26*(5), 629-638. https://doi.org/10.1080/09515089.2012.696327
Todd, P. M., & Gigerenzer, G (2007). Environments that make us smart: Ecological rationality. *Current Directions in Psychological Science, 16*(3), 167-171. https://doi.org/10.1111%2Fj.1467-8721.2007.00497.x
Tushnet, M. V. (Ed.) (2008). I dissent: Great opposing opinions in landmark supreme court cases. Beacon Press. ISBN: 9780807000366
Tversky, A., & Kahneman, D. (1974). Judgment under uncertainty: Heuristics and biases. *Science, 185*(4157), 1124-1131. https://doi.org/10.1126/science.185.4157.1124
Vrij, A. (2008). *Detecting lies and deceit: Pitfalls and opportunities*. John Wiley & Sons.
Wessel, E., Drevland, G. C. B., Eilertsen, D. E., & Magnussen, S. (2006). Credibility of the Emotional Witness: A Study of Ratings by Court Judges. *Law and Human Behavior, 30*(2), 221–230. https://doi.org/10.1007/s10979-006-9024-1
Williams, A. M., Ford, P. R., Hodges, N. J., & Ward, P. (2018). Expertise in sport: Specificity, plasticity, and adaptability in high-performance athletes. In K. A. Ericsson, R. R. Hoffman, A. Kozbelt & A. M. Williams (Eds.), *The Cambridge handbook of expertise and expert performance* (2nd ed., pp. 653-673). Cambridge University Press. https://doi.org/10.1017/9781316480748
Zander, T., Öllinger, M., & Volz, K. G. (2016). Intuition and insight: Two processes that build on each other or fundamentally differ?. *Frontiers in psychology, 7*, 1395. https://doi.org/10.3389/fpsyg.2016.01395
Zoll, F. (2004). *Jaka szkoła prawa? Czy amerykańskie metody nauczania prawa mogą być przydatne w Polsce?* [Eng. 'Which School of Law? Can American Methods of Legal Education be Useful in Poland?']. Dom Wydawniczy ABC.
Zygmunt, T. J. G. (2020). An intuitive approach to hard cases. *Utrecht Law Review, 16*(1). http://doi.org/10.36633/ulr.505

Silvia Zorzetto*

A constructivist conception of legal interpretation

Some critical remarks

This essay explores a number of issues central to a value-based yet positivist conception of law and legal interpretation. In particular, after some reflections on whether and in what sense a theory of law can be considered axiologically and/or methodologically superior, some classic issues in the theory of legal interpretation are discussed: the distinctions of noetic versus dianoetic interpretation, *interpretatio legis* versus *iuris*, and simple versus difficult cases. The analysis then focuses on the claim to correctness inherent in legal reasoning, on its pragmatic connotations, on its controversial relations to the thesis of the so-called separation of law and morality, and to ethical conformism. I argue that the conception of legal interpretation proposed by Isabel Lifante is instead a non-neutral conception of law that contributes to the reinforcement of a Dionysian and Herculean legal practice.

Keyword: legal interpretation, noetic vs. dianoetic, *interpretatio iuris*, claim of correctness, conformism, rule of law

1 INTRODUCTION

This essay explores several issues central to the work of Isabel Lifante Vidal, in particular her book *Argumentación e interpretación jurídica: escepticismo, intencionalismo y constructivismo* and the essay "In defence of a constructivist conception of legal interpretation", which is a summary of the theory presented in the book.[1]

There are many reasons to appreciate and share Lifante's analysis, and I refer in particular to her book's conclusions. However, in the spirit of a methodological principle that she also values, namely critical analysis as a method, I will focus only on the points that I consider more critical or problematic, and on

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1 See Lifante Vidal 2018 for the book and Lifante Vidal 2019 and Lifante Vidal 2020 for the essay (first in Spanish and then in English). For the sake of clarity, I always refer to the content of the essay (in English), when I do not explicitly refer to the book. In this commentary, I follow the order of the theses and arguments presented by the author in her essay, as it is very clear.

which I disagree. It is more productive to address the points on which we disagree, because (rational) criticism is essential to improving theoretical debate and bringing theory and practice closer together. Moreover, my comments in the following paragraphs, although critical, have a constructive aim. Since there are many points on which I agree with Lifante, I would like to suggest some improvements to her theory rather than abandoning it.

In this respect, I share her intention to formulate a constructivist or value-dependent conception of legal interpretation, and to argue for its "superiority" over competing conceptions. In particular, I share her intention to show to what extent approaches that argue for the neutrality or scientificity of legal method in general, and legal interpretation and legal reasoning in particular, are fallacious. To avoid any misunderstanding, I am not referring to the thesis that discretion and indeterminacy necessarily characterize legal interpretation and argumentation, which I believe to be correct, and which is also advocated in Lifante's essay and book.

2 AXIOLOGICAL SUPERIORITY

A first general critical remark concerns precisely the claim of "superiority".[2] This point, while introductory, is by no means a minor aspect of the proposed conception of legal interpretation. Lifante does not simply place her conception on the defensive. Rather, her defence is proactive and a counter-attack. She asserts the "superiority" of her theoretical proposal, but she does not clarify what that superiority consists in. It is never right to criticize an analysis for what it does not say or does not contain. My comment on Lifante's view, however, concerns a lack of explanation and justification that is fundamental at the methodological level.

It is common knowledge that the superiority of a theory can be judged according to various criteria, and that any judgement in this regard depends on further basic methodological assumptions. Some philosophers strive for superiority in the sense of the greater explanatory power of their theories. Others may strive for superiority in the sense of greater conceptual clarity. Moreover, someone may first seek superiority in rhetorical or persuasive terms to increase the legitimacy of his or her own theses. Furthermore, some theories are considered superior by their authors or commentators from a normative or axiological perspective. In this case, the theory's purported superiority may depend on values embedded in the theory that are assumed to be superior, or the same theories may be assumed to achieve certain supposedly superior values. It is almost trivial to say that there is no necessary connection between these different conceptions of methodological superiority. Moreover, according to the approaches that defend an ideal of neutrality and pure scientificity in legal method

2 Lifante Vidal 2020: 1; Lifante Vidal 2018: 11.

and methodology, it would be a contradiction in terms to link superiority with persuasion, axiology and normativity. Under the assumption of methodological neutrality, any approach that commits to axiological assumptions and/or goals, or is dedicated to enhancing persuasion and legitimacy, would by definition be "inferior", i.e. purely ideological in the negative sense of the word.

However, given Lifante's premise—which I believe to be correct—that legal method and methodology cannot be neutral, I believe that her constructivist approach to legal interpretation is not merely aimed at greater explanatory power or greater conceptual clarity. She claims that her constructivist conception of legal interpretation is normatively superior, both in terms of the values embodied in that theory and in terms of those that the theory intends to promote. As I will explain in the following sections, its constructivist conception of legal interpretation is normatively superior to sceptical approaches because it is stronger. It is more attractive to all participants and especially to jurists, because it is more consistent with their point of view, which is in fact equally creative and fully connected to interests, values and political choices.

3 NOETIC AND DIANOETIC INTERPRETATION: CONCEPTS AND INFERENCES

Lifante likens the distinction traced by Letizia Gianformaggio between noetic interpretation and dianoetic interpretation[3] to the distinction recently developed by psychologists such as Daniel Kahneman between two systems of thought: System 1 and System 2.[4] According to Lifante, "[u]nderlying these two meanings of interpretation is the same distinction" between what is called System 1 and System 2: "a fast or intuitive one and a slow and reflective one that relates to the act of deliberation."[5]

I think there is at best a very broad and general similarity between Gianformaggio's distinction and Kahneman's theory. There is not at all the same basic distinction between the two juxtapositions: noetic interpretation vs. dianoetic interpretation on the one hand, and System 1 (fast thinking) vs. System 2 (slow thinking), on the other.

The opposing terms "noetic" and "dianoetic", as used by Gianformaggio, hark back to an idea of Amedeo G. Conte, who coined these two terms to distinguish between the conceptual and the inferential dimension of understanding. In reality, Conte did not use this distinction in relation to the process of (legal) interpretation and the attribution of meaning to statements. Conte instead used the

3 Gianformaggio 1987: 90-96.

4 Kahneman 2011: 20ff.

5 Lifante Vidal 2020: para. 2; Lifante Vidal 2018: 21-24.

distinction in his studies on the concepts of validity and normativity, and in explaining the so-called is-ought question.[6] In relation to the latter, Conte applies the term "dianoetic" to the pair of terms "ontic" and "deontic", and in particular to describe the distinction between descriptive and prescriptive propositions, while he uses the term "noetic" to explain the same distinction in relation to descriptive and prescriptive concepts. In any case, it must be stressed that both the noetic and dianoetic dimensions are logical in Conte's work.

Thus, when Gianformaggio speaks of noetic interpretation, she means conceptual interpretation, i.e. interpretation as conceptual understanding. The concept is bound to an immediate and intuitive conceptual association *in vacuo*, which defies all inference. In the background is the echo of the conceptual analysis of legal terms. Dianoetic interpretation in the legal field, on the other hand, always consists of practical reasoning: it involves an act of communication, which thus involves intersubjectivity.

In this respect, the only partial connection with Kahneman's conception concerns the fact that System 1 is an associative system: a vast network of interconnected ideas, while System 2 is connected to reasoning. However, the conceptual vs. inferential distinction is completely outside the scope of Kahneman's theory.[7] "System 2 performs complex computations and intentional actions, both mental and physical."[8] Therefore, it is not limited to or equated with inferential reasoning. System 1, on the other hand, is shaped by biological and causal factors. It is activated by any stimulus or situation and is highly context-dependent.[9] System 1 is thus not conceptual in the sense that Conte and Gianformaggio thought. Both fast and slow thinking are a fiction, a teaching tool designed to appeal to our basic cognitive instincts.[10] Moreover, both can be rationally explained in terms of inferences and rules.[11]

Lifante's explanation of Gianformaggio's dichotomy of the noetic and dianoetic interpretation of law is also not entirely correct. According to Gianformaggio, noetic interpretation is an activity that is always necessary (whenever we are in a communicative situation, we have to grasp meanings), while dianoetic interpretation is also necessary in all communicative situations. In other words, it is not correct to restrict dianoetic interpretation to difficult or obscure cases where there is doubt about the meaning to be attributed to the object being interpreted. Dianoetic interpretation concerns reasoning (i.e. argumentation).[12] Although the inferences may be greater and more obvious in cases of interpre-

6 Conte 1986, Conte 1988, Conte 2006.

7 See e.g. Shleifer 2012; Grayot 2020.

8 Kahneman 2012: 57.

9 Kahneman 2011: 20ff.; Kahneman 2012: 58.

10 O'Brien 2012.

11 Solaki Berto & Smets 2021.

12 In this sense, see Lifante Vidal 2020: para. 18.

tative doubt and disagreement, there are latent inferences in every application of legal norms, and therefore also in clear cases. In this context, we should not confuse two distinctions: (i) the first distinction between intuitive or immediate understanding and reflective or sophisticated understanding; and (ii) the other distinction between simple or clear cases where there is no doubt, and difficult or opaque cases where there is interpretive doubt or disagreement. When insights are reasonably convergent, there is intuitive agreement without interpretive doubt. On the other hand, when people's intuitions differ, interpreters have to deal with interpretive doubts. Nor is dianoetic interpretation only useful when there is doubt about the interpretation. In many cases, reasoning makes the interpretation more robust and/or refines it, regardless of whether there are any doubts about that interpretation.

I also disagree with Lifante about the thesis that "difficult cases are the interesting ones: cases where doubts arise and where it is necessary to carry out interpretative activity in a dianoetic sense".[13] First, I assume that the comparison is with non-controversial cases, or the so-called easy or clear cases, which do not give rise to doubt or disagreement. Although such delimitation is notoriously controversial, we can leave this debate aside. The fact is that in some cases we agree on the correct resolution of a legal case and in others we do not. In this regard, I believe that Lifante's conception of interpretation is too narrow and circular. According to her definitions of dianoetic interpretation, only doubtful cases requiring reconsideration should be given attention. On the contrary, however, the current law is based on a very broad convergent interpretative practice. In fact, a remarkable number of aspects are not discussed at all, despite forming the legal context or texture in which everyone interprets, makes decisions and behaves. Of course, disputes are ubiquitous in the legal field. Conflicts of interest are commonplace, and the law is there precisely to resolve such conflicts. Nevertheless, legal disputes and disagreements involve a variety of interstices and margins of legal practice, which is generally cooperative and convergent. It is a fact that we never dispute anything and everything: as soon as this happens, the law breaks down. Legal disagreements, while permanent and ubiquitous, are local and selective. Interpretative doubts concern certain aspects of a provision or paragraph, a single word or syntactic concordance, etc., the use or meaning of a legal argument, the hierarchy of a legal norm, etc. Not everything in a case is in dispute.

In summary, noetic and dianoetic interpretations are not mutually exclusive and the latter begin with the grasping of a meaning (however imprecise). Noetic interpretation always takes place, in both clear and doubtful cases. It is also not true, nor did Gianformaggio claim, that dianoetic interpretation is only

13 Lifante Vidal 2020: paras. 4 and 11.

necessary in doubtful cases.[14] Nor is it true that "in easy cases interpretation would be a cognitive activity, though merely noetic."[15] Since all legal reasoning is based on practical inferences (that's quite a tautology), even if not limited to logical inferences, dianoetic interpretation exists in both plain and doubtful cases. In the former, inferences usually remain implicit, while in the latter they are usually expressed.

4 *INTERPRETATIO LEGIS* VERSUS *INTERPRETATIO IURIS*, AND DOUBTFUL CASES

The connection between dianoetic interpretation and doubtful cases is also not entirely consistent with the rest of Lifante's proposed theory.

The analysis also argues—and this time correctly—that "Interpretative activity (in the dianoetic sense) consists in arguing in favour of attributing a certain meaning to an object",[16] whether there is any doubt or not. On the other hand, Lifante refers to Wróblewski's notions of interpretation *sensu largissimo* (SL-interpretation) and interpretation *sensu largo* (L-interpretation),[17] whereas if doubt were the issue, then the relevant notion to refer to would be that of interpretation *sensu stricto*. Indeed, according to Wróblewski:

> (c) 'Interpretation' sensu stricto (S-interpretation) means an ascription of meaning to a linguistic sign in the case its meaning is doubtful in a communicative situation, i.e. in the case its 'direct understanding' is not sufficient for the communicative purpose at hand. Unlike L-interpretation, S-interpretation refers, thus, only to 'problematic' understanding, due to such phenomena as obscurity, ambiguity, metaphor, implicitness, indirectness, change of meaning, etc. Legal practice often faces such problems, and consequently there is a tendence to view this sense of 'interpretation' as the only relevant one for law.[18]

Moreover, the parallelism between Wróblewski's distinction between SL-interpretation and L-interpretation, on the one hand, and the classical distinction between *interpretatio legis* (the interpretation of provisions in statutes or other authoritative legal documents) and *interpretatio iuris* (the interpretation of the law as a whole), on the other, is not entirely clear.[19] Lifante understands *interpretatio legis* as the activity of determining the meaning of a legal statement, and counts as *interpretatio iuris* the integration activities, the resolution of antinomies, the identification of norms, etc., i.e. all those activities that serve

14 Lifante Vidal 2020: para. 11.
15 Lifante Vidal 2020: para. 11.
16 Lifante Vidal 2020: para. 8.
17 Lifante Vidal 2020: paras. 5-6.
18 Dascal & Wróblewski 1989: 427-428.
19 Lifante Vidal 2018: 19ff. and 28ff.

to arrive at that statement that is the object of *interpretatio iuris* (in her sense). However, SL-interpretation differs from this activity of *interpretatio iuris*, which is more similar to L-interpretation: while SL-interpretation concerns the concept of law (i.e. answers the question: *quid ius*?), L-interpretation deals with hermeneutic operations in and for a given law (i.e. answers the question: *quid iuris*?) and is thus an echo of *interpretatio iuris*.

Lifante believes that it is better to use the term "legal interpretation" for *interpretatio iuris*, i.e. to say "L-interpretation". I believe that the analyses in interpretation theory that have led to a refined distinction between the determination of meaning, integration, the resolution of antinomies, etc., have made an important contribution to legal method and methodology. So I think Lifante's approach is in some ways a step backwards in terms of clarity. This is not just a deviation in the terminology chosen. Rather, much of the theory of legal interpretation considered by Lifante in her essay and book relates to *interpretatio legis* rather than *interpretatio iuris* in her sense. There is thus a discrepancy between the targets criticized (sceptical and cognitivist theories of legal interpretation, intentionalists, etc.) and the theoretical constructivism proposed, which is more a proposal for a conception of law.

The relations between *interpretatio iuris* and *interpretatio legis* pointed out by Lifante also need some revision. According to her, "interpretation iuris will always imply carrying out interpretative activities in the sense of interpretation legis (interpretation of statutes or other authoritative legal materials): the starting point for the reconstruction of law must always be statutes, namely legal provisions endowed with authority."[20] I believe that there is an overlap between the different plans of analysis. First, it is neither a logical or theoretical necessity nor a factual truth that *interpretatio legis*[21] always takes precedence over "*interpretatio iuris*, which incorporates a broader scope of activities than the previous case: not just precision of the meaning of linguistic expressions contained in legal provisions, but also the resolution of antinomies, principles balancing for the resolution of gaps, etc."[22] In many cases of *interpretatio iuris* in Lifante's sense, the starting point is not and cannot be a "provision contained in laws or other authoritative legal documents" because, for example, it does not exist. Most importantly, the thesis that "the starting point for the reconstruction of law must always be statutes, that is, legal provisions endowed with authority"[23] reflects a particular doctrine of sources and marks a political choice. It is by no means a matter of describing the relationship between *interpretatio iuris* and *interpretatio legis* in general terms.

20 Lifante Vidal 2020: para. 7.

21 That is to say, for Lifante, the interpretation of provisions contained in statutes or other authoritative legal documents.

22 Lifante Vidal 2020: para. 6.

23 Lifante Vidal 2020: para. 7.

We can agree that *interpretatio iuris* and *interpretatio legis* (i.e. the reconstruction of law, balancing, dogmatic reconstruction, systematization, etc.[24]) are interrelated. However, I think that an approach to legal interpretation as *interpretatio iuris* does not help to clarify such interconnections and complex relationships. On the other hand, it is not compatible with the thesis that "Law is interpreted to find its meaning in those cases when *prima facie* it permits more than one possible reading",[25] since interrelationships exist even in plain or clear cases. Finally, a number of theories—which also differ from Lifante's constructivist view of legal interpretation—can subscribe to the truism that in the legal sphere the activity of interpreting a rule must be demonstrably legally grounded, i.e. in accordance with the law.[26] This is true even in simple and unambiguous cases where legal conclusions are equally well-founded, in accordance with the law, albeit implicitly.

5 INTERPRETATIVE ARGUMENTS: THE CLAIM TO CORRECTNESS AND PRAGMATIC ACCEPTABILITY

In this context, whether one follows MacCormick's proposed taxonomy of interpretive arguments or not,[27] the question is whether Lifante's theory offers an answer to the eternal question of the justificatory criteria of a particular interpretive solution, and if so, what that answer is. The fact is that there is no agreement on what those criteria are, what kind of criteria there are, and in what order they are applied. On this point, I agree with Lifante's critique, which is directed at sceptical and cognitive approaches.

However, neither her essay nor her book make clear which parameter (evaluative, not empirical) controls the claim to correctness that characterizes legal argumentation.[28] Lifante mentions the criterion of pragmatic acceptability,[29] which however remains undefined.

In particular, I do not consider her references to a "constructive process of legal materials establishing the values and objectives pursued by law" and to "ends considered valuable", which are to be developed "to their best extent", to be adequate explanations of this criterion.[30] It is obvious that the criterion of pragmatic acceptability is already extraordinarily indeterminate, vague and ambiguous, and this is all the more true for her references to unspecified "values and objectives

24 Lifante Vidal 2020: para. 7.
25 Lifante Vidal 2020: para. 31.
26 Lifante Vidal 2020: para. 7.
27 Lifante Vidal 2020: para. 8; 2018: 49-56.
28 Lifante Vidal 2020: paras. 11 and 22-23; Lifante Vidal 2018: 211-212, 219.
29 Lifante Vidal 2020: para. 13; Lifante Vidal 2018: 68.
30 Lifante Vidal 2020: para. 8; Lifante Vidal 2018: 217-218.

pursued by law" and "ends considered valuable". When the "best extent" of all this is mentioned, the already remarkable degree of indeterminacy is heightened.

The claim to correctness reflects a (macro-)pragmatic assumption of legal discourse conducted from the internal point of view, i.e. from the participant's point of view.[31] It would be absurd or counterintuitive for anyone to support a particular legal conclusion or interpretive thesis by asserting the opposite (that it is not correct). The game of legal practice implies that each player can only assert the correctness of his or her own interpretation. Otherwise, the interpreter would take himself out of the same game, and his or her speech would be pragmatically infelicitous. The claim to correctness is thus made by all participants in the practice of law. On the one hand, there is the claim to correctness of the decision-maker, such as the judge, the arbitrator, the official who has decision-making functions. On the other hand, there is the claim to correctness of citizens and lawyers, as well as judges and officials who do not have decision-making functions (e.g. public prosecutors and *amicus curiae*). The pragmatic claim to correctness is also an internal element of theoretical-legal metadiscourses, so it must be taken into account in order to understand the nature of theoretical disagreements. The pragmatic perspective adopted is not about whether "a unique solution to these disputes actually exists",[32] nor is it a matter of whether it is true or false that "for all practical purposes there will always be a right answer in the seamless web of our law."[33] The pragmatic approach does not imply a formalist or cognitive position at the level of method and theory of legal interpretation; it is compatible with a non-cognitive or moderately sceptical theory of legal interpretation. Even where there is broad scope for interpretation, reasoning and application, all legal (meta-)discourse involves a claim to correctness that (i) can never be fully satisfied, (ii) will never be absolute but always relative and internal to given premises, and (iii) implies a methodological conformism that precludes scientific neutrality. For these reasons, formulating legal theses in terms of correctness is not a sign of hypocrisy or intellectual dishonesty. It leaves open the possibility that some theoretical disagreements may be philosophically infinite, and that some disagreements may be genuine while others are not. Similarly, this view does not rule out the possibility that someone may abuse the claim to correctness or use it with false consciousness.

6 THE VALUE-LADEN APPROACH AND THE SEPARATION BETWEEN LAW AND MORALITY

Lifante rightly emphasizes that the determination of the criterion of correctness or the criterion of pragmatic acceptability depends on certain theoretical

31 Zorzetto 2019: 57-58.

32 Shapiro 2007.

33 Dworkin 1977: 84.

assumptions that relate to two upstream issues: the nature of law and the nature of practical rationality in general.[34] This advocates the idea of law as social practice and a post-positivist (or non-positivist) conception of law.[35]

Nevertheless, recognizing that law is a social practice that entails a set of values to be realized through the same practice does not, in my view, mean that a legal positivist conception must be abandoned. It is not alien to legal positivism, but is rather an essential part of it, that law involves values that serve as criteria for evaluating the choice of one possible solution, over another, to the problems posed by social practice. On the other hand, this does not mean that the conceptual separation between law and morality must be rejected or discarded. Even in the constitutional framework, we must distinguish between (i) moral values that are integrated into the law (which become legal values) and (ii) those that are not, and which remain external values belonging to a wide possible variety of ethical systems (individual or social). In other words, I believe that there is no necessary link between a constructivist or values-based conception of legal interpretation and an anti-legal-positivist conception. Apart from the eternal diatribes about legal positivism and its name, a constructivist or value-based conception of legal interpretation can coexist well and does not blur the distinction between law and morality, between *being* and *ought*. The above distinction is even more important in a constructivist or value-dependent conception of legal interpretation, because it is obviously essential for addressing the question of which values and which morals enter into the law. Usually, but not necessarily, it is social morality, i.e. that which is accepted and predominant in the social community in question.

On the other hand, the assumption (which I subscribe to as an author) that practical rationality plays a role in legal reasoning[36] is not sufficient to provide a substantive answer to legal problems, nor does it lead to the assumption of harmony between principles, rules and criteria laid down in an applicable law.

The separation between law (with its embedded morality) and morality is itself a moral principle that serves to remind us that there may be other individual and public moralities that are not already accepted and institutionalized in and through the law in force. This leaves room for criticism and non-conformism. No one disputes that law is also ethics and politics enacted in institutions. The point is that the ethical principles institutionalized through existing laws are not immutable or innate, and are not an objective point of reference. Underlying this view is a metaethical conception based on freedom and self-determination, which does not deny that every existing law contains values and is the result of a compromise between different and conflicting ethical systems. The ideal of practical rationality reinforces and supports this metaethical view.

34 Lifante Vidal 2020: para. 18.

35 Lifante Vidal 2020: para. 20.

36 Lifante Vidal 2020: paras. 21-23; Lifante Vidal 2018: 207-213.

Unless we adopt an objectivist and cognitive, but above all exclusive, view, it is not true that law is a coherent set of principles and values. It is instead true that, from the standpoint of political and ethical compromise, law contains contradictory ethical, political and ideological positions. Law is the site of ethical-political compromise. Examples of this can be found at all levels of sources, from constitutions to acts of private autonomy, and in all spheres (private and public, civil and criminal, etc.). The philosophical belief in universal harmony is reassuring and comforting, but unrealistic and mendacious.

7 CONFORMISM AND THE RULE OF LAW

A further important part of Lifante's theory is the emphasis she puts on interpretive activity as a goal-oriented activity.[37] Her statements point to an instrumental or teleological conception, not only of law but also of legal method. I believe that this aspect should be explicitly mentioned, because law is not separate from the legal method. A special feature of law is that the method itself becomes part of the phenomenon. It conditions and permeates it. Lifante is right to highlight these questions as fundamental: Why do we interpret the law? And how is law to be interpreted, or by what criteria should we evaluate interpretations? A conception of law that neglects these questions would betray its own assumptions. Since law is practical, its understanding, construction, implementation and even any critical or approving stance run through these practical questions. On the other hand, it is clear that there is no single (right) answer to such questions.

Lifante assumes that law itself is valuable and essentially reduces the second question to the first. It gives its own answers to the above questions (i.e. "Why do we interpret the law?" and "How is it to be interpreted?"), although these are indeed ambiguous and highly contested. In particular, the question "Why do we interpret the law?" can be asked and answered from an internal or a more external point of view. Moreover, the "why" can be meant in different senses: it can mean for what reason or causes, but also for what purposes or goals.

For Lifante, all participants must pursue the improvement of the law to the furthest extent possible.[38] Whether or not it is true that judges, as lawyers like everyone else, are involved in such a practice, the proposed vision is irenic. The existence of a general collaboration to best implement a unified project is unrealistic, or only illuminates a very basic aspect of legal practice. Certainly law, like any social practice, would not exist without general cooperation. However, law is characterized by constant and pervasive conflict and precarious balance. Law consists of a constant alternation of strategic and cooperative actions. A continu-

37 Lifante Vidal 2020: paras. 24ff.

38 Lifante Vidal 2020: paras. 25-26 and 29.

ous spectrum ranges from the ideal extreme of total conformity to the opposite of radical criticism of the legal order. The latter marks the boundary between the play of the participants and the view of those who are "outside" the practice.

Lifante's position can be better explained, I think, by saying that if we accept the law and regard it as something valuable (to be implemented and improved), the activity of the participants—in order to be consistent and coherent with its premises—should be directed precisely towards the affirmation, implementation and improvement of the practice of law itself.

Obviously, the problem lies in the premise. Why should we accept legal practice? This raises the question of the acceptability of an existing law. This question naturally arises before the proposed constructivist conception of legal interpretation.

Lifante's position is also fraught with a logical leap or gap. Even assuming, *ex hypothesis*, that in order to compare different and competing *prima facie* interpretations one should take into account "the very values that law seeks to materialize", it is not clear on what basis "the criteria of correctness in the field of interpretive activity commit us to the answer to the question of the value of law: the ideal of the rule of law." There is an obvious logical leap between (i) the first statement and the assumption that—in order to maintain internal coherence—the party involved should seek to interpret the law itself (according to an axiological orientation consistent with the values within the law itself) and (ii) the second, according to which the criterion of correctness should be the rule of law. To close the gap, it should be added that the existing laws under consideration are those, and only those, that are (at least ideally) consistent with the rule of law.

In other words, Lifante's conception, like that of many philosophers referred to in her essay and in her book, is also a conception of law intended for only some laws, namely those that conform to the ideal of the rule of law.

The preference (and my personal preference) for this ideal is not in question here. The point is that the existing laws—unfortunately, I might add—are by no means all based on this ideal. Many denounce and betray it in a systematic and tragic way. All this despite the fact that the rule of law, like any ideal, is a goal to be striven for, and that its limits and content are highly debatable.

Therefore, the constructivist conception of legal interpretation proposed by Lifante is not universally valid. It applies only to certain laws in which certain values are contained. Lifante herself, in order to be consistent with her own values, should realize that her conception is not defensible at all, but rather should be questioned whenever the law does not embody the ideal of the rule of law. In light of these cases, apart from denying them the status of law and thus putting a definitional stop to them, I think it would be something of a moral and intellectual embarrassment to argue that every interpreter, as well as "any other

participant in the [legal] practice must pursue" "its improvement" "to the furthest extent possible".[39]

In my opinion, from a methodological point of view, we should recognize that such statements are ideally applicable to cases of laws that we would not approve of, and which we would reject because they involve values that we do not approve of. The proposed constructivism should therefore consider the price of a method that is either valid only if we like it, or which lends itself to the amelioration of even the most shameful and immoral laws (from our particular convictions). The first solution tends to choose the convenient method, while a method should not depend on convenience.

My proposal is not—to be clear—to abandon the idea that participants are compromised. On the contrary, the proposal is only to look with disillusionment at reality and accept that no choice, including that of method and methodological application, is in vain.

Incidentally, I note that the fact that law itself is valuable, because it embodies the ideal of the rule of law, does not mean or imply that the criterion for the correctness of interpretive activity is that same ideal. On the other hand, this ideal is so controversial that it offers few answers, parameters or criteria for the correctness of interpretation.

8 ONCE PRESCRIPTION IS THE BEST DESCRIPTION

Lifante rightly points out that the rule of law is a contested concept: different conceptions compete with each other, depending on the weight given to axiological and authoritative elements—especially, but not exclusively. Lifante favours a conception of the rule of law that gives priority to rights and treats certain forms (democracy, the separation of powers, etc.) as instruments for their protection and preservation.

However, even if one subscribes to this value-prioritizing view, Lifante's conception ultimately does not provide effective answers to the questions it raises. According to her constructivist conception of legal interpretation, "legal practice demands the interpreter to choose the interpretation that makes these authoritative legal materials become the best possible example of law, namely, the fairest."[40] It seems to me illusory to believe that appealing to such ephemeral and transitory criteria can be a way to achieve the postulated ethical-political goals. Similarly, the proposal to give more weight and space to teleological and deontological arguments directly linked to the evaluative dimension of law[41]

39 Lifante Vidal 2020: paras. 28-29.

40 Lifante Vidal 2020: para. 39.

41 Lifante Vidal 2020: para. 39.

can only work in an ideal model where there is a convergence of values. Rather, the laws in force are the arena in which different values, interests, etc. find ever-precarious compromises, and where conflicts are latent. The proposed constructivist conception of legal interpretation risks leading to an amplification and implosion of the ethical contradictions that law should seek to regulate.

Nevertheless, Lifante's conception, like Atienza's and Dworkin's,[42] has one undoubted merit: that it is in full harmony and is an excellent description of the true practice of law by lawyers and beyond. The legacy of these theories is the legitimization of a legal practice characterized by muscular operations. Discretion is cultivated to the highest degree, sometimes unconsciously because of the human tendency to live on irenic illusions, and sometimes deliberately, to bend unspecified principles and values to personal interests and purposes.

Bibliography:

Conte, A. G. (1986). Deontico vs. dianoetico. *Materiali per una storia della cultura giuridica*, 16, 489-494.

Conte, A. G. (1988). Minima deontica. *Rivista internazionale di Filosofia del diritto*, 65, 425-475.

Conte, A. G. (2006). Normativismo. In *Enciclopedia filosofica* (Vol. 8, pp. 7949-7950). Bompiani.

Dascal, M., & Wróblewski, J. (1989). Transparency and doubt: Understanding and interpretation in pragmatics and in law. *Theoria: An International Journal for Theory, History and Foundations of Science*, *4*(11), 427-450.

Dworkin, R. M. (1977). No right answer? In P. M. S. Hacker, J. Raz (Eds.), *Law, Morality and Society: Essays in Honour of H. L. A. Hart* (pp. 58-84). Oxford University Press.

Gianformaggio, L. (1987). Lógica y argumentación en la interpretación jurídica o tomar a los juristasintérpretes en serio. *Doxa: Cuadernos de filosofía del Derecho*, 4, 87-108.

Grayot, J. D. (2020). Dual process theories in behavioral economics and neuroeconomics: A critical review. *Review of Philosophy and Psychology*, 11, 105-136.

Kahneman, D. (2011). *Thinking, Fast and Slow*. Farrar, Straus and Giroux.

Kahneman, D. (2012). Two systems in the mind. *Bulletin of the American Academy of Arts & Sciences*, 55-59.

Lifante Vidal, I. (2018). *Argumentación e interpretación jurídica. Escepticismo, intencionalismo y constructivismo*. Tirant lo Blanch.

Lifante Vidal, I. (2019). En defensa de una concepción constructivista de la interpretación jurídica. *Revus – Journal for Constitutional Theory and Philosophy of Law*, 39, 63-84.

Lifante Vidal, I. (2020). In defence of a constructivist conception of legal interpretation. *Revus – Journal for Constitutional Theory and Philosophy of Law*, 40, 63-83.

O'Brien, D. T. (2012). Review of *Thinking, Fast and Slow* by Daniel Kahneman. *Journal of Social, Evolutionary, and Cultural Psychology*, *6*(2), 253-256.

Shapiro, S. (2007, March). The 'Hart-Dworkin' debate: A short guide for the perplexed. *Public Law and Legal Theory Working Paper Series*. (Working paper no. 77). http://ssrn.com/abstract=968657.

Shleifer, A. (2012). Psychologists at the gate: A review of Daniel Kahneman's *Thinking, Fast and Slow*. *Journal of Economic Literature*, *50*(4), 1-12.

Solaki, A., Berto, F., & Smets, S. (2021). The logic of fast and slow thinking. *Erkenntnis*, 86, 733-762.

Zorzetto, S. (2019). Jueces, juristas y pretensión de corrección. Algunas consideraciones de pragmática jurídica. In E. Sotomayor Trelles (Ed.), *La teoría y filosofía del derecho en el estado constitucional: problemas fundamentales* (pp. 69-89). Zela.

42 Lifante Vidal 2018: 173ff.

SYMPOSIUM ON THE INTERNAL LEGAL POSITIVISM

Edited by Paula Gaido

In her book *"Internal" Legal Positivism*, Cristina Redondo attempts to articulate the metatheoretical presuppositions of an approach directed to the study of law that explains its specific normative character. In doing so, she argues for two main theses: (i) legal norms necessarily constitute reasons in a formal sense, regardless of the substantive correctness of the content they express; and (ii) the theory of law can be morally neutral with respect to its object. This means that, according to Redondo, it is possible to formulate purely descriptive statements that refer to the content of the law; that is, it is possible to formulate them from a point of view that does not presuppose the acceptance of that content. In formulating her arguments, the author focuses on an ambiguity inherent in the distinction between internal and external points of view, and she uses some of the theses developed by Eugenio Bulygin and Fernando Atria to introduce nuances that lead us to her own theses about law and a possible approach to the study of law. The fruitfulness of Cristina Redondo's book makes it the subject of a symposium in which some of the theses of her book are critically examined. The symposium began in Revus (2020) 42 with five contributions in Spanish, continued in Revus (2021) 44 with one contribution in Spanish, and closes in this issue, which includes English translations and the author's response to the critiques.

Paula Gaido*

El método y el objeto de la teoría del derecho según Cristina Redondo

En *Positivismo jurídico "interno"*, Cristina Redondo busca articular los presupuestos meta-teóricos de un enfoque dirigido al estudio del derecho, que pueda explicar su específico carácter normativo. En esta tarea, dirigirá sus argumentos a defender, entre otras, dos tesis principales: (i) que la teoría del derecho *puede* ser moralmente neutral respecto de su objeto; y (ii) que las normas jurídicas constituyen necesariamente una razón en sentido formal, independientemente de la corrección sustancial de los contenidos que expresen. Esto implica que, para la autora, es *posible* formular enunciados referidos al contenido del derecho puramente descriptivos; es decir, desde un punto de vista que no presupone su aceptación. La expresión "positivismo jurídico 'interno'" es la terminología elegida por Redondo para dar cuenta del tipo de enfoque metodológico necesario para que una teoría del derecho positivista à la Hart sea posible. En este escrito introductorio me propongo hacer una síntesis de las principales tesis que la autora defiende en su libro, para luego trazar los puntos centrales que trabaron la discusión con quienes participaron en el *Symposium* sobre Positivismo jurídico "interno" que se publica en esta revista.

Palabras clave: metodología jurídica, normatividad jurídica, punto de vista interno, punto de vista externo, Redondo (Cristina)

1 INTRODUCIÓN

En *Positivismo jurídico "interno"* (PJI),[1] Cristina Redondo busca articular los presupuestos meta-teóricos de un enfoque dirigido al estudio del derecho, que pueda explicar su específico carácter normativo. En esta tarea, dirigirá sus argumentos a defender, entre otras, dos tesis principales: (i) que la teoría del derecho *puede* ser moralmente neutral respecto de su objeto; y (ii) que las normas jurídicas constituyen necesariamente una razón en sentido formal, independientemente de la corrección sustancial de los contenidos que expresen. Esto implica que, para la autora, es *posible* formular enunciados referidos al contenido del derecho puramente descriptivos; es decir, desde un punto de vista que no presupone su aceptación. La expresión "positivismo jurídico 'interno'" es la terminología elegida por Redondo para dar cuenta del tipo de enfoque metodológico necesario para que una teoría del derecho positivista a la manera de Hart sea posible.

Cabe destacar que, Redondo sostiene que no busca argumentar que es sólo desde un específico enfoque metodológico desde el cual es posible dar cuenta de eso que el derecho *es*. La autora asume, más bien, que el derecho se trata de

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1 Redondo 2018.

una entidad normativa abstracta no reducible a hechos empíricos o naturales, y se pregunta cuáles son los enfoques metodológicos desde los cuales es posible dar cuenta de esta clase de objetos. El derecho, sin embargo, podría ser configurado de manera inicial de otro modo, y esto llevaría a que otros sean los métodos aptos para su estudio.[2] En sus palabras:

> La conclusión es que no existe un único método de estudio en la teoría jurídica y que dicho método depende del modo en el que se configure su objeto…"[3]

Sobre el final del libro, sostiene:

> las empresas que identifican estos diversos tipos de conceptos no se presuponen mutuamente y son relativamente autónomas. Autonomía que las posiciones mencionadas parecen no advertir cuando se esfuerzan en la búsqueda de 'la' esencia de los conceptos. Esencia que obviamente -y en esto no se equivocan- el propio método es el único que está en condiciones de captar.[4]

En la articulación de sus argumentos, desarrollados a lo largo de los cinco capítulos que componen el libro, Redondo partirá del "aspecto de la obra de Hart que resulta más iluminador y perdurable [y que] se refiere a la necesidad de entender la conducta gobernada por reglas desde el 'punto de vista interno.'"[5] Se centrará en la ambigüedad que plantea la distinción entre punto de vista interno (PVI)/punto de vista externo (PVE), a partir de la discusión generada alrededor del trabajo de Herbert Hart,[6] y se valdrá de algunas de las tesis desarrolladas por Riccardo Guastini, Alf Ross, Eugenio Bulygin, Ronald Dworkin, Fernando Atria y Bruno Celano, entre otros, para introducir matices que nos llevarán a sus propias tesis sobre el derecho, que descansan, de manera relacionada, en la defensa de una vía posible para su estudio.

El carácter fecundo del libro de Cristina Redondo lo hace merecedor de un *Symposium* en *Revus-Journal for Constitutional Theory and Philosophy of Law* para la discusión de algunas de las tesis allí sostenidas.[7] Se trató de un

2 En un sentido similar, Nino 1994; Alexy 1992. Advertí sobre los límites del pluralismo metodológico en el contexto de la obra de Alexy, en Gaido 2009.

3 Redondo 2018: 196.

4 Redondo 2018: 246.

5 Atienza 2006: 482.

6 Hart 1961.

7 Este *Symposium*, a su vez, tiene su origen en un taller alrededor de su libro, con presencia de la autora y la participación de Marcelo Alegre, Juan Bautista Etcheverry, Santiago Legarre, Ezequiel Monti, Gabriela Scataglini, Jorge Rodríguez y Rodrigo Sánchez Brigido, en la Facultad de Derecho de la Universidad de Buenos Aires, con el auspicio de la Asociación Argentina de Filosofía del Derecho, el 10 de septiembre de 2019. El libro de Redondo fue ampliamente discutido; entre otros foros, en un seminario virtual organizado por el grupo *Law & Philosophy* de la Universidad Pompeu Fabra, coordinado por Alba Lojo, el 4 de diciembre de 2020, con contribuciones de Carrió Sampedro 2022; Lojo 2022; Agüero-San Juan 2022; de la Fuente Castro 2022; Ramirez Ludueña 2022; Moreso 2022; y en el marco del ciclo "Escritores abogan por sus libros", coordinado por Sebastián Agüero-San Juan y Sebastián Figueroa Rubio, en la Universidad Austral de Chile, el 26 de septiembre de 2019 (los trabajos allí discutidos serán

Symposium "en progreso", que se explayó a lo largo de los años 2020-2022. Los incisivos trabajos de Jorge Rodríguez, Santiago Legarre, Rodrigo Sánchez Brigido, María Gabriela Scataglini, Ezequiel Monti, Pablo Rapetti y Veronique Champeil-Deplats pusieron a prueba algunos de sus principales argumentos.[8] El desarrollo de este *Symposium* concluye con una respuesta a las críticas por parte de Redondo,[9] y este trabajo preliminar. En este escrito introductorio me propongo hacer una síntesis de las principales tesis que la autora defiende en *Positivismo jurídico 'interno'*, para luego trazar los puntos centrales que trabaron la discusión.

2 PRINCIPALES TESIS DEFENDIDAS EN *POSITIVISMOS JURÍDICO 'INTERNO'*

Los argumentos articulados por Redondo para dar sustento a las tesis principales que sienta en su libro son complejos, y no aspiro aquí a reconstruirlos en su totalidad. Más bien, me limitaré a dejar sentadas las conclusiones de tales argumentos, es decir, las tesis mismas. Tal como adelanté, las tesis principales que Redondo desarrolla en su libro, tanto a nivel metodológico cuanto sustantivo, son una continuación de la discusión desarrollada alrededor de la distinción entre PVI/PVE usada por Hart para dar cuenta del método y objeto de la teoría del derecho.[10]

2.1 El método jurídico según el PJI

A nivel del método a seguir en la teoría del derecho, Redondo critica el punto en el cual realistas jurídicos e interpretativistas coinciden, y que consiste en señalar que, si el objeto de estudio es normativo, el discurso que lo identifica es en sí mismo un discurso práctico y presupone la adopción del PVI, entendido como una actitud práctica de aceptación o creencia justificativa respecto del objeto al que se refiere.[11] Realistas jurídicos e interpretativistas adherirían a la tesis de la imposibilidad de un discurso estrictamente teórico del derecho, cuando es concebido como un objeto normativo. La autora, por el contrario, defiende la tesis de la posibilidad de conocimiento tanto interno cuanto externo de las

publicados en el *Anuario de filosofía jurídica y social*, Santiago de Chile, en prensa). A su vez, para una revisión de las principales tesis de su libro pueden ser consultados, entre otros, los trabajos de Zorzetto 2021; Kristan & Lojo 2021.

8 Rodriguez 2020; Santiago Legarre 2020; Sánchez Brigido 2020; Scataglini 2020; Monti 2020; Rapetti 2021; Champeil-Deplats 2022.

9 Redondo 2022a (en español) y Redondo 2022b (en inlgés).

10 Julieta Rábanos refiere al uso anterior de esta distinción en el ámbito jurídico por parte de autores escandinavos en su tesis doctoral; cf. Rábanos 2020.

11 Redondo 2018: 197-8.

instituciones sociales.[12] Para ello se propone dar cuenta de las ambigüedades que afectan a la distinción en juego y que, según su propuesta, permean los argumentos de las concepciones del derecho mencionadas. Redondo propone que advirtamos que la distinción PVI/PVE ha sido usada con significados diferentes; distingue entre un sentido semántico y un sentido pragmático.

En un sentido semántico, se haría uso de la distinción PVI/PVE para dar cuenta de dos modos de entender a las aproximaciones teóricas que buscan *describir* instituciones sociales.[13] Quienes desde un PVI buscan describir instituciones sociales lo que hacen es intentar captar y explicar, desde la perspectiva de la tercera persona, *los conceptos con los cuales los participantes se refieren a la institución, que aceptan en primera persona* (el subrayado me pertenece).[14] Quienes desde un PVE buscan describir instituciones sociales lo que hacen es intentar captar y explicar, desde la perspectiva de la tercera persona, tan sólo aspectos empíricos referidos a la institución, en términos de relaciones causales.[15] Cuando la distinción es usada en este sentido, la autora sugiere utilizar las expresiones "PVI_1/PVE_1".

En sentido pragmático, se haría uso de la distinción PVI/PVE para dar cuenta de la presencia o ausencia de la *actitud práctica* de aceptación por parte de un agente ante el contenido normativo de ciertas instituciones sociales.[16] Quienes adoptan el PVI respecto de esos contenidos normativos, lo que hacen es no sólo usarlos, sino *aceptarlos*, en el sentido de justificarlos. Quienes adoptan el PVE respecto de esos contenidos normativos no los aceptan ni los justifican, sino que se limitan a *dar cuenta* de ellos.[17] Cuando la distinción es usada en este sentido, la autora sugiere utilizar las expresiones "PVI_2/PVE_2".

Con estas distinciones sobre la mesa, Redondo sostendrá que si bien la *existencia* de los contenidos normativos presuponen la adopción de un PVI_2, su *conocimiento* no lo presupone.[18] Para conocer contenidos normativos, la opción entre adoptar un PVI_2 o PVE_2 se mantiene, para la autora, como una alternativa metodológica abierta.[19] En su aproximación al estudio del derecho, Redondo opta por el enfoque metodológico PVI_1/PVE_2, el cual, según su caracterización, como vimos, aspira a explicar eso que las normas jurídicas son según el punto de vista de los participantes de las prácticas jurídicas, dejando a un lado toda

12 Redondo 2018: 201.
13 Redondo 2018: 206.
14 Redondo 2018: 203.
15 Redondo 2018: 203. Redondo da cuenta de esta distinción de la mano de Winch 1958.
16 Redondo 2018: 211.
17 Redondo 2018: 209-210.
18 Redondo 2018: 215. Para una lectura similar reciente en este sentido, se puede consultar Scavuzzo 2021.
19 Redondo 2018: 237.

empresa justificatoria.[20] Así, según esta propuesta (que sigue a Hart), desde la teoría se adopta el punto de vista de los participantes para entender la práctica en un sentido significativo, mas esto no implica una aceptación o justificación de la institución. En palabras de la autora:

> el positivismo interno admite que la existencia de una institución presupone la existencia de una teoría justificativa que le atribuye algún valor o función. De lo contrario la institución en cuestión no existiría. Lo que esta posición sostiene es que es posible identificar un concepto institucional, i.e. un elenco de propiedades que se ejemplifica en toda instancia -o en toda instancia paradigmática- de la misma clase de institución, y que ello no significa ofrecer una teoría que racionaliza, hace inteligible, o justifica el contenido de las mismas…[21]

Y agrega:

> La identificación de un concepto institucional presupone siempre la adopción de un punto de vista interno$_1$, sin embargo, no presupone necesariamente la adopción de un punto de vista interno$_2$.[22]

La adopción del enfoque metodológico que promueve Redondo tiene en su trasfondo una implicancia práctica potencial: si no fuese posible adoptar como enfoque metodológico el PVI$_1$/PVE$_2$, no se podría dar cuenta de instituciones que carecen totalmente de justificación, y merecen ser dejadas a un lado en la determinación de cómo es debido actuar.

Importa subrayar que la autora (de la mano de Hart y, en particular, de Raz)[23] está pensando que aun cuando para dar cuenta de la comprensión que se tiene del derecho desde el punto de vista interno, se tiene que *participar* de un lenguaje o forma de vida común, esto no implica necesariamente *compartir* tal punto de vista.[24] La idea de la autora es que el concepto de derecho (y los conceptos en general) que se tiene(n) desde el punto de vista interno, esto es, desde el punto de vista de aquellos participantes que constituyen la práctica, puede(n) ser aprehendidos por cualquier ser racional dispuesto a hacer el esfuerzo necesario para ello.[25] Quien tenga ese afán puede realizar ejercicios de traducción entre los conceptos que observa y los suyos propios, aprenderlos de modo directo, introduciéndose en la práctica, etc.. Su tesis es que el conocimiento objetivo de tales conceptos es posible.[26]

20 Redondo 2018: 230.
21 Redondo 2018: 230.
22 Redondo 2018: 237.
23 Hart 1994; Raz 2004; Raz 1998.
24 Redondo 2018: 70. Realicé una revisión crítica de este aspecto de la teoría de Raz en Gaido 2011; Gaido 2012.
25 Redondo 2018: 74.
26 Redondo 2018: 70 y ss.

2.2 El objeto de la teoría del derecho según el PJI

El punto de partida asumido es que el objeto de la teoría del derecho está constituido por un tipo específico de normas, a las cuales es posible calificar de jurídicas. Los deberes jurídicos que estas normas impongan tienen que ser entendidos como objetos institucionales. A su vez, la autora mantiene que el derecho es constitutivo de razones jurídicas, y que estas razones tienen que ser entendidas como un tipo de razones, en un sentido formal del término. Dicho con otras palabras, desde el PVI_1/PVE_2 la autora detecta que las normas jurídicas que son constitutivas de razones para la acción son reconocidas como premisas de argumentos formales en cada uno de los casos en que se aplican (y no necesariamente como razones sustantivas para actuar como requieren). Dedicaré los próximos apartados a desglosar estas tesis.

2.2.1 Existencia y conocimiento del contenido del derecho

Redondo argumenta que, si bien la existencia del derecho descansa en hechos empíricos, el conocimiento de los deberes jurídicos que impone no se trata de un conocimiento empírico, sino de otro tipo, conceptual. Sus argumentos apuntan a mostrar por qué las empresas que reducen los deberes jurídicos a las prácticas y/o acciones individuales que les dieron origen están equivocadas. Los deberes jurídicos sobrevienen a las prácticas y/o acciones individuales que les dan sustento, y tienen que ser entendidos como objetos/conceptos institucionales; lo cual implica, por una parte, que no son hechos empíricos y, por otra, que no son necesariamente hechos convencionales.[27] Un objeto institucional, en palabras de la autora, es algo que:

> tiene origen y depende de las creencias y actitudes de las personas, pero que no es necesariamente un objeto convencional, y no se identifica necesariamente como se identifican las convenciones.[28]

Se trata de entidades ideales, contenidos de significados dependientes de hechos empíricos que les dan origen, pero no reducibles a ellos.[29]

Respecto al conocimiento de los deberes jurídicos, la autora coincide con Hart en que la determinación del contenido del derecho consiste en un ejercicio cognoscitivo.[30] Sin embargo, disputará una lectura posible de la tesis de Hart que dice que aquello que el derecho ordena deja afuera el desacuerdo.[31] A la autora aquí le interesa subrayar que una cosa es (i) la identificación de eso que

27 Redondo 2018: 46, 164.

28 Redondo 2018: n. 156, 151

29 Redondo 2018: 13 y ss. Para dar fundamento a esta tesis, la autora hace uso de la teoría de los hechos institucionales de Searle 1995.

30 Redondo 2018: 29.

31 Hart 1961: cap. VII; Dworkin 1986.

el derecho ordena, dado un caso genérico determinado (como ejercicio cognoscitivo); y otra (ii) la determinación de la solución a un supuesto caso individual, cuando el derecho establezca diferentes deberes incompatibles entre sí (como ejercicio creativo).[32]

En relación a (i), marca que no es cierto que el ejercicio cognoscitivo se acabe cuando de hecho se plantee un desacuerdo con respecto a eso que ordena el derecho. El ejercicio cognoscitivo se extiende cuando hay desacuerdo al respecto.[33] En estos casos de desacuerdo pueden surgir una "multiplicidad de enunciados interpretativos verdaderos incompatibles entre sí".[34] Para la autora, un compromiso con el cognitivismo no implica un compromiso con la tesis que dice que el derecho ofrece una única respuesta correcta. Y disputaría a quienes sostienen que Hart se compromete con la tesis que dice que cuando el derecho ofrece más de una respuesta contradictoria deja el caso sin resolver: "La posibilidad de múltiples interpretaciones no implica que cualquier interpretación sea posible", sostiene la autora.[35] El derecho resuelve la cuestión, diría Redondo, sólo que de manera contradictoria. La necesidad de elegir entre las diferentes soluciones normativas contradictorias, y dar lugar a un nuevo escenario normativo, sólo surge si se llega a (ii), esto es, a la aplicación del derecho: cuando se debe dar solución a un caso particular.[36]

La verdad de los enunciados jurídicos está directamente determinada por los deberes jurídicos existentes, que dependen de (son relativos a) una determinada práctica de reconocimiento, pero no se reducen a ella.[37] Esto es, lo que los hace verdaderos son las reglas seguidas por la práctica, no la práctica misma. Esto lleva a la autora a sostener que la práctica podría captar mal la regla que aspira seguir, y que está en manos de la teoría jurídica desplegar cuál es el contenido completo de la regla jurídica y el deber que impone, tarea que no está basada en una investigación empírica, sino conceptual.[38] En sus palabras:

> Lo que se intenta identificar son los contenidos o criterios que se usan como base (explícita o implícita) en una práctica de argumentación o justificación de acciones. Estos contenidos tienen carácter normativo o justificativo, en la medida en que se ofrecen como apoyo de demandas, premios o sanciones. La explicitación de estos contenidos significativos y su calificación como jurídicamente debidos, aunque tiene un aspecto semántico, no consiste en un análisis semántico, sino en un intento de captar -a partir de ciertos contenidos explícitamente admitidos como base de críticas y demandas jurídicas- qué otros contenidos tenemos razones para considerar implícita-

32 Redondo 2018. 28.
33 Redondo 2018: 27.
34 Redondo 2018: 28.
35 Redondo 2018: 34.
36 Redondo 2018: 28.
37 Redondo 2018: 54-55.
38 Redondo 2018: 68.

> mente conectados a las fuentes jurídicas, i.e. la forma correcta de extender, restringir o parcialmente reemplazar los contenidos explícitamente usados en la práctica de argumentación.[39]

Y añade:

> el esfuerzo va dirigido a constatar qué contenidos son razones jurídicas dentro de esa práctica.[40]

Finalmente, Redondo sostiene que para la determinación de la verdad de los enunciados que expresan proposiciones jurídicas no hay un test definitivo ni punto de vista ideal infalible.[41] La autora propone comprender el conocimiento jurídico como cualquier otro conocimiento no formal, y que, para ser considerado fundado, sea suficiente exhibir razones públicas, accesibles a todo ser racional, "que esté dispuesto a hacer el esfuerzo de aprender los conceptos necesarios para ello".[42]

2.2.2 Normas jurídicas como razones en sentido formal

En el debate contemporáneo, la pregunta por la normatividad jurídica se tradujo como una pregunta por el tipo de razones para la acción a las que da lugar el derecho.[43] Redondo es una autora pionera y central en la discusión sobre el tipo de razones constituidas por el derecho.[44] Sostiene que el derecho es constitutivo necesariamente de razones en sentido formal, con independencia de su impacto concluyente en lo que es debido hacer.[45] Desde su enfoque metodológico PVI_1/PVE_2, las normas jurídicas que son constitutivas de razones para la acción son "normas genuinas", lo cual implica que de manera invariable establecen razones para fundar lo que es debido hacer en términos jurídicos.[46] Con ello, rechaza la necesidad que desde el punto de vista de los participantes de las prácticas jurídicas haya un compromiso con un componente valorativo (moral).

Decir que las normas jurídicas constituyen razones invariablemente relevantes, quiere decir que, para la autora, son lógicamente inderrotables y usadas como premisas de argumentos formales en cada uno de los casos en que se aplican. Con ello, la autora advierte que, bajo la expresión "derrotabilidad de normas jurídicas" se apunta a dos tipos de problemas diferentes: uno formal, relativo a la derrotabilidad de los enunciados que expresan normas en un razonamiento lógico; y otro sustancial, relativo a la superabilidad del peso de las normas en un

39 Redondo 2018: 56-7.
40 Redondo 2018: 57.
41 Redondo 2018: 91.
42 Redondo 2018: 74.
43 Raz 1990.
44 Redondo 1996.
45 Redondo 2018: 107 y ss., 133
46 Redondo 2018: 97.

proceso de balance de razones.[47] La invariabilidad o inderrotabilidad constitutiva del concepto de normas jurídicas, desde el enfoque metodológico PVI_1/PVE_2, para la autora, es la formal. Las normas jurídicas, en la medida en que sean normas genuinas, tienen invariable relevancia práctica porque es posible *identificar* el contenido del enunciado jurídico que la describe, y el mismo es opaco frente a cualquier condición adicional, subyacente o sobreviniente. Es decir, deja fuera la posibilidad de identificación de toda excepción no explicitada de antemano por el sistema jurídico.[48] Es el modo en que, para Redondo, mejor quedaría reconstruida la normatividad jurídica de un positivismo jurídico à la Hart.

La autora, sin embargo, da un paso adicional en su argumentación sobre este punto, que parece no circunscribir la idea de invariabilidad práctica a una cuestión estrictamente formal. Agrega que la invariabilidad práctica de las normas jurídicas entendida como la posibilidad de *identificar* el contenido del enunciado jurídico que la describe, siendo opaca a consideraciones adicionales, implica que las mismas tienen la capacidad de *ofrecer alguna resistencia* a favor de la solución normativa que proponen.[49] En sus palabras:

> Las tesis del carácter excluyente e invariablemente relevante que se necesitan para dar cuenta del carácter específico de las normas "genuinas" no se refieren al peso sustancial que éstas de hecho pueden o no tener, ya sea desde un punto de vista objetivo (moral) o desde un punto de vista subjetivo, en el proceso de toma de una decisión por parte de un agente. Quienes están obligados a seguir una norma jurídica están obligados a ofrecerla como razón-premisa siempre que ella sea aplicable *y a responder por la expectativa que la generalidad que la norma produce, es decir, a usarla en todos los casos en que es aplicable, y, si corresponde, mostrar las razones que prevalecen sobre la norma imponiendo una conclusión que se aparta de ella* (el subrayado me pertenece).[50]

Redondo enfatiza que cuál sea su *peso o fuerza* final en la justificación de las tomas de decisiones queda, en principio, como cuestión abierta, y una definición al respecto no sería necesaria para una explicación de su carácter práctico.[51] Sin embargo, aún cuando, en efecto, el peso final de las normas jurídicas pudiese quedar planteada como una cuestión abierta, la autora deja sin explicar por qué desde su enfoque metodológico las normas jurídicas constituyen una razón contribuyente en absoluto. Decir que la generalidad de la norma dispara una expectativa de aplicabilidad como algo susceptible de ser explicado en términos puramente lingüísticos no parecería ser suficiente. La idea de una razón que "contribuye" a la construcción de una justificación, la cual incluye "el tener que mostrar las razones que prevalecen sobre la norma imponiendo una conclusión que se aparta de ella", para ser algo más que una mera postulación,

47 Redondo 2018: 93 y ss.
48 Redondo 2018: 110.
49 Redondo 2018: 105.
50 Redondo 2018: 135.
51 Redondo 2018: 105 y ss.

parece presuponer alguna teoría sustantiva. Esto porque para poder dar cuenta de su peso sustancial derrotable, parece requerido explicar el sentido en que se tiene algún peso, al menos de manera inicial.[52] La cuestión que así es posible dejar planteada a la autora es en qué sentido, desde una teoría que tan sólo busca dar cuenta del punto de vista de los participantes de las prácticas jurídicas en términos neutrales, la reconstrucción de la normatividad jurídica en términos formales es meramente informativa.

3 PREGUNTAS CENTRALES QUE TRABARON LA DISCUSIÓN

Es posible identificar una observación común en los/as comentaristas, y esta es la experiencia estimulante que arroja siempre la lectura los escritos de Cristina Redondo, y de *Positivismo Jurídico 'Interno,'* en particular. Las críticas de Rodríguez, Legarre, Sánchez Brigido, Scataglini, Monti, Rapetti y Champeil-Deplats fueron agudas y desarrolladas alrededor de las siguientes preguntas: ¿cuál es el alcance de la tesis de la pluralidad de enfoques metodológicos en relación al derecho?, ¿es posible y relevante una teoría del derecho neutral?, ¿cuáles son las herramientas con las que encarar el estudio neutral propuesto?, ¿cuál es el lugar que los desacuerdos juegan en la ontología y epistemología del derecho?, ¿cuál es el concepto de "participante" asumido?, ¿qué tipo de enunciados es posible adscribir a los puntos de vista distinguidos?, ¿cuál es el concepto de normatividad jurídica relevante? Redondo da cuenta de las objeciones recibidas, matizando y clarificando sus argumentos iniciales, en "Afinando el positivismo jurídico 'interno'". Queda a disposición de las/os lectoras/es la posibilidad de repetir la experiencia estimulante, esta vez expandida por los comentarios críticos, para luego esbozar sus propias conclusiones.

Bibliography:

Agüero-San Juan, S. (2022). Sistema jurídico e identificación del derecho. Una posible respuesta bulyginiana a 'La teoría positivista de Bulygin' de María Cristina Redondo. *Doxa,* 45, 549-579.

Alexy, R. (1992). *Begriff und Geltung des Rechts*. Alber.

Atienza, M. (2006). Entrevista a Neil MacCormick. *Doxa,* 29, 479-489.

Dworkin, R. (1986). *Law's Empire.* Harvard University Press.

Carrió Sampedro, A. (2022). Sobre la existencia y conocimiento de normas. Algunos comentarios y observaciones críticas a los presupuestos ontológicos y epistémicos del *Positivismo jurídico 'interno'* de Cristina Redondo. *Doxa,* 45, 495-522.

Champeil-Deplats, V. (2022). Un positivismo jurídico 'interno': ¿por qué?, ¿cómo? *Revus. Journal for Constitutional Theory and Philosophy of Law,* 48.

De la Fuente Castro, O. (2022). Positivismo jurídico, interpretativismo e institucionalismo. Comentario al capítulo IV de *Positivismo jurídico 'interno'* de María Cristina Redondo. *Doxa,* 45, 581-602.

52 Raz, por ejemplo, parece advertir esto cuando junto a su teoría de las normas jurídicas como razones protegidas, desarrolla su teoría de la concepción de la autoridad (jurídica) como servicio. Analicé los límites planteados en la argumentación de Raz en Gaido 2021.

Gaido, P. (2009). El concepto de derecho: una aproximación metodológica a la teoría de Alexy. *Doxa,* 32, 593-604.

Gaido, P. (2011). The Purpose of Legal Theory: Some Problems with Joseph Raz's View". *Law and Philosophy, 30*(6), 685-698.

Gaido, P. (2012). The Scope of the Participant's Perspective in Joseph Raz's Theory of Law. *Canadian Journal of Law and Jurisprudence, 25*(2), 347-357.

Gaido, P. (2021). Between Authority and Interpretation: The Place for Exclusion in Raz's View of Law. In J. Fabra Zamora & G. Villa Rosas (Eds.), *Conceptual Jurisprudence. Methodological Issues, Classical Questions and New Approaches* (pp. 225-238). Springer.

Hart, H.L.A. (1961). *The Concept of Law*. Oxford University Press.

Hart, H.L.A. (1994). Postscript. In *The Concept of Law* (2nd ed., pp. 238-276) Clarendon Press.

Kristan, V. y Lojo, A. (2021). ¿Un normativismo 'redondo'? El positivismo jurídico 'interno' a examen. *Discusiones,* 26, 211-251.

Legarre, S. (2020). Positivismo jurídico 'interno' a la luz del derecho natural. *Revus. Journal for Constitutional Theory and Philosophy of Law,* 42.

Legarre, S. (2022). 'Internal' Legal Positivism in the Light of Natural Law". *Revus. Journal for Constitutional Theory and Philosophy of Law,* 48.

Lojo, A. (2022). Los problemas epistemológicos de las reglas genuinas en el *Positivismo jurídico 'interno'* de María Cristina Redondo. *Doxa,* 45, 523-547.

Monti, E. (2020). Redondo sobre la normatividad del derecho. *Revus. Journal for Constitutional Theory and Philosophy of Law,* 42.

Monti, E. (2022). Redondo On the Normativity of Law", *Revus. Journal for Constitutional Theory and Philosophy of Law,* 48.

Moreso. J.J. (2022). La normatividad en el positivismo jurídico interno. A modo de colofón. *Doxa,* 45, 621-627.

Nino, N. (1994) *Derecho, moral y política*. Ariel.

Rábanos, J. (2020). *Modelos contemporáneos de autoridad. Elementos para un análisis de los problemas, conceptos y modelos de discurso sobre la autoridad desde la filosofía del derecho.* Doctoral dissertation. University of Genoa (Italy).

Ramirez Ludueña, L. (2022). La imposibilidad del positivismo jurídico interno. *Doxa,* 45, 603-620.

Rapetti, P. (2021). Positivismo jurídico interno: ¿'hurra', 'buh', 'ehhh…'? *Revus. Journal for Constitutional Theory and Philosophy of Law,* 44.

Rapetti, P. (2022). 'Internal' Legal Positivism: 'Hurrah', 'Boo', 'Ehhh…'?". *Revus. Journal for Constitutional Theory and Philosophy of Law,* 48.

Raz, J. (1990). *Practical Reasons and Norms*. Princeton University Press.

Raz, J. (1998). Two Views of the Nature of the Theory of Law: A Partial Comparison. *Legal Theory 4*(3), 249-282.

Raz, J. (2004). Can there be a Theory of Law. In M. P. Golding & W. A. Edmundson (Eds.), *The Blackwell Guide to Philosophy of Law and Legal Theory* (pp. 324-342). Blackwell.

Redondo, C. (1996). *La noción de razón en el análisis jurídico*. Centro de Estudios Constitucionales.

Redondo, C. (2018). *Positivismo jurídico "interno"*. Klub Revus.

Redondo, C. (2022a). Afinando el positivismo jurídico 'interno'. *Revus. Journal for Constitutional Theory and Philosophy of Law,* 48.

Redondo, C. (2022b). Internal legal positivism refined. *Revus. Journal for Constitutional Theory and Philosophy of Law,* 48.

Rodríguez, J. (2021). Sobre la posibilidad de un positivismo jurídico 'interno'. *Revus. Journal for Constitutional Theory and Philosophy of Law,* 42.

Rodríguez, J. (2022). The Possibility of An Internal Legal Positivism. *Revus. Journal for Constitutional Theory and Philosophy of Law,* 48.

Sánchez Brigido, R. (2020). El concepto de derecho como concepto funcional. *Revus. Journal for Constitutional Theory and Philosophy of Law,* 42.

Sánchez Brigido, R. (2022). The Concept of Law as a Functional Concept. *Revus. Journal for Constitutional Theory and Philosophy of Law,* 48.

Scataglini, M.G. (2020). Convenciones interpretativas y positivismo jurídico. *Revus. Journal for Constitutional Theory and Philosophy of Law,* 42.

Scataglini, M.G. (2022). Interpretative Conventions and Legal Positivism. *Revus. Journal for Constitutional Theory and Philosophy of Law,* 48.

Scavuzzo, N. (2021). Positivismo jurídico interno: epistemología o ideología del derecho. *Isonomía,* 54, 109-133.

Searle, J (1995). *The Construction of Social Reality*. The Free Press.

Winch, P. (1958). *The Idea of Social Science and its Relation to Philosophy*. Routledge.

Zorzetto, S. (2021). Positivismo jurídico normativo: de la metafísica a la política. *Isonomía,* 54, 134-166.

Paula Gaido*

The method and object of legal theory according to Cristina Redondo

In *'Internal' Legal Positivism*, Cristina Redondo attempts to articulate the metatheoretical presuppositions of an approach directed to the study of law that explains its specific normative character. In doing so, she argues for, among others, two main theses: (i) legal norms necessarily constitute reasons in a formal sense, regardless of the substantive correctness of the content they express; (ii) legal theory can be morally neutral with respect to its object. This means that, according to Redondo, it is possible to formulate purely descriptive statements that refer to the content of law; that is, it is possible to formulate them from a point of view that does not presuppose the acceptance of that content. The expression "'internal' legal positivism" is the terminology chosen by Redondo to account for the type of methodological approach necessary for a positivist theory of law à la Hart to be possible. In this article, I will summarize the main theses defended by the author in her book and trace the central questions that have been at the heart of the discussion at the *Symposium* on *'Internal' Legal Positivism* published in this journal.

Keywords: legal methodology, legal normativity, internal point of view, external point of view, Redondo (Cristina)

1 INTRODUCTION

In *'Internal' Legal Positivism* (ILP),[1] Cristina Redondo attempts to articulate the metatheoretical presuppositions of an approach directed at the study of law that explains its specific normative character. In doing so, she argues for, among other things, two main theses: (i) legal norms necessarily constitute reasons in a formal sense, regardless of the substantive correctness of the content they express; (ii) legal theory can be morally neutral with respect to its object. This means that, according to Redondo, it is possible to formulate purely descriptive statements that refer to the content of law; that is, it is possible to formulate them from a point of view that does not presuppose the acceptance of that content. The expression "'internal' legal positivism" is Redondo's chosen terminology to account for the type of methodological approach necessary for a positivist theory of law à la Hart to be possible.

Redondo maintains that she does not seek to argue that it is only from a specific methodological approach that it is possible to account for what law is. She assumes, rather, that law is an abstract normative entity that is not reducible

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1 Redondo 2018.

to empirical or natural facts, and wonders what the methodological approaches from which it is possible to account for this kind of object could be. Law, however, could be initially configured in another way, and this would lead to other methods being suitable for its study.[2] In her words:

> The conclusion is that there is no single method of study in legal theory and that this method depends on the way in which its object is configured...[3]

At the end of the book, she maintains:

> the enterprises that identify these different types of concepts do not presuppose each other and are relatively autonomous. Autonomy that the aforementioned positions seem not to notice when they strive in the search for 'the' essence of concepts. Essence that obviously -and in this they are not mistaken- the method itself is the only one that is in a position to grasp.[4]

In articulating her arguments, developed throughout the five chapters that make up the book, Redondo starts from the "aspect of Hart's work that is most illuminating and enduring [and that] refers to the need to understand rule-governed behavior from the 'internal point of view'" (the translation is mine).[5] She focuses on the ambiguity raised by the distinction between internal point of view (IPV)/external point of view (EPV), starting from the discussion generated around Herbert Hart's work.[6] She then develops her arguments from theses provided by Riccardo Guastini, Alf Ross, Eugenio Bulygin, Ronald Dworkin, Fernando Atria, and Bruno Celano, among others, to introduce nuances that lead us to her own theses on law, which rest, in a related way, on the defence of a possible method for its study.

The fruitfulness of Redondo's book made it the subject of a *Symposium* presented in *Revus - Journal for Constitutional Theory and Philosophy of Law,* for the discussion of some of the theses sustained therein.[7] It was a *Symposium* "in progress", which spread over 2020-2022. The incisive articles by Jorge Rodríguez,

2 In a similar sense, Nino 1994; Alexy 1992. I analized the limits of methodological pluralism in the context of Alexy's work, in Gaido 2009.

3 Redondo 2018: 196. All the English translations of the quoted fragments of ILP are mine.

4 Redondo 2018: 246.

5 Atienza 2006: 482.

6 Hart 1961.

7 This Symposium, in turn, has its origin in a workshop around her book, which was attended by the author and included the participation of Marcelo Alegre, Juan Bautista Etcheverry, Santiago Legarre, Ezequiel Monti, Gabriela Scataglini, Jorge Rodríguez and Rodrigo Sánchez Brigido, at the University of Buenos Aires Law School. The event was sponsored by the Argentine Association of Legal Philosophy, on 10 September 2019. Redondo's book was widely discussed; among other forums, in a webinar organized by the group *Law & Philosophy* - Universidad Pompeu Fabra, coordinated by Alba Lojo on 4 December 2020, with critical remarks by Carrió Sampedro 2022; Lojo 2022; Agüero-San Juan 2022; de la Fuente Castro 2022; Ramirez Ludueña 2022; Moreso 2022; and within the framework of the Project "Escritores abogan por sus libros", coordinated by Sebastián Agüero-San Juan and Sebastián Figueroa Rubio, at the Austral de Chile University on 26 September 2019 (the papers discussed there

Santiago Legarre, Rodrigo Sánchez Brigido, María Gabriela Scataglini, Ezequiel Monti, Pablo Rapetti, and Veronique Champeil-Deplats tested some of its main arguments.[8] The development of this *Symposium* concludes with a response to the criticisms by Redondo,[9] and this preliminary paper. In this article, I will summarize the main theses defended by the author in *Positivismo jurídico 'interno'* and trace the central questions that have been at the heart of the discussion.

2 MAIN THESIS DEFENDED IN 'INTERNAL' LEGAL POSITIVISM

The arguments Redondo offers to support the main theses set forth in her book are complex, and I do not aspire here to fully reconstruct them. Rather, I will limit myself to set out the conclusions of such arguments, i.e., the theses themselves. As I have already mentioned, the main theses that Redondo develops in her book, at a methodological and substantial level, are a follow up to the discussion developed around the IPV/EPV distinction Hart used to account for the method and object of legal theory.[10]

2.1 The legal method according to ILP

Regarding the method to be followed in legal theory, Redondo criticizes the point on which legal realists and interpretivists coincide, which consists in pointing out that if the object of study is normative, the discourse that identifies it is in itself a practical discourse and presupposes the adoption of the IPV, understood as a practical attitude of acceptance or justifying belief with respect to the object to which it refers.[11] Legal realists and interpretivists would adhere to the thesis of the impossibility of a strictly theoretical discourse of law, when it is conceived as a normative object. The author, on the contrary, defends the thesis of the possibility of both internal and external knowledge of social institutions.[12] To this end, she proposes to account for the ambiguities that affect the distinction at stake and that, according to her approach, permeate the arguments for the conceptions of law just mentioned.

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will be published in the *Anuario de filosofía jurídica y social*, Santiago de Chile, in press). For further critical reviews of the main theses of her book, cf. Zorzetto 2021; Kristan & Lojo 2021.

8 Rodriguez 2020; Legarre 2020; Sánchez Brigido 2020; Scataglini 2020; Monti 2020; Rapetti 2021; Champeil-Deplats 2022.

9 Redondo 2022a (in Spanish) and Redondo 2022b (in English).

10 Julieta Rábanos refers to an earlier use of this distinction in the legal field by Scandinavian authors in her doctoral dissertation; cf. Rábanos 2020.

11 Redondo 2018: 197-8.

12 Redondo 2018: 201.

Redondo also notices that the IPV/EPV distinction has been used with different meanings; she distinguishes between a semantic sense and a pragmatic sense. In a semantic sense, the IPV/EPV distinction has been used to account for two ways of understanding the theoretical approaches that seek to describe social institutions.[13] Those who seek to describe social institutions from an IPV, try to capture and explain, from the perspective of the third person, *the concepts with which the participants refer to the institution, which they accept in the first person*.[14] Those who seek to describe social institutions from an EPV are trying to capture and explain, from the third-person perspective, only empirical aspects referring to the institution, in terms of causal relationships.[15] When the distinction is used in this sense, the author suggests using the expressions "IPV_1/EPV_1".

In a pragmatic sense, the IPV/EPV distinction would be used to account for the presence or absence of an agent's practical attitude of acceptance of the normative content of certain social institutions.[16] Those who adopt the IPV with respect to these normative contents not only use them, but also accept them, in the sense of justifying them. Those who adopt the EPV with respect to these normative contents neither accept nor justify them, but limit themselves *to giving an account of them*.[17] When the distinction is used in this sense, the author suggests using the expressions "IPV_2/EPV_2".

With these distinctions in mind, Redondo argues that while the existence of normative contents presupposes the adoption of an IPV_2, their knowledge does not presuppose it.[18] To know normative contents, choosing between adopting a IPV_2 or EPV_2 remains, for the author, an open methodological choice.[19] In her approach to the study of law, Redondo opts for the IPV_1/EPV_2 methodological approach, which according to her characterization, as we have seen, aims to explain what legal norms are according to the point of view of the participants of legal practices, leaving aside any justificatory enterprise.[20] Thus, according to this proposal (which follows Hart), the theory adopts the point of view of the participants in order to understand the practice in a meaningful sense, but this does not imply an acceptance or justification of the institution. In the author's words:

> internal positivism admits that the existence of an institution presupposes the existence of a justifying theory that attributes some value or function to it. Otherwise the institution in question would not exist. What this position holds is that it is possible to identify an institutional concept, i.e. a set of properties that is exemplified in every

13 Redondo 2018: 206.

14 Redondo 2018: 203.

15 Redondo 2018: 203 (emphasis mine). Here, Redondo follows Winch 1958.

16 Redondo 2018: 211.

17 Redondo 2018: 209-210.

18 Redondo 2018: 215. For a similar recent reading in this regard, cf. Scavuzzo 2021.

19 Redondo 2018: 237.

20 Redondo 2018: 230.

> instance -or in every paradigmatic instance- of the same kind of institution, and that this does not mean offering a theory that rationalizes, makes intelligible, or justifies the content of them... [21]

She adds:

> The identification of an institutional concept always presupposes the adoption of an internal point of view$_1$, however, it does not necessarily presuppose the adoption of an internal point of view2.[22]

The adoption of the methodological approach Redondo promotes has in its background a potential practical implication: if it were not possible to adopt IPV_1/EPV_2 as a methodological approach, it would not be possible to refer to institutions that totally lack justification and deserve to be ignored in the determination of how one should act.

It is important to emphasize that Redondo (following Hart and, in particular, Raz) [23] is thinking that even if one has *to participate* in a common language or way of life in order to account for the understanding of law from the internal point of view, this does not necessarily imply *sharing* such a point of view.[24] The author's idea is that the concept of law (and concepts in general) held from the internal point of view, that is, from the point of view of those participants who constitute the practice, can be apprehended by any rational being willing to make the necessary effort to do so.[25] Whoever has this interest can carry out exercises of translation between the concepts she observes and her own, learn them in a direct way, introduce herself into the practice, etc... Her thesis is that objective knowledge of such concepts is possible.[26]

2.2 The object of legal theory according to PJI

The assumed starting point is that the object of legal theory is constituted by a specific type of norm, which can be qualified as legal. The legal duties that these norms impose must be understood as institutional objects. In turn, the author maintains that law is constitutive of legal reasons, and that these reasons must be understood as formal ones. In other words, from IPV_1/EPV_2 the author detects that legal rules that are constitutive of reasons for action are recognized as premises of formal arguments in each of the cases in which they apply (and not necessarily as substantive reasons to act as they require). I will devote the next sections to breaking down these theses.

21 Redondo 2018: 230.

22 Redondo 2018: 237.

23 Hart 1994; Raz 2004; Raz 1998.

24 Redondo 2018: 70. I developed a critical review of this aspect of Raz's theory in Gaido 2011; Gaido 2012.

25 Redondo 2018: 74.

26 Redondo 2018: 70ff.

2.2.1 Existence and knowledge of legal content

Redondo argues that although the existence of law rests on empirical facts, the knowledge of the legal duties it imposes is not empirical, but conceptual. Her arguments aim to show why enterprises that reduce legal duties to the individual practices and/or actions that gave rise to them are mistaken. Legal duties supervene on the individual practices and/or actions that support them, and have to be understood as institutional objects/concepts. This implies, on the one hand, that they are not empirical facts and, on the other hand, that they are not necessarily conventional facts.[27] An institutional object, in the author's words, is something that:

> originates from and depends on people's beliefs and attitudes, but is not necessarily a conventional object, and is not necessarily identified as conventions are identified.[28]

They are ideal entities, contents of meanings dependent on the empirical facts that give rise to them, but that are not reducible to them.[29]

Regarding the knowledge of legal duties, the author agrees with Hart that the determination of the content of law consists in a cognitive exercise.[30] However, she disputes a possible reading of Hart's thesis that what the law commands leaves out disagreement.[31] The author is interested here in stressing that one thing is (i) the identification of what the law commands, given a specific generic case (as a cognitive exercise); and another is (ii) the determination of the solution to a supposed individual case, when the law establishes different duties that are incompatible with each other (as a creative exercise).[32]

In relation to (i), she points out that it is not true that the cognitive exercise ends when a disagreement arises with respect to what the law prescribes. The cognitive exercise is extended when there is disagreement about it.[33] In these cases of disagreement, a "multiplicity of mutually incompatible true interpretative statements" may arise. For the author, a commitment to cognitivism does not imply a commitment to the thesis that law offers a single correct answer. And she would dispute those who argue that Hart is committed to the thesis that when law offers more than one contradictory answer it leaves the case unresolved: "The possibility of multiple interpretations does not imply that any interpretation is possible,"[34] she argues. The law resolves the question, Redondo

27 Redondo 2018: 46, 164.

28 Redondo 2018: n. 156, 151

29 Redondo 2018: 13ff. To support this thesis, the author makes use of Searle's theory of institutional facts (Searle 1995).

30 Redondo 2018: 29.

31 Hart 1961: ch. VII; Dworkin: 1986.

32 Redondo 2018. 28.

33 Redondo 2018: 27.

34 Redondo 2018: 34.

would say, only in a contradictory way. The need to choose between different contradictory normative solutions, and give rise to a new normative scenario, only arises if one arrives at (ii), that is, at the application of the law: when a solution must be given to a particular case.[35]

The truth of legal statements is directly determined by existing legal duties, which depend on (are relative to) a given practice of recognition but that are not reducible to it.[36] That is, what makes them true are the rules followed by the practice, not the practice itself. This leads the author to argue that the practice might misapprehend the rule it aspires to follow, and that it is up to legal theory to unfold the full content of the legal rule and the duty it imposes, a task that is not based on empirical, but conceptual, inquiry.[37] In her words:

> The aim is to identify the contents or criteria that are (explicitly or implicitly) used as a basis in a practice of argumentation or justification of actions. These contents have a normative or justifying character, insofar as they are offered as support for demands, rewards or sanctions. The explicitness of these significant contents and their qualification as legally due, although it has a semantic aspect, does not consist in semantic analysis, but in an attempt to grasp -starting from certain contents explicitly admitted as the basis of legal criticisms and demands- what other contents we have reason to consider implicitly connected to legal sources, i.e. the correct way to extend, restrict or partially replace the contents explicitly used in the argumentation practice.[38]

And she adds:

> the effort is aimed at ascertaining which contents are legal reasons within this practice.[39]

Finally, Redondo argues that there is no definitive test or infallible ideal point of view for determining the truth of statements expressing legal propositions. She proposes understanding legal knowledge as any other non-formal knowledge, and that, in order to be considered founded, it is sufficient to exhibit public reasons, accessible to any rational being "who is willing to make the effort to learn the necessary concepts for it".[40]

2.2.2 Legal norm as formal reasons

In the contemporary debate, the question of legal normativity has been understood as a question of the type of reasons for action that law rises.[41] Redondo is a pioneer and central author in the discussion on the type of reasons consti-

35 Redondo 2018: 28.
36 Redondo 2018: 54-55.
37 Redondo 2018: 68.
38 Redondo 2018: 56-7.
39 Redondo 2018: 57.
40 Redondo 2018: 74.
41 Raz 1990.

tuted by law.[42] She argues that law is necessarily constitutive of reasons in a formal sense, irrespective of its conclusive force on what ought to be done.[43] From her IPV_1/EPV_2 methodological approach, legal rules that are constitutive of reasons for action are "genuine rules", which implies that they invariably establish reasons for what ought to be done in legal terms.[44] In doing so, she rejects the need for a commitment to a moral value from the point of view of the participants in legal practices.

To say that legal norms constitute invariably relevant reasons means that, for the author, they are logically undefeatable and used as premises in formal arguments in each of the cases in which they apply. With this, the author alerts us that under the expression "defeasibility of legal norms", two different types of problems are pointed out: a formal one, related to the defeasibility of the statements that express norms in logical reasoning; and a substantial one, related to the defeasibility of the weight of norms in a process of the balancing of reasons.[45] The invariability or indefeasibility constitutive of the concept of legal norms, from the methodological approach IPV_1/EPV_2, for the author, is the formal one. Legal rules, insofar as they are genuine rules, have invariable practical relevance because it is possible *to identify* the content of the legal statement that describes it, being it opaque to any additional, underlying or supervening, condition. That is to say, it leaves out the possibility of identifying any exception not made explicit by the legal system beforehand.[46] This is the way in which, for Redondo, legal normativity for a legal positivism à la Hart would be best reconstructed.

The author, however, takes an additional step in her argument on this point, which seems not to circumscribe the idea of practical invariability to a strictly formal question. She adds that the practical invariability of legal norms understood as the possibility of *identifying* the content of the legal statement that describes it, being it opaque to additional considerations, implies that they have the capacity to offer *some resistance* for the normative solution they propose.[47] In her words:

> The theses of exclusionary and invariably relevant character that are needed to account for the specific character of "genuine" norms do not refer to the substantial weight that they may or may not in fact have, either from an objective (moral) point of view or from a subjective point of view, in the process of making a decision by an agent. Those who ought to follow a legal rule are ought to offer it as a reason-premise whenever it is applicable and *to respond for the expectation that the generality the rule produces, that is, to use it in all cases in which it is applicable, and, if it is the case, to show*

42 Redondo 1996.
43 Redondo 2018: 107ff, 133
44 Redondo 2018: 97.
45 Redondo 2018: 93ff.
46 Redondo 2018: 110.
47 Redondo 2018: 105.

the reasons that prevail over the rule by imposing a conclusion that departs from it (the underlining is mine). [48]

Redondo emphasizes that their *final weight or force* in the justification of a decision-making process remains, in principle, an open question, and a definition in this respect would not be necessary for an explanation of their practical character.[49] However, even if the final weight of legal norms could indeed remain an open question, the author does not explain why, from her methodological approach, legal norms constitute a contributing reason at all. To say that the generality of the norm triggers an expectation of applicability as something that can be explained in purely linguistic terms would not seem to be sufficient. The idea of a reason "contributing" to the construction of a justification, which includes having "to show the reasons that prevail over the rule by imposing a conclusion that departs from it," to be something more than a mere postulation, would seem to presuppose some substantive theory. This is because in order to account for its defeasible substantive weight, it seems necessary to explain the sense in which it has any weight at all, at least initially.[50] The question that it is thus possible to put to the author is, in what sense, from a theory that only seeks to account for the point of view of the participants of legal practices in neutral terms, is the reconstruction of legal normativity in formal terms merely informative?

3 KEY QUESTIONS THAT STRUCTURE THE DEBATE

It is possible to identify a common observation among the critics, and this is the stimulating experience that always comes from reading Cristina Redondo's wirtings, and *'Internal' Legal Positivism* in particular. The criticisms articulated by Rodriguez, Legarre, Sanchez Brigido, Scataglini, Monti, Rapetti, and Champeil-Deplats were sharp and developed around the following questions: What is the scope of the thesis of the plurality of methodological approaches to law? Is a neutral theory of law possible and relevant? What are the tools with which a neutral theory of law can be undertaken? What place do disagreements play in the ontology and epistemology of law? What concept of "participant" is assumed? What kind of statements can be ascribed to the distinguished points of view? What is the relevant concept of legal normativity? Redondo responds to the objections received, qualifying and clarifying her initial arguments, in "Internal legal positivism refined: A reply to the critics". Everyone is invited to repeat the stimulating experience, this time enhanced by the critical comments, and then draw her own conclusions.

48 Redondo 2018: 135.

49 Redondo 2018: 105 ff.

50 Raz, for example, seems to notice this when, along with his theory of legal norms as protected reasons, he develops his conception of (legal) authority as service. I analyzed the limits raised in Raz's argumentation in Gaido 2021.

Bibliography:

Agüero-San Juan, S. (2022). Sistema jurídico e identificación del derecho. Una posible respuesta bulyginiana a 'La teoría positivista de Bulygin' de María Cristina Redondo. *Doxa,* 45, 549-579.

Alexy, R. (1992). *Begriff und Geltung des Rechts*. Alber.

Atienza, M. (2006). Entrevista a Neil MacCormick. *Doxa,* 29, 479-489.

Dworkin, R. (1986). *Law's Empire.* Harvard University Press.

Carrió Sampedro, A. (2022). Sobre la existencia y conocimiento de normas. Algunos comentarios y observaciones críticas a los presupuestos ontológicos y epistémicos del *Positivismo jurídico 'interno'* de Cristina Redondo. *Doxa,* 45, 495-522.

Champeil-Deplats, V. (2022). Un positivismo jurídico 'interno': ¿por qué?, ¿cómo? *Revus. Journal for Constitutional Theory and Philosophy of Law,* 48.

De la Fuente Castro, O. (2022). Positivismo jurídico, interpretativismo e institucionalismo. Comentario al capítulo IV de *Positivismo jurídico 'interno'* de María Cristina Redondo. *Doxa,* 45, 581-602.

Gaido, P. (2009). El concepto de derecho: una aproximación metodológica a la teoría de Alexy. *Doxa,* 32, 593-604.

Gaido, P. (2011). The Purpose of Legal Theory: Some Problems with Joseph Raz's View". *Law and Philosophy, 30*(6), 685-698.

Gaido, P. (2012). The Scope of the Participant's Perspective in Joseph Raz's Theory of Law. *Canadian Journal of Law and Jurisprudence, 25*(2), 347-357.

Gaido, P. (2021). Between Authority and Interpretation: The Place for Exclusion in Raz's View of Law. In J. Fabra Zamora & G. Villa Rosas (Eds.), *Conceptual Jurisprudence. Methodological Issues, Classical Questions and New Approaches* (pp. 225-238). Springer.

Hart, H.L.A. (1961). *The Concept of Law*. Oxford University Press.

Hart, H.L.A. (1994). Postscript. In *The Concept of Law* (2nd ed., pp. 238-276) Clarendon Press.

Kristan, V. y Lojo, A. (2021). ¿Un normativismo 'redondo'? El positivismo jurídico 'interno' a examen. *Discusiones,* 26, 211-251.

Legarre, S. (2020). Positivismo jurídico 'interno' a la luz del derecho natural. *Revus. Journal for Constitutional Theory and Philosophy of Law,* 42.

Legarre, S. (2022). 'Internal' Legal Positivism in the Light of Natural Law". *Revus. Journal for Constitutional Theory and Philosophy of Law,* 48.

Lojo, A. (2022). Los problemas epistemológicos de las reglas genuinas en el *Positivismo jurídico 'interno'* de María Cristina Redondo. *Doxa,* 45, 523-547.

Monti, E. (2020). Redondo sobre la normatividad del derecho. *Revus. Journal for Constitutional Theory and Philosophy of Law,* 42.

Monti, E. (2022). Redondo On the Normativity of Law", *Revus. Journal for Constitutional Theory and Philosophy of Law,* 48.

Moreso. J.J. (2022). La normatividad en el positivismo jurídico interno. A modo de colofón. *Doxa,* 45, 621-627.

Nino, N. (1994) *Derecho, moral y política.* Ariel.

Rábanos, J. (2020). *Modelos contemporáneos de autoridad. Elementos para un análisis de los problemas, conceptos y modelos de discurso sobre la autoridad desde la filosofía del derecho.* Doctoral dissertation. University of Genoa (Italy).

Ramirez Ludueña, L. (2022). La imposibilidad del positivismo jurídico interno. *Doxa,* 45, 603-620.

Rapetti, P. (2021). Positivismo jurídico interno: ¿'hurra', 'buh', 'ehhh…'? *Revus. Journal for Constitutional Theory and Philosophy of Law,* 44.

Rapetti, P. (2022). 'Internal' Legal Positivism: 'Hurrah', 'Boo', 'Ehhh…'?". *Revus. Journal for Constitutional Theory and Philosophy of Law,* 48.

Raz, J. (1990). *Practical Reasons and Norms*. Princeton University Press.

Raz, J. (1998). Two Views of the Nature of the Theory of Law: A Partial Comparison. *Legal Theory 4*(3), 249-282.

Raz, J. (2004). Can there be a Theory of Law. In M. P. Golding & W. A. Edmundson (Eds.), *The Blackwell Guide to Philosophy of Law and Legal Theory* (pp. 324-342). Blackwell.

Redondo, C. (1996). *La noción de razón en el análisis jurídico*. Centro de Estudios Constitucionales.

Redondo, C. (2018). *Positivismo jurídico "interno"*. Klub Revus.

Redondo, C. (2022a). Afinando el positivismo jurídico 'interno'. *Revus. Journal for Constitutional Theory and Philosophy of Law,* 48.

Redondo, C. (2022b). Internal legal positivism refined. *Revus. Journal for Constitutional Theory and Philosophy of Law,* 48.

Rodríguez, J. (2021). Sobre la posibilidad de un positivismo jurídico 'interno'. *Revus. Journal for Constitutional Theory and Philosophy of Law,* 42.

Rodríguez, J. (2022). The Possibility of An Internal Legal Positivism. *Revus. Journal for Constitutional Theory and Philosophy of Law,* 48.

Sánchez Brigido, R. (2020). El concepto de derecho como concepto funcional. *Revus. Journal for Constitutional Theory and Philosophy of Law,* 42.

Sánchez Brigido, R. (2022). The Concept of Law as a Functional Concept. *Revus. Journal for Constitutional Theory and Philosophy of Law,* 48.

Scataglini, M.G. (2020). Convenciones interpretativas y positivismo jurídico. *Revus. Journal for Constitutional Theory and Philosophy of Law,* 42.

Scataglini, M.G. (2022). Interpretative Conventions

and Legal Positivism. *Revus. Journal for Constitutional Theory and Philosophy of Law,* 48.
Scavuzzo, N. (2021). Positivismo jurídico interno: epistemología o ideología del derecho. *Isonomía,* 54, 109-133.
Searle, J (1995). *The Construction of Social Reality*. The Free Press.
Winch, P. (1958). *The Idea of Social Science and its Relation to Philosophy*. Routledge.
Zorzetto, S. (2021). Positivismo jurídico normativo: de la metafísica a la política. *Isonomía,* 54, 134-166.

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On the possibility of an internal legal positivism

In her latest book Cristina Redondo provides an excellent defense of the position she qualifies as *Internal Legal Positivism*, according to which it is possible to formulate statements referring to the content of the law, conceived as a normative entity, that are purely descriptive and expressed from a point of view that does not presuppose their acceptance. In this paper I will restrict myself to three rather marginal observations, raising some doubts, first, about the strategy of contesting the so-called impossibility thesis; second, on a point related to the two senses of the distinction between the internal and external points of view that Redondo proposes to differentiate and, third, regarding a consequence that derives from it for the critical evaluation of interpretivist theories such as Ronald Dworkin's. I then formulate some conclusions of that analysis.

Keywords: positivism, realism, internal and external points of view, interpretativism, skepticism

1 INTRODUCTION: THE IMPOSSIBILITY THESIS

Reading Cristina Redondo's works has always been a very enlightening and rewarding experience, and her latest book, *Positivismo jurídico "interno"*,[1] has not been the exception but rather the confirmation of that rule.

I will focus here on an analysis of the final chapter of the book, where she exposes and defends the position that she qualifies as *Internal Legal Positivism*. I will not summarize all the ideas that Redondo discusses in this chapter but will instead focus fundamentally on her observations on the thesis of the impossibility of a descriptive analysis of a normative reality, and the two senses of the distinction between the internal and external points of view that she proposes.

In Chapter V of her book, Redondo argues that in contemporary legal philosophy there is a deep disagreement between two positions regarding the method of approaching the knowledge of law. On the one hand, from a non-cognitivist conception associated with Legal Positivism –which she exemplifies with the realism of authors such as Guastini– all theoretical discourse referring

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1 Redondo 2018.

to the law is necessarily formulated from an external point of view, is neutral and uncommitted to the beliefs that justify it. Its language is purely descriptive and refer exclusively to empirical facts, corresponding to a level of discourse different from that of the law itself. From this approach, a theoretical discourse concerning genuine normative contents and not empirical facts, formulated from the internal point of view of those who accept the norms to which they refer, would be impossible. On the other hand, from a cognitivist position associated with Antipositivism –which Redondo exemplifies with the interpretivism of authors such as Dworkin– all theoretical discourse referring to the law is necessarily formulated from an internal point of view, committed to the beliefs that justify it. The legal theorist is an acceptant of the law; his language has a justifying and normative character and, although more abstract, is on the same level as the discourse of law itself. From this point of view, an exclusively descriptive theory, formulated from the external point of view of someone who does not accept or assume as justified a normative object of study, would be impossible.

In Redondo's opinion, despite the notorious discrepancy between these two positions, both agree in maintaining that using *a purely descriptive method to study a normative object is impossible*. In law specifically, this would mean that the identification of normative contents necessarily constitutes a practical, justifying or normative discourse, and presupposes a point of view committed to the beliefs and values that justify them, an idea Redondo calls *the Impossibility Thesis* (or *the Necessity Thesis*, depending on the point of view). For authors such as Guastini, this impossibility would result from the fact that, due to the ambiguity of normative formulations, any statement that identifies norms from them would be ascriptive, formulated from the internal point of view of the interpreter or acceptant, a point of view that would be incompatible with a theoretical study since the latter should be purely descriptive. For authors such as Dworkin, on the contrary, this impossibility would result from assuming that all theoretical discourse on normative contents would share the same normative character as its object, being necessarily interpretive and thus presupposing a substantive judgment committed to the values that justify it.

Redondo does not concentrate on an analysis of the reasons why the impossibility thesis should be rejected. What she does point out is that these reasons would not be empirical or deontic but conceptual, so it could not be argued against them that the Impossibility Thesis is incoherent with conceptual presuppositions assumed from an alternative conception that rejects it. It could, however, be argued that such reasons contradict the very starting points of the conception that seeks to justify it, or that they fail to resolve the problems that alternative theoretical schemes do resolve, or that they assume theses that are incompatible with scientific conclusions and attempt to show the reasons why it would be better to adopt an alternative point of view, the one defended by the so-called Internal Legal Positivism.

I find the identification of this common aspect in theories as dissimilar as those of Guastini and Dworkin very attractive, and I agree with Redondo in rejecting the Impossibility Thesis. However, I think it is important to point out two observations on these preliminary reflections. First, it is controversial, to say the least, that the arguments in support of the Impossibility Thesis are of a purely conceptual nature.[2] Second, as stated, Redondo does not examine the reasons offered, both from realism and from interpretivism, in support of the Impossibility Thesis, although she notes authors that have objected to them.[3] However, this seems to concede too much to such positions. In my opinion, to justify the alternative conception offered by Internal Legal Positivism, it is not enough to show that there are good reasons to adopt such a position, and that from this point of view it is possible to draw conceptual distinctions that the defenders of the Impossibility Thesis are incapable of recognizing. It is necessary, and in fact it is possible, to challenge the arguments in support of this latter thesis, showing that they are inconsistent or that are unable to justify it, since, as its name indicates, this thesis disqualifies the very possibility of Internal Legal Positivism. I develop these two claims in the next section.

2 LEGAL REALISM AND THE IMPOSSIBILITY THESIS

In order to examine the two points raised above, I am going to dwell for now only on a position like Guastini's. To justify his idea that a theoretical/descriptive discourse formulated from the external point of view is only possible regarding empirical facts and not normative contents, Guastini relies on the following theses, which could be taken as the central theses of Genoese realism:[4] (1) a clear distinction must be made between normative provisions or formulations (texts) and norms (their meanings), which would be the result of interpretation; (2) normative provisions or formulations admit more than one interpretation, since there is no one-to-one correspondence between normative formulations and norms; (3) interpretive statements formulated by judges and jurists, whose typical structure would be "Normative formulation NF means N", allow norms to be obtained from provisions or normative formulations, so that legislators would not actually produce norms but only normative formulations, and (4) interpretive statements are ascriptive and, therefore, similar to

2 As will be seen below and in Section 4, in Guastini's case this is so because his reasons cannot be exclusively conceptual but rather empirical. In Dworkin's case, if they are taken as conceptual they are inconsistent and to preserve their consistency they must be interpreted as normative.

3 See Redondo 2018: 198-199. In Chapter I of her book, Redondo criticizes Genoese realism, but not directly regarding the Impossibility Thesis.

4 See, for instance, Bouvier 2012: 271; Chiassoni 2013; Ferrer Beltrán & Ratti 2011.

stipulative definitions, and thus interpretation is not a cognitive but a decisional activity.[5]

From this reconstruction, it should first be noted that although it is very important to distinguish, as thesis 1 does, between norms and normative formulations,[6] thesis 2, according to which provisions or normative formulations would admit of more than one interpretation, is not, as Redondo seems to consider, a purely conceptual thesis. If there are arguments to justify the claim that any normative formulation is ambiguous, those arguments should refer to what the existing interpretive conventions in the law in fact determine, and to the characteristics of its language and its methods of interpretation, which cannot be but empirical considerations. And, thus interpreted, this thesis actually seems to be the result of a fallacy of inadequate generalization: in many cases normative formulations admit of more than one interpretation, but this is not unrestrictedly valid for all of them. There could be some normative formulations that correspond to only one single norm. I can see no conceptual argument to exclude the possibility that, faced with a certain text, the various available methods of interpretation converge on the same alternative. Regarding some normative formulations, the legal community could agree on the identification of a certain meaning. That convergence could of course be challenged, and the challenge could even be successful and the interpretation changed, but that a convention can change does not authorize denying the existence of conventions. Consequently, when there is a linguistic convention assumed by the legal community at stake, one can speak of interpretive correctness relative to that convention.

In any case, even if every normative formulation admitted of more than one interpretation, this still would not justify the thesis of the impossibility of a theoretical discourse with respect to normative contents, since if a norma-

5 Perhaps some/all of these theses should be refined or specified to fully account for the richness of Genoese realist thought in general, and of Guastini's thoughts in particular. In any case, the point here is not focused on developing a global critical evaluation of Genoese realism –which, on the other hand, would be impossible within the limited framework of this paper–, but on determining whether the Impossibility Thesis can be justified on these bases.

6 The distinction between norms and normative formulations is, however, difficult to harmonize with the idea that norms are the result of interpretation, and that this result is expressed in statements of the form "Normative formulation NF means N". By distinguishing norms from their formulations, it is assumed that while the latter would be purely syntactic entities (uninterpreted texts), norms would be either purely semantic entities (meanings) or texts with an interpretation (syntactical-semantic entities). But if it is additionally assumed that norms are obtained through interpretation, and that interpretation produces statements of the form "Normative formulation NF means N", in the latter, N can only be another expression of language, although while NF is being mentioned, N is being used. For this reason, interpretive statements would be equivalent to the translation of a linguistic expression into another linguistic expression, which, though more understandable than the first, would also require interpretation. Consequently, either interpretation, although it can be *revealed* through interpretive statements, does not require them, or it would never be possible to obtain norms through interpretive statements.

tive formulation NF is ambiguous, nothing prevents the legal theorist, speaking from an external point of view, to maintain that in such a case the law is composed either by interpretation N_1 or by interpretation N_2.[7] Furthermore, the fact that different methods of interpretation produce different results does not imply that there cannot be clear or easy cases that receive exactly the same solution for all admissible interpretations. Against this it could be argued that the fact that judges adhere to the clear meaning of legal texts in easy cases does not necessarily mean that interpretation is a purely cognitive operation, since a decision would also be required there: to conform to the prevalent interpretation or to use the standard interpretive arguments in that context instead of departing from them and choosing a different meaning.[8] This is undoubtedly true, but exclusively because the function of judges is to make decisions. The relevant question is not whether *deciding* according to the clear meaning is an act of knowledge or of decision, since by definition it is a decision; what is relevant is whether legal norms provide, at least in certain cases, guidelines for evaluating the correctness or incorrectness of judicial decisions.

As for thesis 3, there is no doubt that legislators and other lawmaking organs enact certain texts or normative formulations, but they do not enact mere signs devoid of any meaning. The goal pursued through the production of such texts is not simply to stain papers but to regulate behavior through norms. The fact that the normative formulations enacted by legal authorities may have problematic cases of application or sometimes give rise to more than one interpretation, should not make us lose sight of the fact that in the vast majority of cases they are understood by their addressees, and thus they can follow them and regulate their conduct through them without the mediation of judges or legal interpreters. On this account, the claim that norms are only obtained from normative formulations through the interpretive statements of judges and jurists cannot be accepted without qualification.

7 Redondo argues that if the knowledge of explicit or implicit interpretive criteria does not determine a single correct answer, this does not undermine a cognitive thesis on interpretation. This is so because if, for example, it is true that the constitution incorporates a concept of freedom with various admissible and incompatible interpretations, the only thing that would follow from this is that the constitution incorporates contradictory precepts (see Redondo 2018: 27). But in fact, if there is more than one admissible interpretation, this does not imply that all of them are part of the law. The theorist in such a case may describe the law as being composed of N1 *or* N2, but it would be incorrect for her to say that it is composed of N1 *and* N2. If I came home and said "Honey, I bought a radio", it would not make sense for my wife, due to the ambiguity of the word "radio", to criticize me for having bought many different things, but it would be perfectly sensible for her to ask me to clarify what I bought. And if a judge is faced with a normative formulation susceptible to more than one admissible interpretation, it is not enough to justify her decision simply by appealing to one because she considers all of them to be equally part of the law. Rather, she must justify her choice of one of them as the one that, at least in her opinion, more adequately captures the meaning of the text.

8 See, for instance, Chiassoni 1998: 37-38, 49-55.

This is connected with the scope of thesis 4, according to which interpretive statements would be ascriptive and not purely cognitive. It should be noted here that discussing conceptions of interpretation exclusively in terms of the truth conditions of interpretive statements ("Normative formulation NF means N") can be misleading. Faced with clear cases, interpretive statements are not usually formulated: we simply understand that these cases are within the scope of the norm in question. When an interpretative statement is made, it is usually because there is some doubt or dispute as to what the provision means. This is what gives thesis 4 its appearance of plausibility. If we use a restrictive sense of interpretation, according to which in clear cases interpretation is not required since we simply grasp the meaning of legal norms, and we use "interpretation " only to refer to the attribution of meaning to a normative text when there are doubts or controversy about it, then the truth of thesis 4 could be preserved. This is because in the face of problematic cases the law would be indeterminate, and interpretation would always imply a choice on the part of the interpreter. If this were the correct way to read thesis 4, however, both thesis 1 and thesis 3 would have to be abandoned or reformulated because it could no longer be held that norms are the result of interpretation, nor that they are obtained from normative formulations through interpretive statements, nor that legislators only produce normative formulations and not norms.

Guastini himself has proposed distinguishing between a radical and a moderate interpretive skepticism, and considers the former untenable.[9] In his view, claiming that normative formulations are ambiguous is different from claiming that they are devoid of any meaning whatsoever. Skepticism, in its most radical version, would hold that there is no meaning before interpretation, and would lead, according to Guastini, to unacceptable consequences such as the non-existence of rules or linguistic conventions.[10] Unlike the radical version, moderate skepticism would maintain that interpreting does not consist in attributing just any given meaning to a text, but only one of those included within the *framework of legally admissible meanings*.[11] The admissibility of meanings would be determined by common usage, interpretive methods, and dogmatic theories. Moderate skepticism would thus restrict the scope of the ascriptive nature of interpretive statements to decisions made within that framework. However, this idea would be tantamount to admitting that there is a set of interpretations validated by the legal community and others that are disqualified by it, which is equivalent to accepting the existence of certain criteria to delimit one from the other.[12] Thus, if a norm determines a framework of legally admissible deci-

9 See Guastini 2012; Guastini 2017: 33ff.

10 See Guastini 2012.

11 In this he follows Kelsen 1960: 351ff.

12 Guastini has also clarified that "interpretation" can be understood as resulting from two different activities: "cognitive" interpretation is the analysis of a text with the aim of clarifying

sions, though it could be argued that the selection of one among the admissible alternatives is a decision that cannot be classified as correct or incorrect, those decisions that exceed the framework of admissible interpretations will be unquestionably incorrect, and thus, at least in certain cases, evaluation guidelines would be available for determining the correctness or incorrectness of judicial decisions based on legal norms. Hence, the thesis of the impossibility of a theoretical/descriptive discourse formulated from the external point of view regarding normative contents could no longer be maintained.

3 AN AMBIGUITY IN THE DISTINCTION BETWEEN INTERNAL AND EXTERNAL POINT OF VIEW

Redondo's central argument against the Impossibility Thesis and in defense of Internal Legal Positivism consists in pointing out an ambiguity in the expressions "internal point of view" and "external point of view", and suggesting that a semantic and a pragmatic version of this distinction should be differentiated.[13] In a first sense, the distinction between these two points of view would differentiate, á la Winch,[14] two methodological and discourse approaches with which the study of an institution or social practice can be attempted. Here the external point of view would be assumed from the perspective of a third party who intends to describe and explain only the empirical or behavioral aspects of an institution, whilst the internal point of view would be that of someone who, also from the perspective of a third party, tries to capture and explain the concepts with which the participants or acceptants refer to an institution, the meanings that they attribute to it. In a second sense, the distinction between these two points of view would be used to indicate the presence or absence of a practical attitude of acceptance or approval towards the normative contents of an institution. Here, the external point of view would be that of someone who is not committed to the justification of a social institution, does not adhere to or accept its rules or presuppose the truth of a set of beliefs that justify it. The internal point of view, in its turn, would be that of someone who is committed

its possible admissible meanings, and "decision-making" interpretation attributes a certain meaning to a text. He also claims that realism would be limited to sustaining a skeptical theory about decision-making interpretation (see, for example, Guastini 2015). But in such a case, a theoretical/cognitive discourse regarding normative contents as admissible meanings of legal provisions would be possible, so that the defense of the Impossibility Thesis could not be attributed to realism thus understood.

13 Although contextually it is clear why Redondo qualifies one of them as semantic and the other as pragmatic, I think it would have been more charitable for the reader if, instead of appearing only in the titles, at least a brief explicit reference would have been dedicated to the reason why each one has such a character.

14 See Winch 1958: 111-120.

to its justification, adheres to or accepts its rules, or implicitly presupposes the truth of a set of beliefs that justify it. To differentiate these two ways of understanding the distinction between the internal and the external points of view, Redondo proposes calling the first the external$_1$ and internal$_1$ points of view, and the second the external$_2$ and internal$_2$ points of view.

Redondo claims that the distinction between the external$_1$ and internal$_1$ points of view would offer a basis for identifying different types of discourse and theories and, consequently, of types of statements about social institutions, because though both the statements formulated from the external$_1$ and from the internal$_1$ points of view would be descriptive, the former would refer to empirical data or causal correlations while the latter would refer to normative concepts or contents. From this perspective, the need to assume the internal point of view in order to account for institutional concepts or normative contents would mean rejecting a causal/empiricist perspective and assuming that the only way to grasp or understand a social institution would be to adopt the internal$_1$ point of view, a thesis to which Internal Legal Positivism is committed.

By contrast, the distinction between the external$_2$ and internal$_2$ points of view would not allow the identification of two types of discourse or semantic contents, nor would it refer to different types of objects, but rather

> *[T]he same type of discourse referred to a normative object or content can be formulated or proposed with the attitude of the external$_2$ point of view or that of the internal$_2$ point of view".*[15]

In other words, this distinction would not involve a distinction between two different types of statements:

> *The ideas of internal$_2$ and external$_2$ points of view refer to the pragmatic attitude with which any internal$_1$ statement is formulated, i.e., a statement about the meaning or content of an institution.*[16]

Based on these two ways of understanding the distinction between the internal and external points of view, Redondo maintains that the notion of the internal$_2$ point of view is essential to account for the existence of a social institution, since that attitude plays a constitutive role for a social institution to come into existence or to remain in time. Thus, the internal$_2$ point of view would undoubtedly have ontological relevance. Now, the defenders of the Impossibility Thesis, by not differentiating the two meanings of the distinction between the internal and external points of view, assign to the former both an ontological or constitutive role, in the sense that a social institution exists if a group adopts the internal point of view, and a methodological or epistemic role, according to which a social institution can only be identified and explained by adopting the internal point of view. However, Redondo argues that in the first case the refer-

15 Redondo 2018: 211.

16 Redondo 2018: 211.

ence would be to the internal$_2$ point of view, while in the second case the reference would be to the internal$_1$ point of view. The fact that the internal$_2$ point of view has ontological relevance because it constitutes a necessary condition for the existence and subsistence of a social institution would offer no reason to justify its also being a necessary condition to identify and know it as such. And to admit that the internal$_1$ point of view has methodological relevance because it constitutes a necessary condition for the identification of the content of an institution, would offer no reason to justify its being a necessary condition for the existence or subsistence of a social institution. Thus, by not differentiating these two senses of the distinction, the defenders of the Impossibility Thesis become unable to identify the sense in which the thesis would be correct, and in which sense it would be incorrect.

Again, I fully agree here with the core of Redondo's argument, and I think it is very illuminating to clear up this ambiguity in the distinction between the internal and the external point of view in order to appreciate the argumentative fallacy committed by the defenders of the Impossibility Thesis. My only doubt regards the character of the distinction between the two senses of internal and external points of view. As indicated, Redondo claims that only the distinction between internal$_1$ and external$_1$ points of view involves two different types of statements, not the one between assuming an internal$_2$ or external$_2$ points of view. This seems a bit dark to me. If what Redondo means by this is that adopting the internal$_2$ or external$_2$ point of view does not necessarily imply formulating statements of different types, the thesis is correct in the sense that, as Redondo explains, the same internal$_1$ statement could be formulated presupposing or not the truth of certain beliefs that justify it, or the acceptance of the rules in question, i.e., it could be formulated assuming the internal$_2$ or external$_2$ point of view. However, Redondo seems to hold something stronger, namely, that assuming the internal$_2$ or external$_2$ point of view would allude to the pragmatic attitude with which internal$_1$ statements are formulated, which seems to indicate that from the internal$_2$ or external$_2$ point of view only internal$_1$ statements can be formulated. This still would not be a problem if it meant that from the internal$_2$ or external$_2$ point of view it only makes sense to formulate statements about normative contents, not about empirical facts. But Redondo also claims that "*...every statement in which institutional concepts are used is an internal statement$_1$ that is uttered, inevitably, either from an internal$_2$ point of view, or from an external$_2$ point of view.*"[17]

My doubt here is that internal$_1$ statements, though referring to normative contents and not to empirical facts, are still purely descriptive just like external$_1$ statements. However, when referring to an institution or social practice, whether exclusively in terms of empirical facts or in terms of normative contents, it is

17 Redondo 2018: 239.

possible to formulate either purely descriptive statements or normative or evaluative statements about it, but only the former would be included in Redondo's classification of external$_1$ and internal$_1$ statements. Therefore, it does not seem correct to maintain that whenever institutional concepts are used, purely descriptive statements are formulated. On the other hand, although it is possible to formulate internal$_1$ statements either committing or not committing to their acceptance, i.e., from the internal$_2$ or external$_2$ point of view, from the internal$_2$ point of view it is also possible to formulate purely normative or evaluative statements to justify normative contents, which cannot be done from the external$_2$ point of view.[18] To make this clear perhaps it would have been preferable to draw the distinction between the external$_1$ and internal$_1$ points of view more broadly, only as a distinction between those that refer to an institution exclusively in terms of its empirical or behavioral aspects and those that refer to an institution in terms of normative contents, but without also assuming that in both cases descriptive statements are formulated from the perspective of a third party.

Although, as Redondo rightly points out, Hart formulated somewhat ambiguous reflections when referring to the distinction between the internal and the external points of view, one issue that Hart highlights is that whoever adopts the internal point of view in the face of a set of rules accepts them and uses them as guides for their own behavior and as a guideline for the critical evaluation of the behavior of others.[19] But whoever uses rules to evaluate her own actions or those of others, in doing so she does not formulate descriptive statements but rather normative or justificatory statements. Moreover, whoever adopts the internal$_2$ point of view, although she could formulate internal$_1$ statements, she ordinarily uses the norms in the manner indicated above, thereby formulating non-descriptive statements. In fact, Redondo herself speaks later of *internal$_2$ concepts*.[20] Now, if there is not only an internal$_2$ point of view from which internal$_1$ statements can be formulated, but also internal$_2$ concepts, then the

18 When saying that from the internal$_2$ point of view purely normative or evaluative statements can be formulated, I am not reflecting my own opinion in this regard, but what follows from the characterization that Redondo offers of that point of view. On the other hand, as will be seen in the following Section, from the external$_2$ point of view it is also possible to formulate normative or evaluative statements, such as one considering that a certain normative content should be rejected. But in order to *justify* a social practice or normative content it is necessary to adopt the internal$_2$ point of view.

19 See Hart 1961: 110-111. In his own way, Hart not only distinguishes between the internal point of view of someone who is committed to the acceptance of certain norms and the external point of view of someone who is not committed to the norms to which he refers, which would correspond to Redondo's internal$_2$ and external$_2$ points of view, but also between statements that refer to a social or normative practice exclusively in terms of empirical facts and those in which the meaning that the practice has for the acceptants is taken into account, which would correspond with Redondo's external$_1$ and internal$_1$ point of view, although Hart qualifies these last two types of statements as external (see Hart 1961: 309).

20 See Redondo 2018: 224.

statements referring to the latter could not be purely descriptive statements like internal$_1$ statements: they would have to be normative themselves. That being so, there are statements that refer to institutional or normative concepts that are not internal$_1$ statements, but purely normative or justificatory statements formulated from the internal$_2$ point of view.

4 INTERPRETIVISM AND SKEPTICISM

This brings me to my last observation. Commenting on Ronald Dworkin's interpretive theory, Redondo maintains that from this point of view, to identify the concept of law, i.e., what the law *is*, is to propose a theory about what the law *should be*, and not just any theory whatsoever but one that shows the beliefs of the participants in their best light and the way in which they develop over time. It follows that the language of a theory identifying the concept of law would not be of a different kind than the language of law. Dworkin, as is known, distinguishes four different types of concepts of law: a sociological concept, a taxonomic concept, a doctrinal concept, and an ideal (aspirational) concept, of which the first two would be determined exclusively by their criteria of use (criterial concepts), and the last two would be interpretive concepts.[21] But whereas by identifying a doctrinal concept of law, the theorist would commit herself to the truth of some theory that *justifies* an effectively existing type of institution, by identifying an ideal concept, the theorist would commit herself to the truth of a theory that *should justify* that kind of institution, even though she may not endorse some of its specific aspects. The task of identifying an ideal concept of law would have a fundamentally critical or utopian objective, which Redondo exemplifies with the work carried out by Luigi Ferrajoli in *Diritto e Ragione*[22] by proposing a concept of minimal criminal law.

I believe that what was indicated in the previous section turns out to be important here. Ferrajoli's theory on a minimal criminal law is normative or justificatory; it does not intend to describe how contemporary criminal systems in fact *are*, but how they *should be*, so that their statements are not internal$_1$ statements. Those statements refer to normative contents and not to empirical facts, but they are not internal$_1$ statements because they are not descriptive. They also suppose a commitment to the justification of the practice to which they refer, and thus they involve the assumption of the internal$_2$ point of view.

21 Dworkin claims that a sociological concept of law would be used when referring to it as a particular type of social structure, institution, or pattern of conduct; a taxonomic concept of law would be used when a rule or principle is classified as legal and not as another class; a doctrinal concept of law would be used when legal propositions are expressed, i.e., statements about what the law requires, allows or prohibits and, finally, an ideal (aspirational) concept of law would be used when referring to the ideal of legality or the rule of law (see Dworkin 2006: 1-5).

22 See Ferrajoli 1989.

And the same must be observed with respect to the doctrinal concept of law in Dworkin's classification. Redondo correctly observes that both the doctrinal concept and the ideal would need to be situated in the internal$_2$ point of view. They would be, as she says, internal$_2$ concepts of an interpretive or justificatory nature, but based on what was stated in the preceding section, Redondo seems committed to maintaining that the statements that refer to them would be internal$_1$ statements and, therefore, descriptive rather than normative or justificatory statements themselves.

On the other hand, Redondo holds that in Dworkin's interpretivist vision, even someone who tried to defend a skeptical thesis according to which a certain type of institution totally lacks justification, would assume an internal$_2$ point of view since her analysis would assume some kind of substantive moral argument. On this Redondo clarifies that if the external$_2$ point of view is conceived as an Archimedean position, not committed in absolute terms, the radical skeptic would effectively be located in the internal$_2$ point of view. But if the external$_2$ point of view is conceived as an uncommitted position in relation to a certain institution, the radical skeptic would find himself in an external$_2$ point of view with respect to it, since she would not be committed to a theory that justifies that institution but to one that holds that no theory justifies it.

From this analysis Redondo concludes that once it is accepted that institutional concepts are interpretive, it would be conceptually impossible to propose a concept applicable to an institution without adopting the internal$_2$ point of view. Moreover, she asserts that proponents of the Impossibility Thesis, such as Dworkin, would explicitly reject the distinction between the two senses of the internal and external points of view, and adds that if the way such views understand concepts is accepted, their conclusion *"would be impeccable."*[23]

Here again, as was observed at the beginning when examining a position like Guastini's, Redondo's considerations seem too weak as a response to interpretivism, since it would suffice to reject the distinction between the two senses of the internal and external points of view for a position like Dworkin's to be admissible. A plausible defense of Internal Legal Positivism should show that it is necessary to accept this distinction and that the Impossibility Thesis is wrong, disqualifying the arguments offered to support it. Instead, Redondo limits herself to claiming that Dworkin's arguments in support of the impossibility of an Archimedean or neutral position in absolute terms would not affect the possibility of referring to normative contents from an external$_2$ point of view, because adopting the external$_2$ point of view with respect to an institution would be incompatible with presupposing a theory or set of beliefs that justify that practice, but compatible with assuming, in general, moral commitments.[24]

23 See Redondo 2018: 214.

24 See Redondo 2018: 214.

However, from what has been indicated above, Redondo seems to be here thinking of Dworkin's criticism of a skeptic who commits herself to a normative position that holds that none of the possible justificatory theories is valid or correct with respect to a certain institution.[25] This is what Dworkin qualifies as *internal skepticism*, which defends a substantive or first-order moral thesis according to which the truth of any moral judgment on a certain issue should be rejected. *External skepticism*, on the other hand, pretends to formulate second-order statements, outside from the realm of morality, maintaining that moral judgments are not true, either because they are all false or because they lack truth values. In other words, external skepticism would be skepticism at the metaethical level and, therefore, Dworkin's criticism of this position amounts to a criticism of the possibility of metaethics, of *"talking about morality from outside of morality"*, so to speak.[26] This criticism may not affect the possibility of assuming an external$_2$ point of view, as Redondo characterizes it, but it does affect Internal Legal Positivism. This is so because Internal Legal Positivism maintains that it is possible to formulate statements referring to normative contents that are purely descriptive and from a point of view that does not presuppose their acceptance, when Dworkin's arguments against external skepticism are aimed at showing precisely that such a formulation is impossible.

Dworkin's critique consists in holding that external skepticism is self-contradictory, since its conclusion that no moral judgment is true would be a first-order moral judgment, and a first-order moral judgment can only be justified by appealing to moral premises, since it would otherwise commit Hume's fallacy, i.e., the derivation of a normative conclusion from non-normative premises. Dworkin argues as follows: suppose someone asserts a certain moral judgment, such as "Slavery is unjust." Suppose now she adds "*It is true* that slavery is unjust", or "*It is an objective fact* that slavery is unjust". What would have been added with these new expressions? For Dworkin, holding that a moral judgment is true or objective does not imply that there are strange facts or moral particles in the universe that make it true. The only difference between asserting "Slavery is unjust" and "It is an objective fact that slavery is unjust" would be a greater emphasis of the second expression, so that it would also be a first order moral judgment. And since "It is an objective fact that slavery is unjust" would simply be a more emphatic way of saying "Slavery is unjust," rejecting the objectivity of the injustice of slavery, as the external skeptic claims, could only consist in developing a moral argument against the injustice of slavery.

Though Dworkin's entire argument is too sophisticated to answer adequately here, that there is a strong air of paradox in all of his reasoning cannot be ignored. In the first place, external skepticism would be unintelligible for Dworkin

25 See Redondo 2018: 226.

26 See Dworkin 1986: 78-85; Dworkin 1996; Dworkin 2004: 141-143 and Dworkin 2011: 40-68.

because it would pretend to reject something that would make no sense to maintain, i.e., that there are moral facts that determine the truth or falsity of our moral judgments. But this is exactly what the external skeptic holds: that there are no moral facts or that moral judgments lack truth values. With this, Dworkin has granted the skeptic everything that she claims to defend, and the rest of Dworkin's argument would be nothing but speculation about the allegedly normative consequences that would derive from that meta-ethical thesis.[27]

But, second, suppose Dworkin is right and external skepticism is impossible. This could be so, according to Dworkin, because pretending to refer to morality "from outside" is something that could not be done. But then it should be deemed equally impossible to examine external skepticism "from the outside" and claim that it is an indefensible position. The point of view from which Dworkin is speaking to us is somewhat mysterious. If in his opinion the external skeptic cannot formulate propositions about morality, as would be needed to affirm that moral judgments are not objective, then how is it possible that to justify such an assertion Dworkin himself does so, as when he maintains that affirming "It is an objective fact that slavery is unjust" is simply an emphatic way of saying "Slavery is unjust"? This does not seem to make sense, but the only alternative interpretation would be that when Dworkin calls the external skeptic's position impossible or unintelligible, what he is really doing is offering a moral criticism of his position. In short, if with his claim that predicating objectivity of a moral judgment is simply a way of emphasizing it, Dworkin formulates a thesis about the semantics of moral discourse, then he cannot deny the external skeptic that he can equally hold certain semantic or philosophical theses about moral discourse. If, on the other hand, Dworkin does not pretend to be formulating a thesis about the meaning of moral discourse but a moral thesis, he would be saying something similar to "It is morally reprehensible to maintain that predicating objectivity of our moral judgments is something different from affirming those moral judgments with greater emphasis". But then the skeptic's answer seems even easier: the moral objections that can be directed against a certain philosophical thesis do not prevent its truth. In either of the two alternatives considered, the external skeptic's position may or may not be considered justified, but there is nothing unintelligible or impossible about it.

Dworkin is undoubtedly right in holding that, since moral discourse is an argumentative practice consisting of offering substantive reasons in support of a

27 In line with this idea, Dworkin has attempted to show that a positivist theory of law like Hart's would have normative consequences, would necessarily be compromised with valuations, and thus that an evaluatively neutral theory of law would not be possible (see Dworkin 2006: 143-145; in criticism, see, among others, Endicott 2007 and Perot and Rodríguez 2010). What is surprising is that Dworkin's own theory, which proclaims itself as committed to certain moral values and not evaluatively neutral, does not allow for normative consequences as strong as those that Dworkin attributes to Hart (Dworkin 2006: 13-14).

certain position, whoever formulates judgments from the internal point of view of a certain moral conception (from the internal$_2$ point of view using Redondo's terminology), could not justify his position by appealing to metaethical propositions about whether moral judgments are susceptible to truth values and, in that case, on what determines their truth or falsity. But from the fact that one cannot appeal to arguments "outside morality" to justify a substantive moral position, it does not follow that, apart from having an opinion on a substantive moral issue and arguing in its defense, a certain metaethical position can be defended as well. The external skeptic as such confines himself to arguing at this latter level of analysis, arguing that there is no objectivity in moral discourse, but in the domain of substantive moral argumentation he need not reject every possible position. In other words, a moral judgment such as "Slavery is unjust" is expressed from the internal$_2$ point of view of a certain moral conception, and within it there may or may not be good reasons to support it. If there are, it is possible to affirm, as a normative proposition, that from the moral conception of those who defend it, it is true that slavery is unjust. In this way, it could be argued that if it is possible to speak of the truth of such judgments, their truth is relative to a certain moral conception. An external skeptic need not deny this way of presenting things. What she would reject is that there is such a thing as a moral conception that is privileged or "correct" and that allows any moral judgment to be objectively evaluated.

Dworkin has only two alternatives here. On the first, he can accept this latter view, in which case he would not only have to admit the possibility of skepticism in metaethics but would himself to be a skeptic in metaethics. If he instead rejects it, he would be assuming that there is only one moral conception or that one of them is, for some reason, privileged, true, or correct. Now, as Caracciolo argued many years ago, the criterion for establishing that a certain moral conception is true or correct compared to others cannot be formulated from within itself but only from outside, since from the internal$_2$ point of view of each moral conception, such moral conception is understood as the correct domain.[28] Consequently, Dworkin cannot reject the possibility of skepticism in metaethics because he either accepts that there is a plurality of moral conceptions without any of them being privileged, in which case his own position collapses into skepticism, or to be able to maintain that only one is correct, he must admit the possibility of speaking of morality from outside of it, which is precisely what he criticizes of skepticism in metaethics. Developing this line of criticism, I believe that an argument can be constructed to show that from a point of view like Dworkin's, it is not possible to justify the thesis of the impossibility of a purely descriptive method of approximation when the object to be known is normative.

28 See Caracciolo 2003.

5 CONCLUSIONS

In these pages, I have tried to highlight the merits of Redondo's defense of Internal Legal Positivism, and of the possibility of developing a purely descriptive theory of a genuinely normative object of study like the law. Beyond some minor clarifications, my only contribution in this regard has been to stress the following basic idea.

Commenting on Kelsen's ethical skepticism, Carlos Nino argued that the Austro-Hungarian philosopher derives from this position, without additional premises, a demand for tolerance regarding alternative moral conceptions.[29] Nino is correct in objecting to this derivation as unfounded: a principle of substantive morality, such as the requirement of tolerance, cannot be derived from a metaethical thesis that does not have such a character. However, the basis for that objection also implies that a supporter of skepticism in metaethics would not be in any way undermined by his skepticism in formulating substantive moral principles himself, so long as he adopts the internal point of view of a certain moral conception, something that Nino does not seem willing to recognize.

Analogous considerations can be formulated, I believe, regarding the general methodological perspective that Redondo assumes in her book, according to which there would not be a single adequate method to approach the study of law and social institutions in general.[30] This healthy pluralist assumption does not entail a correlative requirement to be tolerant regarding those who, as Dworkin does explicitly,[31] disqualify as impossible or incoherent a descriptive analysis of a normative reality as postulated by Internal Legal Positivism. From the internal point of view of Internal Legal Positivism, so to speak, it is possible and necessary, as I have tried to argue, to offer an answer to the arguments that try to justify the thesis of the impossibility of this perspective of analysis of the legal phenomenon.

Bibliography:

Bouvier, H. (2012). *Particularismo y derecho. Un abordaje postpositivista en el ámbito práctico*. Marcial Pons.

Caracciolo, R. (2003). *Conocimiento moral.* Talk presented at the XII Seminario de Filosofía y Teoría del Derecho, Vaquerías, Córdoba.

Chiassoni, P. (1998) L'ineluttabile scetticismo della 'scuola genovese'. *Analisi e diritto 1998*, 21-75.

Chiassoni, P. (2013). Normativismo ingenuo v. normativismo crítico. *Analisi e diritto 2013*, 33-44.

Dworkin, R. (1986). *Law's Empire*. Harvard University Press.

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

Dworkin, R. (2004). *Hart´s Postscript and the Point of Political Philosophy.* Oxford Journal of Legal Studies, 24(2), 1-37.

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

29 See Nino 1984/1989: 53.

30 See Redondo 2018: 244 ss.

31 Although I will not try to justify it here, I do not believe that a similar claim can be formulated regarding Genoese realism.

Dworkin, R. (2011). *Justice for Hedgehogs*. Harvard University Press.
Endicott, T. (2007). *Adjudication in the Law*. Oxford Journal of Legal Studies, *27*(2), 311-326.
Ferrajoli, L. (1989). *Diritto e ragionne. Teoria del garantismo penale*. Laterza.
Ferrer Beltrán, J. & Ratti G.B. (2011). Introducción. In J. Ferrer Beltrán & G.B. Ratti (eds.), *El realismo jurídico genovés* (pp. 11-14). Marcial Pons.
Guastini, R. (2012): El escepticismo ante las reglas replanteado. *Discusiones*, 11, 27-57.
Guastini, R. (2015). Un enfoque realista acerca del derecho y el conocimiento jurídico. *Revus. Journal for Constitutional Theory and Philosophy of Law*, 27, 55-65.
Guastini, R. (2017). *Saggi scettici sull'interpretazione*. Giappichelli.
Hart, H.L.A. (1961). *The Concept of Law*. Oxford University Press.
Kelsen, H. (1960). *Reine Rechtslehre*. Frans Deuticke.
Nino, C.S. (1989). *Ética y derechos humanos* (2nd ed.). Astrea. (Original work published 1984).
Perot, P.M. & Rodríguez, J.L. (2010). Desacuerdos acerca del derecho. *Isonomía*, 32, 119-147.
Redondo, C. (2018). *Positivismo jurídico "interno"*. Klub Revus.
Winch, P. (1958). *The Idea of a Social Science and its Relation to Philosophy.* Routledge.

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Un positivismo jurídico "interno": ¿por qué? ¿cómo?

Tras una metódica y erudita discusión de importantes autores de la teoría del derecho, María Cristina Redondo defiende la posibilidad de un positivismo jurídico "interno", que al contrario de lo que hace una aproximación dogmática, analiza el derecho sin justificarlo. Sostiene, además, que una concepción ontológica institucional del derecho sería la forma más adecuada de conseguirlo. La propuesta plantea varias cuestiones: ¿Cómo concretamente es posible analizar el derecho desde un punto de vista interno? ¿Cuál es el *corpus* objeto de la investigación? ¿Es un enfoque institucional del derecho, si no el único posible, el mejor? Este artículo toma en serio las propuestas teóricas de María Cristina Redondo, considerando la posibilidad de un positivismo interno basado en otras concepciones ontológicas del derecho.

Palabras clave: positivismo jurídico, ciencia jurídica, ciencia social, epistemología

Tras una metódica y erudita discusión de la obra de importantes autores de la teoría del derecho (Kelsen, Hart, Ross, Bulygin, Atria, Raz y Guastini, entre otros), María Cristina Redondo defiende la posibilidad de un positivismo jurídico "interno". Sintéticamente este último es presentado como "una teoría que versa, o bien sobre conceptos jurídicos (la teoría general del derecho) o bien sobre el contenido de las normas jurídicas (la dogmática o doctrina referida a las distintas ramas del derecho)" (Redondo 2018: 195-196). La autora sostiene que la teoría ubicada en un punto de vista interno "admite que *existen* creencias o teorías que justifican la institución, (…), sin embargo, no se compromete con el *contenido* de ninguna de ellas" (Redondo 2018: 212). En otras palabras, Redondo defiende la posibilidad de estudiar el contenido y el propio discurso de justificación del derecho, sin necesidad de aceptar dicha justificación ni de contribuir a ella. En consecuencia, una postura considerada "neutral" respecto al derecho no parece ser exclusiva de un punto de vista externo. La autora pretende así diferenciarse de la posición dominante entre los positivistas respecto a la distinción entre punto de vista interno y punto de vista externo, dada su ambigüedad (Redondo 2018: 207 et s.) y a pesar de haber sido objeto de varios diseños (Redondo 2018: 233 et s.).[1] La conclusión es, entonces, "que no existe un único método de estudio en la teoría jurídica y que dicho método depende del modo en el que se configure su objeto, *i.e.* los conceptos institucionales o el contenido de las instituciones jurídicas" (Redondo 2018: 196). Asimismo, Redondo no parece establecer una vinculación necesaria entre la concepción

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1 Ver, en particular, sobre la construcción de esta distinción y sus diversos debates, Spaak 2009: 1 ss.; Hart 1961: 86 ss.; Guastini 2006: 137-145.

ontológica que se tiene del derecho y el estatus modal (descriptivo o prescriptivo) del metadiscurso acerca del derecho.

Consecuentemente, entiendo que la propuesta teórica general de la autora se puede interpretar como la búsqueda de dos posiciones intermedias:

(1) A nivel ontológico, entre una concepción hilética y una expresiva (o empírica) de las normas, para decirlo con el lenguaje de Alchourrón y Bulygin,[2] adherida a una concepción institucional del derecho.

(2) A nivel metodológico y epistemológico, entre un punto de vista interno que necesariamente involucraría un metadiscurso de justificación del derecho, y un punto de vista externo que desarrollaría un metadiscurso de descripción/explicación neutral del derecho (Redondo 2018: 196 et s.).

Respecto a ello, en el presente artículo quisiera, por un lado, señalar un importante acuerdo que tengo con esta posición; por el otro, y sin llegar a un desacuerdo completo, incorporar una importante distinción.

El acuerdo es relativo a la posibilidad de un positivismo jurídico interno cuyas proposiciones no justifican su objeto, es decir, el derecho. Esta propuesta no parece tan extraña, considerando otras ciencias sociales. Se han desarrollado en el marco de estas últimas reflexiones importantes respecto a las posibilidades mismas y a las condiciones que permiten tener un discurso de tipo descriptivo/explicativo que sea objetivo y distanciado respecto a sus objetos de estudio.[3] Además, a mi parecer, la propuesta de Redondo está bastante cerca del "punto de vista externo moderado" sugerido por Hart y explorado por otros,[4] por lo que podría llamarse "punto de vista interno moderado", para resultar más afín a la propuesta de la autora; aunque el matiz entre ambas posturas pueda parecer *prima facie* pequeño.

En consecuencia, la primera pregunta general que suscita la propuesta de Redondo es: "¿Por qué?" ¿Por qué le parece necesario, en el campo de la ciencia y de la teoría del derecho del siglo XXI, justificar la posibilidad de una postura epistemológica y metodológica que es aceptada desde hace mucho tiempo en otros tipos de ciencias sociales (sociología, historia, antropología, y psicología, entre otras)? Parece posible entenderlo, recordando que muchos teóricos positivistas formalistas de tradición kelseniana proponen (reivindican) un punto de vista externo con el fin de diferenciarse de una concepción dogmática de la ciencia jurídica que, para racionalizar, perfeccionar y justificar el derecho vigente, adopta un punto de vista interno. Entre ambas posturas, la propuesta metodológica de Redondo tiene su originalidad en tomar lugar dentro de un espacio "teórico" y "epistemológico" estrecho (§ 1).

2 Alchourron & Bulygin 1981: 95-124.

3 Ver Tamahana 2006: 1255; Chérot 2007:17-33; Champeil-Desplats 2016: 284ss.

4 Hart 1961: 86 s.; Chérot 2007: 17-33.

No obstante, y aquí vienen los puntos de discrepancia con Redondo, su libro parece el anuncio general de un programa científico que merecería más precisiones acerca del "cómo". ¿Cómo concretamente debemos analizar el derecho desde un punto de vista interno? ¿Cuál es el *corpus* objeto de la investigación? Estas preguntas conducen a pensar el despliegue de un positivismo jurídico interno no sólo a partir de una concepción institucional de la ontología del derecho, sino también, quizás más aún, a partir de concepciones empíricas de las que la autora desea apartarse. Esto confirmaría, como afirma Redondo, no solo que "no existe un único método de estudio en la teoría jurídica" sino también que el positivismo jurídico interno que propone puede acomodarse a varias concepciones ontológicas y definiciones del objeto de la ciencia del derecho. Estas últimas no se reducen, entonces, necesariamente a la concepción institucional que defiende la autora (§ 2).

1 LAS VÍAS EPISTEMOLÓGICAS ESTRECHAS DEL POSITIVISMO JURÍDICO INTERNO

La originalidad de la defensa de un positivismo jurídico interno se entiende mejor reformulando los aspectos generales, históricamente dominantes, atribuidos a la ciencia jurídica. Podríamos afirmar que la propuesta de un positivismo jurídico interno surge como punto intermedio entre una construcción dogmática de la ciencia jurídica (§ 1.1) y una reacción positivista de la que se han construido teorías generales del derecho meramente formalistas (§ 1.2).

1.1 Construcción dogmática de la ciencia jurídica

Desde un punto de vista analítico tanto las funciones como el estatus lógico, y los modos de conceptualización y razonamiento que estructuran los metadiscursos científicos son, en principio, distintos de los que caracterizan el discurso-objeto (esto es, el derecho en sí mismo). Mientras que los enunciados que constituyen el derecho son normativos en el sentido de que tienden a prescribir y enmarcar comportamientos (prohíben, obligan o permiten), el metadiscurso científico es conocido por tener una función descriptiva y explicativa en relación con su objeto. Sin embargo, por varias razones, existe históricamente en el ámbito jurídico una fuerte interferencia, vista como un mimetismo, entre los dos niveles de discurso. En otras palabras, mientras que es raro que el especialista de literatura escriba su análisis en forma de novela (Borges podría haberlo hecho), que el antropólogo se identifique con los pueblos que estudia (aunque pueda temporalmente vivir con ellos) o que el sociólogo adopte la posición social de los que observan (a pesar de sus experiencias sociológicas participativas), existe una tendencia estructural de los juristas académicos a concebir

su trabajo como la reproducción, la racionalización o el perfeccionamiento, de los métodos, conceptos y modos de razonamiento que adoptan las autoridades normativas. El derecho es entonces reconstruido como un objeto racional, perfecto, al cual todos los juristas, sea cual sea su posición profesional, deben contribuir. En otras palabras, los juristas deben trabajar juntos para construir "El Derecho": la ciencia del derecho y su objeto, el derecho, se presupone que comparten la misma racionalidad. Varias razones pueden explicar este fenómeno de fusión y confusión de niveles de discurso.

En primer lugar, durante mucho tiempo la frontera entre los juristas profesionales y los académicos ha permanecido porosa. La antigua figura del jurisconsulto, que podía trabajar a la vez como juez, administrador y erudito, ha sido sucedida por la del "consejero del príncipe" o la del "profesor-juez". El posicionamiento institucionalmente híbrido de estos actores tiende a favorecer la confusión de los niveles del discurso jurídico y metajurídico, y amplía la expresión de discursos internos de justificación y racionalización *a posteriori* de las decisiones de las autoridades normativas, en lugar de sus descripciones y explicaciones.

En segundo lugar, incluso cuando cada uno se dedica a una tarea separada y específica, existen varias formas de interacción entre los niveles de discurso. Como lo señala Friedrich Müller, por un lado, "la metodología, la dogmática, la enseñanza, la sistematización" del derecho propuesta por los académicos puede influir "en la concreción del derecho operado por el legislador, la administración o los jueces. Sus métodos de trabajo aparecen así parcialmente 'cientifizados'".[5] Por otro lado, como ya he subrayado, muchos académicos conciben su trabajo como una obra de reproducción, racionalización y perfeccionamiento del derecho positivo y, en particular hoy, del razonamiento judicial, adoptando una concepción dogmática de la ciencia del derecho. Esta labor dogmática puede luego transformarse en teorías de mayor amplitud que proponen modelos de razonamiento a los jueces reputados más coherentes, lógicos y justos que los que éstos últimos adoptan efectivamente. Este doble movimiento de "cientifización" del discurso jurídico y de "jurisdiccionalización" contribuye también a una confusión del contenido de los niveles del discurso.

1.2 La reacción positivista

La dimensión evaluativa, justificadora y prescriptiva del discurso dogmático es precisamente lo que lleva a los positivistas más exigentes a rechazar sus pretensiones de tener un estatus científico.[6] Poniendo en el centro de su programa epistemológico tanto la distinción entre hechos y valores como la oposición entre neutralidad axiológica del discurso científico y los juicios de valor, los positivistas han defendido la finalidad descriptiva y explicativa de la ciencia del derecho,

5 Müller 1996: 164.

6 Ver Ross 1958: 11; Ross 1968: 1-8; Troper 2003: 61; Troper 2001: 3.

cualquiera sea su contenido moral o ideológico. Como lo explica Hans Kelsen en el prefacio de su *Teoría Pura del Derecho*, el objetivo único de la ciencia jurídica es el conocimiento del derecho y "acercar los resultados de este trabajo de conocimiento al ideal de toda ciencia: la objetividad y la exactitud".[7] Del mismo modo, para Norberto Bobbio, "el positivismo querrá insistir en que la crítica de las leyes es distinta de la teoría jurídica, porque no puede ejercerse con el mismo rigor y no puede ser una 'ciencia'".[8] Esta exigencia de neutralidad axiológica es entonces la que permite a los positivistas distinguir el discurso científico de discursos de otros tipos, ideológicos, políticos, morales, religiosos, etc.

Esta asociación de la ciencia del derecho con un trabajo de descripción axiológicamente neutro está unida a la obra de Kelsen, y para muchos de sus discípulos, a una concepción bastante restrictiva del objeto de las teorías generales del derecho, llamadas a concentrarse en el análisis de las formas y en la estructura del derecho. Como Hans Kelsen anunció

> la *Teoría Pura del Derecho* es una teoría del derecho positivo, del derecho positivo en general (…); no es una teoría de un orden jurídico particular; no tiene por objeto interpretar tal o cual conjunto de normas jurídicas nacionales o internacionales. Es una teoría general del derecho (como tal, incluye, por supuesto, una teoría de la interpretación jurídica).[9]

Si, como Kelsen indica, la teoría general del derecho puede tomar la forma de las teorías centradas en la interpretación, en los razonamientos o argumentaciones jurídicas, lo que interesa a la teoría general del derecho supera el estudio del funcionamiento de un ordenamiento jurídico concreto. Una vez más, el objeto de las teorías generales del derecho se distingue claramente del de la dogmática jurídica: a las primeras, les interesa tanto el análisis de las formas y estructuras del derecho como las reflexiones sin fines prácticos, mientras que a la segunda, le interesa el estudio del contenido preciso de lo que prescriben los ordenamientos jurídicos nacionales o internacionales y el posible uso de modelos teóricos para comentar y resolver casos concretos.[10] Así pues, en la gran mayoría de los casos, las teorías generales del derecho contemporáneas se centran en el análisis de fenómenos transversales a los distintos ordenamientos jurídicos: en el análisis de los conceptos jurídicos fundamentales (derecho, sistema jurídico, norma, jerarquía de normas); en la identificación y fundamento de las normas jurídicas; en el análisis de los métodos de interpretación, razonamiento o argumentación; en la determinación de la relación entre el derecho y la lógica, el derecho y la moral, etc.

7 Kelsen 1962: VII.

8 Bobbio 1996: 27.

9 Kelsen 1962: 1.

10 Véase también sobre una distinción de los tipos de discurso metajurídico, MacCormick & Weinberger 1992.

Finalmente, es comprensible que, entre un punto de vista interno, dominado por un enfoque dogmático que tiende a justificar la producción de derecho positivo vigente, y las teorías generales descriptivas, que no tienen en cuenta el contenido del derecho y proceden mediante construcciones y razonamientos esencialmente abstractos y deductivos, el camino de un positivismo jurídico interno propuesto por Redondo parezca ser estrecho. Sin embargo, como sugiere la autora, deja espacio suficiente para varios programas de investigación.

2 LAS VÍAS TEÓRICAS ABIERTAS DE UN POSITIVISMO JURÍDICO INTERNO

El camino del positivismo jurídico interno no carece de precedentes. Las obras que lo han explorado muestran que esta postura no requiere necesariamente la adhesión a la concepción institucional del derecho que defiende Redondo (§2.1). El punto central sigue siendo que su propuesta teórica plantea cuestiones importantes sobre los métodos de la teoría general del derecho en el siglo XXI (§ 2. 2.).

2.1 Algunos precedentes

Mientras que las teorías positivistas se han centrado históricamente en el estudio de las formas y estructuras del derecho, Redondo sostiene que es posible mantener sus requisitos de neutralidad y de no justificación desarrollando teorías generales del derecho que se preocupen del contenido y, añadiría, de los discursos y procesos de auto-justificación internos al derecho. Si, como ya he subrayado, Redondo vincula esta postura a la adopción de una concepción institucional del derecho, no veo obstáculos (al menos no mayores a los que se desarrollan también a partir de otras concepciones ontológicas del derecho, en particular las empíricas) que el derecho sea considerado como un conjunto discursivo compuesto por enunciados lingüísticos (tradición analítica), o como un conjunto de comportamientos (tradición realista). Por cierto, como recuerda Redondo, uno de los programas científicos del realista Alf Ross para poder explicar las decisiones de los jueces, era estudiar sus ideologías normativas, es decir, sus creencias sobre lo que es el derecho, en particular, sobre los conceptos y razonamiento jurídicos.[11]

Por su parte, Norberto Bobbio también introdujo las teorías de la justicia en el campo de la teoría general del derecho. Y no hay duda de que para el autor este tipo de teorías no consiste en especular sobre la esencia de los conceptos jurídicos y, entre todos de ellos, en el de la justicia, como lo habían hecho los iusnaturalistas, sino en "esforzarse en partir de fenómenos jurídicos" empíricos

11 Ross 1958*:* 37 ss.

para analizar concretamente los modos de razonamiento y presupuestos ideológicos o morales de los discursos producidos por las autoridades normativas.[12] Esto es, en definitiva, lo que el autor realiza ampliamente al estudiar los discursos jurídicos y metajurídicos sobre los derechos humanos, aunque admite que dentro de la teoría política en la que sitúa su estudio de los derechos humanos, la neutralidad es más difícil que en el marco de teorías jurídicas generales, que se concentran en el estudio de las formas y la estructura del derecho.[13] El hecho es que, a la luz de esta experiencia *bobbiana*, se puede admitir la posibilidad de un discurso teórico sobre los derechos humanos que responda a las exigencias epistemológicas y metodológicas del positivismo y, en consecuencia, que no de necesariamente lugar a una justificación.

En este sentido, Bobbio no es el único que ha explorado este camino. Desde finales del siglo XX, en el campo de la teoría del derecho se han presentado varias propuestas de deconstrucción analítica de los discursos jurídicos relativos a los derechos y libertades, poniendo de relieve su función de justificación de las decisiones, especialmente jurisdiccionales, adoptadas en los ordenamientos jurídicos contemporáneos que pretenden regirse por el Estado de derecho.[14] Del mismo modo, y más generalmente, el análisis descriptivo y explicativo de los principales conceptos jurídicos que constituyen el Estado y que justifican su ejercicio de poder (soberanía, representación, entre otros) está en el centro de la investigación de una teoría jurídica del Estado que se diferencia no solo de otros tipos de teorías disciplinarias (sociológicas, históricas en particular), sino también de un discurso interno según el cual resulta justificado el ejercicio del poder.[15]

Es posible que tales aproximaciones internas al derecho tiendan a perder un grado de generalidad con respecto a los enfoques formales o estructurales de las teorías generales del derecho más clásicas. La razón es que ciertos contenidos de normas no se encuentran en todos los ordenamientos jurídicos y, por lo tanto, no constituyen una condición *sine qua non* para su definición. Sin embargo, no toda pretensión de generalidad es excluida al identificar conceptos que estructuran y justifican la producción de normas en un número significativo de ordenamientos jurídicos, como, por ejemplo, los ya evocados de representación, soberanía, responsabilidad o, desde la Segunda Guerra Mundial, los de derechos fundamentales, dignidad y Estado de derecho.[16] Las investigaciones realizadas en Italia sobre el neoconstitucionalismo, también pueden integrarse en esta perspectiva de análisis de las evoluciones del contenido del derecho contemporáneo sin justificarlo.[17]

12 Troper 2007: 244 ss.

13 Bobbio 1990.

14 Troper 2007; Guibourg 2013: 167; Ferrajoli 2001.

15 Troper 1994.

16 Ver por ej., Troper 2003; Girard & Hennette-Vauchez 2005; Champeil-Desplats 2019.

17 Ver Barberis 2003: 259-278; Pozzolo 1998: 339; Comanducci 2009: 89.

2.2 El desafío de la identidad disciplinaria

En tanto que altera la centralidad que habitualmente se confiere al estudio de las formas y de las estructuras del derecho, el análisis interno de los conceptos jurídicos plantea inevitablemente el problema de la delimitación disciplinaria de las teorías generales del derecho. ¿Con qué herramientas metodológicas y conceptuales se puede desarrollar el positivismo jurídico interno que propone Redondo?, ¿son suficientes los instrumentos del análisis lógico y del análisis del lenguaje?

La autora no responde, al menos en este ensayo, a estas preguntas. Con respecto a ello, si volvemos a los realistas escandinavos, veremos que fueron precursores en el análisis de las ideologías jurídicas y de los factores que conducen a producir las decisiones judiciales o a aceptar las normas jurídicas, procediendo a una apertura hacia las ciencias sociales, especialmente la psicología y la sociología.[18] Asimismo, como he aludido, Bobbio procede a un análisis de los derechos humanos y del concepto de democracia, más en el marco de una teoría política, que se basa en la historia del pensamiento y de la filosofía jurídica, que en el marco de la teoría general del derecho. Este problema de los métodos y marcos conceptuales resurgió con mayor intensidad cuando el autor propuso trasladar el objeto de la teoría general del derecho del estudio de la estructura del derecho al de sus funciones. Como el propio Bobbio señala "el paso de la teoría estructural a la teoría funcional es también el paso de una teoría formal (¡o pura!) a una teoría sociológica (¿impura?)".[19]

El problema epistemológico que, en consecuencia, se plantea al teórico positivista al analizar el contenido normativo, es determinar en qué medida se encuentra todavía en el marco de una teoría "jurídica" del derecho. Está claro que todo depende de la concepción que tengamos de lo que es una teoría de tal tipo. Pero es bastante claro también que no todos quienes adhieren a los requisitos metodológicos mínimos que identifican al positivismo jurídico (la neutralidad axiológica y el trabajo de descripción/explicación, en particular) comparten una misma concepción de lo que es una teoría específicamente jurídica, en parte porque no tienen la misma concepción y definición de lo que es el derecho positivo: ¿un conjunto de enunciados explícitos y/o implícitos de reglas, normas, comportamientos efectivos, creencias, decisiones institucionales…?

Por lo menos, podemos recordar la especial atención que muchos positivistas pusieron para evitar los sincretismos metodológicos.[20] Por esta razón, los que han dado algunas señales de apertura disciplinaria han preconizado más una aproximación *pluri*disciplinar, que respeta la identidad de cada una de las

18 Vease Olivecrona 1939; Olivecrona1971; Ross, 1958; respecto a Alf Ross, ver Guastini 1993: 264.

19 Bobbio 2012: 36.

20 Kelsen 1962: 1-2. Ver también, Bobbio 2012: 84; Eisenmann 2002: 511.

disciplinas movilizadas, que una aproximación *inter*disciplinar, que mezcla los conocimientos y métodos. Sin embargo, nada está fijo en este punto, menos aún desde el nuevo siglo; es decir, en un momento en que los límites disciplinarios y los fenómenos normativos se están transformando. Nada excluye que la apertura hacia disciplinas que hoy analizan nuevas formas de expresión normativa, regulación y control del comportamiento social, ofrezca herramientas más sofisticadas que las teorías generales del derecho fundadas durante el siglo XX, para comprender las redefiniciones formales, estructurales y materiales del derecho en el siglo XXI.

3 CONSIDERACIONES FINALES

El libro de María Cristina Redondo es de gran interés para estimular la reflexión sobre los nuevos rumbos que puede tomar la teoría jurídica contemporánea, basada en una tradición positivista. De su propuesta a favor de un positivismo jurídico interno parecen surgir dos desafíos. Por una parte, el de un posible luto que debe hacerse hacia una cierta generalidad, abstracción y enfoque esencialmente lógico-deductivo de las teorías jurídicas. Después de todo, a Bobbio a veces le gustaba recordarnos que no hay teoría del derecho sin derecho. Por otra parte, el desafío de la identidad de las teorías jurídicas del derecho. ¿Con qué herramientas metodológicas y disciplinares debe realizarse el análisis positivista jurídico interno para que no sea otra cosa que la repetición, apenas generalizada, de los propios discursos jurídicos y, en consecuencia, para que no conduzca, como quiere evitar Redondo, a sus justificaciones? La autora, consecuentemente, nos invita a reflexionar acerca de una profunda renovación del objeto y de los métodos de las teorías generales del derecho para este nuevo siglo. A mí parecer la aproximación institucionalista que propone Redondo no es la única vía adecuada para enfrentar este desafío. La teoría del derecho positivista tiene todo para ganar al abrirse a las experimentaciones de otras ciencias sociales que se han interesado en estos últimos años en los discursos públicos y sus justificaciones, tal como la sociología pragmática. El objetivo no es convertirse en sociólogos o psicólogos, tal como lo preconizaban los realistas del principio del siglo XX, sino renovar las herramientas metodológicas y conceptuales de análisis de los discursos jurídicos, adoptando un punto de vista interno moderado que respete las exigencias de neutralidad axiológica y distanciación crítica respeto de su objeto de estudio.

Bibliografía:

Alchourron, C., Bulygin, E. (1981). The Expressive Conception of Norms. In R. Hilpinen (ed.), *New Studies in Deontic Logic* (pp. 95-124). Reidel.

Barberis, M. (2003). Neoconstitucionalismo, democracia e imperialismo de la moral. In Carbonell M. (ed.). *Neoconstitucionalismo(s)* (pp. 259-278). Trota.

Bobbio, N. (1990). *L'età dei diritti*. Einaudi.

Bobbio, N. (1996). *ll positivismo giuridico.* Giapichelli editore.

Bobbio, N. (2012). *De la structure à la fonction*, (trad. francesa D. Soldini), Dalloz

Champeil-Desplats, V. (2016). *Méthodologies du droit et des sciences du droit.* Dalloz.

Champeil-Desplats, V. (2019). *Théorie générale des droits et libertés*. Dalloz

Chérot, J. (2007). La question du point de vue interne dans la science du droit. *Revue interdisciplinaire d'études juridiques*, 59, 17-33. https://doi.org/10.3917/riej.059.0017

Comanducci, P. (2009). Constitucionalización y neoconstitucionalismo. In P. Comanducci, M. Angeles Ahumada, D. Gonzales Lagier, *Positivismo jurídico y neoconstitutionalismo*. Fundación coloquio jurídico europeo.

Eisenmann, C. (2002). Droit constitutionnel et science politique. *Revue internationale d'histoire politique et constitutionnelle* (1957), rééditado en Ch. Leben, *Ecrits de théorie du droit, de droit constitutionnel et d'idées politiques.* Ed. Panthéon-Assas.

Ferrajoli, L. (2001). *Diritti fondamentali. Un dibattito teorico.* Laterza.

Girard, Ch., Hennette-Vauchez, S. (2005). *La dignité : recherche sur un processus de juridicisation.* PUF.

Guastini, R. (1993). Alf Ross : une théorie du droit et de la science juridique. In Amselek P. (dir.), *Théorie du droit et science*. PUF

Guastini, R. (2006). Le 'point de vue' de la science juridique. *Analisi e diritto* 2006, 137-145.

Guibourg, R. A. (2013). On Rights. *Analisi e Diritto 2013*, 165-175.

Hart, H.L.A. (1961). *The Concept of Law*. Oxford University Press.

Kelsen, H. (1962). *Théorie pure du droit*. Dalloz.

MacCormick, N., Weinberger, O. (1992). *Pour une théorie institutionnelle du droit*. LGDJ.

Müller, F. (1996). *Discours de la méthode juridique* (1993). PUF.

Olivecrona, K. (1939). *Law as Fact.* Humphrey Milford.

Olivecrona, K. (1971). *Law as Fact* (2nd ed.). Sweet & Maxwell.

Pozzolo, S. (1998). Neoconstitucionalismo y especifidad de la interpretación constitucional. *Doxa*, 21-II.

Ross, A. (1958). *On Law and Justice*. Stevens and Sons Limited.

Ross, A. (1968). *Directives and Norms*. Routledge & Kegan Paul.

Spaak, T. (2009). The legal Philosophy of Ingemar Hedenius. In Pattaro, E. (ed.), *A Treatise of Legal philosophy and general jurisprudence* (vol. *11*(2), pp. 1 et s.). Springer.

Tamahana, B. Z. (2006). A Socio-legal Methodology for the Internal/External Distinction: Juris2-prudential Implications. *Fordham Law Review*, 75 (Dec).

Troper, M. (1994). *Pour une théorie juridique de l'État*. PUF, coll. Léviathan.

Troper, M. (2001). Science du droit et dogmatique. *La théorie du droit, le droit et l'Etat*. PUF.

Troper, M. (2003). *La philosophie du* droit. PUF

Troper, M. (2007). Le positivisme et les droits de l'homme. In B. Binoche, J.-P. Cléro (ed.), *Bentham contre les droits de l'homme*. PUF.

Pablo A. Rapetti*

Internal legal positivism: "Hurrah," "Boo," "Ehhh…"?

This paper offers a focused analysis of Cristina Redondo's latest book, *Positivismo jurídico "interno."* I first point out the lack of a discussion regarding what a *participant* (of the legal practice) is. I then emphasize that Redondo's distinctions between the internal and external points of view, which she offers in order to shape her favoured form of positivistic metatheory, are incompatible with an expressivistic rendition of first-order legal language. Since what constitutes the best rendition of first-order legal language is a controversial *theoretical* matter, a *meta*theoretical framework would be, in principle, preferable to others since it does not prejudge such a matter. Finally, I suggest an alternative strategy to arrive at a metatheoretical model similar to Redondo's, but which does not incur that particular problem.

Keywords: internal legal positivism, participants, legal theorists, semantic expressivism

1 INTRODUCTION

Definitely: hurrah! *Positivismo jurídico "interno,"* by Cristina Redondo, is a milestone in the analytic legal (meta)theory of this century. It is a highly stimulating book, meticulously argued, yet never tiresome or excessively hard to follow. In it, Redondo manages to address a large part of the most pressing controversies in current legal philosophy, discussing them with dedication and carving a path by connecting them together toward a metatheoretical model, which can seriously claim to be original and novel.

Given the impossibility of tacking the full breadth and scope of the themes and discussions Redondo analyzes, in the following I concentrate on disputing the central claim of her book. Hopefully, this exercise will also allow me to gauge my own stance regarding internal legal positivism. Aware that if I am not already a full-fledged internal legal positivist that I at least feel very close to it, I believe this could be a good exercise in measuring our proximities.

Now, it may help to hint in advance at I intend to argue in my paper. I will direct two criticisms to Redondo's central idea, both of which are external in character. On the one hand, I will argue that the book lacks a proper philosophical reconstruction of the features defining the *participants* of legal practices as

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such and, in particular, the kind of language we may attribute to them[1] –*i.e.*, *first-order* legal language. On the other hand, I will argue that careful consideration of this absent element reveals that certain philosophical assumptions contained in the book, for which no argument is put forward, have a much heavier weight than apparent in the proposal of an *internal* version of legal positivism. More specifically, I think that should semantic expressivism turn out to offer an appropriate way of depicting first-order legal language, then Redondo's distinctions between two modes of understanding the *internal/external* binomial would be untenable.[2] And so the conceptual space Redondo carves out to locate internal legal positivism in the metatheoretical map would be lost - at least in the specific way she sketches.

2 INTERNAL LEGAL POSITIVISM AND ITS DISTINCTIONS

Internal legal positivism, as proposed by Redondo, is conceived as an alternative to what she marks as the two preeminent metatheoretical options in contemporary general jurisprudence. On the one hand, we have a version of legal positivism founded upon skepticism about the possibility of knowing normative contents. In Redondo's words:

> According to this skeptic position every theoretical discourse about legal institutions is, necessarily, a discourse made from an external point of view, which assumes no commitment whatsoever regarding the beliefs justifying such institutions. The theorist referring to an institutional reality such as the law, for example, is a neutral observer, her language is exclusively descriptive and of an empirical content.[3]

On the other hand, we have interpretive antipositivism, according to which every discourse relative to legal institutions in necessarily internal to those institutions and is somehow committed to a justification of them. Thus, the discourse by someone who proposes an interpretive study or understanding of the law operates at the same level as that of legal participants and shares with it a normative and justificatory character.

1 It is of course controversial whether, when it comes to accounting theoretically for the role of the legal participant, one "discovers" the kind of language distinctive of such role or rather "attributes" a kind of language to it. Furthermore, it is controversial whether there is only one kind of language characteristic of the role (perhaps the present paper could be taken as a hint to this being the case). Regarding the first issue, I would like to make clear that in this article I use the word "ascribe" in a neutral fashion, without taking sides on any of the views on offer.

2 Hence (plus some playful spirit) the title of this paper. As we will see, it is usual to draw a link between current expressivism and the metaethical emotivism most fashionable during the mid-20th century. As is known, emotivism represents normative statements favourable to X as "Hurrah: X" and those unfavourable to X as "Boo: X". Along these lines, "Ehhh: X" could be taken as representing an expression of doubt or wondering.

3 Redondo 2018: 196. All translations of Redondo's work are mine.

Both views assume what Redondo calls "the impossibility thesis," that is, they both reject the possibility of a purely informative and descriptive approach when the object of inquiry is of a normative character –as is the case, according to Redondo, with the law (*i.e.*, legal rules). That kind of description would be precisely what is impossible. Thus, whereas "skeptical" legal positivism attempts to reduce normative phenomena to empirical matters governed by causal relations apt for description, interpretive antipositivism rejects the possibility of description, submitting that the jurisprudential approach to normative contents must be consequently normative too.

It may be noticed that the characterization of both views is built upon a distinction between an internal and an external point of view towards the law as an object of inquiry. Positivism intends the adoption of an external perspective towards it, while interpretivism holds that there is no alternative to the internal perspective, which, by the way, implies seeing the legal theorist as also acting *qua* a legal participant, thereby contributing to the conformation of the law itself: her work has ontological import. While Redondo begins with the internal/external distinction as classically drawn by Herbert Hart, she takes it to be founded upon an ambiguity, which she aims to dispel. Redondo thus posits there are actually two *internal/external* distinctions that should be borne in mind, and she labels them "semantic" and "pragmatic."

The distinction in semantic terms would be relative to

> two methodological and discoursive approaches with which it is possible to face a social institution. In this case, the external point of view approach is that which, from the perspective of a third person, attempts to describe and explicate the exclusively empirical and behavioural aspects of an institution; whereas the internal point of view approach is that which, still from the perspective of a third person, attempts to capture and explicate the *concepts* with which the participants of an institution refer to it, or the meaning the institution has for those who accept it from the first-person stance. That is, for those who –via their behaviours, beliefs or attitudes– constitute it and keep it alive.[4]

Crucially, this distinction offers, according to Redondo, a basis for identifying different kinds of discourses and statements: "considering the content of a statement suffices to establish whether it provides information from an internal or an external point of view."[5]

With the distinction thus drawn, Redondo respectively calls these points of view "internal$_1$" and "external$_1$."

On the other hand, we find what she calls the "internal$_2$" and "external$_2$" points of view. According to this second distinction, drawn in a pragmatic fashion, the contrast

> is used to indicate either the presence or absence of a practical attitude of acceptance or approval that an agent may or may not have towards the normative content of

4 Redondo 2018: 203. Italics in the original.

5 Redondo 2018: 205.

certain social institutions. That is to say, towards the rules composing an institution. Specifically, she who assumes an internal point of view in this sense does not only understand and use the normative concepts in force in a social group, but she is also committed to, and justifies, the rules followed by the group.[6]

In contrast with "internal$_1$" and "external$_1$", this second distinction does not allow for a further distinction between two different kinds of statements: "the same kind of discourse referring to a normative object or content can be formulated or proposed with the attitude making for either the external$_2$ point of view or the internal$_2$ point of view."[7]

The conceptual space for an internal version of legal positivism that transcends the two established options cracks open with this twofold internal/external distinction. For, once the distinction is drawn, it allows us to see the possibility of a theoretical perspective given by the adoption of the external$_2$ point of view, which nonetheless formulates statements belonging to the internal$_1$ point of view. In Redondo's opinion, this will be necessary in turn if one acknowledges that the legal objects of theoretical inquiry are concepts and meanings, whose ontological category is basically abstract and therefore irreducible to bare empirical facts.

3 PARTICIPANTS AND THEORISTS

Despite the complexity introduced by Redondo's twofold distinction, it is not clear to me that it contributes much to the demarcation between the roles of the participant and the theorist in the context of her book. The fact is that, unfortunately, Redondo offers very little with which to characterize the notion or role of participant, particularly regarding the kind of discourse (if any) that would be distinctive of it. She certainly tells us that the actions, beliefs, and attitudes of each participant of the legal practice contribute to making the law, and we may surely include here the statements they formulate.[8] She also tells us (better put: she insinuates) that in some sense it can be acknowledged that the statements belonging to an internal-positivistic theoretical approach are on the same level as those of participants, *although they have a different subject-matter*: basically, legal concepts for the theorist and the content of the specific legal institutions for the participant.[9] This, however, prompts the question of whether the role of the internal-

6 Redondo 2018: 208.

7 Redondo 2018: 210-211.

8 Redondo 2018: 212.

9 Redondo 2018: 228-229. Throughout these pages Redondo actually talks about two kinds of discourses she designates as "theoretical." However, she does so when debating with Dworkinian antipositivism, characterized as equating theoretical discourse and participative discourse. Thus, she opposes it to the possibility of a "theoretical" discourse relative to the analysis of institutional concepts, but does not dispute the possibility of the other "theoretical" discourse referred to by Dworkin, relative to the content of particular institutions. Even if

positivist theorist also contributes to making its very object of inquiry –something Redondo apparently rejects.[10] The question arises in this context because she also insists that the legal-theoretical endeavour aims at knowing and explicating the law, and that legal-theoretical statements have a mind(word)-to-world direction of fit.[11] Furthermore, we may ask: what is, then, that which constitutes and characterizes as such the first-order legal language and the participant's role? It seems to me that the lack of answers to these questions can best be found by looking at Redondo's drawing of her second internal/external distinction.

As we have seen, that second distinction has to do with the presence or absence of the attitude of acceptance. Here, Redondo refers specifically to the Hartian conception of acceptance and designates it as an attitude of "commitment" regarding rules or institutions that

> can be described in non-cognitive terms as an attitude of adherence or acceptance with respect to the rules in question. Or else, in cognitive terms, directly as a set of beliefs which justify such rules.[12]

Perhaps Redondo would like to distinguish between participants and theorists precisely by means of the fact of the adoption (or not) of the attitude of acceptance. Thus, the one adopting it will count as a participant. But this would be problematic because she characterizes the interpretive *theorist* as one who adopts the internal point of view, who is thereby someone adopting the attitude of acceptance. Instead, it seems to me that, from the framework of internal legal positivism, the interpretivist is simply precluded to be considered a "theorist" proper.

In any event, Redondo may claim she has not sought to distinguish between participants and theorists, but between theorists and accepters.[13] Hence, the interpretivist is an accepter, whereas the internal legal positivist is not. However, I think Redondo's characterization of the idea of acceptance has some shortcomings. As we have just seen, on the non-cognitive reading, the accepter is such because of her commitment defined as adherence to or acceptance of rules. But this is viciously circular. On the opposite side, for the cognitive reading, the accepter has a set of beliefs in virtue of which she deems the (accepted) rules as justified. But how to understand "justification" in this context is not quite clear.

Redondo challenges details of the interpretive understanding on this issue, she does not seem to reject the equivalence of this latter kind of "theoretical" discourse with that of the participants. Hence my claim in the main text.

10 And which constitutes a potential criterion for the elusive distinction I am speaking of.

11 See, *e.g.*, Redondo 2018: 167.

12 Redondo 2018: 208. Footnotes omitted.

13 Should it be so, I would maintain that we are still missing something more about the notion of a *participant*, or at least an argument showing why the notion is otherwise theoretically irrelevant. After all, the strategy I am articulating implies that the participant does not equate to the accepter, nor to the theorist, nor to the agent who formulates first-order legal statements, nor to the agent who formulates statements of a certain (unitary) subject-matter.

If the idea was that accepting a legal rule amounts to deeming whatever the rule establishes as legally justified, then that would certainly suit the way Hart himself expounded the concept of acceptance. But this says very little in connection to Redondo's aims: being someone who thus "accepts" a rule is not very different from being someone who holds that, if such rule commands to do X, then X is what should be *legally* done –no matter if, at the same time, one holds that there is no other reason[14] to do X and, perhaps even more still, that maybe there are multiple reasons of other kinds to refrain from doing X. If the idea was, instead, that the accepter deems the rule justified *simpliciter*,[15] then Redondo would be distorting Hart's proposal, since he explicitly made clear that the acceptance of legal rules does not require other kinds of endorsement –in particular, moral approval.[16]

I do not intend to dwell on any of these issues, but just to show a lack of precision in the way Redondo conceives of accepters, in the same way I found her work on participants left wanting. Accordingly, I would like to highlight something mentioned a few lines above, namely, the question concern which of the readings identified by Redondo –the cognitive or the non-cognitive– we should prefer and for what (theoretical, conceptual, explicative) reasons. Redondo does not offer arguments in any direction. In connection to the present point, she submits the following, right after the last passage I quoted:

> In what follows, and just not to shy away from the terms a large part of contemporary literature employs, I will adopt a cognitivist language and assume that someone who adopts the internal point of view towards an institution, i.e., who accepts it, is one who explicitly proposes, or implicitly presupposes, the truth of some set of beliefs which justify it. In any case, on this reading we can notice that both the internal and the external point of view are adopted towards the same type of object: the content of normative concepts or statements. That is to say: they are adopted towards internal$_1$ statements.[17]

This passage, it seems to me, shows two things. First, it reinforces what I have said about the absence of a more elaborate characterization of the concept of participant. This is in part because the point of view is adopted towards the content of normative concepts or statements is asserted –that is, internal$_1$ state-

14 Or, perhaps, that there is no single "genuine" reason, should that presuppose a concept of *reason* construed in a somewhat more substantialist way, that is, including minimum material restrictions and contents.

15 As Redondo occasionally seems to suggest; see *e.g.*, Redondo 2018: 219-220.

16 Hart, 2012: 114-116; Hart 1982: 146. Strictly speaking, the distortion would take place if, in addition, one assumes (and attributes to Hart) the *thesis of the unity of practical reasoning*, giving moral considerations the paramount position or seeing them as the only *genuine* reasons. All of this is rejected in Redondo, 1999. The distortion would not take place, however, if one assumes instead the *thesis of practical reasoning's fragmentation*, but in this case the option collapses into the relatively trivial and insufficient first option.

17 Redondo 2018: 208-209. Footnote omitted.

ments. Should it be so, then what kind of statements do participants formulate? I surmise that *more internal$_1$ statements* is the answer to expect, but then (1) the problem rises that such statements are supposed to be formulated, according to Redondo's definition, from a third-person perspective, yet it could be argued that statements, let us say, "of law", stem *characteristically* from a first-person perspective.[18] And thus, (2) we again face the lack of a further distinction between the statements made by participants and those made by theorists. The idea that participants formulate other internal$_1$ statements fits well with something we have already seen –that, according to Redondo, there is some sense in which the language of the participant and that of the internal-positivist theorist operate at the same level. Yet, alongside that, we have also seen that they are to be differentiated by their corresponding subject-matter: the contents of particular legal institutions, and legal concepts, respectively. And now it looks like accepters (participants?) do indeed formulate statements relative to both (concepts and institutional contents).[19] Moreover, the question of the kind of reading we shall make of acceptance, which is the attitude distinctive of the internal point of view (internal$_2$ here), seems to amount to an important aspect of the characterization of what a participant is (an aspect closely linked to the characterization of the kind of language we are to ascribe to participants).[20]

Second, the passage seems to show that, in Redondo's opinion, the choice between a cognitive or a non-cognitive language is of no major significance for

18 This is consubstantial to the basic understanding of the law as a social phenomenon (or socially constructed or grounded), which every positivistic approach, including the *internal*, shares. In this sense, even a rule created by an individual agent invested with authority, and directed to a specific sub-group of the community of which she may not even be a member (*e.g.*, a tax rule directed to autonomous labourers of a particular sector), can be understood as something *we* (the members of the community) do for/to ourselves. Nevertheless, I do not mean by this that every statement of law can be construed this way, let alone that it ought to be, nor that doing it would be necessarily more illuminating. More modestly, I would just like to emphasize that the third-person perspective may in no way be regarded as *exclusive*.

19 Yet this consequence is, I am afraid, nothing but common-sensical. A definition stipulating that the language of legal participants does not cover matters relative to the content of legal concepts, whether more or less fundamental, would be just that - a stipulation. If that were instead claimed with a reconstructive, explicative, "more direct" aim ("more direct" meaning that no use of stipulations is made as a tool for the explication), then many intuitions clearly militating in the opposite direction should be dealt with. I conjecture that in the last quoted passage, Redondo is trying to offer a more direct thesis, reconstructive in nature, thus leaving aside her initial stipulation.

20 Diego Dei Vecchi has lucidly pointed out to me that in Redondo's book there seems to be a further, implicit, distinction between two senses of *acceptance*, a distinction running correlative to those already surveyed. Thus, accepting$_1$ would amount to understanding and adopting a conceptual framework, whilst accepting$_2$ would amount to endorsing a particular justificatory theory. Additionally, one may say that a not-yet-formulated internal$_1$ statement can be accepted anyway and be formulated afterwards from a first-person perspective. Still, this would not clear away the problem in Redondo's characterization generated by her definition of internal$_1$ statements as formulated from the third-person perspective.

her specific aims. I suspect, on the contrary, that it is a matter of the utmost relevance. That is what I will try to show in the next section, where I identify a problem in Redondo's proposal, which I believe finds a cause, again, in the scarce analysis of the concept of participant.

4 THE INTERNAL/EXTERNAL DISTINCTIONS *VIS A VIS* A NON-COGNITIVE SEMANTICS

The internal legal positivism proposed by Cristina Redondo depends on the drawing of the two internal/external distinctions we have seen. Hence, it is placed in an intermediate space between "skeptical" positivism, which adopts the external$_2$ point of view –but at the cost of being restricted to assuming the external$_1$ point of view– and interpretive antipositivism, which affords itself the adoption of the internal$_1$ point of view, but only because it also adopts the internal$_2$ point of view. The version of legal positivism Redondo offers is meant to be internal$_1$, yet external$_2$.

To my mind, drawing such distinctions is only possible if one embraces a cognitivist reading of the attitude of acceptance distinctive of legal participants, by ascribing a cognitive character to the semantics of the language they employ. Conversely, the drawing of said distinctions is not conceptually tenable if one ascribes a non-cognitive semantics to the participants' language –at least in some version of such non-cognitive semantics. That is the case, at the very least, with an expressivist semantics.[21]

According to expressivist semantics, the meaning of our statements is a function of our mental states.[22] The mental state we are in when we proffer a statement makes for its meaning, inasmuch as our saying is an expression of our feelings. Hence, semantic expressivism notoriously requires at least a *relaxation* of the distinction between semantics and pragmatics; what we say is not thoroughly distinguishable from what we do or intend to do with our saying, since, on this conception, what we intend to do with our saying determines (the meaning of) what we actually say. As is well-known, expressivism –usually taken to be the heir of metaethical emotivism–[23] was originally proposed as a way

21 I believe my argument also applies to other forms of non-cognitivism. Thus, my analysis may be taken as a sort of "false-target." However, it is also true that a serious discussion of the incompatibility between Redondo's proposal and non-cognitivism in general would require an examination of the details of the different versions of the latter, and here I lack the space to do so.

22 Schroeder 2008: 3.

23 The link is usually mentioned, but argumentation specifically attempting to show it is harder to find. I tried to offer a broad sketch of such argumentation in Rapetti 2019. It is also usual to conceive of metaethical emotivism as relative not to the semantics, but to the pragmatics of moral language. This may be true even of some versions of contemporary expressivism, but at the same time it is undeniable that a genuine expressivist *semantics* (and *metasemantics*) is

of understanding and depicting first-order moral language, but in time grew to encompass the normative domain more broadly (including legal language[24]). Moreover, there are also proposals of *global* expressivist semantics, conceived as appropriate for understanding and depicting language *in general*.[25]

Hart thought that his distinction between internal and external points of view runs alongside his distinction between internal and external statements: an internal legal statement is a manifestation of the speaker's internal point of view, whereas an external legal statement is a manifestation of the speaker's external point of view.[26] If the internal point of view is that of an accepter of a legal rule and if someone formulates an internal legal statement if, and only if, she linguistically expresses her acceptance of a legal rule, then it is such acceptance that determines and explains the statement in question *qua* internal. Conversely, when one admits a statement as an internal legal statement, one thereby admits that the agent who formulated it accepts some legal rule. Consequently, Redondo's idea according to which we may only discriminate among kinds of statements in connection to the internal$_1$/external$_1$ divide, but not to the internal$_2$/external$_2$ divide, no longer holds. Therefore, the twofold internal/external distinction itself falls apart. By the lights of expressivist semantics, what Redondo calls the "internal$_2$ point of view" determines corresponding internal statements, and what she calls the "external$_2$ point of view" determines corresponding external statements. Precisely what she denies.

In addition, I believe the foregoing explains another issue she mentions but does not discuss sufficiently. Redondo alludes to the Hartian concept of acceptance when she introduces her internal$_2$/external$_2$ distinction, yet when she introduces the internal$_1$/external$_1$ distinction she says[27] that the internal point of view may be considered as the one MacCormick took to be a sort of "moderate" external point of view. As I see it, however, on this matter MacCormick was basically following Hart's steps, without adding much substance. As might be recalled, Hart held than an observer external to a legal practice (*i.e.*, a non-accepter) could, from her external point of view, formulate –*external*– statements of different types, among which are those not just limited to registering behavioural regularities and social reactions to them, but that also account for the community members' acceptance of certain rules as standards and guides for conduct,

already developed and on offer. See Bar-On & Chrisman 2009; Blackburn 1993 and Blackburn 1998; Brandom 1994; Copp 2009; Gibbard 1990, Gibbard 2003, and Gibbard 2012.

24 See, *e.g.*, Toh 2005 and Toh 2015.

25 See, *e.g.*, Price 2013.

26 This is a reason, among others, to construe Hart's analysis of internal legal statements as expressivist. Note that the upcoming discussion of the internal/external twofold distinction Redondo proposes, reinforces such a reading. It is not, indeed, the traditional or most popular reading, but I do not find it unattractive.

27 Redondo 2018: 204, n. 207.

and that account for their considering said conduct and observable reactions as required or justified by those very rules.[28] I think this can be taken not as showing an ambiguity in Hart's internal/external distinction,[29] but as showing instead that such a distinction is built upon the presupposition that, in fact, the presence or absence of the attitude of acceptance in the agent *makes for the kind of statement that the agent consequently formulates* qua *agent*. In other words: Hart's original distinction already contains an implicit rejection of the further twofold distinction Redondo proposes, and such rejection is founded upon the adoption of an expressivist semantics for the analysis of first-order legal language.

I gather that an intuitive way of addressing the problem just raised might consist in holding that when Redondo claims to assume "a cognitivist reading of acceptance," she is doing so regarding the characterization of the role (and language) of the legal theorist and not that of the legal participant. This way, she would not really be prejudging the philosophically controversial issue of how to best construe the semantics of the legal practice, but only fulfilling her explicit metatheoretical goal of offering a model with which to approach said practice theoretically. Thus, language in a cognitive vein would only belong to the theoretical model and endeavour, but that would not necessarily exclude beforehand the possibility of construing first-order legal language, in turn, on an expressivistic key.

This line of defense does not seem very promising, however. To begin with, note that it stems from acknowledging that, from an expressivist perspective, the twofold distinction Redondo offers is untenable. Consider the scenario that this defense claims to be possible –the scenario composed of a non-cognitive first-order legal language running parallel to a cognitive second-order theoretical language, *based on Redondo's twofold distinction between points of view*. In such a scenario it is impossible from the point of view of participants to recognize the space for a theoretical, external stance, founded on that very distinction. Should it turn out to be right to understand participants as those who distinctively formulate statements expressive of rule-acceptances, one would also have to assume that a participant, *qua* participant, is unable to recognize a possible theoretical stance such as that modelled by Redondo. This seems clearly problematic. Theorizing social practices is valuable because it helps us to understand ourselves, inasmuch as such practices are created and developed by ourselves –agents, human beings. Law is a social practice[30] because it is constituted by the actions, attitudes, and beliefs of human beings, which (somehow) add up altogether. Redondo makes

28 Hart 2012: 291.

29 Of course, Redondo is neither the first nor the only one to point out this ambiguity. As I said above, the expressivist reading of Hart's is not very popular. As I also said, my discussion here may perhaps obliquely help strengthening such a reading.

30 Perhaps *sub-social*, *i.e.*, a product of the actions by relatively small groups (*e.g.*, a particular set of officials) within social communities of a wider range. The difference is inconsequential here.

this very point. And the law also has the peculiarity of being nearly ubiquitous: nowadays almost every human being is subject –more or less consciously– to legal practices. It would be strange if in order to be able to recognize the possibility of an external, non-accepting, non-committed legal theorizing, one should be somehow required to "forget" one's character as a legal subject with legal responsibilities, capacities, and obligations. Should it be insisted that this is truly necessary, then what legal theory can add to our understanding *of ourselves* would become unclear. Note further that something quite analogous to this is claimed by interpretivists and that Redondo explicitly opposes them.

I certainly believe that the prospects for a theoretical understanding of social practices (which, as such, are normative) are of a limited scope. Little can be *theoretically* discovered, made clear, and understood about the law when compared to what can be discovered, made clear, and understood about the law as participants of its practice (to begin with, because we thereby contribute to *making* it).[31] But those like me who, contrary to interpretivists, believe that there is a conceptual space for this kind of theoretical, external approach –as modest as it may be– cannot at the same time deem or presuppose said approach to be inscrutable, inaccessible for those comprising the object of inquiry. The response I am here discussing has that implicit self-frustrating consequence and it is therefore not an appealing response.

Finally, someone may perhaps try to claim that the foregoing discussion yields, more simply and directly, the lesson that there is good reason *against construing first-order legal language in expressivistic terms*. But I think that would be going too far, too hastily. This may be seen through an alternative to Redondo's, that is yet capable of reaching similar conclusions. In the following section I offer a brief and preliminary sketch in that direction.

5 A NEW (OLD) ALTERNATIVE

Redondo's strategy to delineate her internal legal positivism by means of the twofold internal/external distinction, may be fruitfully understood as an inquiry into the nature of conceptual investigations. After all, Redondo is interested in claiming (i) that there is some difference between legal participants and legal theorists, (ii) that the theorist is primarily concerned with the analysis of certain specific concepts created within the legal practice, (iii) that such analysis need not be committed to the political and moral values that the practice –and its concepts, in particular– embodies, and (iv) that such an analysis does not consist in surveying and classifying empirically verifiable data. Indeed, the main dispute between her position and what she calls "skeptic legal positiv-

31 See also Dei Vecchi 2019.

ism" seems to be ontological in character. The latter endorses a stance that is reductionist-to-the-empirical of the concepts and meaning-contents that make for jurisprudence's subject-matter, whereas Redondo assumes that such entities are abstract, irreducible to fact.[32] The issue then amounts to establishing the prospects for a theoretical approach concerned with such kinds of objects. And here enter Redondo's proposed definitions and distinctions, meant to show that a –let us say– "genuine" theory (*i.e.*, adopting the external$_2$ point of view) can be developed via the formulation of statements that are not empirical but –precisely– *conceptual* (internal$_1$) in nature.

I have tried to show what I take to be some shortcomings of this strategy. It seems to stipulate that legal concepts are exclusively the subject-matter of the theoretical endeavor in a way seemingly implausible from an intuitive perspective; it involves some gaps concerning other aspects of the distinction between the theorist and the participant (lacking a further characterization of the latter); and, above all, it is inconsistent, beforehand, with a potential construal of first-order legal language in terms of an expressivist semantics.

Nevertheless, I think there is a path leading to a metatheoretical model very close to Redondo's, but which does not necessarily suffer from the shortcomings just mentioned. I cannot offer the alternative in detail here, discussing the ways in which it would deal with such shortcomings and the further differences that would rise in connection to the many particular questions Redondo deals with in her book.[33] So I must confine myself to noting that it is possible to conceive of the nature of conceptual investigations as a *tertium genus* amidst empirical and normative investigations, which nonetheless shares elements with both. And the twofold internal/external distinction is no requisite for it.[34] I quote von Wright:

> Reflexion on the grounds for calling things by words is a type of conceptual investigation. How is such investigation conducted? Here a warning is in place. The aim of the type of investigation of which I am speaking is not to 'uncover' the existing meaning (or aspect of meaning) of some word or expression veiled as it were behind the bewildering complexities of common usage. The idea of the philosopher as a searcher of meanings should not be coupled with an idea or postulate that the searched entities actually *are there*—awaiting the vision of the philosopher. If this picture of the philosopher's pursuit were accurate then a conceptual investigation would for all

32 This does not exclude the possibility that they may be somehow *founded* in facts. A large part of the contemporary literature in metaphysics concerning notions such as *grounding* or *anchoring* is set out to explicate the difference I am referring to. I review part of this literature, relating it to legal ontology, in Rapetti 2021.

33 Particularly, I believe, in other parts of chapter 5 and in chapter 1.

34 Redondo pointed out to me that she does not introduce the distinction, but only makes it explicit, since it is already implicit in legal discourse. Should that be the case, then the alternative I propose here is directed to multiple addressees.

> I can see be an *empirical* inquiry into the actual use of language or the meaning of expressions.
>
> Philosophic reflexion on the grounds for calling a thing '*x*' is challenged in situations when the grounds have not been fixed when there is no settled opinion as to what the grounds are. The concept still remains to be *moulded* and therewith its logical connexions with other concepts to be *established*. The words and expressions the use of which bewilder the philosopher are so to speak *in search of a meaning*.
>
> I would not wish to maintain that the *only* fruitful way of dealing with the problems here is to mould the unmoulded meanings to make fixed and sharp that which ordinary usage leaves loose and undetermined. It has seemed to me however that conceptual inquiries which take the form of a moulding or shaping of concepts are particularly suited for the treatment of problems in ethics and some related branches of philosophy...[35]

These are the general brushstrokes of a conception of conceptual analysis, which I dare to label as "classic." It is important to remark that it is a conception of the endeavor itself, and not of a certain point of view from which to embark on it. Nuances aside, I think it is the same conception upheld by Hart with his *only* internal/external distinction. And it is, therefore, not incompatible with an expressivist rendering of first-order legal language. Thus, I would dispense with the twofold distinction Redondo offers and say that there is a logical space for a theoretical jurisprudence which is external, as it does not commit itself evaluatively with its subject-matter (since it neither presupposes nor expresses *acceptance*), and which consequently unfolds by means of the formulation of ("moderately") external legal statements, which are conceptual in nature –and not strictly or merely empirical. Why not? Because they are not reports of statistically collected beliefs, but statements built upon the two-layered operation of perhaps the most fundamental philosophical input – that is, intuitions. I claim it is a "two-layered" operation –we might also say, "in two layers"– since the theorist, on this conception, works with her own intuitions about (which are) the intuitions the participants of the legal practice have about the concepts they actually employ. This is what marks the proposed perspective as external. Additionally, I think this conception helps to account for a distinction that is widely presupposed in jurisprudential work, yet rarely scrutinized: the distinction between description and (*conceptual*) reconstruction. In any event, it seems clear to me that, should we be pressed to begin with a sharp twofold divide between the descriptive and the prescriptive (evaluative) functions of language, identifying the *normative* domain with the prescriptive, then the typical formulation of the statements belonging to conceptual investigations, would fall on the side of the descriptive function. Bearing this in mind, recall that Redondo, when characterizing the "skeptical" positivism she confronts, claimed that ac-

35 von Wright 1958-1960: sec. 3. Italics in the original. See also Strawson 1992: 7; Stevenson 1944: 86-87, 160-161 and 222-223. For some qualifications, see also Goodman 1983: 47 and 65, n. 2.

cording to such version, theoretical language is "descriptive *and* of an empirical content." Well, we may now say that for the classic conception of conceptual analysis that I briefly reviewed here, theoretical language is descriptive and of a content which is –not empirical but, precisely– conceptual.

6 CONCLUSION

I believe there is space to endorse *internal legal positivism* or, rather, something quite similar to it. I find this label a bit infelicitous, since I prefer to say –having rejected the twofold internal/external distinction– that a theory that fits the classic framework I have outlined is thereby "external" and formulates "external" statements as well. This difference with Redondo's characterization is merely linguistic and, therefore, irrelevant. However, more relevant is the other difference here examined, namely, that to show the logical space available for this version of legal positivism, it does not seem convenient to resort to a distinction between two senses of the internal/external binomial, which –as drawn by Redondo– turns out to be incompatible with an expressivist rendering of first-order legal language. Instead, we may come to an analogous "model"[36] simply by taking hold of a conception of the nature of conceptual investigations defended by classic authors such as von Wright, Strawson, and Hart.[37] While such model is analogous to Redondo's, it is in some sense of a wider scope or, if you will, "ecumenism": it does not prejudge the central and philosophically difficult question of what the most appropriate semantic reconstruction of first-order legal language is. Surely other differences in detail between both models will arise, but an inquiry into those will have to be left for another occasion.

Bibliography:

Bar-On, D., & Chrisman, M. (2009). Ethical Neo-Expressivism. In Shafer-Landau, R. (ed.), *Oxford Studies in Metaethics*, vol. 4. Oxford University Press.

Blackburn, S. (1993). *Essays in Quasi-Realism*. Oxford University Press.

Blackburn, S. (1998). *Ruling Passions. A Theory of Practical Reasoning*. Oxford Clarendon Press.

Brandom, R. (1994). *Making It Explicit*. Harvard University Press.

Copp, D. (2009). Realist-Expressivism and Conventional Implicature. In Shafer-Landau, R. (ed.), *Oxford Studies in Metaethics*, vol. 4. Oxford University Press.

Dei Vecchi, D. (2019). *Modos de describir el derecho*. Marcial Pons.

Gibbard, A. (1990). *Wise Choices, Apt Feelings. A Theory of Normative Judgment*. Harvard University Press.

Gibbard, A. (2003). *Thinking How to Live*. Harvard University Press.

Gibbard, A. (2012). *Meaning and Normativity*. Oxford University Press.

Goodman, N. (1983). *Fact, Fiction, and Forecast* (4th ed.). Harvard University Press. (First edition published in 1955.)

Hart, H. L. A. (1982). *Essays on Bentham*. Oxford University Press.

36 May the hyperbole be excused.

37 Making Hart an "internal" legal positivist (or, rather, something close to it).

Hart, H. L. A. (2012). *The Concept of Law* (3rd ed.). Oxford University Press. (First edition published in 1961.)

Price, H. (2013). *Expressivism, Pragmatism and Representationalism*. Cambridge University Press.

Rapetti, P. A. (2019). Carrió y el enfoque emotivista sobre los desacuerdos jurídicos. In Sierra Sorockinas, D. (ed.), *Notas (al margen) sobre derecho y lenguaje*. Universidad del Externado de Colombia.

Rapetti, P. A. (2021). Ontología social y práctica jurídica: la actualización de un debate. *Discusiones*, 26, 255-287.

Redondo, M. C. (1999). *Reasons for Action and the Law*. Springer.

Redondo, M. C. (2018). *Positivismo jurídico "interno"*. Klub Revus.

Schroeder, M. (2008). *Being For. Evaluating the Semantic Program of Expressivism*. Oxford Clarendon Press.

Stevenson, C. (1944). *Ethics and Language*. Yale University Press.

Strawson, P. F. (1992). *Analysis and Metaphysics*. Oxford University Press.

Toh, K. (2005). Hart's Expressivism and His Benthamite Project. *Legal Theory*, 11(2), 75-123.

Toh, K. (2015). [Erratum to] Four Neglected Prescriptions of Hartian Legal Philosophy. *Law and Philosophy*, 34(3), 233-268.

von Wright, G. (1958-1960). *The Varieties of Goodness.* The Gliffford Lectures. URL: https://www.giffordlectures.org/books/varieties-goodness/i-varieties-goodness. Published also as *The Varieties of Goodness*, Routledge & Kegan Paul (1963).

Santiago Legarre*

"Internal" legal positivism in the light of natural law

Images and objections of natural law in contemporary analytical jurisprudence

This article focuses on the use of the term and the concept "natural law theory" in Cristina Redondo's book *Positivismo jurídico "interno"*. The article notes how Redondo's analysis of natural law theory is lacking in that the idea she attributes to that theory of reducing legal norms to moral norms is absent in true "natural law theory". For this theory there are two ways of deriving positive law from natural law, which Redondo does not account for. Furthermore, her understanding ommits the reality that according to natural law theory unjust *laws* are laws. Finally, this article tries to show posible ways in which Redondo's theory may be compatible with natural law theory.

Keywords: natural law, positivism, Redondo (Cristina), Aquinas (Thomas), Finnis (John)

1 INTRODUCTION

This essay revolves around some of the main concepts in Cristina Redondo's book *Positivismo jurídico "interno"*. My observations will especially focus on Redondo's use and the practical relevance of the term "natural law". It will not just be about observing (and eventually objecting) to the use of the term. Otherwise, my own observations and objections would be subject to a fair, nominalist criticism: *De nominibus non est disputandum*.[1] In other words: What does it matter if what she calls "natural law" I and others call differently? The difference in names only matters when different names entail conceptual mistakes. When this happens there is not just a terminologycal difference, there is also a conceptual difference, one involving different realities.

In the Preface, the author announces that her brand of positivism (which she names "normativistic" or "internal" positivism) will strive "to combat an anti-positivistic approach, be it a natural law approach or an interpretativist

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1 See Orrego 2007: 77.

one".[2] Redondo's positivism will also contest "a purely empiristic [positivistic] view, such as the one suscribed by sceptical positivism".[3] Even though the preceding statement is not relevant for my purposes, given the natural law perspective of these remarks, it is worth noting that that statement would probably place Redondo on the same shore of the divide that separates positivism from true natural law theory, for the latter is also critical of all forms of scepticism.[4] Indeed the particular brand of positivism Redondo defends holds the knowledge of legal duties as possible, against sceptical positivism. This constitutes common ground between her theory and natural law theory because her thesis relies on the possibility of knowing and following rules, and so does the legal philosophy of Thomas Aquinas, the quintessential leader of natural law theory.[5] Incidentally, Redondo calls "cognitivism" this possibility of knowing and following rules.[6] More than one contemporary natural law thinker would not object to Redondo's use of this neologism.[7]

2 THE USE OF THE TERM "NATURAL LAW THEORY" IN REDONDO'S BOOK

As a preliminary remark, it should be clarified that Redondo's work is foreign to the natural law tradition and she never claims otherwise.[8] It would therefore be asking too much —it would be unfair to ask, to use an adjective dear to the natural law tradition– that Redondo include ample references to the topic that, given my specialty, constitutes the main focus of this short essay. Having said that, and given that she is a learned, honest, and intelligent author, one observes that her work markedly differs from others within the analytical genre where it belongs, and which for the most part seem to ignore natural law altogether.

The first reference to natural law and natural law theory opens Chapter One of the book in the context of her discussion of "duty-expressing propositions.

2 Redondo 2018: 9. I like Redondo's choice and use of the term "interpretativist". From an aesthetical point of view, it is preferable to the term Dworkin put in vogue in *Law's Empire* (1986: 46-47): "interpretive" (derived from "interpretivist"). "Interpretive" and "interpretivist" hardly exist as words. Instead, the right word would be "interpretative", from which derives "interpretativist", the term rightly chosen by Redondo.

3 Redondo 2018: 9.

4 Finnis 1980/2011: 73-75.

5 Aquinas, *Summa Theologiae*, I-II, q 90 aa 1-4.

6 Redondo 2018: 13 and 21.

7 See, for example, Legarre 2006: 1068.

8 In the symposium on internal legal positivism held in September 2019, at which this paper was originally delivered, Professor Redondo squarely and modestly recognized that, even when her book touched upon natural law theory she had no hopes of exhausting the topic and that indeed, that was far from what she expected to accomplish regarding natural law.

Redondo never defines "natural law theory".[9] However, given that she simply uses the term, it seems safe to asume that she means to use it in the conventional, generally accepted way, according to which natural law theory[10] is the philosophical doctrine or school that affirms: (i) there is an objective moral normativity accesible to all, preexisting any conventional or positive order;[11] (ii) such moral normativity —usually called, within this school, "natural law" or "natural, moral law"[12] serves as a measure and tool for the ethical evaluation of all conventional or positive order;[13] and (iii) as such, that measure and tool allows for the moral disqualification of any conventional or positive ordinance contrary to it (to natural law, that is), which does not imply *per se* passing judgment on the exact consequences of such disqualification in the legal domain.

With a working definition of natural law theory at hand, we may return to Redondo's work. When dealing with "duty-expressing propositions" she begins by recognizing that:

> The idea that statements such as 'In Italy it is mandatory to drive on the right-hand side' or 'Euthanasia is permitted in the Netherlands' express propositions that refer to legal duties has been strongly resisted (Redondo 2018: 4).

First, she claims, that idea has been strongly resisted by realistic or non-normativistic positivism —a brand of positivism different from her; as we know she embraces "normativistic or internal positivism".[14] She calls the several arguments that resist the idea "reductionistic and non-descriptivist" (Redondo 2018: 15). Her first example of this realistic or non-normativistic reductionism is Riccardo Guastini's position on the validity and existence of legal norms, a position grounded on the logical form of statements. According to Redondo, Guastini provides three arguments against interpreting "deontical" statements as normative propositions (Redondo 2018: 16). These arguments are not relevant for my purposes here, even if I do not doubt their relevance for Redondo's own line of reasoning. What does matter for my purposes is what Redondo

9 The word rightly used by Redondo in Spanish is "iusnaturalismo".

10 George 1992: v.

11 Redondo, like several natural law thinkers, calls "cognitivism" the ability of knowing norms, independently of whether (as natural law theory claims) they are objective and preexisting all conventional or positive ordering. See *e.g.,* Redondo 2018: 198, note 202 (with a reference to Finnis, among others).

12 The adjetive "moral", in "natural, moral law", seeks to distinguish natural law from so-called natural laws. See Legarre 2018: 879-881, where I contrast natural law with what the classics used to call "eternal law", containing "natural laws" (of physics, chemistry, etc).

13 The English term "natural law" covers, in most contexts, both the Spanish terms "ley natural" and "derecho natural" (Hill 2016: 64-71). But in the context of subjective natural rights, when the English language uses the expression "natural rights" (each of which is a "natural right") the Spanish language uses "natural rights" (each of which is a "*derecho natural*") (Finnis 2000: 227-253).

14 Redondo 2018: 9.

affirms when dealing with the second of those three arguments, because this is when natural law theory comes into play. She then clarifies that, within Guastini's second argument, for the "reduction" to take place, the existence of a normative statement (such as "'euthanasia is allowed' is valid if and only if euthanasia is allowed") must be understood empirically. She adds:

> For example, thinking about this same issue *in natural law terms*, the alluded equivalence would lead us to a very different conclusion. For in that light the existence of a norm would be analyzed in terms of the existence of the moral duty or permission granted by that norm. In other words, the norm "stealing is forbidden" is valid (*i.e.,* it exists) if and only if it is true that morally you shall not steal. This equivalence leads us to affirm that a norm is valid only when the normative proposition referred to a moral fact (the duty or the permission to do or to ommit something) is true (Redondo 2018: 19, emphasis added).

If this paragraph on natural law did not feature in Redondo's book, then that absence would not change anything to her main argument, which moves along unrelated boundaries. But given that the paragraph is there, I will strive to analyze it in the light of the already provided definition of natural law, to check if Redondo adequately characterizes the "natural law terms".

Natural law theory does not pose that to be legally valid a norm also ought to be morally valid. According to natural law theory there are two types of law: just law (which is the central case of law)[15] and unjust law (which represents a deviant or watered-down version of law:[16] a secondary or derivate cognate of the term).[17] Both just and unjust law are law, but to a different degree, in a way similar —saving the evident differences— to the sense in which a glass of Coca-Cola and a glass of watered-down Coca-Cola are both Coca-Cola, but to different degrees. Almost that much can be said of legal validity, so much so that Finnis uses the adjective "watered-down" to refer to the secondary or derived instance of law (unjust law).[18] For this reason it could be that, in almost the same way as someone might confuse watered-down Coca-Cola with pure Coca-Cola, so might someone have as a legally valid a norm that is morally invalid (even when from the moral point of view that legal validity may be subject to negative (moral) scrutiny). If I may insist one more time with the metaphor, in almost the same way in which watered-down Coca-Cola has something (or even a lot) of pure Coca-Cola, so unjust law has some (more or less, depending on the type of injustice at stake) of the elements of just law. These elements of justice subsisting in unjust law are precisely what justifies our calling it "unjust

15 Hervada 1981: 131-133.

16 Finnis comments on the Aristotelian origins of the water metaphor as applied to "analogy". Finnis 1998: 443.

17 Finnis 1980/2011: chapter XII, titled "Unjust Laws".

18 Finnis 1980/2011: 11, with reference to "watered-down version" and to "undeveloped, primitive, corrupt, deviant […] instances".

law", in a way almost like the way in which that persistent Coca-Cola flavour in watered-down coca-cola justifies our calling it Coca-Cola.

Regarding just law—the one that "derives" from natural, moral law: it may be traced to it—, natural law theory affirms that moral principles appear in just law with two different intensities. According to classical natural law theory, some positive norms (and some aspects of some positive norms) constitute "derivations from natural law by way of conclusion".[19] This may be described—albeit imperfectly— the way Redondo does when she alludes to legal norms that can be "reduced" to moral norms. So, for example, the legal norm in her example ("stealing is forbidden") could be reduced to the moral norm "stealing is forbidden" —an existing moral norm according to natural law theory. I said that this may be thus described "imperfectly" because strictly speaking the legal norm on theft is going to be (and should be) more complex than the moral norm on theft. On the one hand, the legal norm in question shall determine numerous, contingent aspects requiring a regulation compatible with several morally acceptable solutions. On the other hand, that legal norm shall provide a sanction of some sort that will be absent in the equivalent moral norm. These determinations (both of those numerous, contingent aspects and of the sanctions) are called by classical natural law theory "derivation by way of determination"[20] and they could never be "reduced" to moral norms.[21] On the contrary, while the legal norm establishing the "determinations", when just, may be traced to a general and indeterminate moral norm, through those determinations it offers a new reason for action. So, for example, if the moral norm in question —part of "natural, moral law", according to natural law theory— requires the moral justification of some instances of theft, a just legal norm shall determine how much bread famined persons (such as Jean Valjean) may *legally* take by force to satisfy their needs. The answer to this precise question is not "written in the stars" (of natural, moral law); neither is the sanction that the protagonist of *Les Miserables* ought to receive if with the excuse of hunger he steals, not a morcel of bread but an entire bakery. The answer, rather, is written in… the letter of positive law.

Back to Redondo's example (and quoting her in part), for natural law theory "the norm 'stealing is forbidden' is valid (*i.e.,* it exists) if and only if it is true that legally you shall not steal".[22] And if it is true (as it is for natural law theory) that "stealing is morally forbidden", it does not follow from this moral truth— *i.e.,* from the existence of this moral norm— that stealing is legally forbidden. According to natural law theory, for the latter to be true there ought to exist the

19 Aquinas, *Summa Theologiae*, I-II, q 95, a2, c.
20 Aquinas, *Summa Theologiae*, I-II, q 95, a2, c.
21 Finnis 2012: 111-117; Legarre 2012: 103-110.
22 Redondo 2018: 19.

equivalent, promulgated legal norm; or, in more Hartian terms, a social source ought to recognize the moral norm on theft and afford it legal normativity.

For natural law theory, the extreme proof of the difference between moral validity and legal validity is provided by that theory's treatment of unjust laws. If, for example, almsgiving were legally forbidden, the positive norm so providing would be legally valid (assuming it is legally valid) independently of wheter it is morally true that one ought not to give money to the needy. The legal prohibition of almsgiving might be an unjust prohibition, but that injustice (*i.e.,* that immorality) will not *per se* make the positive norm legally invalid or non-existent.[23] By way of summary, if within the natural law tradition one talks about "unjust law" it is because it is… "law"!

3 CONCLUSION: COMPATIBILITY BETWEEN NATURAL LAW THEORY AND NORMATIVISTIC POSITIVISM

The second context in which Redondo uses the term "natural law theory" is similar to the previous one, so my remarks here shall repeat the preceding ones and develop on them. Redondo holds:

> The normativistic positivist distinguishes between empirical facts and norms to emphasize that the law understands a legal order as a set of these latter and not of the former. The non-reducibility of legal norms, either to social facts, on the one hand, *or to moral norms*, on the other, is what allows normativistic positivism to criticize, on the one hand, legal realism and, on the other, natural law theories (Redondo 2018: 46, emphasis added).

Nevertheless, from what I have explained above, it follows that natural law theory does not affirm that legal norms may be reduced to moral norms. Even though for natural law theory just law derives from natural, moral law —in the sense that just law may be traced to natural, moral principles— that theory also admits the possibility that a certain legal norm could, as a result of its injustice, not derive from a moral norm. Furthermore, strictly speaking, according to natural law theory only a bunch of those just legal norms could be "reduced" to moral norms. One could say that the legal norms derived from natural law by way of "conclusion"[24] could be "reduced" to moral norms. But most just legal norms derive from natural law by way of "determination",[25] where although the legal norm respects natural, moral law, that legal norm is far from "reduced" to moral principles. On the contrary, such legal norms take a general, moral prin-

23 Finnis 1980/ 2011: chapter XII.

24 Aquinas, *Summa Theologiae*, I-II, q 95, a2, c.

25 Legarre 2013: 137-144.

ciple and concretize it into one of several, morally valid ways or determinations, all of which are compatible with natural, moral law.

Behind the argument in the preceding paragraph lies the natural law idea of the distinction between morality and law, as two related but different normative orders.[26] If, instead, one could "reduce" law to morality, law would be either pointless or it would have the minimal function of providing sanctions. But from natural law theory's perspective morality —natural, moral law— is insufficient for social life and it therefore itself requires the existence of positive law, much further than sanctions (but including them). If I understand Redondo's position, there is ultimately agreement between her and natural law theory on this point. And if she does not share this view, I suggest that maybe it is because she calls "natural law theory" something that indeed does not exist or, at least, it is not the classical version of natural law —the one explained by Thomas Aquinas and renewed by Finnis and others.

The third context in which Redondo uses the term "natural law theory" reinforces the optimistic conclusion I have just reached, and perhaps it allows us to go one step further towards a posible compatibility between her position and the doctrine of natural law. This new context arises in footnote 140. In the text to which note 140 is attached, Redondo holds that the book *Normative Systems*, by Alchourrón and Bulygin

> does not pretend to articulate a specific "theory of law", but rather presents a "theory of normative systems" offering a variety of tools that could be used by very different kinds of legal theories; obviously, provided they accept the idea that law can usefully be reconstructed as a system of norms (Redondo 2018: 138-139).

In the footnote itself, Redondo clarifies that like José Juan Moreso, she thinks that:

> The notion of normative system developed in *Normative Systems* is a powerful conceptual construction applicable to any normative problem ... regardless of our position on the nature of law and, therefore, compatible with natural law theories and legal positivism (Redondo 2018: 139, note 140, with a quote from Moreso; ellipsis in original).

In so far as natural law theory is concerned, I too share, at least potentially, the idea of this compatibility because, on the one hand, the doctrine of natural law is compatible with considering normative systems (where they exist) as an instance of the concept of law (Rosler: 2019). On the other hand, the doctrine of natural law is not called to ajudge the logical, and other problems that arise within normative systems (where they exist). But to affirm the potential compatibility between natural law theory and the solutions advanced in the famous book by Carlos Alchourrón and Eugenio Bulygin does not entail passing judgment on the usefulness or correctness of those solutions, a topic on which I declare myself ignorantly agnostic; although, perhaps thanks to Redondo's book,

26 Finnis 2012: 111-117.

if normative logics would be a god and *Normative Systems* the bible, I would in no way proclaim myself an atheist, just in case.

Without prejudice to my declared agnosticism, and regardless of my blissful ignorance, I preliminarily observe that some ideas in *Normative Systems* maybe be conducive to understading how is it possible that a legal system could contain not only the norms explicitly established in it, but also others that are the logical consequence of them. I note in this sense an analogy between the task undertaken by Alchourrón and Buygin in their "bible" and the enterprise of Thomas Aquinas in his "*summa*", regarding the derivation of norms within morality, concluding specific moral norms from other more general ones. For example,[27] without leaving the moral order, Aquinas derived from the principle "you ought to do go good and avoid evil", a more concrete moral principle: "you ought not to harm others". And from this principle, he derived an even more concrete one: "you shall not kill".[28] While Aquinas applied this method of derivation to morality, with respect for Aristotelian logic, the Argentine analytical masters did likewise (saving the differences), applying that method to normative systems: another coincidence that deserves to be underscored. One that, it would seem, is also a coincidence between Redondo and natural law theory.

Bibliography:

Alchourrón, C. E. & Bulygin, E. (1971). *Normative systems*. Springer.

Aquinas, T. (1273). *Summa Theologiae*.

Dworkin, R. M. (1986). *Law's Empire*. Fontana Press.

George, R. P. (1992): *Natural Law Theory*. Oxford University Press.

Finnis, J. M. (1998). *Aquinas: Moral, Political, and Legal Theory*. Oxford University Press.

Finnis, J. M. (2000). *Ley natural y derechos naturales*. Abeledo-Perrot.

Finnis, J. M. (2011). *Natural Law and Natural Rights* (2nd ed.). Oxford University Press. (Original publication 1980).

Finnis, J. M. (2012). Coexisting Normative Orders? Yes, but no. *American Journal of Jurisprudence*, *57*, 111-117.

Hervada, J. (1981). *Introducción crítica al derecho natural*. EUNSA.

Hill, J. L. (2016). *After the Natural Law*. Ignatius Press.

Legarre, S. (1999). El concepto de derecho en John Finnis. *Persona y Derecho*, 40, 65-87.

Legarre, S. (2012). Derivation of Positive from Natural Law Revisited. *American Journal of Jurisprudence*, *57*, 103-110.

Legarre, S. (2013). La derivación del derecho positivo a partir de la ley natural y los principios jurídicos: un diálogo con John Finnis. *Anuario de Filosofía Jurídica y Social*, *32*, 137-144.

Legarre, S. (2018). A new Natural Law Reading of the Constitution. *Louisiana Law Review*, *78*, 877-905.

Orrego, C. (2007). Natural Law Under Other Names: *De Nomibus Non Est Disputandum*. *American Journal of Jurisprudence*, *52*, 77-92.

Redondo, C. (2018). *Positivismo jurídico "interno"*. Klub Revus.

Rosler, A. (2019). *La ley es la ley: Autoridad e Interpretación en la Filosofía del Derecho*. Katz.

27 Aquinas, *Summa Theologiae*, I-II, q 95, a2, c.

28 This "intramoral" derivation is different from the two modes of derivation of positive from natural law identified in the text. On the difference, see Legarre 2012: 104-107.

Rodrigo E. Sánchez Brigido*

The concept of law as a functional concept

In her book Positivismo jurídico «interno», Cristina Redondo claims that legal theory can be neutral from a moral point of view. An essential part of her argument is based on the criticism of an anti-positivist conception of law developed by Fernando Atria according to which, since law is a functional concept, no descriptive or morally neutral theory of law can be provided. The essay claims that, while Atria's conception of law encounters some difficulties, Redondo's criticisms miss the mark leaving their impact inconclusive. More importantly, there are two kinds of natural law theory that also claim that law is a functional concept but that do not face Atria's difficulties. One such theory seems particularly suitable for avoiding not only Redondo's criticism but also standard objections from the positivist camp. If this type of theory is correct, a theory of law cannot be morally neutral.

Keywords: concept of law, functional concepts, legal positivism, natural law theory, neutrality, philosophy of law

1 INTRODUCTION

Legal scholars have been debating the aspirations and limits of legal theory for quite a long time. The book *Positivismo Jurídico "Interno"* is an important contribution to that discussion.[1] In her book, Cristina Redondo defends a positivist account of legal theory according to which it is possible to develop an empirical description of a normative object such as law. She also argues that anti-positivist accounts, which deny this possibility, are inconsistent or face serious difficulties.[2]

Redondo's book cogently presents the pros and cons of each kind of approach. It further explains with unusual clarity how the literature argues about the different ways in which legal theory can analyze its object of inquiry, and develops an argument in favor of the idea that such an approach can be morally neutral. Although the book has all these virtues, I believe that it also has an important weakness. Redondo bases much of her view on a criticism of an anti-positivist conception of law developed by Fernando Atria, according to which

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1 Redondo 2018.

2 A substantial part of the book is devoted to discussing skepticism. I shall not consider it here.

law is a functional concept such that it cannot be philosophically explained in a descriptive or morally neutral fashion. The problem is that, even though Atria's account indeed faces several problems, Redondo's criticisms miss the mark leaving their impact inconclusive. More importantly, there are two kinds of accounts of natural law that Redondo strikingly does not discuss, which on the idea of a functional concept, but that do not face the difficulties faced by Atria's account. One of them relies on the idea of law as a functional kind, while the other uses the idea of law as a normative-functional concept. I do not intend to show that these views are correct. But I do believe that they should be seriously considered. In particular, the account that relies on the idea of the concept of law as a normative-functional concept looks particularly apt not only to meet Redondo's criticisms but also to avoid standard objections from the positivist camp. If this kind of approach is sound, a theory of law cannot be neutral.

The paper is structured as follows. First, I will describe the theses that, according to Redondo, are shared both by positivism and anti-positivist theories of law (section 1). I will then consider their points of disagreement and I will focus my attention on the issue of whether an account can be descriptive or morally neutral (section 2). Redondo criticizes Atria's anti-positivism and, although her general criticism is well oriented, I will claim that it does not really identify the main problem in Atria's theory and that, in any event, it does not allow us to reject the view that law is not a functional concept (section 3). I will then consider the two other main types of accounts available in the literature that rely on the idea that law is a functional concept. The first has been defended by Michael Moore and claims that law is a functional kind. The second claims that the concept of law refers to an institution constituted by a normative standard of success and has been defended by, among others, Mark Murphy. Although my intention here is not to determine whether these accounts are correct, I will attempt to show that neither of them face the difficulties of Atria's theory and that the second kind of theory is the most attractive. Considering this kind of approach is important because, if correct, a theory of law is necessarily incomplete and superficial unless it holds a view on the moral value of law (section 4).

2 POSITIVISM AND ANTI-POSITIVISM ACCORDING TO REDONDO

To determine the way in which Redondo characterizes the dispute between positivism and anti-positivism it will be useful to start by describing her disagreement with Atria. According to Redondo, Atria's anti-positivist account shares three ideas with positivism. On the one hand, a concept refers to a set of properties necessarily present in any instance of law (or in its paradigmatic in-

stances), which allows one to distinguish between what is and what is not law.[3] On the other hand, one of these properties is that law is an institutional entity that exists only if a social group believes that it exists and accepts it. That is, there is law only if there are acceptants.[4] Finally, both Atria positivist accounts hold that a theory of law is not necessarily committed to the values accepted in a given legal system.[5] Thus, the theory does not have to commit itself to the view that law is valuable or must be obeyed in virtue of its very existence. Put otherwise, legal theory must adopt a point of view that is different from the acceptants' point of view.[6]

Redondo then distinguishes positivism and Atria's anti-positivism on the bases of the theses that they do *not* share. Although both accounts attempt to identify those features that law necessarily exhibits,[7] positivism claims that the theory can do so in neutral terms (that is, without assigning moral value to its object of inquiry), while, for anti-positivism, the theory defines its object of inquiry in non-neutral terms.[8] Call this the "problem of neutrality". On the other hand, according to Redondo, there is a difference in relation to the theory's direction of fit. According to positivism, the theory's aim is to describe or inform about law's essential features. While acceptants' claims about the law have a world-to-mind direction of fit (or, in other words, they have an internal or constitutive relationship with law), the theory's claims have a mind-to-world direction of fit.[9] On the contrary, for an anti-positivist account such as Atria's, the relation of fit of both acceptants and legal theorists is one and the same. A legal theorist cannot capture, analyze, or explain its object without, at the same time, demarcating it. Call this point of disagreement between positivism and Atria's account "the problem of the direction of fit."

This way of analyzing the dispute is important not only because it is the starting point for Redondo's criticism of Atria, but also because it allows us to characterize the debate with anti-positivism in general. Indeed, no anti-positivist account has to deny that the concept of law refers to a set of properties, which are necessarily present in any instance of law, or that law is an institution

3 Redondo 2018:159.

4 Redondo 2018: 164.

5 Redondo 2018: 165.

6 Redondo 2018: 163.

7 The idea that legal theory should identify the necessary features of law is widely shared. For instance, for many positivists the theory of law is a set of propositions about the law that are necessarily true and adequately explain the nature of law (cfr. Raz 2004: 324; Dickson 2001: 17). There are many ways of conceiving what "explaining the nature" means, but under any plausible conception, it involves the task of identifying the features that distinguish the law from other phenomena. On the other hand, as the argument proposed in the text shows, natural law theories also accept this way of understanding legal theory's task.

8 Redondo 2018: 165.

9 Redondo 2018: 166.

that exists only if there are acceptants, or that jurisprudence is not necessarily committed to the values accepted in a real legal system.[10]

With respect with the theses that are not shared, the non-neutrality thesis also characterizes anti-positivism as such. I believe, nonetheless, that it is extremely doubtful that that same thing occurs with the thesis related to the direction of fit. For instance, as far as I can see, well-known natural law theorists such as Finnis, Moore, or Murphy do not claim that jurisprudence cannot analyze the concept of law without simultaneously demarcating it. In fact, there are strong reasons to think that this idea is not only wrong (in this respect, Redondo's arguments look sound)[11] but that anti-positivism does not need to endorse it. The thesis does not really help ground anti-positivism's basic commitments.[12]

Since I am interested here not only in analyzing Redondo's criticisms of Atria's view but also in the plausibility of anti-positivism as such, I will put the direction of fit thesis to the side and I will focus my attention on the neutrality thesis only.

3 THE PROBLEM OF NEUTRALITY

It might be helpful to start with Redondo's criticisms of Atria. Atria puts forward an argument in favor of the non-neutrality thesis, grounded on a distinction between kinds of concepts. The nature of any object X is that in virtue of which X is what it is, in such a way that the property in question is not alien to X but is in some sense *in X*.[13] Now, according to Atria, a class of objects is a nominal class if the properties that define the objects do not share any characteristic on top of its denomination. On the other hand, a class of objects is a natural class if what is internal to the class (the class's objects, one is inclined to think) is its structure or shape (structural class) or function (functional class). Nominal classes lack this nature. The possibility of something being called X but not being in fact an X is what distinguishes natural from nominal classes. In this framework, Atria claims that although there are structural concepts (such as the concept of water), legal concepts are functional concepts.[14] For instance, something is a sanction if it fulfils the function of expressing blame.[15] Legal

10 For a persuasive argument to the effect that natural law theorists such as Aquinas, Finnis, Moore o Murphy share this view, see Duke 2016: 485-509.

11 Redondo claims correctly that it is implausible to think that legal theories are part of the set of beliefs constitutive of law. Thinking so would be incompatible with claiming that the law is a social entity, not a theoretical entity, and, besides, denying that a theory can be descriptive is self-defeating (Redondo 2018: 172). I have put forward arguments to the same effect elsewhere (Sánchez Brigido 2020: 114-122).

12 Later on I shall clarify why.

13 Atria 2016: 112.

14 Atria 2016: 115.

15 Atria 2016: 119.

concepts are, nevertheless, functional in a special sense: they refer to an object whose task can only be fulfilled if the object is identified by its structural properties and not by its function. For instance, the concept of a law (a general and abstract norm that is in everyone's interest) is manifested in a structure (the legislative procedure) that allows identifying a law without referring to its function.[16] And the theory should make the structure intelligible by referring to such function.[17]

As should be clear, Atria's argument attempts to defend the non-neutrality thesis. If legal concepts are functional and not structural concepts, the theory cannot adopt a neutral point of view when giving an account of law.

Redondo puts forward three criticisms against this theory.[18] The first criticism is that Atria's distinction between concepts is inadequate because Atria himself claims that the notion of a structural concept is "a necessary notion we cannot do away with if we wish to give an account of the institutional nature of law".[19] Even though he attempts to do the opposite, Atria in fact grants, Redondo says, that we cannot give up the notion of a structural concept and, in fact, recognizes that both structure and function are necessary.

The scope of this criticism is not very clear but, it seems to me that Redondo is saying is that Atria is inconsistent when claiming that legal concepts are structural concepts, while at the same time also claiming that legal concepts are functional concepts. If this is an accurate account of Redondo's position, then I believe that this criticism is plausible but that it does not get us very far. Atria's distinction between functional and structural concepts is in effect problematic. It claims that the two relevant categories are mutually exclusive, when it is in fact possible that there are concepts that are both functional and structural at the same time (e.g., a concept according to which an object is an X if it has certain properties that allow it to fulfil a certain function). The very reconstruction of legal concepts put forward by Atria, according to which they are functional in a particular way, shows that there are in fact "mixed" concepts, that is, concepts that are both functional and structural in nature. In other words, it may the case that for Atria legal concepts are not functional but mixed concepts.[20]

16 Atria 2016: 126.

17 Atria 2016: 133.

18 Redondo also claims that Atria does not need the notion of a structural concept to develop a theory of adjudication (Redondo 2018: 187) but, in my view, her argument is too schematic and brief. Besides, its scope is very limited because it relates to the concept of adjudication only. In any case, it seems clear that the thesis of non-neutrality would survive even if this argument were successful.

19 Redondo 2018: 185.

20 When claiming that there can be mixed concepts, I am only saying that there are concepts that are not functional in the sense in which Atria understands this notion, since part of what is internal to them is their structure and not only their function. I am not claiming that structure and function are independent of each other. In fact, Atria criticizes such a view because it

If this is what Redondo is trying to say, then I believe that she is right. The problem is, nevertheless, that she has offered no argument to show that legal concepts are not mixed concepts.

Redondo's second criticism is that Atria's account is committed to the wrong idea, that legal concepts cannot serve as criteria for individuating cases of legal institutions because, according to Atria, the institution's content must be identified without taking its function into consideration.[21] This consequence is paradoxical, says Redondo. Normally, having a concept implies having a criterion of individuation. In contrast, for Atria, to have a concept one needs a theory that makes it intelligible and explains it, although surprisingly, it does not serve as an individuation criterion. In fact, Redondo concludes, if we put this issue to one side, both positivism and Atria's anti-positivism accept an institutional identification criterion based on the structure, even though it is fitting to rely on the function they play.[22]

I have serious doubts about the scope of this criticism and tend to believe that it is wrong. It is useful to recall that Atria's functional concepts are, in fact, mixed concepts in the sense explained above. The structure plays the role of an individuation criterion in Atria's account *because* (as he understands it) the constitutive function of the object referred to by the concept demands that the structure plays that role. For instance, the concept of a law refers to an institution constituted by a function (a general and abstract norm that is in everyone's interest) that manifests itself in a structure (the legislative procedure) that allows identifying something as a law without referring to its function. And this is because, in Atria's terminology, if that were not the case, the structure would not make the realization of the function probable. Put otherwise, that concept refers to an institution constituted by a moral function (a law) that demands individuating the concept's instances of application (the concrete dispositions that count as laws) by reference to a certain structure (the legislative procedure). The function, then, does serve as an identification criterion, though only indirectly. It is then not true, contrary to Redondo's suggestion, that an account such as Atria's presupposes that the concept cannot individuate its instances of application.

Redondo's last criticism is that it is not clear how Atria could avoid the threat of skepticism. In this sense, Redondo says that Atria's theory faces cannot settle a disagreement about the true function that makes an institution intelligible if

ignores that, as he claims, the structure makes the function possible (Atria 2016: 123). On the other hand, when claiming that Atria's concepts are mixed concepts I am not ignoring Atria's main idea, namely, that these concepts refer to legal forms that make what is improbable probable. A mixed concept, in the sense I am referring to in the text, still refers to an institution in which structure and function work as Atria supposes.

21 Redondo 2018: 186, 189ff.

22 Redondo 2018: 187.

we have two or more interpretations (accounts) with equal or almost equal rational support. Redondo (2018: 192) asks:

> How can one claim that not just any interpretation captures the true function of an institution (the function to which it is internally related) without admitting the contrast between propositions that describe or report the function that the institution in question in effect performs, regardless of the theory, and propositions that identify the functions that the institution should perform, according to the theory?

This criticism is a bit misguided. If we are not provided with an example of two interpretations and an argument that shows that they both have equal theoretical credentials, then the view that there can be two or more interpretations of an institution with *equal* rational support is merely speculative. Presumably, Atria and other philosophers who belong to his school of thought believe that there are criteria to evaluate theories such that they all do not have the same rational support and, possibly, that only one theory (the correct one) has it. On the other hand, the criticism that is put forward as a question presupposes that Atria cannot distinguish between the function that a specific instance plays and the function that, according to the theory, law as such and that particular instance should play. But Atria does not have to deny that distinction. If the concept of law is a mixed concept, that does not deny that there can be legal institutions within which their morally valuable function is performed in a suboptimal, incomplete, or degraded fashion.

At the end of the day, Redondo's three criticisms are inconclusive. It does not look right that Atria's functional concepts cannot have individuation criteria, nor are there strong reasons to believe that the threat of skepticism could not be avoided. And, even though it is true that Atria's classification of concepts is a little bit too idiosyncratic, Redondo has not discarded the possibility that law is not a mixed concept.

Of course, I am not saying that Atria's thesis is correct. The key problem with Atria's account, in my view, is that, even if the legal concepts he has in mind were mixed concepts (Atria focuses on concepts such as will, sanction, and law), the very concept of law is not mixed. The concept of law is an ordinary notion, not a legal notion. To be a mixed concept, that concept would have refer to an object (and nobody denies that it is an institution) whose function can be achieved only if the institution itself is identified by reference to certain structural properties and not by its function. But this does not look right at all. To make the case as favorable to Atria's view as possible, assume that law is an institution that, as he says, attempts to make probable something naturally improbable (that we are not alienated). It is not true that, to achieve this, the

institution itself must be identified by structural properties without referring to its function.[23]

In a recent paper Atria has replied to this objection. There (Atria 2020: 857-860), he argues that even though this is a point that his book *La forma del Derecho* (LFD) has dealt with,[24]

> it may be useful to consider that it is the same type of argument that Raz employs in his theory of authority to move from his *normal justification thesis* to his *preemption thesis*: if the normal way of justifying the authority of law is that following its directives makes it more likely that their subjects conform to the reasons that already apply to them, then those directives must be identifiable without relying on those reasons because, if that were not so, the authority of law would be redundant. The same applies, as LFD claims (p. 154), to contractualist justifications of the state (Hobbes, Locke). To take Sánchez Brigido's idea of my own view, the law makes a non-alienated life a probable prospect. Then one asks why that would imply that the structure is opaque in relation to its function. A possible answer, discussed in LFD, (pp. 402-406), is that the law makes possible that, when our interests are in mutual conflict, something that we can recognize as a common interest emerge. This requires procedures for creating a common will, the outputs of which will be recognized as such not because we are in agreement from a substantive point of view but because the procedural requirements have been satisfied.

In my opinion, Atria here misidentifies the scope of the objection. The objection is that there is a crucial difference between legal concepts, such as the concept of a law (such as a legal disposition), and the concept of law (the institution). For instance, even if it were true that I can only identify a certain norm by focusing on its structure (e.g., that it was enacted by a legislative procedure), because if that were not the case then its function (being a general norm in everyone's interest) could not be achieved, it does not look right that I can only iden-

23 An anonymous referee suggested that Atria may not be interested in giving an account of the general idea of law when developing his theory of concepts. Although Atria's book may be read in that way, I do not think that it is Atria's view. When making the distinction between functional and nominal concepts, Atria is explicit in claiming that the very concept of law is a functional concept: "It is in virtue of the structure of water that our answer to the question about the identity of water is correct or incorrect. And if the question goes up one level, why H_2O?, the answer may be: simply because this is how the world is. Our explanation of the nature of water leaves water just as it was before explaining it. This means that the analysis of the concept of water may take the concept (its nature) for granted, and it may suppose it is a datum that exists previous to the analysis (in the sense that our conceptual explanations may be refuted, for instance, by experimentation, that is, by looking at what water simply is). And it is precisely here where the law is different from water. *The law —and the same happens with legal concepts such as contract, felony, testament—does not have a nature before the analysis that may work as a criterion of correction by way of experimentation*" (Redondo 2018: 64, emphasis added). Besides, as I claim in the text below, when answering my objection Atria concedes that the concept of law is a functional concept. Finally, in any case, if the concept of law were not a functional concept (or a mixed concept), the considerations that I mention in the text below would apply.

24 This book will be identified here as Atria 2016.

tify a certain legal system (e.g., the Italian one) focusing on its structure (e.g., there is a general rule of recognition accepted by certain officials, and the Italian people follows the norm identified by such a rule) without focusing on its function (e.g., to achieve that the Italians are not alienated). This is because for the system to achieve its function, this cannot be the case. I can perfectly identify that in Italy there is a legal system by focusing both on its structure and its function, without that making it improbable that its function be achieved. Relying on Atria's wording in his reply, I can identify that there is a legal system in Italy that has procedures of creation of a common will that allows the Italians to recognize its results as their own. When I do that, I have identified a legal system (that is, the object referred to by the concept of law) focusing both on its structure and function without that conspiring against the function achieving its aim. Put otherwise, I see no way of saying that the very concept of law is a mixed concept.

Now, a criticism such as the one I have just put forward might be decisive against Atria's theory but it is still inconclusive in relation to anti-positivism as such. This is because it can be the case that law is a functional concept in a sense less idiosyncratic than the one defends. One may argue, for instance, that the concept refers to an institution that plays a moral role without saying that it must be identified by its structure without referring to its function. And it is plausible to think that, if the concept of law is functional in that sense and that the relevant function is a moral one, the non-neutrality thesis is correct.

It is true that Redondo puts forward theses that exceed what Atria says about functional concepts. In this sense, she claims that positivism does not deny that legal institutions necessarily play one or several social functions, such as regulating behavior, and neither does she deny that one can assign them moral value. What she says is that:

> these general functions…are also performed by other normative institutions such as customs, morality or religion; they are not distinctive of law, i.e. they do not allow us to tell what is law and what it not. At the same time, more specific functions change from one instance of law to the other and, accordingly, these functions cannot be considered a common feature of all instances. In other words, what is essential of law is not the functions that it performs but the specific way in which it does. (Redondo 2018: 184)[25]

As far as I can see, this argument is too hasty. On the one hand, the view that the law shares general functions with other institutions is underdeveloped. There are well-known naturalist accounts that defend well-articulated ideas about what the relevant and distinctive function of law is.[26] Yet Redondo has not said a word about them. On the other hand, even if it were true that the law shares certain general functions with other institutions and that what is distinc-

25 For a similar argument, see Ehrenberg 2009: 101.

26 For a good description of the different functions that natural law theorists such as Aquinas, Finnis, Moore, and Murphy attribute to the law, and of how they are distinctive functions, see Duke 2016: 495-502.

tive about it —as Redondo claims— is the way in which it does that, it is not clear why the theory could not refer to this feature in a morally neutral fashion. One might claim that one would not be able to fully understand the way in which law plays its function without understanding that very function, which in turn makes plausible the non-neutrality thesis if, as anti-positivists argue, that function is morally relevant.

In short, Redondo's criticisms of anti-positivism are also inconclusive. It is indeed necessary to further develop the arguments instead of discarding the possibility that the concept of law is functional. In fact, as I will argue now, there are other theories that rely on the idea of law as a functional concept that Redondo has not examined and that do not face the problems Atria's account faces.

4 TWO ALTERNATIVE ACCOUNTS

Although there are several ways of characterizing naturalism, perhaps the best summary of this view says that there is a necessary link between law and the fundamental requirements of practical reason.[27] In the recent literature, there are two kinds of theories that rely on this thesis, which are grounded in the notion of function to develop the specific characterization of the kind of necessity involved. The first one uses the notion of functional kind while the second uses the notion of normative-functional concepts.

4.1 "Law" as a functional kind

The theory of law that uses the notion of functional kind is the one first put forward by Michael Moore. It says that "law" is a term that refers to an object directly, without any third element (certain properties designated by the concept) serving as an intermediary. The meaning of "law," according to this view, is based on the nature of the thing referred to rather than by the concept. This kind of metaphysical necessity depends only on what the law is, in the same vein that happens with natural kind terms. That water is H_2O is a metaphysical truth because something cannot be water if it were not H_2O. But "law" is different from natural kind terms because, says Moore, it refers to artifacts whose nature is given only by its structure. Moore calls them "*functional* kind terms." They are terms that refer to artifacts whose nature is given by the function they play and in which the structure is in the service of that function.[28]

Moore is aware that the identification of the function of an object is a controversial issue, yet he believes that we are familiarized with this kind of approach. For instance, terms that refer to organs that are members of the human

27 Duke 2016: 486.

28 Moore 1992: 206-208.

body are of this kind. Consider the human heart. In order to identify the heart's function, according to Moore, we should involve ourselves in a procedure subject to review on the basis of the available evidence that identifies the good the body produces and the way in which the organ at stake causally contributes to the promotion of such good. According to the best theory available, says Moore, the heart's function is to pump blood because physical health is the goal of the human body (i.e., that for which the body is good) and pumping blood causally contributes to achieving that goal.[29]

Moore says that the term "law" refers to an institution that also has a function related to the human good and its ways of achieving it. The best account available, which according to Moore is Finnis's, shows that law's function is achieving the common good understood as a set of conditions that allow a given community's members to achieve for themselves goals that are reasonable, or to reasonably realize certain values that can only be achieved if they act together.[30] Moore then concludes that, "given certain metaphysical truths about human nature, and given certain necessary truths about morality that make certain goals of law good goals, then the law must have certain structural metaphysical features".[31] And such structural features are those that serve to achieve its function.

As should be clear, if this theory is correct, then the non-neutrality thesis cannot be correct. This is because to explain law, in a sense that fits both positivism and anti-positivism, one should explain that that makes it be what it is. That what makes the law what it is, according to Moore, is something that is metaphysically determined by the function that law plays, which is something that implies conceiving of it as an instrument for the realization of the human good. Determining what that value is necessarily requires, in turn, relying on the best moral theory available. Thus, the theory of law cannot explain its object (law as an institution) unless it adopts a moral point of view. In other words, it cannot explain law in a neutral fashion.

This kind of approach does not face the difficulty faced by Atria's account because it does not say that the institution must be identified only by its structure, without reference to its function. On the other hand, Finnis' view, on which Moore relies, has a reasonably concrete and articulated elaboration of the idea of the common good, and Moore puts forward a reasonably well-constructed argument about why its function is specific and distinctive of law. That function would allow us to distinguish law from other institutions. For this reason, Moore's view, if correct, could also deal with Redondo's criticisms. In short, it is a functional approach that does not face the problems faced by Atria's account

29 Moore 1992: 208-213.

30 Moore 1992: 213-216.

31 Moore 1992: 218.

and which, if correct, would show that Redondo's defense of the non-neutrality thesis is inadequate.

This does not mean, of course, that Moore's view is not without problems of its own. On the one hand, saying that law is a functional kind implies adopting a particularly strong metaphysical commitment. It assumes that law has a nature in some sense, in a similar vein to other natural kind terms (H_20, etc.), which is controversial to say the least. On the other hand, the accounts of the good and the right that Moore's approach relies on, as well as his explanation of the function that law plays in light of such accounts, is controversial. Be that as it may, if one wishes to defend the neutrality thesis, a view such as Moore's should be seriously considered and eventually discarded.

4.2 "Law" as normative-functional notion

The second kind of functionalist argument does not say, as Moore does, that "law" is a functional kind. On the contrary, the concept of law refers to certain properties, and these properties are those that allow identifying its object. In an elaboration that I find particularly attractive, the argument is based on two premises.

First, it is possible that there are different types of concepts (of natural kinds, of kinds identified according to the so-called "semantic externalism,"[32] interpretative concepts, prototypical concepts, amongst others).[33] The concept of law, together with others, is of a special class. It is a functional concept in the sense that it designates a property that refers to an item constituted by a normative standard of success. Call these concepts, lacking a better name, "normative-functional concepts." For instance, to rely on a particular version of this premise, Mark Murphy argues that in the natural law tradition, law necessarily designates a rational pattern of conduct; that standard (rationality) is internal, it is a constitutive part of the nature of the object. The kind of necessity at stake, then, is not that of a "a triangle necessarily has three sides". Rather, it is of the kind purporting claims like "necessarily cheetahs are fast." An object that does not have three sides is not a triangle but, according to this way of understanding things, a legal system that does not meet the standard is still a legal system, only it is one that is defective in relation to the standard. On this way of understanding the question, according to Murphy, necessity is predicated of the kind, not of the individuals that belong to the kind.[34] Other philosophers defend a similar view.[35]

32 Semantic externalism is elaborated in Burge 1979: 73–121.

33 About the relevance of the variety of concepts for a theory of law, see Stoljar 2013: 230.

34 Murphy 2005: 21. A similar argument can be found in moral theory by the so called "constitutivist" approaches. See Katsafanas 2018.

35 Duke 2016: 485-509.

Second, the standard in play is genuinely normative. This means that the concept designates an entity (in the case of law, an institution) such that satisfying the standard is relevant for us from a normative or, more generally, a practical point of view. That the standard is satisfied is relevant for the question of how we should act. This entails that any acceptable theory about an institution should be grounded in the dominion of practical philosophy. And given that analyzing a concept involves identifying necessary properties that distinguish law from other institutions, adopting a moral point of view to identify law is indispensable. For instance, Murphy says that a theory of law is not adequate "without a full understanding of the requirements of practical reasonableness".[36] In other words, if the concept of law is functional in the sense emphasized, we must determine the relevant normative standard that distinguishes law from other notions, and determine why it is genuinely normative. Any other approach is incomplete and superficial.[37] Thus, if this view is correct, the neutrality thesis cannot be correct.

This kind of approach has several advantages. On the one hand, it avoids the difficulties that marred Atria's view because it does not say, as Atria did, that legal systems must be identified without reference to the function because, if not identified in that way, they could not achieve their function. Contrary to what happens with Moore's view, it does not claim that the concept of law is a natural kind term, and as a consequence, it does not have a dubious or strong metaphysical commitment. The theory only says that the concept of law belongs to the dominion of practical reasoning, and there are several ways of understanding that idea.[38] Ex ante, there is no reason to doubt its conceptual or metaphysical credentials. On the other hand, this kind of theory can plausibly avoid several positivist objections.

Thus, the positivist cannot argue that it is possible to explain law as one could explain any other artifact, that is, by explaining what people *believe* about is function and what people *believe* about the alleged value of that function.[39]

36 Murphy 2006: 23. Moreover, Murphy claims that, if one accepts that being constitutively capable of being a rational standard is not only a merit but also part of the existence conditions of law, then a proposition about these conditions includes reference to the merits. Murphy 2013: 19-20.

37 This is one of the ways in which the law is connected, according to this view, to morality. This does not, however, mean that this is the sense in which positivism is different from natural law theory from a historical point of view. For instance, one way in which this difference is traditionally expressed claims that it is not necessary for a norm to be legally valid, that it satisfy a moral criterion, or that it is necessary that it does not satisfy a moral criterion (Leiter 2018: 7). The first sense may be shared by a natural law theorist. The second sense, depending on its precise content, possibly not. Cfr. Gardner 2001: 201.

38 The idea can be elaborated by employing Aristotle's or Aquinas's metaphysics, as Duke suggests (Duke 2016: 491). Or, one can appeal to the notion of constitutive concepts (cfr. Katsafanas 2018).

39 Ehrenberg thinks that a functional explanation need not adopt a view as to whether the function is really valuable. He claims that there is a difference between a reasonable and prudential

This possibility is blocked because, as I said, the theory must necessarily explain its normative standard and what makes it genuinely binding.

The positivist cannot say that it is merely a theory about how ideal law should be, and that this is not problematic because no one really denies that there can be morally ideal instances of law.[40] This is because the theory claims that, unless one explains the morally ideal instances of law, one cannot explain its real instances. As Murphy says, one cannot have a full account without a complete theory of the way in which law can be defective, and one cannot have such a complete theory without a full understanding of the requirements of practical reasonableness.[41]

Further, because of the previous point, the theory correctly deals with the habitual positivist objection according to which the view would be committed to the implausible idea that any real instance of law is morally valuable. Redondo also seems to rely on this line of criticism in the last part of her book. She argues that there are different points of view from which the philosopher may explain the law. The first distinction between different points of view is semantic. Thus, the point of view she calls "external$_1$" is the point of view that attempts to describe and explain only the empirical or behavioral aspects of an institution. The point of view referred to as "internal$_1$" explains the way in which those that participate in the institution refer to it.[42] In turn, one can classify points of view in terms of the different pragmatic assumptions that one can assume, that is, depending on whether one morally accepts the institution or not. Thus, the point of view called "internal$_2$" of those who believe that the institution is justified, while those that adopt "external$_2$" do not assume that.[43] In my view, Redondo believes that her classification is exhaustive and implies that an anti-positivist must adopt the point of view according to which, if one explains social institutions, one accepts that they are justified ("internal$_2$"). For the anti-positivist account that I just sketched, this is false. The classification is not exhaustive because there is another possible normative point of view, and therefore, the anti-positivist must not accept the idea that any real institution is morally justified. This, incidentally, shows why it is not true, contrary to what Redondo says,[44] that the anti-positivist must admit that the point of view of

point of view, one that claims that "the law is a good thing because it does good things", from a theoretical point of view, which claims that "the law is an important thing to study and understand because people *believe* that it does good things" (Ehrenberg 2009: 91-113, 111).

40 Leiter claims that, understood charitably, Finnis' project consists of trying to explain the features of morally ideal legal systems and that this need not be disputed by a positivist (Leiter 2018: 21). For a similar argument, see Shapiro 2011: 408-409.

41 Murphy 2006: 23.

42 Redondo 2018: 203-208.

43 Redondo 2018: 208-210.

44 Redondo 2018: 244.

the one that describes the law is that of an acceptant. Put otherwise, there is no reason to accept that the direction of fit of theory is the same as the direction of fit (constitutive) of the acceptant. This is why, as I said above, an anti-positivist may not accept this idea.

Finally, the positivist cannot say that one can choose philosophically describing law from different points of view depending on the objective one pursues. I tend to think that Redondo believes that the correct point of view is optional because when she introduces the different points of view at the end of her book, she does not say that only one of them is correct. This suggests that this issue is merely optional. But according to the argument I just sketched, this is false. The only possible point of view is the moral point of view. Any other approach is necessarily superficial and incomplete.

To sum up, the view I just sketch does not carry any of the problems Atria's faces and looks perfectly able, if correct, to deal with the usual positivist objections. More importantly, if correct, the non-neutrality thesis is true.

5 BY WAY OF CONCLUSION

The theories that employ the idea of function are, as I see it, the most recent and interesting attempt to deploy the non-neutrality thesis. Redondo criticizes this kind of approach and she does so with her characteristic deepness and philosophical clarity. I have tried to show, however, that her argument against functionalism faces two crucial problems.

On the one hand, Redondo criticizes Atria's version of functionalism but, even though the criticism is well oriented, it does not identify the main difficulty of that theory and, in any case, it does not show that the concept of law is not a functional concept.

On the other hand, Redondo's criticism is almost exclusively centered on Atria and ignores other functionalist theories. One of them employs the idea of law as a functional kind and the other considers law as a normative-functional concept. The latter kind of theory looks attractive for many reasons: it does not face the difficulties of Atria's theory, it does not have unnecessary metaphysical commitments, and it seems fit to avoid usual positivist objections.

These considerations show, in my view, the main weakness of Redondo's excellent book. It does not propose a direct argument to show that the concept of law cannot be functional, nor does it consider the version of functionalist approaches that seems more promising. The point is important because this sort of account belongs to an old tradition —the natural law theory— and there is no straightforward discussion of the main thesis of that tradition: law is a concept that belongs to the domain of practical reasonableness and, consequently,

a philosophical account of the item referred by the concept cannot be provided unless one adopts a practical point of view, that is, unless one determines how the law bears on our reasons for action.

Bibliography:

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

Atria, F. (2020). Una réplica para seguir conversando. En J. Gallego Saade (ed.), *El derecho y sus construcciones. Diálogos con Fernando Atria* (pp. 803-1015). Palestra.

Burge, T. (1979), Individualism and the Mental. *Studies in Epistemology: Midwest Studies in Philosophy, 4*(1), 73-121.

Dickson, J. (2001). *Evaluation and Legal Theory*. Hart Publishing.

Duke, G. (2016). The Weak Natural Law Thesis and the Common Good. *Law and Philosophy* 35, 485-509.

Ehrenberg, K. (2009). Defending the Possibility of a Neutral Functional Theory of Law. *Oxford Journal of Legal Studies, 29*(1), 91-113.

Gardner, J. (2001). Legal Positivism: 5 ½ Myths. *American Journal of Jurisprudence, 46*(1), 199-227.

Katsafanas, P. (2018). Constitutivism about Practical Reason. En D. Star (ed.), *Oxford Handbook of Reasons and Normativity* (pp. 367-391). Oxford University Press.

Leiter, B. (2018). Legal Positivism about Artifact Law: a Retrospective Assessment. En L. Burazin, K. Himma & C. Roversi (Eds.), *Law as an Artifact* (pp. 13-28). Oxford University Press.

Moore, M. (1992). Law as a Functional Kind. En R. George (Ed.), *Natural Law Theories* (pp. 188-244). Oxford University Press.

Murphy, M. (2004). Natural Law Theory. En M. Golding & W. Edmunson (Eds.), *The Blackwell Guide of Law and Legal Theory* (pp. 15-28). Blackwell Publishing.

Murphy, M. (2006). *Natural Law in Jurisprudence and Politics*. Cambridge University Press.

Murphy, M. (2013). The Explanatory Role of the Weak Natural Law Thesis. En W. Waluchow & S. Sciaraffa (Eds.), *Philosophical Foundations of the Nature of Law* (pp. 3-21). Oxford University Press.

Raz, J. (2004). Can There Be a Theory of Law. En E. Martin & W. Edmundson (Eds.), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (pp. 324-342). Blackwell Publishing.

Redondo, C. (2018). *Positivismo jurídico "interno"*. Klub Revus.

Sánchez Brigido, R. (2020). Atria sobre análisis conceptual. Hacia una teoría del derecho no descriptiva. En J. Gallego Saade (Ed.), *El derecho y sus construcciones. Diálogos con Fernando Atria* (pp. 114-138). Palestra Editores.

Shapiro, S. (2011). *Legality*. Harvard University Press.

Stoljar, N. (2013). What Do We Want Law to Be: Philosophical Analysis and the Concept of Law. En W. Waluchow & S. Sciaraffa (Eds.), *Philosophical Foundations of the Nature of Law* (pp. 230-256). Oxford University Press.

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Interpretative conventions and legal positivism

The thesis that the content of law depends on the "interpretative conventions" of legal practice implies that what the rules establish is not always determined by their literal meaning. To leave aside the literal interpretation of a word (by extending or limiting its ordinary meaning) or the literal interpretation of a rule (for example, by considering a circumstance as an exception, even if it is not explicitly mentioned), and to argue that *it is what the law requires* means entering the realm of the implicit. But what is «the implicit»? Does it consist in the criteria implicit in the social practice of law (i.e., in the interpretative conventions «without restrictions») or only in what the legislator has implicitly established (i.e., in the interpretative conventions «with restrictions»)? In light of this distinction, recently pointed out by Cristina Redondo, I discuss some of the questions she raises about the «relevance thesis» of the legal system as something other than the «relevance hypothesis», and I critically discuss her view that the choice between the interpretative conventions «without restrictions» and those «with restrictions» implies a choice between inclusive and exclusive legal positivism.

Keywords: interpretative conventions, exclusive legal positivism, deep conventionalism, social practice

1 INTRODUCTION

The thesis that the content of law depends on the "interpretative conventions" of legal practice[1] implies that what the rules establish is not always determined by their literal meaning.[2] Interpretative conventions are implicit criteria shared by participants of legal practice about how a word or a rule are to be

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1 Bayón 2002.

2 In this paper I will use the terms "literal meaning" and "ordinary meaning" interchangeably because they are used as such in Bayón's paper, to which I refer, as well as among legal theorists in general. However, I consider the term "literal meaning" to be ambiguous and philosophically problematic. In Scataglini (2021) I have suggested doing without it and just using "ordinary meaning" for referring to the meaning that words have in everyday use, as opposed to the meaning they acquire in legal practice. The main problem with "literal meaning" is that if a word has a totally acontextual meaning – that is, it is only determined by linguistic rules or semantic conventions without incidence of pragmatic factors –, then such a thing does not exist even in the ordinary use of language.

understood or applied (i.e., knowing what counts as a particular instance of that word or rule in legal practice). The content of interpretative conventions *is shown* in the agreement on some paradigmatic cases that are recognized as correct applications of the rule.[3] Being so, the core of clear cases determined by semantic conventions may be different from the core of clear cases determined by semantic conventions *plus* interpretative conventions.[4]

This implies rejecting a "simple positivism" that ignores the existence of interpretative conventions, or just assumes that we have only one interpretative convention: that of literal meaning.[5] Simple positivism assumes that "clear cases" are those determined by literal or ordinary meaning, and cases not determined (or not determinable) in that way will be "hard cases" requiring judicial discretion. Determining the correct criterion to distinguish "clear cases" from "hard cases" is a controversial issue in legal literature, but I follow this one: "clear cases" - unlike hard ones - have a correct legal answer (even if reaching it may take some epistemic effort). Accordingly, once accepted that interpretative conventions determine the content of law, it must be acknowledged that there are "clear cases" that have a correct legal answer, although they may not correspond to literal or ordinary meaning of the rule.

In legal interpretation, leaving aside the literal interpretation of a word (by extending or restricting its ordinary meaning) or the literal interpretation of a rule (for example, by taking a circumstance as an exception, even if it is not explicitly mentioned), and to argue that *it is what the law requires*, means entering the realm of the implicit. This is to admit that there are correct, not necessarily explicit, criteria specific to legal practice that determine how a rule or a word are to be understood.[6]

3 Bayón 2002: 79. It should be noted that sharing interpretative conventions is about having an ability (i.e., to recognize whether an exception or an extended or restrictive interpretation of a term are legally acceptable). Such a skill involves mastering a technique of use, having a "know-how" (not necessarily a "know that" -i.e., a knowledge expressible by propositions). Of course, it is not a matter of some mysterious knowledge, but instead of the skill acquired by those who – by means of training - participate and become familiar with the legal practice, sharing actions among others within that social practice. Since interpretative conventions are "substantive" criteria, it would be inappropriate to describe them as an "interpretative method". A different question - independent of the above - regards determining the method that can be used to identify or find the current interpretative conventions.

4 Bayón 2002: 63.

5 Bayón 2002: 63.

6 In this short characterization of interpretative conventions, I deliberately avoid assuming the distinction between norms and norm formulations (Bulygin 1991). This is a widely accepted distinction (sometimes also referred to as that between legal rule and provision or rule and legal text). I have some hesitations with such a distinction, but I can't explain them in this paper. In a nutshell, I find it problematic to think of meaning as an abstract entity that as a kind of "halo" surrounds or "informs" a naked text. For further development see Scataglini (2021). A radical critique of the distinction between norms and norm formulations is found in Narváez Mora 2015a and Narváez Mora 2015b.

Now, what is "the implicit"? What exactly is that is "not expressed" that determines the content of law? Does it consist in the criteria implicit in the legal social practice, or only in what the legislator has established, even if it has not been expressly mentioned (i.e., the "relevance thesis" of the system[7])? This alternative has been pointed out by Cristina Redondo (2018: 144-7), who has stressed that there is a contrast between two possible ways of accepting interpretative conventions as determining the content of law: either "without restrictions", that would be, taking what arises from the prevailing interpretative practice without any condition, or "with restrictions" to what the legislator has established explicitly or implicitly.

Redondo formulates this alternative in the context of a critique of Eugenio Bulygin's work, claiming that the Argentine legal theorist - and co-author with Carlos Alchourrón of the famous *Normative Systems*[8] - oscillates ambiguously between these two possible ways of accepting interpretative conventions, without choosing either of them.[9] Further, she suggests that, depending on the way they are understood, accepting interpretative conventions may be incompatible with some of the main theses of the mentioned book.

Regardless of what Bulygin may hold in his defence, what I will try to do in this paper is, first, analyse the alleged inconsistency raised by Redondo, which I reconstruct as follows: (Sec. 2) The acceptance of interpretative conventions might be incompatible with assuming, (2.1), that the identification of the relevance thesis of a legal system is always an act of description; and, (2.2), it is always possible to draw a sharp line between the relevance thesis of the system and a hypothesis of relevance. Second, I critically discuss Redondo's suggestion that, (Sec. 3), the choice between accepting interpretative conventions "without restrictions" and accepting them "with restrictions" to what the legislator established, implies a choice between inclusive and exclusive legal positivism.

7 Following Alchourrón (2000), all conditional statements have implicit exceptions. So, what at first glance would appear as the relevance thesis of a system – that one explicitly issued- could in a second analysis include something that the legislator has not expressed, but that is nevertheless considered to have been implicitly established. In the context of what Alchourrón calls a dispositional approach, the question is to interpret counter-factually what the legislator's solution would have been if she had considered a certain circumstance, but which she did not in fact consider. This is not a factual investigation, but a counter-factual and interpretative investigation of the legislator's values. For example, if it were to be concluded that a certain circumstance – if considered by the legislature – would have been taken as an exception, it must be understood, as Alchourrón says, that although it may seem paradoxical, such circumstance was always an exception contained in the issued legal rule. Alchourrón 2000: 25-27.

8 Alchourrón & Bulygin 1971/2002.

9 Redondo notes that in Bulygin 2006, interpretative conventions "without restrictions" are supported. Instead, in Bulygin 2005, interpretative conventions are taken just as what has been established by the legislator explicitly or implicitly.

2 ON ACCEPTING INTERPRETATIVE CONVENTIONS

(2.1) The acceptance of interpretative conventions might be incompatible with assuming that the identification of the relevance thesis of a legal system is always an act of description, so Redondo says. She also claims that if interpretative conventions are accepted as determining the content of law, it should be accepted that sometimes the relevance thesis of a system could be controversial or answerable, and, in turn, that its identification would remain a cognitive (identifying) and non-discretional act (not a choice). The obstacle would arise, she says, as to whether "contents on which disagreement exists can still be considered part of the descriptive relevance thesis of a system (assuming that it is still possible to call them conventional)".[10] I find no problem in answering this question affirmatively, yet it is problematic for Redondo on the basis of the idea, which she introduces in a footnote quoting Jorge Rodríguez, that no assertion about controversial content can be considered descriptive.[11]

Discussing or at least relativizing this idea would solve Redondo's worries. In this regard, something involving the use of the term "conventionalism" should be clarified. First of all, it should be noted that it is one thing to assume a conventionalist ontology regarding the existence of law and another to give a conventionalist answer to the problem of rule-following. These are separate issues.[12] It can be argued that the law is -ontologically speaking- a conventional object (in a minimal and lax sense of "conventionalism" that refers to being a product of social relations and intersubjective human agreements) and, at the same time, to avoid a conventionalist answer to the question on following a rule; that is: not assuming that what a rule requires (i.e. its content; its meaning) is given by the unanimous and explicit agreement of the community in its specific applications. Bayon's distinction between "deep conventionalism" as opposed to "superficial conventionalism"[13] is - as I understand it - concerning the question of rule-following.

Within deep conventionalism - which is based on the notions of background and social practice - it is possible to distinguish between, on the one hand, the explicit agreement of the community, and on the other hand, what makes the applications of a rule correct, namely: the shared background criteria - not necessarily transparent or explicit for practitioners – in virtue of which they recognize certain cases as paradigmatic. Well, according to Bayón's characterization, the shared background criteria that determine the correct applications - i.e.,

10 Redondo 2018: 144.

11 Redondo 2018: 144.

12 This distinction is stressed by Bayón (2002: 83) by distinguishing between conventionalism in relation to conditions of *existence* of law and conventionalism in relation to its *content*, arguing that positivism is necessarily committed to the former but not the latter.

13 Bayón 2002: 76-80.

interpretative conventions - can, at the same time, coexist with some degree of disagreement and/or error in particular applications. Then, within deep conventionalism it can be said that correction regarding what a rule requires depends on the existence of those shared criteria or social practice but not necessarily on the effective consensus on applications, on which it is accepted that disagreement may arise.

I think that sometimes in saying that the content of a rule (i.e., its meaning) depends on interpretative conventions mentioning the "practice," this is understood as referring to the existence of consensus on applications. This use of "practice" should be disambiguated. The background of interpretative conventions is not identified as a consensus, regularity, or (superficial) convention. The identification of deep conventions does not consist of empirical verification or observation. Instead, Bayón refers to a kind of holistic reasoning, a deliberative practice toward a reflective equilibrium.[14]

So, if we accept the notion of "deep conventions", understood not as the description of an observable empirical reality but still as an act of identifying the content of law, the idea that no claim on controversial content can be considered descriptive is refuted. Disagreement could be due to some (or even many[15]) people being wrong about what the community's background criteria establish as the content of a rule. Still, this does not prevent the existence of a correct legal answer, i.e., the one that these criteria determine, nor that it can be described by an act of identification.

14 Bayón 2002:76-80. When trying to think examples of interpretative conventions, some paradoxical questions arise. That's because the explanation of meaning usually becomes trivial (even in the context of a specific practice such as legal practice). We don't need to say how we recognize anything as something, when we know how to do it. The implicit background operates autonomously and automatically. The need for explanation arises when there is some mismatch or some feature that doesn't fit. This leads us to reflexively "look back" to the background and –through amendments and adjustments – try to articulate the criteria that we are actually dealing with.

15 Bayón explains (2002: 92): "Deep conventionalism admits the possibility of a widespread error of the community about what a rule requires in a given case, but at the same time, it puts a limit on the amount of collective error that can be meaningfully admitted: because to argue that it is possible that (almost) everyone is wrong about (almost) all cases would be equivalent to denying the very existence of that background of shared criteria which is precisely what would allow us to say, in a given case, that the whole community is wrong." (My own translation). Thus, the existence of disagreement is not a problem those who avoid a conventionalist answer on rule-following should face. Let me briefly clarify: only for the "superficial conventionalist" disagreement means an obstacle to assert that a rule exists. This is because those who think that the existence of rules depends on unanimous agreements on applications are forced to prove that those agreements actually exist in order to assume that, consequently, the rules in question do. I cannot address the complex question of the existence of rules here. In a nutshell, asserting that a rule exists just requires us to be able to recognize (at least some) paradigmatic cases of it (i.e., to understand its meaning). This is conceptually distinguishable from actual agreements on applications and even from a great majority of clear cases empirically verified.

In conclusion, it seems that accepting deep interpretative conventions as determining the content of law and, in turn, arguing that the relevance thesis of a legal system may be controversial but still capable of identification or description, is perfectly right.

(2.2) The acceptance of interpretative conventions might be incompatible with assuming that it is always possible to draw a sharp line between the relevance thesis of the system and a hypothesis of relevance.[16]

Redondo claims that we have a problematic issue here: once we recognize that the identification of interpretative conventions is a complex or step-by-step process, there is no way to warrant a relevance thesis that remains stable. In her own words, there is no way to assure that "*(the relevance thesis)* does not change from one moment to the next according to the discretion of judges or any other interpreter". She adds that what should be excluded is that the relevance thesis "changes at will of the interpreter, or depends on him/her".[17] Thus formulated, she could be misunderstood on this point. First, interpretative conventions could change if background practice changed, and in that scenario discretion would still not come into play. But let's set that quite remote hypothesis aside. The important issue is that the determination of the content of interpretative conventions, as long as it is identification of law, conceptually *excludes* discretion (being exercised by a judge or by an interpreter or by the whole community; from now on I will speak of these interchangeably as "the interpreter"). Therefore, concluding that the alternative is between stability, on the one hand, and discretion or free will of the interpreter on the other hand, would be wrong. Identification of interpretative conventions is *de facto* made by the interpreter, but nothing prevents the interpreter from *identifying* them (nor does that such identification eventually remains stable). Let me explain.

Redondo stresses the contrast between identifying interpretative conventions "without restrictions" and identifying them "with restrictions" to what the legislator established explicitly or implicitly, as already mentioned. The way she presents the analysis makes it seem like the opposite of interpretative conventions "with restrictions" to what the legislator established, is the instability of the relevance thesis of the system and the defeasibility of legal rules.

It should be clarified that accepting interpretative conventions "without restrictions" does not necessarily imply that when someone interprets, she is postulating a hypothesis of relevance understood as an alternative or criticism of the relevance thesis established by the legislator (i.e., a *prescriptive* hypothesis

16 Alchourrón and Bulygin (1971: 156-7) distinguish between the "relevance thesis of the system" as a proposition that identifies a set of properties that *are* relevant to a universe of actions, and the "hypothesis of relevance" as the proposition that identifies the set of properties that *should be* relevant to a universe of actions. The relevance thesis assumes a descriptive criterion, while the hypothesis of relevance assumes a prescriptive or axiological criterion applied by an interpreter.

17 Redondo 2018: 147.

of relevance). The interpreter is not always expressing –in a disguised way or not- her opinion on what the law *should be*. On the contrary, when identifying interpretative conventions, what the interpreter does is to describe what the law *is*, according to the implicit criteria governing the legal practice (i.e., issuing a *descriptive* hypothesis of relevance).[18]

This is precisely the challenge that Bayón poses in distinguishing interpretative conventions from mere exercise of discretion and, in turn, stressing that such conventions are not identified by empirical verification. It should be noted that the background criteria that constitute the interpretative conventions are, in a broad sense, normative: a kind of know-how, the mastery of a technique (i.e., how something is correctly understood, what arguments/reasons are legally admissible or not to introduce exceptions) yet, they can be identified descriptively.

Once it is clear that when we talk about identifying interpretative conventions we are talking about issuing a descriptive hypothesis of relevance, only then - and keeping that in mind- the contrast claimed by Redondo arises. In the context of that reconstruction/description the emphasis can be placed on the legislator's will, that is, to formulate a descriptive hypothesis of relevance of the axiological system of the authority (something like Carlos Alchourrón's dispositional approach, or Jorge Rodríguez's proposal),[19] or rather strive to describe/identify the background criteria implicit in the legal practice understood as a social practice (which is more like Bayón's idea of shared deep conventions).

The contrast exists and Redondo is quite right to point it out. But the contrast does not run in parallel with the opposition between the relevance thesis of the system vs. the prescriptive hypotheses of relevance. In both cases, namely, interpretative conventions with or without restrictions, it is about reconstructing the law as *it is* (i.e., a descriptive hypotheses of relevance). It is just that in the first case it is done in a more originalistic way.

I think the contrast encompasses two possible ways of conceiving law itself: one conception that emphasizes the notion of *system* and another grounded on the notion of *social practice*. This does not mean that both items oppose one

18 Jorge Rodríguez (2021: 377) stresses: "A jurist could be genuinely trying to reconstruct those properties that should be considered relevant according to the axiological system of the authority itself, and not proposing her own value judgments, even in disguise. In issuing certain legal rules, the authority presupposes a particular axiological system. And if in some case it is true that a property has not been considered relevant because it was not taken into account at the time of the enactment of the legal rules, but that, had it been considered by the authority, it would have correlated the case with a different solution, then it could be said that that property should be considered relevant according to the axiological system of authority. /.../ From this descriptive reading of the hypothesis of relevance, and accepting the additional premise that the axiological system from which it is derived is a reconstruction of the axiological system of the authority, it could be argued that the property in question is relevant in the legal system, not that it should be." (My own translation.)

19 See footnote 7, quoting Alchourrón (2000: 25-27), and footnote 18, quoting Rodríguez (2021: 377).

another. Rather, it seems to be a matter of focus or emphasis about a general conception of law. Now, returning to the interpretative matter and on the question of stability, that emphasis does not seem illuminated by putting the pair legislator/stable thesis of relevance on one side, and the pair interpreter/unstable hypothesis of (prescriptive) relevance on the other one.

In conclusion, reformulating Redondo's original claim, I believe that the notion of interpretative conventions, even in its two versions "without restrictions" or "with restrictions" to what the legislator established, is not incompatible with the possibility of keeping a sharp distinction between the relevance thesis of the system and an hypothesis of relevance as conceived in *Normative Systems*,[20] even more so when keeping in mind that it is a prescriptive hypothesis of relevance that is referred to in that book.

3 THE CHOICE BETWEEN INCLUSIVE AND EXCLUSIVE POSITIVISM

Redondo argues that the choice between accepting interpretative conventions "without restriction" or "with restrictions" to what the legislator established explicitly or implicitly implies a choice between the inclusive and exclusive legal positivism.[21] I disagree with her on this idea.

I have already said that Bayón stresses the determination of interpretative conventions as a way of identifying the law (even if this task may become epistemologically hard), and this involves distinguishing that exercise, from discretion on the one hand, and from moral reasoning, on the other.

In accordance with the classic characterization of Moreso and Vilajosana,[22] inclusive legal positivism sometimes admits the incorporation of moral reasoning in order to identify the content of law.

So, if we accept: (i) that the determination of interpretative conventions is always identification of the content of law (as opposed to moral reasoning or discretion), and (ii) that inclusive legal positivism entails introducing moral

20 Alchourrón & Bulygin 1971/2002.

21 Redondo (2018: 148) literally says: "Inclusive legal positivism argues – as Bulygin also does in Legal Positivism – that the criteria for the identification of law depend on the prevailing "interpretative conventions", without restriction. It follows from that argument that what the legislator wanted or attempted to legislate must be taken into account only to the extent that it is so established by the interpretative conventions in force. By contrast, exclusive legal positivism understands – as Bulygin argues – that in order to identify the relevance thesis of a system it is necessary to take into account only what the legislator (the authority) established. It follows from this thesis that interpretative conventions must be taken into account only in so far as they serve to capture the content of what, explicitly or implicitly, the legislator in fact wanted or attempted to legislate." (My own translation.)

22 Moreso & Vilajosana 2004.

reasoning for the purposes of identifying legal norms, then the determination of the content of law according to the interpretative conventions always falls within the framework of exclusive legal positivism (it doesn't matter if such a process acquires an originalist nuance or not).[23]

Accordingly, we must conclude that the choice between the two ways of identifying interpretative conventions - with or without restrictions - is not related to the distinction between exclusive or inclusive legal positivism, or in other words, with the necessity or contingency of the thesis on the separation between law and morals (assuming contingency as that, in some cases, determining the content of law may depend on morals and not on social sources).

Nevertheless, Bayon's hypothesis-(i)- could be rejected. So, it could be claimed that since as a matter of fact nothing prevents interpretative conventions from referring to morals, on those occasions the identification of law would depend on moral argumentation. And, to avoid Bayon's critique that this would imply having abandoned the conventionalist ontology inherent to all positivism, one should stress an argument showing that a convention that refers to an unconventional criterion may exist, and that it would not be an apparent or empty convention.[24]

But Redondo takes another path. She distinguishes the conceptual question of what the law is (as something different from other normative orders such as morals) on the one hand, from another question concerning what the law is in Spain, Italy, Argentina, etc., which relates to how the thesis of relevance of (that) legal system is identified. According to her view, exclusive legal positivism sees the first question – the conceptual one – as imposing a restriction on the second one -related to the identification of the thesis of relevance of a particular system. As a consequence of this restriction, anything that is not relevant in the legislator's system is descriptively irrelevant. This would draw a limit on what can be law in each legal system. Redondo stresses that this conceptual restriction, which makes the above a necessarily true statement, would not be a mere stipulation but an implicit feature of a correct understanding of the concept of law and its connection to the notion of authority. She herself considers that such a restriction "may seem inadmissible or excessive".[25]

In characterizing the response of inclusive legal positivism, Redondo notes that it does not establishes any restriction on the criteria or content in answering the "conceptual question" about what the law is, so it may include moral (not conventional) criteria, provided that they are accepted by practice. Redondo

23 This conclusion seems sound, since in the same paper in which Bayón characterizes interpretative conventions (Bayón 2002:73), he also criticizes inclusive legal positivism as an unstable position, which either collapses into iusnaturalism or exclusive legal positivism.

24 This is the path followed in Orunesu 2007.

25 Redondo 2018: 154.

acknowledges that here the inclusive legal positivist would be admitting what the positivist concept of law precludes, namely, resorting to morals to determine what the law is. However, she suggests a way out. She says that the inclusive legal positivist could abandon the conventionalist ontology concerning the concept of law in order to pose that law is an institutional object, that is, "that it has its origin and depends on beliefs and attitudes, but that it is not necessarily a conventional object and is not necessarily identified as conventions are."[26]

Accepting Redondo's general approach for a moment, and keeping in mind that the restriction of interpretative conventions to what the legislator established might seem excessive or inadmissible to her, we might ask: is Redondo suggesting to accept the interpretative conventions "without restrictions" and with them the inclusive legal positivism (in the terms she has defined that position), and to reject exclusive legal positivism and the conventionalist ontology with it?

To clear the issue, we must remember the distinction I made in 1.1 between "conventionalism" in relation to the *existence* or the ontological status of law and in relation to the *content* of law or about rule-following. Within Redondo's general approach, accepting interpretative conventions "without restrictions" to determine the content of a particular system would mean embracing inclusive legal positivism, since it is accepted that such conventions could eventually refer to morals.[27] This would imply giving up conventionalism not only in relation to the content of law (i.e., it would be accepted that it sometimes does not depend on social sources), but also in relation to the existence of law (i.e., law would no longer be a "conventional object"). Here the two issues of "conventionalism" I had distinguished seem to collapse. I think that is why her analysis is misleading.

Instead, in my proposal, conventionalism in relation to the *existence* of law and conventionalism in relation to its *content* are separable issues. Therefore, interpretative conventions "without restrictions" are compatible with exclusive legal positivism. This is so because regarding the *content* of law it is possible to reject "superficial conventionalism" (that argues that the community's effective

26 Redondo 2018: 151. Here it is not clear whether in using "conventions" Redondo means the technical sense coined by Lewis -i.e., a regularity of conduct that is followed or preferred by agents because others also follow or prefer it to solve a coordination problem (Lewis 1969) - or she is simply speaking in a general sense, using "conventions" to indicate that they are identified empirically. In any case, it is not clear whether Lewis's notion of convention applies to law, as a good way to characterize the rule of recognition of a legal system. For a discussion on this, see Vilajosana 2010.

27 It could be asked: what exactly would it mean for an interpretative convention to "refer to morals"? To speak of "rules that refer to morals" is intelligible. This is the case when an expressly legal rule contains, for example, the clause "according to morals and good customs". It is another thing to assert that when a legal rule contains evaluative terms (such as "cruel punishment") our interpretative conventions on them refer to morals. Of course, the content of legal and moral duties (however "moral" is understood) usually overlap, are coextensive. But this does not mean that the interpretative conventions of legal practice refer to morals, even less that the content they determine become legal *because* they are moral.

consensus determines what a rule requires) in pursuit of "deep conventionalism", but in turn, regarding the *existence* of law, to keep ontological conventionalism as an inherent feature of positivism. That is, to conceive law as a conventional phenomenon, in the sense of being a product of social relations and intersubjective agreements between humans (i.e., a social practice).

In fact, the latter is quite similar to Searle's "institutional object" to which Redondo refers, so we would not likely disagree on that issue. The controversial matter would be that, under my reconstruction, accepting interpretative conventions "without restrictions" does not mean abandoning conventionalism in relation to the *existence* of law (nor a deep conventionalism -albeit a superficial one– in relation to its *content*) and so it doesn't lead to rejecting exclusive legal positivism.

Thus, in my analysis it would be possible to show that "Internal Legal Positivism" (the novel position that Redondo presents in her valuable book, so titled) is not – and does not go hand in hand with – inclusive legal positivism.

Bibliography:

Alchourrón, C. (2000). Sobre derecho y lógica (J. Rodriguez con la colaboración de S. A. Militello, trad.). *Isonomía*, *13*, 11-33.

Alchourrón, C. & Bulygin, E. (2002). *Introducción a la metodología de las ciencias jurídicas y sociales* (1ª ed.). Astrea. (Original work published 1971).

Bayón, J. C. (2002). Derecho, convencionalismo y controversia. En P. Navarro & M. C. Redondo (Eds.), *La relevancia del derecho. Ensayos de filosofía jurídica, moral y política* (pp. 57-92). Gedisa.

Bulygin, E. (1991). Normas, Proposiciones Normativas y Enunciados Jurídicos. En C. Alchourrón & E. Bulygin, *Análisis Lógico y Derecho* (pp. 169-193). Centro de Estudios Constitucionales.

Bulygin, E. (2005). En defensa de El Dorado. Respuesta a Atria. En F. Atria, E. Bulygin et al., *Lagunas en el Derecho. Una controversia sobre el derecho y la función judicial* (pp. 73-85). Marcial Pons.

Bulygin, E. (2006). *El positivismo jurídico.* Fontamara.

Lewis, D. (1969). *Convention. A Philosophical Study*. Basil Blackwell.

Moreso J. J. & Vilajosana J. M. (2004). *Introducción a la teoría del Derecho*. Marcial Pons.

Narváez Mora, M. (2015a). Expressing norms. *Revus – Journal for Constitutional Theory and Philosophy of Law, 25*, 43-70. https://journals.openedition.org/revus/3191

Narváez Mora, M. (2015b). Expresiones de normas. *Revus – Journal for Constitutional Theory and Philosophy of Law, 25*, 71-100. http://revus.revues.org/3266

Orunesu, C. (2007). Sobre la inconsistencia teórica del positivismo incluyente. *Análisis Filosófico, XXVII, Nº 1*, 23-46. https://analisisfilosofico.org/index.php/af/article/view/178

Redondo, M. C. (2018). *Positivismo jurídico "interno"*. Klub Revus.

Rodríguez, J. L. (2021). *Teoría Analítica del Derecho.* Marcial Pons.

Scataglini, M. G. (2021). *Seguimiento de reglas: el "aguijón pragmático" en la teoría del derecho.* Marcial Pons.

Vilajosana, J. M. (2010). Una defensa del convencionalismo jurídico. *Doxa, Cuadernos de Filosofía del Derecho*, *33*, 471-501. https://doxa.ua.es/article/view/2010-n33-una-defensa-del-convencionalismo-juridico

Ezequiel Monti*

Redondo on the normativity of law

In her latest book, *Positivismo jurídico "interno"*, Cristina Redondo defends a novel account of the normativity of law. According to Redondo, the law does not claim legal rules to be substantive reasons to act as they require. Rather, she argues, law only intends legal rules to be recognized as logically non-defeasible rules to be used as premises in formal arguments whenever they apply. Thus, the law claims legal rules to be reasons only in a linguistic-formal sense, independently of their impact on what people ought to do. Here, I shall argue that Redondo's arguments against the view that law intends legal rules to be substantive reasons (or to be treated as such) are misguided, and that her own positive proposal according to which law claims legal rules to be reasons in a merely formal sense ought to be rejected.

Keywords: legal normativity, rules, reasons for action, defeasibility, particularism

1 INTRODUCTION

Reading Cristina Redondo's work is always fruitful and enjoyable. Her latest book, *Positivismo jurídico "interno"* [*"Internal" Legal Positivism*], is no exception. There, she defends a novel and interesting account of the normativity of law.[1] In this paper, my aim is to critically examine Redondo's account and the arguments she offers in its favour.

Redondo's starting point is the observation that the law claims or intends to guide people's behaviour by rules. In this context, the expression "law" refers, I take it, to legal institutions (Congress, courts, etc.), or their members (legislators, judges, etc.), or to a subset of those institutions or individuals.

But how should we understand the claim that legal institutions intend to guide people's behaviour by rules? It cannot mean that whenever legal institutions enact a rule they have the intention of guiding people's actions. The intention with which legal institutions act is, after all, contingent.[2] I take it that

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1 Redondo 2018: chap. 2.

2 Let us suppose that a corrupt king accepts a bribe in exchange for enacting a rule requiring his subjects to attend Church on Sundays. He is not in the least interested in guiding their conduct: he is not interested in them going to Church or in giving them a reason to do so. His

Redondo's claim is rather that, by enacting a rule, legal institutions *communicate* the intention of guiding people's actions by way of that rule. It is possible to enact a rule without the intention of guiding people's behaviour. But it is not possible to enact a rule without *communicating* the intention to guide people's behaviour: enacting a rule *consists*, at least partly, in communicating the intention that people be guided by it.

But what do legal institutions intend when they intend that people's actions be so guided by the rules they enact? A common answer is that legal institutions seek to give the rule's addressees a *reason* to act as the rule requires. Thus, by enacting a rule, legal institutions would be communicating the intention to give the rule's addresses a reason to act as the rule requires by way of that very act of communication.[3]

Furthermore, legal institutions do not simply intend to give people *some* reason to do what the rule requires. Rather, they intend to give them a reason of a special kind, that is, they intend to *impose an obligation on them* to act as the rule requires.

Thus, in enacting rules, legal institutions communicate the intention that the enacted rule be (or "work as")[4] a reason for action of a distinct type. But, of course, they don›t always achieve what they set out to do. Redondo claims that a rule is a "practical" or "genuine" rule when the institution that enacted it actually succeeds in doing what it communicated the intention to do, that is, if and only if the rule actually is, or works as, a reason for action of the relevant distinct type. That is the notion of a genuine rule that Redondo is interested in examining more closely.

To establish her argument, she first distinguishes three different senses in which it can be said that genuine rules are or function as reasons for action. Second, she reconstructs two objections that defenders of the thesis that law claims that legal rules are or function as reasons for action must address. The

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intention is simply to cash his check. However, he does that for which he was paid, that is, he enacts a rule requiring his subjects to go to Church on Sundays. My suggestion is that in issuing that rule, the king is communicating his intention of giving his subjects a reason to go to Church by that very act of communication. But that, of course, does not imply that he actually has the intention he communicated that he has. One can communicate intentions that one lacks.

3 Not all legal rules are enacted by agents (e.g., customary law). To generalize the point made in the text, we should say something along the following lines: the claim that "the law claims to guide people's conduct by rules" means that legal rules are either enacted by legal institutions with the (communicated) intention of guiding people's actions or, if not enacted by anyone, they are at least treated by legal institutions as guiding action in precisely the same sense in which someone enacting them would have communicated the intention that they do. This generalization requires several clarifications, but the required clarifications do not affect the arguments that follow.

4 This expression is Redondo's. More on it will appear later.

first objection is an epistemic one, according to which it is impossible to know whether a genuine rule so understood exists or not. The second objection is a practical one, according to which rule-following is irrational. Finally, she argues that only in *one* of the three different senses in which it could be claimed that genuine rules are or function as reasons for action is it plausible to hold that law necessarily claims that legal rules are genuine rules. The argument is that only if the thesis is understood in this way is it possible to respond satisfactorily to the epistemic and practical objections in a way that is compatible with legal positivism.

My aim in this paper is to critically examine Redondo's argument. I shall proceed as follows. First, I reconstruct Redondo's distinction between the three different senses in which it can be said that genuine rules are or function as reasons, namely, an objective, a subjective, and a formal sense (Section 2). Second, I explain why Redondo's arguments against the thesis that the law claims that legal rules are reasons in a subjective (Section 3) or objective (Section 4) sense are inadequate. Finally, I argue against Redondo's thesis that law claims that rules are reasons only in a merely formal sense (Section 5).

2 RULES AND REASONS

2.1 Substantive reasons, formal reasons and defeasibility

Redondo distinguishes two senses in which it can be said that a normative statement is or functions as a reason for action.

On one hand, a normative statement can express a *substantive reason* for action, which could be conclusive in a particular case, depending on its relative weight.

On the other hand, a normative statement can be a *premise* in a formal argument, in which, by applying the appropriate rules of inference, a normative conclusion is drawn regarding a particular case. In this sense, normative statements can be *formal reasons*.

To these two senses in which normative statements can be reasons, there are two corresponding senses in which normative statements can be *defeated*.

From the point of view of substantive reasons for action, a normative statement may express a totally weightless consideration, in which case it does not express a reason at all. Thus, a distinction must be made between rules that are *invariably relevant* (they constitute a reason to act as required in *all* cases to which they apply) and rules that are not reasons or are only reasons in some cases, but not all. However, the fact that a rule expresses an invariably relevant reason does not imply that one always ought to act as it requires, all things considered. It is

possible for a normative statement to express a reason that is *pro tanto* only. *Pro tanto* reasons count in favour of performing a certain action but they can be *defeated* by weightier reasons that count against doing so. Thus, it is possible for a normative statement to express a *pro tanto* reason for an agent to Φ but that, all things considered, the agent ought not to Φ. Thus, a normative statement is *substantively defeasible* if and only if it expresses a merely *pro-tanto* reason.

From the formal point of view, a conditional normative statement is *logically defeasible* if and only if *modus ponens* is not applicable to it. Thus, the antecedent is not a logically sufficient condition of the consequent. It is understood that the antecedent is related to a set of unstated assumptions and that only in conjunction with them it would constitute a sufficient condition for its consequent. Thus, logically defeasible normative statements are subject to exceptions that render them, on Redondo's terms, "internally inapplicable".

The second type of defeasibility (*logical defeasibility*) affects the identity of a rule and the type of relationship that it establishes between its antecedent and its consequent (identification/structure). In contrast, the first type of defeasibility (*substantive defeasibility*) concerns its capacity, as a substantive reason, to determine what ought to be done all things considered, but it leaves intact its content and the possibility of drawing conclusions from it.

2.2 Three interpretations of the notion of genuine rules

Armed with the abovementioned distinction between substantive and formal reasons, Redondo distinguishes three senses in which it can be said that genuine rules are or function as reasons for action, namely:

(*a*) *Substantive-objective sense*: According to a first interpretation, a rule is a genuine rule if and only if it objectively is (or expresses) an invariably relevant substantive reason of a distinct type.

(*b*) *Substantive-subjective sense*: According to a second interpretation, a rule is a genuine rule if and only if the agents to whom it is addressed *treat it as* (or they take it to express) an invariably relevant substantive reason of a distinct type.

(*c*) *Formal-linguistic sense*: According to a third interpretation, "following" a legal rule implies no more than a linguistic and formal behaviour within a normative discourse, which says nothing about the subjective reasons that effectively motivate action or about the objective reasons that count in favour of performing an action. In this sense, a rule is a genuine rule if and only if: (i) it is recognized as a logically non-defeasible conditional; (ii) it is offered as a reason in the formal sense in all cases where it is applies; and (iii) where appropriate, the reasons why a particular case -

which is recognized as falling within its scope - is not finally decided in accordance with the rule, are explicitly stated.

Note that, in one important respect, the third sense or interpretation is weaker than the other two. For rules to be, or to be treated as, invariably relevant substantive reasons, they must be, or be treated as, logically non-defeasible. In contrast, rules can be recognized as logically non-defeasible without being, or being treated as, invariably relevant substantive reasons. Redondo's central thesis is that what law claims is that legal rules are reasons in this merely formal and weaker sense. It does not claim that legal rules are substantive reasons, whether in a subjective or an objective sense. This is, I believe, a mistake. In the next two sections, I will examine and reject Redondo's arguments against the thesis that what law claims is that rules are substantive reasons in a subjective (Section 3) or objective (Section 4) sense.

3 THE LAW INTENDS THAT LEGAL RULES BE *TREATED AS* INVARIABLY RELEVANT SUBSTANTIVE REASONS

3.1 The epistemic objection

If genuine rules are interpreted as reasons in the substantive-subjective sense, then what the law necessarily intends is that legal rules be treated by citizens as invariably relevant substantive reasons. Redondo introduces two fundamental arguments against this thesis.

The first is an epistemic objection. The idea is that it is impossible to determine whether an agent treats a legal rule as expressing an invariably relevant substantive reason or not. Therefore, it would be impossible to determine whether legal rules are genuine rules in the relevant sense. Redondo identifies two difficulties in this regard.

First, even if an individual always acts according to a given rule, it is impossible to determine whether she does so *motivated by* the rule. Even if she explicitly invokes the rule as a justification for her behaviour, we could not on that basis conclude that her conformity to the rule were motivated by it. After all, individuals often invoke rules to rationalize actions in which, in fact, the rules played no motivational role. Therefore, conformity with a rule is not sufficient to conclude rule following.

Second, the fact that an individual *fails* to conform to a given rule does not mean that she does not regard it as an invariably relevant substantive reason. Indeed, it is possible for her to consider that, although invariably relevant, it is also substantively defeasible. The problem is that it is epistemically impossible

to distinguish between those cases in which an agent violates a rule because she does not regard it as a reason for action and those cases in which she violates it because, although she does regard it as a reason, she judges that it is defeated by weightier reasons that count against conforming to the rule. Therefore, breach of the rule is not enough to conclude absence of rule-following.

This objection must be rejected. First, it is not clear why it would be a problem if it were epistemically impossible to determine whether individuals act as the law intends them to act. Perhaps the idea is that, in that case, the law (say, courts or judges) wouldn't be able to control whether individuals act as intended. But it is a mistake to believe that the law necessarily controls whether agents act as it intends them to act (more on this later).

Second, it is simply false that it is epistemically impossible to determine whether someone regards a rule as a reason or not. It is true that it is possible for someone to conform to a rule without acting motivated by it. But this does not imply that there could be no further evidence that would allow us to reasonably determine whether someone is motivated by the rule or acted on other reasons. If an agent normally acts according to a given rule, she must act motivated by certain considerations that explain her behaviour. If the best explanation is that her actions are motivated by the rule, then we have reason to believe that that is indeed the case. To determine the best explanation of an agent's behaviour, what the agent says and believes about her own motivation, how she reacts to other people's breaches, what we generally know about human motivation, etc., is relevant evidence. It is also true that sometimes people lie or have false beliefs about what motivates their actions. But this does not imply that we are never justified in relying on their testimonies. We know they lie, when they do, or that they are mistaken about their own motivations, when they are, because we have evidence that they are lying or that they are mistaken.

It is also possible for someone who regards a certain rule as an invariably relevant reason for action to deliberately fail to act as it requires. But again, there are many elements that serve to distinguish between the breaches of someone who regards a rule as a reason and someone who could not care less about it. For example, if I believe that I have an obligation to help you move houses next weekend because I have promised to, but nonetheless I fail to act as promised in order to take care of my sick mother, I will probably call to apologize or feel remorse or try to make it up to you in some way. But if I thought that my promise does not bind me, that it is not a reason at all, then I would probably behave and feel differently. Or if I acted in the same way, it would be for reputation related reasons, etc., in which case, again, there would probably be elements that allow us to determine that was the case.

To sum up, our motivations are, of course, difficult to ascertain. But they are not epistemically inaccessible. We often do *know* that someone acted motivated

by *x* or did not do so motivated by *y*. And there is no reason to believe that the rules are special in this regard.[5]

3.2 The "inquiring motives" objection

Redondo's second objection runs as follows. If it were true that the law intends that we accept legal rules as substantive reasons, this would imply that the law intends not only that we act in a certain way but that we do so motivated by certain reasons. But that would be, the objection continues, deeply illiberal. And, in fact, neither citizens nor judges are investigated (by other judges or officials) about the motives for which they act, which suggests that the law does not intend that we act for a particular motive.

This second objection must also be rejected. First, how the law intends us to act is one thing, but what it monitors or controls is another. It is possible that the law wants us to act motivated by the rules, but that nonetheless the task of the judges is limited to controlling that we act according to the rules, regardless of our motives. And I do not see why it would be illiberal for the law to merely intend that we act motivated by certain reasons, insofar as it doesn't pretend to control whether we actually do so.

Second, the thesis could be reformulated to avoid this criticism (and also, incidentally, the epistemic objection). Thus, the thesis could be that what the law intends is that we externally act as someone motivated by the rules would. As far as I can see, this variation of the substantive-subjective conception preserves all the advantages of Redondo's original formulation while avoiding its criticisms.

5 Someone could argue that my reply to Redondo's epistemic objection is superficial or incomplete at best. After all, I say very little regarding the kind of evidence that would allow us to distinguish between conformity motivated by the rule and conformity motivated by other reasons; and between the non-conformity of someone who takes the rule to be a reason that was defeated by weightier reasons and the non-conformity that does not consider the rule to be a reason at all. But it is not my intention to provide a full account of what constitutes good evidence to conclude that someone regards a rule as a reason. My point is simply that there is no reason to believe that it is not possible for there to be evidence of the required kind. Thus, my intention is to shift the burden of proof here. We normally assume that we *can* know the reasons that motivate people to act as they do. Redondo, I take it, does not deny as much. But then she has the burden of showing what is so special about rules as a kind of reason for action such that we are unable to know whether people act motivated by rules or not. The fact that one can conform to a rule without being motivated by it, and the fact that rules could be regarded as defeasible (*pro tanto*) reasons do not distinguish rules from other kinds of reasons. For example, it is possible for you to know that I killed my father in order to inherit his money even if I could have acted in conformity with that reason motivated by other considerations -say, that I hate him- and even if I take that reason to be substantively defeasible -say, I take it that inheriting my father's money would not justify betraying my best friend. Thus, Redondo has not yet done anything to satisfy the burden of proof.

3.3 The practical irrationality objection

Redondo also considers a practical objection, according to which treating rules as invariably relevant substantive reasons is irrational. This would imply that the law necessarily intends that we act irrationally, which is implausible. Redondo rejects this objection. Although I agree that it should be rejected, I find her arguments unconvincing.

Reconstructing *the* practical irrationality objection is not easy because Redondo includes a variety of objections under this label that all are very different from each other. A first reason why someone could consider that following rules is irrational goes as follows. Legal institutions enact rules based on its addresses' reasons (i.e., the so-called "underlying reasons"). The rules, however, sometimes require actions that are not justified in light of the underlying reasons and even actions that, according to the underlying reasons, the agent ought to refrain from performing. However, it is assumed that genuine rules are a reason to act as required even (and especially) when what they require is not justified according to the balance of underlying reasons. Otherwise, they wouldn›t make any practical difference. Thus, in a first approximation, the irrationality objection poses the following challenge: how can a rule be a reason in those cases in which the reasons that justified its enactment (i.e., the underlying reasons) require disobeying it?

Note that the objection assumes that the explanation of why rules give reasons for action depends, in some way, on the underlying reasons. Indeed, if the explanation of why rules give reasons did not appeal to the underlying reasons, why would it be a mystery for rules to give reasons even when the underlying reasons recommend disobeying it? For the record, I believe that the characteristic way in which legal rules give reasons does *not* necessarily appeal to the underlying reasons, so this is not a problem for me.

But it is true that one of the standard explanations of why genuine rules are or give reasons does crucially appeal to the underlying reasons. Joseph Raz argues that rules are reasons because they help people improve their compliance with the underlying reasons.[6] In a nutshell, the idea is that rules are reasons to act as they require when by following them the agent will improve her conformity with the underlying reasons (relative to the level of conformity with those reasons that she would achieve by following her own judgment about what they require). But, crucially, rules can only help people to improve their conformity with reasons if they follow the rules "disregarding" (more on this later) what the balance of underlying reasons requires in each particular case.

Against this background, the challenge posed by the practical irrationality objection can be understood in a different way, namely: how can it be rational

6 See Raz 2001.

to disregard the underlying reasons? Someone could argue as follows. A rational decision simply *is* one that is based on the prior consideration of all the applicable reasons.[7] Thus, to the extent that following rules implies disregarding the underlying reasons, then it is, by definition, irrational.

Redondo concedes that following rules is, indeed, irrational insofar as it involves failing to consider all the applicable reasons. However, she argues that the fact that following rules is irrational in that sense does not imply that it is not the decision-making procedure that we ought to adopt, all things considered. Thus, she claims (Redondo 2018:121) that although

> the decision procedure supported by rules does not have or does not promote the value of rationality, this is not the only applicable value, nor is it always the one with the greatest weight, so it is perfectly possible […] that in certain circumstances it is justified to decide irrationally.

This reply is inadequate. On the one hand, it is insufficient to respond to the first challenge. On the other, it concedes too much to the second challenge.

Let us suppose that it would indeed be better, all things considered, if I were to treat a given rule as an independent reason to act as it requires, while disregarding the underlying reasons. This still would not be enough to adequately answer the first challenge posed by the irrationality objection. The fact that I have reasons to *treat* a rule as if it were an independent reason is not enough for it to actually *be* an independent reason. Not all reasons for having an attitude show that attitude to be fitting or appropriate. A reason for an attitude is a reason of the right kind, if and only if it is "something on the basis of which someone could […] come to hold the attitude as a conclusion of a process of considering […] whether to do so."[8] Consider the following example:

A Prize for a Belief:
An eccentric millionaire offers John $1,000 if he just believes that *p*.

John has a practical reason to bring it about that he believes that *p* (i.e., that he will win the prize if he does so), but that reason does not make believing in *p* a fitting or appropriate attitude (only truth-related reasons are of the right kind).

Analogously, the fact that by treating the rule as an independent reason I will improve my conformity with reasons in the long run, is a practical reason to treat it as such. But it is not a reason that makes it *appropriate* for me to so treat it: only considerations related to whether the rule *actually* is facts that count in favour of doing what it requires in this particular case are reasons of the right kind for treating it as such.

7 Redondo 2018: 120.
8 Darwall 2009: 16.

In this regard, the law's intention that we treat legal rules as reasons with independent weights, even when they are not, would be tantamount to John's friend's intention that he form the belief that *p* in order to win the prize even though *p* is obviously false. All things considered, it is better for John to believe that *p* (he will earn $1,000 if he does). However, the fact that makes it the case that it would be better for John to believe that *p* is not a reason of the right kind for John to believe that *p*. And, in *this* sense, it would be unfitting and hence irrational for John to believe that *p* (he lacks reasons of the right kind for believing that *p*). Likewise, in a sense, it would be better for me to treat legal rules as reasons (in the long run, I will improve my conformity with the underlying reasons if I do so). However, the fact that makes it the case that it would be better for me to treat legal rules as if they were independent reasons is not a reason of the *right kind* for me to so treat them. In *this* sense, it would be irrational for me to follow legal rules (i.e., to treat them as reasons) unless they actually *are* reasons to act as they require. But the objection is, precisely, that rules are *not* independent reasons (how could they be when the underlying reasons recommend disobeying it?). And the point is that it is implausible for the law to necessarily intend that we treat rules in a way that is inappropriate or unfitting (and, in this sense, irrational).

As I anticipated, I do not believe that this objection hits it target.[9] My point here is simply that to answer it, it is not enough to show, as Redondo does, that there are circumstances in which, all things considered, it would be better to treat rules as reasons because this does not show that rules actually *are* reasons. And if they are not, then no matter how good it would be for us to treat them as if they were, it would still be inappropriate and irrational for us to so treat them.

Note that this way of formulating the objection concerns the first challenge rather than the second. The challenge, so understood, is the following: how could the fact that by following the rule I will improve my conformity with the underlying reasons in the long run count in favour of doing what the rule requires in this particular case where, in fact, the underlying reasons recommend disobeying it? Of course, the fact that by following the rule I will improve my conformity with the underlying reasons in the long run might be a practical reason to *convince* myself that the rule is an independent reason to act is it requires, even in those cases where the underlying reasons recommend otherwise. But it is *not* a reason to do what the rule requires in *this* case. In this way of understanding the challenge posed by the objection, the fact that following rules involves *disregarding* the underlying reasons is neither here nor there.

What should we say, then, about the second objection according to which following rules is irrational simply because it involves disregarding the underlying reasons? Here Redondo concedes too much. In fact, it is not the case that

9 For my own answer to this objection, see Monti 2018.

the "rule-based decision procedure" implies that individuals ought not to consider all the applicable reasons, or that having done so, they ought not to act on the balance of reasons. What defenders of the Razian view of the rationality of rule-following are committed to is, simply, the claim that *amongst* the reasons that agents must evaluate, there are exclusionary reasons, that is, reasons not to act for certain reasons. The point is *not* that following rules requires that the agent sometimes act against the balance of reasons. The claim is much weaker, namely, that following rules sometimes requires agents to act against the balance of *first-order* reasons. But this is only the case because acting against the balance of first-order reasons is what the agent ought to do all things considered, that is, considering not only her first-order reasons but also her *second-order* reasons, i.e., her reasons to act or not to act for first-order reasons. Thus, following rules requires the agent to "ignore" or "disregard" *some* reasons (i.e., it requires the agent not to act for certain reasons) because there are *other reasons* (exclusionary reasons) for her to do so. I do not see what the irrationality is supposed to be here. If anything, it would be irrational for the agent to act for reasons she has decisive reasons not to act for. Of course, someone might argue that the very concept of exclusionary reasons does not make sense, or that there are no exclusionary reasons, or that exclusionary reasons cannot be justified in the way that Raz claims they can be justified. But these are objections of an entirely different nature. The discussion would not be between those who believe that it is justified to act irrationally (against the balance of reasons) and those who deny it, but between those who argue that amongst the reasons that make up the balance of reasons there are exclusionary reasons and those who deny it.

One final clarification. Redondo associates this series of objections with particularism.[10] But need not be a particularist to raise any of these objections (nor is one forced to accept that they are correct if one turns out to be a particularist). Are there any practical irrationality objections especially associated with particularism? An objection of this sort that, one which again Redondo does not adequately distinguish from the previous ones, is the following. According to the thesis we are considering, the law intends that people treat rules as *invariably* relevant substantive reasons. But, says the particularist, there are no invariably relevant reasons. The fact that a fact counts in favour of an action in one context does not ensure that it counts in favour of that action in all contexts. Therefore, to the extent that following rules implies treating them as invariably relevant reasons, following rules is irrational. I will consider this objection in the next section, when examining the thesis that law claims that rules are reasons in an objective sense.

10 See Dancy 2004.

4 THE LAW CLAIMS THAT LEGAL RULES *ARE* INVARIABLY RELEVANT SUBSTANTIVE REASONS

If genuine rules are regarded as being reasons in an objective-substantive sense, then in issuing a rule, legal authorities would be communicating the intention that the rule be an invariably relevant reason for its addresses to act as it requires (not that they treat it as such) by virtue of that very act of communication (i.e., by virtue of its having been thus enacted). Unfortunately, Redondo focuses her critical efforts on the substantive-subjective conception, without saying much about why we should reject the substantive-objective one. This is surprising, among other reasons, because neither the epistemic objection nor the "inquiring motives" objection apply to the claim that law intends that rules be objective reasons.

Indeed, there is no special epistemic difficulty in determining whether legal rules are reasons for action (contrary to what might be the case in determining whether people are motivated by them). And the fact that the law claims that legal rules are reasons to act as they require does not imply that it intends that people be motivated by them. The law only claims that legal rules are reasons to act as they require. It need not claim that there are reasons for people to act as they require *because* they so require rather than for any other reason.

4.1 Objective reasons and legal positivism

But then, why reject this account of the normativity of law? Redondo's argument is that it is incompatible with legal positivism. This objection is, I believe, incorrect for the following reasons.

First, as Redondo herself seems to concede, there is a weak version of the thesis under consideration that is perfectly compatible with legal positivism. According to this weaker version, legal institutions simply *intend* that legal rules be invariably relevant reasons. This is perfectly compatible with claiming that legal rules often are not, in fact, reasons to act as they require. It is even compatible with claiming that the relevant officials (judges or legislators) are not or need not be sincere when asserting that they are reasons, or when communicating the intention that they be reasons.

Second, even on the stronger thesis according to which individuals necessarily have objective reasons to act as they are legally obliged to act is compatible with legal positivism. Legal positivism is compatible, in fact, with the thesis according to which having a legal obligation to Φ consists in having reasons of a certain kind to Φ.

To understand this point, we must distinguish between legal rules (and what they require), on the one hand, and the content of the law, that is, the legal obligations and legal rights that obtain in virtue of legal rules, on the other.

For a legal institution to enact a rule requiring citizens to Φ in circumstances C is, roughly, for it to communicate the intention of imposing upon citizens the obligation to Φ in circumstances C by that very act of communication (that is, to communicate the intention to give citizens a reason of a distinct type to Φ in circumstances C). Thus, we shall say that there is a legal rule that requires citizens to Φ in C, roughly, if and only if a legal institution communicated the intention to impose citizens an obligation to Φ in C.

If the legal institution in question has the practical or moral authority that it claims to have, then, it will succeed in imposing the obligations (reasons) that it communicates the intention to impose. Legal obligations are those obligations that legal institutions create in this way, by virtue of their authority. If, on the other hand, the legal institution in question does not have the authority that it claims to have, then it will fail to create the obligations (reasons) that it communicated the intention to create. And, consequently, it will not have succeeded in creating any legal obligation (reason).

According to this account, legal obligations are reasons for action of a distinct type. And yet, this account is consistent with three theses normally associated with legal positivism, namely:

T1. The content of law is determined by social facts only.

T2. It is possible for a legal rule to require that A Φs but for A to have no reason to Φ.

T3. It is possible for A to have a legal obligation to Φ but that, all things considered, A ought not to Φ.

Let us begin with (T1). For it to be true, it is sufficient that the obligations that legal institutions create by virtue of their authority are identical to those that they communicate the intention to create. It is true that, in this conception, the existence of legal obligations depends on the existence of moral facts. But this does not imply that moral facts determine the content of the law. The moral facts explain the authority of the legal institution in question, that is, they explain why the enacted legal rule succeeds in creating an obligation. They do not, however, determine the content of that obligation. The content of the obligation is completely determined by the content of the enacted legal rule. It is identical to the obligation that the institution communicated the intention to create.

(T2) is true to the extent that legal institutions may lack the authority they claim to have.

(T3) is true insofar as it is possible for the obligations created by legal institutions by virtue of their authority to be defeated by non-excluded weightier reasons.

To sum up, this conception is not vulnerable to the epistemic objection nor to the "inquiring motives" objection and, contrary to what Redondo suggests, it is perfectly compatible with legal positivism.

4.2 Again on the practical irrationality objection: The particularist challenge

Finally, I do not believe that this conception is vulnerable to "the" practical irrationality objection either. In fact, the objections considered in Section 3.3 fail for analogous reasons when directed against the thesis that the law intends legal rules to be substantive reasons (rather than be merely treated as such). It remains, however, for us to consider the particularistic challenge according to which it is implausible for the law to claim that legal rules are (or should be treated as) invariably relevant substantive reasons simply because no reason is invariably relevant.

This objection is plausible, but it is important not to exaggerate its scope. In this sense, one could simply accept the objection and modify the corresponding theses so as to affirm that what the law claims is that legal rules are (or should be treated as) substantive reasons of a characteristic type, without claiming that they are invariably so (or that they should be invariably so treated).

Redondo might object that a rule that is not an invariably relevant reason is not a genuine rule at all. But there is no reason to restrict the notion of genuine rules in this way. In fact, Redondo poses a false dilemma (FD):

> (FD) Either rules are invariably relevant reasons or they are merely useful devices that summarize what ought to be done normally or in ordinary situations but lack any independent weight.

This, however, is a false dilemma. Rules could be independent reasons even if not in all those cases to which they apply. To illustrate this possibility, consider again the Razian account of the normativity of rules. No one doubts that according to Raz´s account, rules have independent normative weight. As I will show, however, for Raz rules are not invariably relevant reasons.

In a nutshell, according to the Razian account, if by following rule R agent A will improve her conformity with certain reasons, then the fact that R requires A to Φ is a reason for A to Φ and not to refrain from Φing for those same reasons she will improve her conformity with.

This is consistent with the rule that helps A to improve her conformity with reasons not being invariably relevant for at least two reasons. First, circumstances may change so that it is no longer true that by following the rule A will improve her conformity with reasons. In that case, the rule ceases to be a protected reason to act as it requires.

Perhaps what Redondo means is that, although a rule may cease to be a reason as "general" circumstances change, a rule that is normally a reason to act as it requires cannot fail to be a reason in a particular case in virtue of the properties of that particular case. But this is not true either. As Raz argues, it is consistent with his conception to claim that if, in a particular case, the rule requires you to perform an action that is *manifestly* incorrect to (i.e., one that it is manifest that, on the balance of first-order reasons, you ought not to do), then it does not constitute a reason to so act.[11]

Therefore, we must reject the thesis that genuine rules are invariably relevant reasons. And, consequently, I take it that there is no reason to insist that genuine rules must be logically non-defeasible either.

5 LEGAL RULES AS FORMAL REASONS

Let us now consider Redondo's positive proposal. The basic idea is that the law intends legal rules to be regarded as logically non-defeasible and for them to be offered as formal reasons (i.e., as premises in an argument) within the framework of a justificatory discourse in all cases to which they apply (and, where appropriate, for reasons to be given when the case is decided against the rule). This conception has at least three problems.

First, according to this conception, it seems that the law seeks to guide only the conduct of legal officials and, particularly, of judges. It would be absurd to believe that the law requires that we articulate and verbally express arguments every time a legal rule applies to us. There is a legal rule that prohibits killing others. The law cannot pretend that I discursively articulate an argument every time that rule applies to me (almost all the time!). Therefore, for Redondo's proposal to be plausible, it must be interpreted as holding that what the law intends is for *judges* to deductively infer all the normative consequences of those rules whose antecedents are satisfied in the case submitted for their consideration. The idea that law claims only to guide the behaviour of judges is, however, implausible. As HLA Hart observed long ago (1961/2012: 40):

> The principal functions of law as a means of social control are not to be seen in private litigations or prosecutions, which represent vital but still ancillary provisions for the failure of the system. It is to be seen in the diverse ways in which the law is used to control, to guide and to plan life out of court.

Second, legal rules can play the role of formal reasons only insofar as they are regarded as substantive reasons. Let us suppose that a legal authority enacts a legal rule according to which whoever buys an ice cream has the obligation to pay $10 in taxes. John buys an ice-cream. It follows, it seems, that John now has

11 Raz 1986: 62.

a legal obligation to pay $10 in taxes. But what exactly is the argument supposed to be? Consider (A):

A1. The authority issued a legal rule according to which whoever buys an ice cream has the obligation to pay $10 in taxes.
A2. John bought an ice cream.
A3. John has the obligation to pay $10 in taxes.

This argument is obviously invalid. In particular, (A3) does not follow from (A1) and (A2) by *modus ponens*. How could legal rules operate as formal reasons then? We would want something like the following (B):

B1. The authority issued a legal rule according to which whoever buys an ice cream has the obligation to pay $ 10 tax (i.e., the authority communicated the intention to impose an obligation to pay $10 in taxes to those who buy ice cream).
B2. Given (B1), those who buy ice cream actually do have an obligation to pay $10 in taxes.
B3. John bought an ice cream.
B4. John has the obligation to pay $10 in taxes.

This argument is valid. But, what are statements (B2) and (B4) about? Clearly, they are *not* about what the rules enacted by the authority require. Thus, for example, (B4) is not equivalent to "The authority issued a rule requiring John to pay $10 in taxes". Among other things, that would *not* follow from (B1) - (B3). The authority issued a rule that requires those who buy ice cream to pay $10 in taxes, but it did not issue a rule *requiring John* to pay $10 in taxes. The most plausible alternative is that such statements refer to what the rule's addressees (and John in particular) are "genuinely" obliged to do, that is, to what they have substantive reasons of a distinct kind to do.

Finally, the law normally intends to not only guide our conduct but to also make us accountable to one another for conforming to legal rules. Thus, in issuing a legal rule that establishes the obligation to Φ, legal institutions communicate the intention to make it appropriate to demand of the rule's addresses that they Φ and to blame them if they fail to do so without justification or excuse. A plausible hypothesis is that both claims are related. The law intends to give us reasons of a distinct type to Φ, that is, precisely, reasons that make it appropriate to demand of us that we Φ, and to blame those of us who fail to do so without justification or excuse. But if the sense in which the law intends legal rules to be reasons were merely formal and linguistic, then clearly such "reasons" could not make it appropriate to demand that we conform to legal rules or to blame us if we do not. Only substantive reasons, it seems, can do the required normative

work. Thus, it turns out that even if Redondo's thesis adequately explains the law's claim to guide our conduct, it would have serious difficulties in explaining law's (equally important) claim to make us accountable in the relevant sense.

6 CONCLUSION

Redondo argues that the sense in which the law claims that legal rules are reasons is a purely linguistic-formal one. The law does not claim that legal rules count in favour of acting as they require, nor does it intend that people treat them as so counting. It merely intends that legal rules be used as premises within formal arguments, regardless of their impact on what people should do. Here I have argued that we should reject this suggestion. On the one hand, the epistemic objection (Section 3.1), the "inquiring motives" objection (Section 3.2) and the practical irrationality objection (Section 3.3 and 4.2) are not decisive arguments against the thesis that the law claims that legal rules are (or intends that they be are treated as) substantive reasons. On the other hand, this thesis is perfectly compatible with legal positivism (Section 4.1). Finally, Redondo's own alternative account of the normativity of law has three serious shortcomings. First, it is implausible to claim that the law intends that the legal rules be used as formal reasons by ordinary citizens. Thus, Redondo must conclude that the law intends to guide only the conduct of judges and officials, which, as Hart argues, constitutes a narrow and impoverished account of law and its aspirations. Second, legal rules can only be formal reasons to the extent that they are taken to be substantive reasons. Finally, third, law's claim that legal rules are reasons only in a formal sense cannot adequately explain the law's related claim according to which we are accountable to each other for acting as the law requires.

Bibliography:

Dancy, J. (2004). *Ethics Without Principles*. Oxford University Press.

Darwall, S. (2009). *The Second-Person Standpoint: Morality, Respect and Accountability*. Harvard University Press.

Darwall, S. (2010). Authority and Reasons: Exclusionary and Second-Personal. *Ethics*, *120*, 257-278.

Hart, HLA (2012). *The Concept of Law* (3rd ed.). Oxford University Press. (Original work published 1961).

Monti, E. (2018). On Darwall's Case Against the Normal Justification Thesis. *Ethics*, *128*, 432-445.

Raz, J. (1986). *The Morality of Freedom*. Oxford University Press.

Raz, J. (2001). Reasoning with Rules. *Current Legal Problems, 54*, 1-18.

Redondo, C. (2018). *Positivismo jurídico "interno"*. Klub Revus.

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Afinando el positivismo jurídico interno

Una respuesta a los críticos

En este artículo trataré de contestar a algunos de los comentarios y críticas planteados por autores que participaron en la discusión de mi libro Positivismo jurídico 'interno'. He agrupado las criticas en seis puntos. Primero, la posibilidad de un positivismo jurídico interno y la pluralidad de enfoques metodológicos con relación al derecho. Segundo, la ambigüedad de la distinción "interno" - "externo". Tercero, el convencionalismo en general y las convenciones interpretativas en particular. Cuarto, el iusnaturalismo y el anti-positivismo (metodológicos). Quinto, participantes y aceptantes, cognitivistas o no cognitivistas. Sexto, el derecho como razón para la acción.

Palabras clave: positivismo jurídico interno, puntos de vista interno y externo, anti-positivismo metodológico, convenciones interpretativas, participantes, aceptantes, razones para la acción

En las líneas que siguen intentaré responder a algunos de los comentarios y críticas planteados por los autores que intervinieron en la discusión de mi libro *Positivismo jurídico 'interno'*. Ante todo, quiero agradecer a Paula Gaido que tuvo la iniciativa, en primer lugar, de organizar un seminario en la UBA sobre algunos de los tópicos centrales del volumen y, luego, de llevar adelante el presente debate en *Revus*, que incorpora la contribución de algunos colegas que no estuvieron presentes en aquel seminario. Ha sido para mí un privilegio recibir este conjunto de observaciones. En algunas ocasiones, ellas me han permitido reforzar las ideas que sostengo sobre la base de nuevos argumentos sugeridos durante la discusión. En otras ocasiones, me han hecho notar la necesidad de corregir mis dichos para formular con mayor eficacia aquello que pretendo sostener. En todo caso, ha sido un placer volver sobre lo andado y repensar diversos problemas a la luz de reflexiones inteligentes. La cantidad y la sutileza de las intervenciones justificaría respuestas que la dimensión razonable de un artículo de revista no me permite ofrecer. Me veo obligada a seleccionar solo algunos de los temas tomados en consideración. Espero, a su vez, que esto sea un estímulo para continuar con el diálogo. Aprovecho esta oportunidad para expresar a cada uno de los participantes mi reconocimiento. Sus aportes han enriquecido mi trabajo y, sin duda, me llevarán a seguir cavilando sobre los distintos modos de entender el derecho.

En general, son muchas las ideas expuestas en los comentarios que suscribiría plenamente. Al mismo tiempo, también hay apreciaciones que se basan en un malentendido, o en una interpretación que a mi juicio se puede y se debería evitar. Trataré de indicar al menos algunos de estos equívocos, cuya adverten-

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cia, en mi opinión, disuelve las observaciones a las que dieron lugar. Por último, vale la pena notar que algunas opiniones, aunque se refieren a puntos muy concretos, presuponen genuinos desacuerdos generales con respecto a cómo afrontar el estudio del derecho. Es decir, presuponen un enfoque filosófico alternativo que, por hipótesis, se considera preferible. Al respecto, sería necesario hacer una evaluación comparativa de los enfoques involucrados para escoger cuál demuestra ser mejor, todo considerado, y no solo al momento de afrontar el punto concreto que se discute. Lamentablemente, es imposible hacer esta evaluación general en este contexto.

A continuación, me referiré a seis puntos tomados de la discusión.

1 LA POSIBILIDAD DE UN POSITIVISMO JURÍDICO INTERNO Y LA PLURALIDAD DE ENFOQUES METODOLÓGICOS CON RELACIÓN AL DERECHO

Una de las ideas generales que he intentado subrayar en mi texto es la importancia de distinguir claramente entre cuestiones ontológicas y epistemológicas con relación al derecho. Esta separación neta es la que me permite asumir una posición cognitivista (y objetivista) con respecto a la pregunta sobre la posibilidad de conocer normas (jurídicas o morales) sin abandonar una tesis no-cognitivista (y subjetivista) al momento de explicar el modo en el que las normas existen. Respecto de esta última cuestión ontológica, me he comprometido con algunas de las tesis sostenidas por John Searle en su teoría de la realidad social, y que a mi entender son afines con las que aporta Hart al momento de explicar la existencia de normas jurídicas.[1] Respecto de la cuestión epistémica, más que defender el específico enfoque del positivismo jurídico interno que propongo, mi objetivo fundamental ha sido destacar su posibilidad. Posibilidad que algunas teorías niegan explícitamente, pero que, en todo caso, resulta implícitamente rechazada al asumir ciertas tesis y conceptos, como los que proponen el interpretativismo escéptico de Guastini, el interpretativismo cognitivista de Dworkin y de Atria, o algunas formas de iusnaturalismo.

Dado el objetivo de mi trabajo, lleva razón Jorge Rodríguez cuando destaca, en general, que no examino críticamente las razones que se ofrecen, tanto desde el realismo como desde el interpretativismo, en apoyo a la tesis de la imposibilidad.[2] En efecto, en mi texto no me detengo con mayor cuidado en los argumentos que se podrían ofrecer en contra o a favor de las teorías jurídicas que impugno. Ello es así porque mi interés no ha sido evaluar tales posiciones, sino subrayar principalmente un punto con relación a ellas: su compromiso con lo que he llamado 'la

1 Searle 1995; Searle 2010; Hart 1961.

2 Rodríguez 2020: 81.

tesis de la imposibilidad'. En tal sentido, lo único que me ha interesado destacar es que estas posiciones descansan en presupuestos que hacen conceptualmente imposible el enfoque metodológico del positivismo jurídico normativista. Dicho en otras palabras: parten de premisas conforme a las cuales, necesariamente, todo intento de aproximarse al estudio de contenidos normativos está unido a la asunción de un compromiso justificativo. Para ellas, no es posible explicar, analizar, describir, o identificar normas desde una perspectiva relativamente neutral.

Por este motivo, no discutiré aquí, como no he discutido en mi libro, los argumentos – a los que se refiere Rodríguez – en contra del interpretativismo de Dworkin y su tesis de la imposibilidad de un escepticismo externo. Solo cabe mencionar que, conforme al análisis que he propuesto, si se asumen los conceptos propuestos por Dworkin, el así llamado 'escepticismo externo', en efecto, es imposible. Tal imposibilidad está implícita en las tesis Dworkinianas acerca de lo que significa *interpretar* e *identificar un concepto normativo*; tesis que se basan en la superposición de distintos sentidos en los que se puede adoptar un punto de vista interno y externo. Consecuentemente, una posición escéptica externa (metateórica) deviene posible solo una vez que se advierte la ambigüedad del contraste interno-externo y se distinguen el sentido que he denominado "semántico" del sentido que he llamado "pragmático" o "práctico".

En mi texto, además de defender la posibilidad de estudiar un fenómeno normativo sin asumir un compromiso práctico con relación a él, he defendido también la posibilidad de la convivencia de diversos enfoques metodológicos en el estudio de conceptos e instituciones jurídicos. Esta última idea es aparentemente tan obvia e inocua que difícilmente alguien la pueda negar en modo expreso. De hecho, lo que las teorías criticadas niegan no es la posibilidad de distintos enfoques metodológicos *tout court* sino, específicamente, la de un positivismo jurídico normativista o interno, i.e. la de un estudio relativamente neutral de normas o conceptos jurídicos. Con respecto a la complementariedad de distintas perspectivas metodológicas, creo estar en total acuerdo con Véronique Champeil-Desplats cuando pone énfasis en el pluralismo metodológico que deberíamos aceptar para acercarnos a la comprensión del derecho.[3] Sin embargo, justamente porque acepto esta tesis, desacuerdo con ella cuando afirma que esto da lugar a "un posible luto que debe hacerse hacia una cierta generalidad, abstracción y enfoque esencialmente lógico-deductivo".[4] En realidad, si aceptamos la pluralidad de enfoques no se ve la razón por la que los estudios abstractos de carácter lógico-deductivo tengan que dejarse atrás. No hay nada en la idea de pluralidad, ni en los específicos enfoques metodológicos que Champeil-Desplats celebra (por ejemplo el de Bobbio o el de los realistas escandinavos) que requiera o justifique el abandono de estudios abstractos. En

3 Champeil-Desplats 2022.

4 Champeil-Desplats 2022: 101.

todo caso, concuerdo también en que esta multiplicidad de enfoques y disciplinas que estudian el derecho pone en cuestión la demarcación exacta de aquello que comprende la teoría del derecho. Tema que preocupa a Champeil-Desplats y en el que yo no me he detenido en mi trabajo.

El último capítulo de mi libro puede dar la impresión de que adopto un radical relativismo teórico, en el sentido de que todas las teorías a las que la tesis de la posibilidad abre el juego aparecerían como *igualmente buenas*. No ha sido esta mi intención, ya que la tesis defendida solo apunta a mostrar que, a diferencia de lo que sostienen la posiciones interpretativistas, todas estas opciones metodológicas son *igualmente posibles,* no igualmente plausibles, y que para habilitar dicha posibilidad es fundamental advertir la ambigüedad que explotan quienes la niegan.

En resumen, en mi trabajo no pretendo tanto destacar las ventajas de una determinada perspectiva metodológica cuanto defender su posibilidad. Usando las palabras de Pablo Rapetti, mis consideraciones son de ‚(meta) teoría analítica' y se concentran en analizar y criticar un grupo específico de consideraciones teóricas. Concretamente, aquellas que precluyen la posibilidad de una teoría del derecho que pretenda identificar, analizar y, en general, conocer normas (no datos empíricos) sin necesariamente adoptar una posición justitificativa con relación a ellos. Este tipo de enfoque – cuyas ventajas sí han sido destacadas por autores como Hans Kelsen o Herbert Hart – exige distinguir o separar aquello que las posiciones criticadas sobreponen al asumir, en modo ambiguo, que el estudio de contenidos normativos requiere la adopción de un punto de vista interno. Específicamente, por una parte, exige distinguir la adopción de un punto de vista interno en un sentido epistemológico (perspecitva metodológica imprescindible para conocer normas) de la adopción de un punto de vista interno en sentido práctico (actitud comprometida necesaria para la existencia y subsistencia de normas). Por otra parte, exige distinguir la adopción de un punto de vista externo en sentido epistemológico (perspectiva metodológica de quien conoce datos empíricos) de la adopción de un punto de vista externo en sentido práctico (actitud neutral posible, tanto frente a datos empíricos como frente a normas). Solo una vez que se acepta estas distinciones el positivismo jurídico normativista es posible ya que este enfoque pretende analizar el derecho (un conjunto de normas) sin necesariamente asumir un compromiso práctico frente a él. Consecuentemente, su estudio exige adoptar, en sentido epistemológico, un punto de vista interno y, en sentido práctico, un punto de vista externo.

2 LA AMBIGÜEDAD DE LA DISTINCIÓN "INTERNO" - "EXTERNO"

Conforme al análisis que he ofrecido, la tesis de la imposibilidad – que critico – deviene plausible en virtud de la ambigüedad del clásico contraste entre

punto de vista interno y externo. Consecuentemente, he tratado de despejar esta ambigüedad mostrando que las etiquetas "punto de vista interno" y "punto de vista externo" superponen dos cuestiones independientes. Concretamente, adoptar un punto de vista interno para captar o referirse a contenidos normativos (semánticos o jurídicos), como proponía Peter Winch, no equivale ni exige adoptar el punto de vista interno de los aceptantes a los que se refería Herbert Hart. Es decir, no requiere comprometernos en términos prácticos y específicamente morales, ni a favor ni en contra de los contenidos en cuestión. En el presente debate, el único participante según el cual podemos despreocuparnos de esta ambigüedad es Pablo Rapetti. En su opinión, ella no merece ser tenida en consideración.[5]

En primer lugar, según Rapetti, una propuesta como la que él prefiere es apta para dar cuenta del tipo de empresa que se propone el positivismo jurídico normativista ya que, entre otras virtudes, permite captar o referirse al contenido de los conceptos jurídicos (no queda claro si podría referirse también al contenido de normas jurídicas) y, a la vez, no es ejemplo de un discurso normativo-justificativo, i.e. no implica la aceptación de tales contenidos. Ahora bien, este enfoque, a diferencia de lo que yo he propuesto, no es ejemplo de un lenguaje descriptivo, sino que tendría un status especial: analítico, reconstructivo.[6] No discutiré aquí sobre este tipo de empresa reconstructiva que en otros contextos he aceptado plenamente. El punto crucial es saber si la propuesta de Rapetti puede prescindir de la distinción que he introducido o, lo que es lo mismo, si puede despreocuparse de la conexión necesaria – implícita en la idea ambigua de punto de vista interno – entre comprender el contenido de conceptos jurídicos y asumir una posición comprometida frente ellos. Lamentablemente, la respuesta es negativa. Si no se advierte la ambigüedad y, sobre todo, si no se desmontan los argumentos que unen necesariamente todo intento de *analizar* contenidos (de conceptos o normas jurídicos) a la adopción de una actitud práctica, justificativa, la propuesta de Rapetti es tan imposible como la del positivismo jurídico interno. En otras palabras, Rapetti nos propone entender la teoría del derecho como análisis de conceptos jurídicos, no comprometido moralmente. Algo para lo cual, si no introducimos la distinción que propongo, no hay espacio lógico. Si prescindimos de distinción propuesta y mantenemos la ambigüedad, es imposible, referirse, analizar, reconstruir conceptos jurídicos sin adoptar un enfoque normativo-justificativo.

En su presentación, Rapetti no utiliza las expresiones "punto de vista interno" y "punto de vista externo" y al no hacerlo, parece no necesitar detenerse en la ambigüedad de las mismas. Sin embargo, aunque utilicemos un lenguaje que no se apoye explícitamente en la engorrosa distinción interno$_1$- interno$_2$ y externo$_1$-externo$_2$, el problema subsiste y no se resuelve mientras no se denuncie

5 Rapetti 2021: 86, 92.

6 Rapetti 2021: 97.

el hecho que la referencia a contenidos de conceptos o de normas (adoptando lo que he llamado un "punto de vista interno$_1$") no significa, ni exige comprometerse o adoptar una determinada posición justificativa con relación a ellos (adoptar lo que he llamado un "punto de vista interno$_2$"). Rapetti pretende abrir un espacio lógico entre un discurso normativo-justificativo y otro *reconstructivo* (no-descriptivo) pero, para ello, debe rechazar la tesis de la imposibilidad, conforme a la cual, así como no es posible *describir* el contenido de conceptos jurídicos o sociales, tampoco es posible *reconstruirlos* o *analizarlos* sin asumir un compromiso práctico-normativo.

En pocas palabras, si bien la propuesta de Rapetti es una alternativa al positivismo jurídico interno, ella intenta lo mismo que este enfoque metodológico plantea. Por tal motivo, presupone necesariamente distinción de dos sentidos de "punto de vista interno". Si aceptamos que el discurso analítico-reconstructivo de Rapetti se refiere a conceptos jurídicos, entonces, por definición, es un discurso interno$_1$. Ahora bien, él sugiere que el discurso analítico-reconstructivo es un discurso *sui generis,* que no es ni descriptivo ni normativo. Al respecto, en la hipótesis de que se admitiese este tipo especial de discurso (interno$_1$) habría que admitir también que él o bien se compromete (a favor o en contra) de aquello a lo que se refiere (se propone desde un punto de vista interno$_2$), o bien es relativamente neutral (se propone desde un punto de vista externo$_2$). En la concepción de Rapetti el discurso analítico-reconstructivo es claramente un discurso que se coloca en un punto de vista externo$_2$.

En segundo lugar, en mi trabajo he caracterizado el contraste entre un punto de vista interno$_1$ y externo$_1$ como un contraste de carácter semántico. A su vez, el contraste entre un punto de vista interno$_2$ y externo$_2$ como uno de carácter pragmático. Puedo ver ahora que esta caracterización ha sido engañosa puesto que insinúa una distinción general que no se sigue ni me interesa defender. La distinción introducida subraya la independencia entre dos cuestiones: aquello de lo que hablamos (el objeto de nuestro discurso) y la actitud práctica con la que lo hacemos *en una determinada ocasión*. Pero la separación de estas dos cuestiones no supone, en general, la independencia entre semántica y pragmática.

Concuerdo con Rapetti en que conviene "relajar la distinción entre semántica y pragmática".[7] Ahora bien, aún admitiendo una conexión, salvo que adoptemos un subjetivismo radical, es posible rechazar que el significado de un discurso esté determinado por la actitud individual de un hablante *en cada ocasión de uso* (a menos que el hablante esté estipulando en un contexto delimitado). En otras palabras, en la perspectiva que adopto, los significados, en efecto, dependen de actitudes pragmáticas. Por ejemplo, en el ámbito jurídico, como señala Scataglini, dependen de la aceptación de ciertas convenciones interpretativas.[8]

7 Rapetti 2021: 92-93.

8 Scataglini 2020: 125.

Sin embargo, ello no significa que, en las ocasiones concretas de uso, no podamos distinguir aquello de lo cual el agente habla y lo que dice al respecto, de la actitud práctica de aprobación o desaprobación con la que lo hace. En todo caso, y para no insinuar una separación que la distinción introducida no implica, quizás sería mejor abandonar las etiquetas "semántica" y "pragmática" al momento de presentarla, siempre que se recuerde que las dos cuestiones que se señalan sí son independientes, y que esto presupone que (salvo en casos de estipulación) el significado del lenguaje no es decidido por el hablante en cada ocasión de uso.

Las reflexiones de Rapetti me exigen precisar aquello que he intentado expresar. El contraste interno$_1$-externo$_1$ hace exclusivamente referencia al objeto de un discurso, a aquello a lo que un enunciado se refiere. El discurso interno$_1$ se refiere a contenidos (conceptuales o normativos). El discurso externo$_1$ se refiere al mundo empírico, a datos susceptibles de percibirse a través de nuestros sentidos, en un determinado tiempo y lugar. Ahora bien, al respecto, y como volveré a destacar más adelante, mi texto requiere una corrección. Tal como bien advierte Rodríguez, en un punto de mi texto sostuve que el discurso interno$_1$ se propone desde la perspectiva de la tercera persona y es siempre descriptivo.[9] Debería ser claro que esta restricción no puede considerarse definitoria del discurso interno$_1$, en general, sino del discurso interno$_1$ de la teoría jurídica positivista cuya posibilidad emerge cuando advertimos los dos sentidos del contraste interno-externo. En efecto, como he subrayado insistentemente, también un discurso normativo y propuesto en primera persona, como el de la teoría interpretativa de Dworkin, es ejemplo de un discurso interno$_1$. Por lo tanto, cabe enfatizar que este tipo de discurso, que se define solo por el hecho de tener como objeto contenidos semánticos o normativos, puede tener status descriptivo o normativo. Y si admitiésemos lo que sugiere Rapetti, también podría ser ejemplo de un *tertium genus* 'reconstructivo'.

A la par de esta distinción entre discursos internos$_1$ y externos$_1$ he puesto en contraste dos tipos de actitudes mutuamente exclusivas y conjuntamente exhaustivas, siempre con relación a un objeto. Una actitud normativo-justificativa, comprometida en términos prácticos (el punto de vista interno$_2$) y una actitud neutral, no justificativa o no-comprometida en términos prácticos (el punto de vista externo$_2$). Como acabo de reconocer, presentar este último contraste como uno de carácter 'pragmático' ha resultado engañoso. No porque no lo sea, sino porque sugiere algo que no pretendo sostener: que las actitudes pragmáticas que un agente puede adoptar son solo estas dos. No ha sido esto lo que intenté sostener. Un agente puede tener actitudes muy diversas y de intensidad muy variable. La idea es que cualquiera sea su actitud, su discurso, o bien se compromete en términos prácticos, i.e. asume una posición normativo-justificativa respecto de aquello a lo que se refiere, o bien no, permanece en una

9 Rodríguez 2020: 85, 86.

posición relativamente neutral. En realidad, los conceptos que estoy utilizando merecerían aún ulterior precisión. Por ejemplo, cuando digo que el discurso se usa con una actitud "no-comprometida" debe entenderse que hago referencia a la ausencia de una actitud justificativa en última instancia de carácter moral, ya que, en otro sentido, el uso de cualquier discurso es siempre comprometido. De hecho, el discurso descriptivo se compromete con el valor de la verdad.

Manteniendo la ambigüedad, i.e. sin usar la distinción interno$_1$/interno$_2$ - externo$_1$/externo$_2$, Rapetti ha subrayado la necesidad de operar una distinción ulterior: entre enunciados de primer orden y de segundo orden.[10] Desgraciadamente, no queda claro cómo deberíamos entender esta distinción, y es interesante observar que la falta de precisión, una vez más, explota la ambigüedad de la idea de punto de vista interno. Por una parte, la distinción entre discursos de primer y segundo nivel parece marcar una división en el interior de la clase de los enunciados comprometidos en sentido práctico: los que se refieren directamente al mundo son de primer nivel (como el discurso del legislador o del aceptante) y los que se refieren a contenidos (conceptuales o normativos) son de segundo nivel (como el discurso del dogmático o del teórico del derecho). Esta es la distinción que parece marcar Rapetti cuando dice que los enunciados internos de primer nivel son aquellos que emiten los participantes que constituyen la práctica, mientras los estudiosos del derecho utilizan enunciados internos de segundo nivel.[11] Sin embargo, existe también la posibilidad de que los enunciados de primer nivel sean aquellos que se refieren al contenido de normas o instituciones jurídicas concretas, existentes en un lugar y tiempo determinados, por ejemplo, los enunciados de los aceptantes, los jueces o los dogmáticos del derecho, mientras que los de segundo nivel sean los de la teoría general, de los filósofos del derecho, que analizan conceptos. En suma, el contraste entre enunciados de primer y segundo orden está impregnado de la ambigüedad a la que Rapetti niega relevancia. En mi opinión, se gana en precisión si distinguimos los diversos tipos de enunciados que surgen una vez que se elimina la ambigüedad: enunciados referidos al mundo empírico y enunciados referidos a contenidos. Dentro de estos últimos, ciertamente, podemos distinguir los que se refieren al contenido de específicas reglas regulativas, al contenido de teorías de distinto tipo o al de determinados conceptos o reglas semánticas. Advirtiendo, a su vez, que cada uno de estos tipos de enunciados pueden ser emitidos desde el punto de vista interno$_2$, es decir, con la actitud práctico-comprometida de un participante (siendo irrelevante que se trate de un ciudadano, un juez, un dogmático o un teórico general) o desde el punto de vista externo$_2$, es decir, con la actitud de un observador neutral (siendo irrelevante que se trate de un ciudadano, un juez, un dogmático o un teórico general).

10 Rapetti 2020: 86.

11 Rapetti 2020: 88.

Con relación a las distinciones que emergen cuando se advierte la ambigüedad señalada es de gran utilidad tener en cuenta las consideraciones que formulan tanto Rodríguez como Scataglini. En sus trabajos ellos detectan la inexactitud a la que ya me he referido.[12] A su vez, el análisis de Rodríguez sugiere una importante ampliación de las distinciones propuestas.[13]

En primer lugar, al introducir la distinción entre discursos y estudios realizados desde un punto de vista interno y externo he estado guiada principalmente por el interés explícito de captar los distintos tipos de *teorías posibles acerca del derecho*, específicamente, la posibilidad de una teoría descriptiva y relativamente neutral referida a conceptos institucionales y normas jurídicas. Este interés predominante explica (aunque no justifica) algunas de mis afirmaciones. Concretamente, es verdad que los enunciados propuestos por la teoría cuya posibilidad me interesa destacar se refieren a conceptos o contenidos normativos (son enunciados del punto de vista interno$_1$) y son neutrales: se formulan *exclusivamente desde la perspectiva de un tercero* (se emiten desde un punto de vista externo$_2$). Como he dicho anteriormente, esto es definitorio de dicha posición. Sin embargo, y como bien subraya Rodríguez, ello no implica que todo enunciado que se refiere a conceptos o contenidos normativos sea neutral (proferido desde un punto de vista externo$_2$). En tal sentido, lleva razón al afirmar que "no parece correcto sostener que toda vez que se usan conceptos institucionales o se hace referencia a contenidos normativos *se formulan enunciados puramente descriptivos*."[14] Ahora bien, en concordancia con lo que indica Rodríguez, en mi trabajo he admitido, por ejemplo, que las teorías interpretativistas analizan conceptos jurídicos formulando enunciados internos$_1$ y lo hacen desde un punto de vista moralmente comprometido, i.e. desde un punto de vista interno$_2$. En general, una teoría justificativa como la de Dworkin, teorías críticas como las de Ferrajoli o Atria, o bien teorías de carácter analítico como la que sugiere Rapetti, no formulan enunciados *puramente descriptivos*, sin embargo, usan y hacen referencia a contenidos normativos, es decir, formulan enunciados internos$_1$. En síntesis, esta es una corrección necesaria en mi trabajo: los enunciados internos$_1$ no son siempre ni necesariamente descriptivos o neutrales.

En segundo lugar, las distinciones que he propuesto pueden ser ampliadas. Como afirma Rodríguez, no hay nada problemático en sostener que desde el punto de vista interno$_2$ o externo$_2$ solo tiene sentido formular enunciados sobre contenidos normativos. Sin embargo, es perfectamente plausible admitir que también los enunciados referidos directamente 'al mundo', a estados de cosas

12 Rodríguez 2020: 87; Scataglini 2020.

13 Rodríguez 2020: 88: "Sin embargo, cuando se hace referencia a una institución o práctica social, sea que se lo haga exclusivamente en términos de hechos empíricos o en términos de contenidos normativos, es posible formular ya sea enunciados puramente descriptivos o enunciados normativos o valorativos a su respecto…"

14 Rodríguez 2020: 88. Las cursivas son mías.

empíricos (i.e. enunciados externos$_1$), pueden emitirse con una actitud o bien comprometida o bien neutral. En mi lenguaje, pueden formularse desde un punto de vista interno$_2$ o externo$_2$. Ciertamente, en este contexto, el principal interés en desambiguar las expresiones "punto de vista interno" y "punto de vista externo" mira a destacar la posibilidad de dos tipos de teorías sobre conceptos y contenidos jurídicos: teorías neutrales como la que propone el positivismo jurídico y teorías comprometidas como la que propone el interpretativismo. Pero, a la vez, al eliminar la ambigüedad se abre la posibilidad de distinguir diversos tipos de discursos y actos de habla en general. En otras palabras, las consideraciones presentadas avalan una clasificación amplia que tiene en cuenta, por una parte, las distintas clases de objetos a los que un enunciado se refiere (al mundo empírico o a representaciones abstractas del mismo, i.e. contenidos intencionales) y por otra parte, los distintos tipos de actitudes con las que se pueden proferir (neutral o comprometida). En tal sentido, podemos identificar cuatro tipos de situaciones:

(1) La situación en la que, con una actitud comprometida (desde un punto de vista interno$_2$), se emiten enunciados que se refieren directamente al mundo empírico (desde un punto de vista externo$_1$). Por ejemplo, el caso del legislador que establece que la acción de matar está prohibida.
(2) La situación en la que, con una actitud comprometida (desde un punto de vista interno$_2$), se emiten enunciados que hacen referencia, no al mundo empírico, sino a conceptos o contenidos normativos (desde un punto de vista interno$_1$). Por ejemplo, el caso del teórico interpretativista que estudia la institución de la cortesía o cualquier institución jurídica.
(3) La situación en la que, desde un punto de vista neutral (desde un punto de vista externo$_2$), se emiten enunciados con relación directa al mundo empírico (desde un punto de vista externo$_1$). Por ejemplo, el hablante que describe un paisaje o los movimientos físicos involucrados en un tipo de práctica. Asimismo, el caso del teórico del derecho, conforme a la propuesta metodológica del realismo jurídico.
(4) La situación en la que, con una actitud neutral (desde un punto de vista externo$_2$), se emiten enunciados con relación a conceptos o contenidos normativos (desde un punto de vista interno$_1$). Esta última es la que ha recibido mayor atención en mi trabajo, la que el interpretativismo considera imposible y que podría estar asociada a una empresa descriptiva, pero también a una analítico-reconstructiva.

Como se puede observar, esta clasificación no discrimina entre enunciados referidos al contenido de instituciones jurídicas concretas y enunciados referidos al contenido de conceptos jurídicos generales, y está bien que así sea, no porque esta última distinción no sea importante, sino porque la clasificación

intenta poner de relieve que en cualquier caso se trata de enunciados internos$_1$. En general, y sin renegar de esa distinción que he marcado permanentemente en mi trabajo, puede decirse que en ambas situaciones el hablante se refiere a normas: en la primera, a reglas y principios pertenecientes a un ordenamiento jurídico concreto, en la segunda, a reglas y principios de carácter semántico que determinan el sentido de ciertas expresiones.

3 SOBRE EL CONVENCIONALISMO EN GENERAL Y LAS CONVENCIONES INTERPRETATIVAS EN PARTICULAR

Estoy totalmente de acuerdo con Scataglini en que no es correcto asimilar el convencionalismo en tanto teoría acerca de la ontología del derecho, al convencionalismo en tanto teoría sobre la identificación del contenido de un sistema jurídico.[15] De hecho, he aceptado que el contenido de un derecho depende (entre otras cosas) de reglas convencionales sobre el uso del lenguaje, pero he negado que la ontología del derecho sea adecuadamente explicada por el convencionalismo. Ello porque esta posición reduce la existencia de normas a un conjunto de comportamientos, creencias y actitudes de un grupo de agentes. En contraste, he sostenido una posición no-reduccionista y 'realista' respecto de la existencia de una 'realidad institucional': hechos y entidades cuya existencia depende de, pero no se reduce a, las creencias, actitudes y comportamientos de un grupo social.

Con relación a la pregunta epistémica sobre el contenido de un determinado sistema jurídico, en el tercer capítulo de mi trabajo, discurriendo sobre la teoría de Eugenio Bulygin, he expresado algunas dudas acerca de la posibilidad de mantener, en ciertas circunstancias, la neta distinción propuesta en *Normative Systems* entre tesis de relevancia (descriptiva) e hipótesis de relevancia (prescriptiva). Concretamente, cuando se admite que la identificación del contenido de un derecho depende de una pluralidad de prácticas o convenciones interpretativas que la hacen controvertida. Respecto de este tema, Gabriela Scataglini destaca que esta duda no se pone si distinguimos correctamente entre convenciones superficiales y profundas. Concretamente, la idea es que aun cuando las convenciones interpretativas sean superficialmente controvertidas, las convenciones profundas (un conjunto de criterios de trasfondo que sí pueden "ser objeto de identificación y descripción") eliminan la indeterminación o inestabilidad en la identificación de la tesis de relevancia descriptiva.[16] En un sentido, estoy totalmente de acuerdo con esto. Si existen convenciones (y es irrelevante si son profundas o superficiales) que "pueden ser objeto de identificación y des-

15 Scataglini 2020: 128.

16 Scataglini 2020: 128, 130.

cripción" el problema no se plantea. Sin embargo, Scataglini parece no advertir que la existencia de convenciones profundas no controvertidas no es una respuesta a mi inquietud, sino una situación en la que la hipótesis que genera mi inquietud no se presenta. En efecto, si existen convenciones interpretativas profundas respecto de las que, a diferencia de lo que sucede superficialmente, no hay controversia, la situación problemática no subsiste. La cuestión es: ¿qué sucede en la hipótesis en que sí hay controversia? Por ejemplo, la situación en la que no hay una convención profunda o hay múltiples convenciones superficiales y profundas que conviven y guían la identificación en sentidos incompatibles. Frente a esta hipótesis, que no niega que las convenciones puedan tener un nivel superficial y otro profundo, se hace evidente que el verdadero argumento de Scataglini en contra de la posible indeterminación o inestabilidad de la tesis de relevancia no se basa en la distinción entre convenciones superficiales y profundas, sino en la convicción – no argumentada y altamente problemática – de que *siempre* es posible identificar y describir la opción correcta, i.e. que la controversia es siempre y solo superficial porque en un nivel más profundo podremos indefectiblemente encontrar una respuesta determinada. Obviamente, no niego que siempre es posible describir o informar sobre los términos de una controversia, sobre cuáles son las diferentes alternativas interpretativas. Sin embargo, bajo la hipótesis de controversia, establecer cuál es el contenido del derecho parece requerir un acto de elección entre tales alternativas, decisión que va más allá de la descripción de las mismas. Scataglini no argumenta este punto, simplemente niega que esta decisión sea necesaria y asume que detrás de toda controversia hay un contenido (¿esencial?, ¿profundo?) que no es controvertido y que – y en esto todos estaríamos de acuerdo –, al no ser controvertido, siempre podrá ser identificado mediante una mera descripción. Asimismo, si se admite que las convenciones interpretativas existentes pueden ser más de una, aún aceptando, como sostiene Scataglini, que las hipótesis que identifican su contenido son descriptivas, como resultado tendremos necesariamente una multiplicidad de hipótesis y deberemos decidir cuál es la mejor. En otras palabras, la identificación de lo que ha de ser considerado la tesis de relevancia descriptiva del sistema, en rigor e ineludiblemente, no será fruto de una mera descripción, sino de una elección entre distintas hipótesis descriptivas.

Como se ve, no estoy argumentando aquí en contra de la distinción entre convenciones superficiales y profundas, ni afirmando que no existan convenciones profundas. Lo dicho solo muestra que, como nos enseña el realismo jurídico, la convivencia de múltiples convenciones interpretativas no solo no elimina, sino que es fuente de indeterminación y conduce a decisiones discrecionales. Tomar en cuenta este punto no supone aceptar la tesis realista de que la identificación del derecho, y la tesis de relevancia de un sistema, estarían *siempre* indeterminadas. A su vez, y en virtud de las mismas razones expuestas, resulta dudoso que, como sostiene Scataglini, en virtud de la existencia de

convenciones interpretativas profundas, el positivismo jurídico exclusivo puede aceptar que el derecho depende de ellas, sin restricción alguna. Nuevamente, visto que la existencia de convenciones interpretativas profundas, como se mostró, no elimina la posibilidad de que el contenido del derecho sea controvertido, el positivismo exclusivo no puede admitir que el derecho depende de ellas, sin restricción. Y ello, como bien nota Scataglini, no porque tales convenciones puedan conducir a la moral, o porque en tal caso el derecho dejaría de ser ontológicamente un objeto convencional; la razón es porque, si el derecho depende de convenciones interpretativas sin restricciones, su identificación puede estar indeterminada y depender de actos discrecionales. Por este motivo, entiendo que una posición como la de Bulygin, que pretende mantener una distinción clara entre tesis descriptivas y prescriptivas acerca del contenido de un derecho, podría apoyarse en una tesis conceptual como la del positivismo jurídico exclusivo que entiende que el derecho es fruto de la intención de una autoridad y, por lo tanto, para identificar descriptivamente su contenido solo cuentan las convenciones interpretativas que apuntan a captar ese dato. En síntesis, el derecho no es fruto de convenciones interpretativas *sans phrase*, se introduce una restricción: las convenciones relevantes a la hora de identificar descriptivamente el contenido de una institución jurídica son aquellas que nos permiten conocer lo que la autoridad intentó decir.

4 SOBRE EL IUSNATURALISMO Y EL ANTI-POSITIVISMO (METODOLÓGICOS)

Como bien destacan Legarre y Sánchez Brígido, en mi trabajo no me he detenido en profundidad en el análisis del iusnaturalismo, en general, y menos aún en el de sus diferentes versiones.[17] Solo en algunas ocasiones he aludido a esta perspectiva para señalar que, por ejemplo, en cuanto teoría del derecho, ella sería totalmente compatible con un enfoque, también aceptado por una teoría positivista, que entiende el derecho como un sistema de normas. Como nos recuerda Legarre, subrayé que la noción de sistema propuesta en *Normative Systems* por Alchourrón y Bulygin es aplicable al derecho en modo totalmente independiente de la concepción iusnaturalista o positivista que se tenga de él.[18] Un punto diferente y no discutido explícitamente por Legarre es si la adopción de una teoría iusnaturalista del derecho supone necesariamente la adopción de un método anti-positivista. Un corolario obvio de mi propuesta – también implícito en la perspectiva de Alchourrón y Bulygin en virtud de lo que acabo de decir – es que no es así. Es decir, es posible sostener que el derecho está necesariamente conectado con normas morales, sin por ello objetar la posibilidad de una apro-

17 Legarre 2020: 99; Sánchez Brígido 2020: 107, 116.

18 Legarre 2020: 104-105; Alchourrón & Bulygin 1971: online §§ 54-61.

ximación neutral, o bien descriptiva o bien analítica, al momento de estudiarlo. Esto es lo que dice la tesis de la posibilidad: un objeto normativo – como es el derecho en una perspectiva iusnaturalista – puede ser descripto y analizado desde una posición relativamente neutral. Compréndase bien, no estoy afirmando que las teorías iusnaturalistas adopten de hecho un método o actitud neutral; estoy diciendo que ello es posible cuando se rechaza la idea de que, necesariamente, el estudio de un objeto normativo requiere un método de estudio normativamente comprometido (a favor o en contra) respecto de su objeto.

Probablemente mi principal desacuerdo con Legarre y Sánchez Brígido se refiere a una idea que ambos dan por descontada es sus trabajos: que la pregunta metateórica sobre el método de aproximación al estudio del derecho tiene una única respuesta correcta. En tal sentido, Legarre no duda de que, entre los diversos enfoques iusnaturalistas, hay uno verdadero (que sería el de Finnis).[19] Del mismo modo, Sánchez Brígido sugiere que el modo correcto de entender los conceptos jurídicos es uno (la concepción funcional) y, como trata de mostrar, si el concepto es funcional, el método para analizarlo no es opcional, habiendo solo un método adecuado (el enfoque de la filosofía moral, no neutral).[20]

A decir verdad, la posición de Sánchez Brígido oscila. En principio, parece no asumir la tesis de la imposibilidad de aproximarse a un objeto normativo, dotado de valor moral, desde un punto de vista descriptivo y neutral. Sin discutir esta tesis, parece avalar una idea más débil: la opción metodológica del positivismo interno, al no pronunciarse sobre el valor moral del derecho, sería incompleta y superficial.[21] Al respecto, entiendo que el positivismo jurídico puede aceptar sin problema la crítica de la incompletitud: su análisis no es, ni pretende ser, completo. Por otra parte, bastaría poco para refutar la tesis de la superficialidad. Los resultados producidos en aplicación del *método* del positivismo normativista están lejos de ser superficiales. Sin embargo, no me detendré en este punto.[22] Me interesa aquí subrayar el argumento en el que se sustenta la afirmación de la incompletitud y la superficialidad que, en última instancia, conlleva a una imposibilidad conceptual. La razón por la que es incompleto y superficial aportar un enfoque neutral es que, en verdad, el concepto de derecho es un concepto funcional y, por hipótesis, analizar un concepto de este tipo *significa* adoptar un enfoque moral, comprometido.[23]

Mi respuesta a este argumento es la siguiente. En primer lugar, no creo que tengamos un único tipo de concepto de derecho (ni de democracia, ni de constitución, ni de familia, etc.). Al mismo tiempo, parece aún mas difícil aceptar

19 Legarre 2020: 98.

20 Sánchez Brígido 2002: 121.

21 Sánchez Brígido 2020: 108, 121.

22 Redondo 2020: 120.

23 Sánchez Brígido 2020: 119.

que el estudio del derecho tenga que estar siempre guiado por un único tipo de interés y que, en tal sentido, 'la' teoría del derecho sea necesariamente de un único tipo. A mi juicio, según sea el interés que guía un estudio, será apropiado concentrarse en un específico concepto que – usando las categorías tenidas en cuenta en este contexto – podrá ser estructural, funcional o mixto. En esta perspectiva es engañoso preguntarse si el concepto de derecho *es* estructural, funcional o mixto: la pregunta se basa en un presupuesto falso.

Sánchez Brígido se concentra en el intento de mostrar que *el* concepto de derecho es funcional. Sin avalar semejante tesis, podemos aceptar que, en ciertos contextos, compartimos un único concepto ('nuestro concepto', aquel efectivamente en uso en un momento y lugar determinados) y que nos interesa analizarlo. En tal caso, una conclusión probable es que dicho concepto sea funcional. La cuestión es: ¿puede el método del positivismo jurídico normativista analizar este tipo de concepto? La respuesta de Sánchez Brígido es clara: en rigor es imposible, puesto que el único modo correcto de analizarlo es asumiendo el interés que mueve a las teorías iusnaturalistas. Como ya se dijo, analizarlo significa o requiere necesariamente hacer una evaluación de carácter moral. Debo admitir que, si esto último fuese verdad, estaría totalmente de acuerdo con Sánchez Brígido. Es decir, si asumimos – lo que para mi es absurdo – que un dato por el hecho de satisfacer estándares normativos y tener relevancia moral admite solo un tipo de análisis, también moral, entonces se sigue la tesis de la necesidad/imposibilidad. Pero ese presupuesto es uno de los puntos que está en cuestión.

En mi trabajo he intentado mostrar que es *posible* rechazar la idea de que el estudio de un objeto normativo o valorativo requiere necesariamente un método moralmente comprometido. El trabajo de Sánchez Brígido no toma en cuenta las consideraciones que he ofrecido para tratar de desmontar esa necesidad. Principalmente, la idea de que ella está basada en, y explota, una ambigüedad que habilita la conclusión según la cual comprender y analizar un contenido normativo (i.e. adoptar un punto de vista interno$_1$) exige necesariamente asumir un método no neutral (i.e. adoptar un punto de vista interno$_2$). En otras palabras, no evalúa ni toma en cuenta los argumentos que pueden esgrimirse en contra de la idea central de los ejemplos iusnaturalistas propuestos que superponen y asocian conceptualmente el intento de comprender y explicar datos valorativos con la necesidad de evaluarlos (aceptándolos o criticándolos) adoptando una posición comprometida.

Muchos positivistas jurídicos sostienen que existen buenas razones para concentrarse en un concepto estructural de derecho (de democracia, de jurisdicción, de estado, etc.), pero ello no significa que nieguen la posibilidad de identificar conceptos funcionales de derecho (de democracia, jurisdicción, estado, etc.). Esto es una banalidad, y permite poner el énfasis en uno de los puntos centrales del desacuerdo: la presuposición de que hay una única verdadera

forma de entender los conceptos jurídicos y un único método para afrontar el estudio de aquello a lo que tales conceptos se aplican. Esto no significa negar la posibilidad de respuestas correctas en general. Ahora bien, sí presupone que no hay un único método de estudio provechoso, y que diversas perspectivas no solo conviven de hecho, sino que se complementan y aportan a la comprensión del objeto. También por esta razón – y en contra de lo que propone el interpretativismo – es relevante conservar la distinción entre cuestiones teóricas y cuestiones metateóricas o conceptuales (que no son tesis acerca de cómo se usan las palabras). Sobre la base de esta distinción, puede decirse que en mi trabajo he admitido que, en las disputas teóricas, referidas directamente al objeto de estudio, presuponemos la existencia de respuestas correctas. Sin embargo, ello no significa admitir que los desacuerdos metateóricos acerca de cómo entender los conceptos y/o el método con el cual delimitar el objeto tengan una única respuesta correcta. En este sentido, estos últimos desacuerdos se distinguen de los desacuerdos 'teóricos'.

5 SOBRE PARTICIPANTES Y ACEPTANTES, COGNITIVISTAS O NO COGNITIVISTAS

Tal como señala Rapetti, mi trabajo requiere una aclaración con referencia a las nociones de participante y aceptante. En un trabajo anterior, he dedicado mucho espacio a la noción de aceptación y no ha sido mi intención volver en este caso sobre el tema.[24] En aquel escrito, distinguí con precisión la noción de creencia de la de aceptación. Y, más allá de lo dicho allí, siguiendo a Hart, siempre he adoptado una concepción amplia de aceptación. Alguien acepta un contenido (un tipo de comportamiento, una regla semántica, o una norma jurídica) cuando asume una actitud práctica *favorable* con relación a él, que se manifiesta en una disposición a actuar. Y ello independientemente de las razones, si las hubiese, por la cuales el agente acepta. Esto significa que la noción de aceptante cubre a quien simplemente ha internalizado un patrón de comportamiento y es propenso a actuar casi automáticamente, sin que su disposición favorable haya sido adoptada en modo racionalmente fundamentado, incluye también a quien conscientemente adopta una política a favor de un tipo de comportamiento, y al verdadero creyente, que sostiene la corrección intrínseca del mismo. Ahora bien, en el actual contexto de discusión es más adecuado concentrarse en la noción de participante, que en algún sentido es aún más amplia. En efecto, ella se aplica a quienquiera que asuma una actitud comprometida, ya sea a favor o en contra, con relación al contenido de una práctica de comportamiento. Concretamente, lo que he intentado distinguir en mi trabajo son dos tipos de actitudes mutuamente exclusivas y conjuntamente exhaustivas:

24 Redondo 1996: cap. 5.

la del participante que asume una actitud práctica comprometida y, en tal sentido, *acepta* una 'teoría' normativa *favorable* o *desfavorable* en relación con ciertos un tipos de comportamiento, y la de quien se abstiene de esta evaluación y, consecuentemente, asume una actitud neutral, i.e. no se compromete con ningún tipo de teoría normativa *ni favorable ni contraria*, siempre con relación a ciertos contenidos o tipos de comportamiento.

Mi interés ha sido principalmente tratar de captar la posición en la que se coloca un estudioso frente a un objeto normativo (reglas semánticas o instituciones jurídicas).[25] Con relación a este tipo de objeto que forma parte de la así llamada "realidad social", he destacado que la actitud del participante – a diferencia de la del observador neutral – tiene relevancia ontológica. De los participantes depende que lleguen a existir y, sobre todo, que se mantengan o extingan los hechos y entidades institucionales. Ahora bien, la impugnación de Rapetti con relación a este punto es que una perspectiva cognitivista no es adecuada para dar cuenta de la actitud de los participantes.[26] No puedo aquí presentar sus argumentos, pero creo que es útil aclarar mi posición. A riesgo de ser reiterativa, entiendo que la dificultad que Rapetti señala emerge cuando no se distinguen las cuestiones ontológicas acerca de la existencia y el tipo de existencia de un determinado tipo de objeto, de las cuestiones epistémicas acerca de la posibilidad y el modo adecuado de comprenderlo o estudiarlo. Respecto de la cuestión epistémica he adoptado una posición y un lenguaje cognitivistas, es decir, siguiendo a Searle, he admitido la posibilidad del conocimiento (más o menos objetivo) de entidades que ontológicamente son subjetivas. En otras palabras, entidades y hechos que se explican en términos no-cognitivistas, y cuya existencia depende enteramente de las actitudes, sentimientos, emociones, preferencias, y creencias de los participantes. En tal sentido, debería quedar claro que, independientemente de que los participantes se auto-perciban como cognitivistas o no cognitivistas, mi tesis es que las entidades normativas que un estudioso pretende, y puede, conocer (i.e. respecto de las cuales podemos ser cognitivistas) dependen enteramente de las actitudes subjetivas de los participantes que las constituyen y las mantienen en vida. Los participantes se definen por el hecho de adoptar una actitud práctica favorable o contraria a ciertos contenidos y no por el hecho de creer en su verdad o falsedad. Esta, ciertamente, no es una explicación cognitivista de la actitud de los participantes.

No considero sabio volver a las categorías de Hart, cuya ambigüedad he tratado de disipar. Defender – como lo hace Rapetti – una lectura no-cognitivista de 'los enunciados internos de Hart' deja sin aclarar si tales enunciados 'internos' son aquellos que emiten los participantes con un objetivo práctico, y que tienen relevancia ontológica respecto de la existencia de reglas, o si son aquellos que

25 Sin embargo, como dije al inicio siguiendo a Rodríguez, no habría problema en extender la propuesta para tener en cuenta al hablante que se refiere directamente al mundo empírico.

26 Rapetti 2021: 92 principalmente.

se emiten con el objetivo de identificar, conocer, comprender o explicar reglas ya existentes (semánticas o jurídicas) y que *pueden* proferirse con una actitud neutral. En mi trabajo no he entrado en el debate entre lecturas cognitivistas y no-cognitivistas de 'los enunciados internos' justamente porque este debate pasa por alto la distinción entre cuestiones ontológicas y epistémicas en la que he insistido en el párrafo anterior y, a la vez, ignora el hecho de que hay dos cosas distintas a explicar, y que Hart no distinguió con precisión al hablar de 'enunciados internos': (i) los enunciados comprometidos desde un punto de vista práctico: enunciados emitidos ya sea por ciudadanos, dogmáticos, jueces, teóricos o filósofos, y que tienen relevancia ontológica (enunciados emitidos desde del punto de vista interno$_2$) y (ii) los enunciados apuntan a identificar, comprender, describir o analizar un contenido normativo (a los que he llamado enunciados internos$_1$), y que también pueden ser emitidos por ciudadanos, dogmáticos, jueces, teóricos o filósofos, independientemente de la actitud práctica que ellos adopten. En rigor, creo que la mejor teoría para explicar los enunciados (i) que expresan una actitud práctica de compromiso es una teoría no-cognitivista. Sin embargo, conscientemente, he adoptado un lenguaje cognitivista. En este contexto es irrelevante si estos enunciados del punto de vista interno$_2$ se *analizan* como expresando preferencias o emociones (i.e. en términos no-cognitivistas), o creencias de los agentes (i.e. en términos cognitivistas). Ello es así porque el punto bajo debate no es cuál es la mejor explicación de este tipo de enunciados emitidos desde un punto de vista interno comprometido, sino el hecho de que ellos no deben confundirse ni asimilarse con aquellos denominados 'internos' en otro sentido: enunciados que pretenden referirse al contenido de conceptos o nomas.

Con respecto a la posición no-cognitivista defendida por Rapetti cabe una aclaración importante. Si bien él pretende captar la posición de Hart, su expresivismo semántico es afín a una concepción escéptica y, a mi juicio, habría sido contundentemente rechazado por Hart. Desde una perspectiva Hartiana, el contenido de las normas depende de convenciones y acuerdos paradigmáticos que, en los casos claros, pueden ser objeto de conocimiento.[27] Y, en este caso, los enunciados que identifican tales contenidos no expresan necesariamente aceptación. Aplicando la distinción introducida anteriormente, cabría decir que Hart adopta una posición no-cognitivista respecto de los enunciados propuestos desde un punto de vista interno$_2$. Ellos expresan la actitud favorable de un agente y tienen relevancia ontológica. Sin embargo, al mismo tiempo, Hart adopta una teoría intermedia, parcialmente cognitivista, respecto de los enunciados internos$_1$, es decir, en general, respecto del discurso que pretende captar el contenido de reglas lingüísticas y normas jurídicas. Conforme a Hart, en los casos claros, es posible emitir enunciados internos$_1$ que expresan solo co-

27 En tal sentido, si bien merecería mayor análisis, Hart no estaría de acuerdo con Rapetti cuando sostiene que, de acuerdo con la semántica expresivista que él acepta: "el significado de nuestros enunciados está en función de nuestros estados mentales". Cf. Rapetti 2021: 92-93.

nocimiento, i.e. es posible errar respecto del contenido claro de una convención o de un acuerdo paradigmático. Ciertamente, en los casos difíciles que las reglas dejan indeterminados, todo enunciado que identifica su contenido expresa un acto de decisión y no de conocimiento: es necesariamente un enunciado interno1 emitido desde un punto de vista interno$_2$.

6 SOBRE EL DERECHO COMO RAZÓN PARA LA ACCIÓN

En el segundo capítulo de mi libro he intentado establecer en qué sentido una posición positivista puede dar cuenta de la normatividad jurídica. Mi análisis se apoya en dos presupuestos que no todos los positivistas aceptan. En primer lugar, que todo derecho es un fenómeno normativo, es decir, si bien no todas sus disposiciones, algunas de ellas son genuinamente normativas. En segundo lugar, que las reglas genuinas son o se definen en términos de razones para la acción.[28] Con este objetivo en mente, he repasado los distintos sentidos en los que se pueden entender las razones que las reglas genuinas establecen, distinguiendo dos sentidos sustantivos y uno formal. En aplicación de estos conceptos, las normas genuinas podrían ser entendidas como: (i) razones sustantivas en sentido subjetivo (consideraciones que creemos o aceptamos como relevantes en nuestra motivación), (ii) razones sustantivas en sentido objetivo (consideraciones dotadas de peso justificativo, independientemente de nuestra creencias y actitudes), (iii) razones en sentido formal (consideraciones que funcionan como premisas justificativas de una conclusión, independientemente de su peso sustantivo objetivo y de su poder motivacional). Monti, evalúa críticamente cada una de mis propuestas a partir de una serie de consideraciones que en su mayoría comparto, si bien no veo que ellas avalen las conclusiones a las que él llega. No podría en este contexto responder a cada uno de sus articulados argumentos. Me concentraré exclusivamente en las tesis centrales que en el capítulo comentado me interesaba defender.

En primer lugar, tomando en cuenta la noción de razón en sentido psicológico, subjetivo, ¿Puede decirse que las normas genuinas que el derecho pretende, y a veces logra, establecer son razones en este sentido? He sostenido que no, que no sería adecuado entender la normatividad típica del derecho en término de razones en sentido motivacional. Textualmente, he sostenido que:

> si la noción de razón se entiende en términos subjetivos, el status de regla 'genuina' que adquiriría una generalización en virtud de su función como razón en razonamiento de los individuos sería muy *difícil de controlar*. Una posición mínimamente liberal debería restringir la tesis de que el derecho propone reglas 'genuinas' solamente a los órganos aplicadores del derecho excluyendo a los ciudadanos. De lo contrario, se

28 Redondo 2018: 93.

haría necesario admitir que el derecho a través de sus reglas busca gobernar no sólo las conductas de los ciudadanos sino también sus razonamientos.[29]

En otras palabras, la tesis de que el derecho pretende constituir razones en sentido subjetivo debería afrontar una dificultad empírica y una dificultad normativa: es de hecho problemático conocer y por lo tanto, controlar los estados psicológicos de los individuos, pero, además, sería injustificado hacerlo desde un punto de vista liberal. Al respecto, Monti exagera mi tesis y, al hacerlo distorsiona mi objeción. En su lectura, yo sostendría la imposibilidad de conocer estados mentales.[30] Y consecuentemente, nos recuerda algo que no he intentado negar: "es simplemente falso que sea epistémicamente imposible determinar si alguien acepta una regla como una razón o no.[31] Sobre esta base, Monti no ve ninguna dificultad en que el positivismo sostenga la tesis de que el derecho pretende que sus normas se constituyan efectivamente en motivos que guían la acción. Ahora bien, paralelamente, su argumento admite tanto la dificultad empírica como la normativa relativas al *control* que debería realizar el derecho. En sus palabras: "el derecho (digamos los jueces) no podría controlar que los agentes actúen como pretende que actúen"[32] (i.e. no podría controlar si efectivamente las normas han operado como razones motivacionales). Al mismo tiempo, Monti sostiene que no es problemático ni específicamente antiliberal "que el derecho meramente pretenda que actuemos por determinados motivos, *en la medida que no pretenda controlar si efectivamente lo hacemos o no*".[33] En efecto, estoy de acuerdo en que admitir que el derecho pretenda algo que no admitimos que controle no es en absoluto antiliberal, el problema es que es bastante absurdo. No es fácil captar la *ratio* en virtud de la cual pueda sostenerse que es plausible que el derecho pretenda X (en este caso la motivación de los destinatarios) si a la vez admitimos que es implausible que pretenda controlar si X en efecto se verifica. En suma, aunque Monti intenta ofrecer una consideración en contra de mi propuesta, en realidad, ofrece una razón aún más fuerte por la cual avalarla. Su tesis – que comparto – acerca del carácter antiliberal del control por parte del derecho (¿de los jueces?) de si sus normas operan o no como razones en sentido psicológico pone en evidencia, no ya el carácter antiliberal, sino el carácter paradójico que tendría la pretensión de constituir razones en este sentido, visto que normativamente le estaría prohibido – siempre desde un punto de vista liberal – controlar si lo que pretende efectivamente tiene lugar.

Con respecto a la objeción sobre la racionalidad de entender las reglas como razones subjetivas motivacionales, Monti dice estar de acuerdo con mi conclusión, si bien por razones diferentes. No puedo analizar aquí su propuesta,

29 Redondo 2018: 126. Las cursivas son añadidas.

30 Monti 2020: 138, 141 ss.

31 Monti 2020: 142.

32 Monti 2020: 142.

33 Monti 2020: 143. Las cursivas son mías.

pero cabe señalar que se basa en una comprometida distinción general entre dos tipos de razones para la acción: razones prácticas y razones apropiadas. En su ejemplo (que presupone la problemática tesis de que las creencias pueden decidirse intencionalmente) obtener un millón de dólares que nos han ofrecido para adoptar la creencia que *p* es una razón práctica para hacerlo, pero no es el tipo apropiado de razón, el cual debería estar asociado a la verdad de *p*.[34] Conforme a esta clasificación, la teoría moral del utilitarismo queda *ab initio* descartada como posible marco de justificación/motivación de acciones ya que no acierta a ofrecer 'el tipo correcto de razones' para evaluar una situación. Concuerdo con Monti en que este enfoque podría ofrecer una base alternativa para llegar a una conclusión similar a la que he tratado de avalar. El punto es que dicho enfoque no muestra por sí mismo su prioridad respecto de otros, y no se ve en qué sentido indique un déficit del que he propuesto en mi trabajo, y respecto del cual se presenta como una crítica.

En segundo lugar, con respecto a la posibilidad de que el positivismo jurídico sostenga que las normas genuinas que el derecho pretende establecer son razones sustantivas en sentido objetivo, la primera crítica de Monti es que no digo demasiado al respecto, sin embargo, luego admite que sí ofrezco un argumento.[35] Cabe recordar que mi pregunta general es en qué modo el positivismo jurídico puede admitir que las reglas genuinas que el derecho pretende ofrecer son prácticamente relevantes, i.e. generan razones para la acción. Con esta pregunta en mente, he sostenido la incompatibilidad lógica entre las tesis del positivismo jurídico y la tesis de que tales reglas son razones sustantivas en sentido objetivo. Diría que el argumento de la incompatibilidad lógica es quizás el más fuerte que se puede ofrecer para concluir que el positivismo jurídico no puede avalar la tesis en cuestión. Ciertamente, esta línea de razonamiento habilita la conclusión – que muchos autores promueven – de que lo que cabe abandonar es el positivismo jurídico, no la tesis de que las reglas genuinas con las que el derecho pretende guiar a sus destinatarios son, efectivamente, razones sustantivas en sentido objetivo. Pero, en este contexto, el abandono del positivismo jurídico no está en discusión, ni en mi trabajo ni en el de Monti.

Aunque no emerge explícitamente en el comentario de Monti, creo que el desacuerdo de fondo reside en que, en mi opinión y no en la suya, el derecho es, por definición, un fenómeno práctico o normativo, y dicha normatividad se explica en términos de razones para la acción. De allí la urgencia o necesidad de explicar en qué sentido el derecho goza de normatividad o, lo que es lo mismo, logra establecer 'normas genuinas' que, por hipótesis, confieren razones a sus destinatarios.

34 Monti 2020: 146.

35 Monti 2020: 148.

Monti no nos dice nada acerca de si el derecho es o no un fenómeno normativo dotado de carácter práctico. Lo único que queda claro a partir de sus dichos es que esta característica no puede atribuirse a cada norma jurídica. De hecho, esta es una de la tesis que, según Monti, el positivismo jurídico acepta necesariamente "(T2. Es posible que una regla jurídica requiera que A realice Φ y que, sin embargo, A no tenga ninguna razón para realizar Φ)".[36] Estoy totalmente de acuerdo con esto. Ahora bien, como dije anteriormente, en mi visión, en algún sentido, el derecho – no cada una de sus normas – efectivamente genera razones para la acción. De lo contrario no se entiende qué significa la idea de que derecho se define como un fenómeno normativo, dotado de carácter práctico.

Las consideraciones que ofrece Monti no atacan en absoluto lo que he sostenido en mi trabajo. Ellas simplemente hablan de otra cosa. Concretamente, en primer lugar, ambos estamos de acuerdo en que es perfectamente *posible* que el positivismo jurídico admita la idea débil de que el derecho pretende constituir razones sustantivas-objetivas. Mi punto es que el positivismo jurídico no puede sostener la tesis de que la normatividad típica o definitoria del derecho se explica en términos de este tipo de razones. Y la justificación de esta aserción es obvia, porque si explicase la normatividad jurídica en términos morales estaría contradiciendo una de sus tesis centrales: la separabilidad entre derecho y moral. En tal sentido, el positivismo jurídico no puede explicar la normatividad jurídica en términos de razones sustantivas-objetivas.

Según Monti, "El positivismo jurídico es compatible, de hecho, con la tesis de acuerdo con la cual tener la obligación jurídica de realizar Φ consiste en tener razones de cierto tipo para realizar Φ."[37] En efecto, esta no puede ser considerada una crítica, visto que es el punto de partida de mi razonamiento. Si aquello que llamamos derecho, en general (i.e. no cada norma jurídica) es un fenómeno normativo dotado de relevancia práctica, esto significa que genera razones de cierto tipo. La pregunta es justamente qué tipo de razones son las razones jurídicas, según el positivismo jurídico.

La respuesta de Monti es clara, en su opinión, son hechos morales los que explican la autoridad del derecho para crear razones.[38] La existencia de razones jurídicas – que Monti permanentemente equipara a la existencia de obligaciones jurídicas – depende de la existencia de hechos morales.[39] A modo de conclusión sobre este punto solo diré dos cosas. La primera es que, el positivismo jurídico que sostiene esta tesis, está reconociendo que con su equipaje teórico es incapaz de explicar el carácter práctico del derecho. En contraste con esto, mi intención ha sido mostrar que el positivismo puede explicar que las reglas ge-

36 Monti 2020: 149.
37 Monti 2020: 149.
38 Monti 2020: 149.
39 Monti 2020: 149.

nuinas que pretende (aunque no siempre logra) establecer tienen una relevancia práctica, son en sí mismas un tipo de razones para la acción, que no se basa en la existencia de hechos o razones morales. La segunda es que si, siguiendo a Hart, por ejemplo, se adopta la tesis de que el derecho, por definición, tiene carácter práctico, el tipo de positivismo jurídico que admite que el carácter práctico del derecho depende de hechos morales contradice (o abandona) la tesis de la no necesaria conexión entre derecho y moral. En esta visión, el derecho está necesariamente conectado a la moral puesto que su carácter práctico, i.e. su capacidad de ofrecer razones para la acción, depende de hechos morales.

En mi trabajo he sostenido que, en la medida en que el positivismo admita que el derecho necesariamente pretende constituir razones para la acción, debe entender esta noción desde una perspectiva formal: como un tipo de premisas que exige una determinada forma de razonamiento justificativo. La noción de razón en sentido "formal" no debería sugerir que el derecho establece razones en sentido debilitado o vacuo. Por el contrario, la noción de razón así entendida es altamente relevante y de fuerte interés. A la vez, el que la normatividad típicamente jurídica se explique de este modo no quiere decir que el derecho, de hecho, no pretenda o no brinde razones sustantivas. Lo que quiere decir es que, conforme al positivismo, el modo típico en que el derecho pretende incidir sobre el razonamiento práctico de sus destinatarios – ordinarios e institucionales – no es necesariamente sustancial. Su específico carácter práctico reside en la forma de razonamiento que impone: las reglas mediante las que pretende guiar el comportamiento constituyen un determinado tipo de razones-premisas invariablemente relevantes que, por el hecho de serlo, están unidas a un doble compromiso pragmático. Explicar de este modo la forma en que las reglas jurídicas genuinas ofrecen razones para la acción es compatible con el positivismo jurídico pero, ciertamente, ello no constituye en sí mismo una virtud. La virtud de este enfoque, según he intentado mostrar, es que capta un rasgo típico del derecho que, a su vez, no queda afectado por las objeciones que se presentan cuando la noción de razón se entiende en sentido sustantivo.

Al abandonar el sentido de razón para la acción en el que usualmente se entabla la discusión (razones en sentido sustantivo), ninguna de las usuales objeciones que se formulan al seguimiento de reglas se aplica. En tal sentido, creo que los comentarios de Monti no han captado mi idea. Es verdad que si, como propone Monti, continuamos defendiendo la tesis de que el derecho pretende ofrecer razones en sentido sustantivo, podemos – y deberíamos – ofrecer argumentos al fin de superar las objeciones que se presentan. Sin embargo, yo he seguido otro camino. He intentado brindar argumentos a favor de que el derecho ofrece razones en sentido formal y, desde esta perspectiva, no hay por qué hacerse cargo de superar tales objeciones. En suma, esto debería ser claro:

conforme a la posición que defiendo, el derecho no pretende constituir el tipo de razón que da lugar a las críticas usuales que se discuten en la literatura.

Conforme he propuesto, las reglas genuinas son razones-premisas invariablemente relevantes. Ellas se expresan en condicionales formalmente inderrotables y están asociadas a un doble compromiso práctico de carácter lingüístico (específicamente pragmático): aplicar la misma razón a todos los casos que caen en su alcance y, si ella no determina la conclusión final, indicar las razones que justifican dicha conclusión. Con el propósito de comprender mejor la idea de inderrotabilidad de las normas genuinas que el derecho ofrece, he considerado relevante traer a colación la distinción entre dos formas en las que las normas pueden considerarse derrotables, lo cual se conecta con un aspecto del debate entre universalismo y particularismo. Ciertamente, el rico debate entre universalismo y particularismo involucra una multiplicidad de cuestiones y va mucho más allá de este contraste.

¿Cómo se conecta la tesis que sostengo con el debate entre universalistas y particularistas? Desde una perspectiva que entiende la noción de razón en sentido sustantivo, la posición particularista niega, mientras la posición universalista afirma, la invariabilidad de la relevancia de las razones que el derecho ofrecería. La posición que propongo, si bien no asume que el derecho ofrezca razones sustantivas, es compatible con y permite expresar una tesis universalista. Solo las disposiciones que se entienden como razones-premisas inderrotables son aptas para expresar razones sustanciales universalmente relevantes. En contraste, la posición que propongo es incompatible con la idea de que el derecho ofrece razones sustantivas en sentido particularista, puesto que el particularismo descarta el doble compromiso pragmático asociado a la idea de que las normas son, en sentido formal, invariablemente relevantes.

Entiendo que el hecho de abandonar la noción de razón usualmente involucrada en el debate, i.e. el 'sentido sustantivo', puede crear desconcierto. Sin embargo, si no advertimos esto, no es posible captar lo que intento sostener. Creo que Monti lleva razón cuando señala que la opción con la que la literatura normalmente nos enfrenta (i.e. las razones jurídicas, o bien son razones sustantivas invariablemente relevantes o bien son meros compendios carentes por sí mismas de fuerza justificativa o motivacional) puede considerarse un falso dilema. En mi propuesta, dicho dilema se disuelve porque proponer que las normas jurídicas son invariablemente relevantes, en sentido formal, cambia el eje de la discusión y la aleja de ambos cuernos. En esta lectura, el positivismo jurídico no sostiene que las normas jurídicas sean razones sustantivas invariablemente relevantes, ni que sean meros compendios carentes de toda fuerza motivacional independiente. Tal como he señalado, sostiene precisamente que son enunciados-premisas inderrotables en sentido formal, que imponen un específico

compromiso práctico con respecto al acto lingüístico de justificación de una decisión.

Ahora bien, cuando se adopta el sentido formal de razón, necesariamente, o bien las normas jurídicas son razones invariablemente relevantes (condicionales inderrotables), o bien no lo son, es decir, son condicionales derrotables (admiten la introducción de condiciones adicionales de aplicación no previstas de antemano y provenientes del contexto de aplicación). *Tertium non datur*. En este sentido, la posición de Raz – a pesar de que Monti afirma lo contrario – no constituye una tercera opción. Tanto su propuesta como la de Alchourrón y Bulygin – que son las dos posiciones que he tomado como ejemplo – presuponen que las normas jurídicas, independientemente de su fuerza sustantiva (objetiva o subjetiva) sean entendidas en sentido formal, como condicionales inderrotables capaces de expresar razones invariablemente relevantes.

Comprendo que Monti no concuerde con mi propuesta de entender las normas jurídicas como razones invariablemente relevantes en sentido formal. Sin embargo, independientemente de que esta interpretación se considere o no convincente, es necesario usarla al leer mi trabajo, de lo contrario se está atribuyendo a mis dichos un sentido diferente del que he intentado darles.

En suma, conforme al análisis que he ofrecido, la noción de norma 'genuina' presupone el reconocimiento de la inderrotabilidad lógica de los enunciados que las expresan. Consecuentemente, afirmar que el derecho ofrece normas genuinas significa que el derecho ofrece razones-premisas que imponen un determinado tipo identificación y de aplicación por parte de quien las sigue. Al momento de la identificación, estas normas 'genuinas' excluyen cualquier consideración que no haya sido prevista de antemano por el derecho como condición de aplicación y, al momento de su aplicación, exigen un determinado comportamiento externo lingüístico: un específico tipo de fundamentación de la decisión por parte de quien sigue la regla. Esto último, como vimos, no significa que logren constituir razones sustantivas en sentido objetivo, ni que exijan que quien las sigue actúe motivado por su aceptación.

Concluyo esta respuesta agradeciendo sinceramente la discusión de mi trabajo. Puedo ver que los malentendidos y algunos de los desacuerdos se basan en una presentación deficitaria de mi parte. Espero haber aportado mayor claridad. En todo caso, cada uno de los comentarios ha sido muy bienvenido. Todos me han exigido evaluar con detenimiento mi propuesta y cuanto más aguda ha sido la crítica más estimulante ha sido el desafío para lograr exponer adecuadamente aquello que me interesa defender.

Bibliografía:

Agüero-SanJuan, S. (2022). Sistema jurídico e identificación del derecho. Una posible respuesta bulyginiana a «La teoría positivista de Bulygin. Un análisis crítico» de María Cristina Redondo. *Doxa. Cuadernos de Filosofía del Derecho,* 45, 549-579. https://doi.org/10.14198/DOXA2022.45.20

Alchourrón, C. & Bulygin, E. (1971). *Normative Systems*. Springer-Verlag.

Andrade Moreno, M. (2022). Variedades de positivismo y ontología social. *Anuario de filosofía jurídica y social*, 38 (por publicarse).

Arriagada Cáceres, M. B. & Navarro Gezan, L. (2022). El *necesario* placer de discutir con Redondo. *Anuario de filosofía jurídica y social*, 38 (por publicarse).

Carbonell Bellolio, F. (2022). La distinción entre semántica y pragmática y la posibilidad de un positivismo jurídico "interno". *Anuario de filosofía jurídica y social*, 38 (por publicarse).

Carrio Sampedro, A. (2022). Sobre la existencia y conocimiento de normas. Algunos comentarios y observaciones críticas a los presupuestos ontológicos y epistémicos del Positivismo jurídico «interno» de Cristina Redondo. *Doxa. Cuadernos de Filosofía del Derecho,* 45, 495-522. https://doi.org/10.14198/DOXA2022.45.18

Champeil-Desplats, V. (2022). Un positivismo jurídico "interno": ¿por qué? ¿cómo? *Revus. Journal for Constitutional Theory and Philosophy of Law,* 48, 93–102.

De la Fuente Castro, O. (2022). Positivismo jurídico, interpretativismo e institucionalismo. Comentario al capítulo IV de Positivismo jurídico «interno» de María Cristina Redondo. *Doxa. Cuadernos de Filosofía del Derecho,* 45, 581–602. https://doi.org/10.14198/DOXA2022.45.21

Hart, H.L.A. (1961). *The Concept of Law*. Oxford University Press.

Kristan, V. & Lojo, A. (2021). ¿Un normativismo "redondo"? El positivismo jurídico "interno" a examen. *Discusiones*, 26, 211–251. https://doi.org/10.52292/j.dsc.2021.2497

Legarre, S. (2020). Positivismo jurídico "interno" a la luz del derecho natural. *Revus. Journal for Constitutional Theory and Philosophy of Law,* 42, 97–105.

Legarre, S. (2022). "Internal" legal positivism in the light of natural law. *Revus. Journal for Constitutional Theory and Philosophy of Law,* 48, 119–126.

Lojo, A. (2022). Los problemas epistemológicos de las reglas genuinas en «Positivismo jurídico 'interno'» de María Cristina Redondo. *Doxa. Cuadernos de Filosofía del Derecho,* 45, 523–547. https://doi.org/10.14198/DOXA2022.45.19

Monti, E. (2020). Redondo sobre la normatividad del derecho. *Revus. Journal for Constitutional Theory and Philosophy of Law,* 42, 137–154.

Monti, E. (2022). Redondo on the normativity of law. *Revus. Journal for Constitutional Theory and Philosophy of Law,* 48, 155–172.

Moreso Mateos, J. J. (2022). La normatividad en el positivismo jurídico interno. A modo de colofón. *Doxa. Cuadernos de Filosofía del Derecho,* 45, 621-627. https://doi.org/10.14198/DOXA2022.45.23

Ramírez Ludeña, L. (2022). La imposibilidad del positivismo jurídico interno. *Doxa. Cuadernos de Filosofía del Derecho,* 45, 603-620. https://doi.org/10.14198/DOXA2022.45.22

Rapetti, P. A. (2021). Positivismo jurídico interno: ¿'hurra', 'buh', 'ehhh…'? *Revus. Journal for Constitutional Theory and Philosophy of Law,* 44, 85–99.

Rapetti, P. A. (2022). Internal legal positivism: "Hurrah," "Boo," "Ehhh…"? *Revus. Journal for Constitutional Theory and Philosophy of Law,* 48, 103–118.

Redondo, M. C. (1996). *La noción de razón para la acción en el análisis jurídico*. Centro de Estudios Constitucionales.

Redondo, M. C. (2018). *Positivismo jurídico "interno"*. Klub Revus.

Redondo, M. C. (2022). El positivismo jurídico interno. Algunas ideas bajo la lupa. *Anuario de filosofía jurídica y social*, 38 (por publicarse).

Riffo Elgueta, E. (2022). ¿Qué puntos de vista importan en la teoría del derecho? *Anuario de filosofía jurídica y social*, 38 (por publicarse).

Rodríguez, J. L. (2020). Sobre la posibilidad de un positivismo jurídico interno. *Revus. Journal for Constitutional Theory and Philosophy of Law,* 42, 79–95.

Rodríguez, J. L. (2022). On the possibility of an internal legal positivism. *Revus. Journal for Constitutional Theory and Philosophy of Law,* 48, 75–92.

Sánchez Brígido, R. (2020). El concepto de Derecho como concepto funcional. *Revus. Journal for Constitutional Theory and Philosophy of Law,* 42, 107–123.

Sánchez Brígido, R. (2022). The concept of law as a functional concept. *Revus. Journal for Constitutional Theory and Philosophy of Law,* 48, 127–142.

Scataglini, M. G. (2020). Convenciones interpretativas y positivismo jurídico. *Revus. Journal for Constitutional Theory and Philosophy of Law,* 42, 125–136.

Scataglini, M. G. (2022). Interpretative conventions and legal positivism. *Revus. Journal for*

Constitutional Theory and Philosophy of Law, 48, 143–154.
Searle, J. (1995). *The Construction of Social Reality*. Penguin Books.
Searle, J. (2010). *The Construction of The Social World. The Structure of The Human Civilization*. Oxford University Press.
Zorzetto, S. (2022). Normative legal positivism: from metaethics to politics. *Isonomía*, 54, 134-166. https://doi.org/10.5347/isonomia.v0i54.463

María Cristina Redondo*

Internal legal positivism refined

A reply to the critics

In this article I will try to answer some of the comments and criticisms raised by authors who participated in the discussion of my book *'Internal' legal positivism*. I have grouped the criticisms into six points; the first, on the possibility of an internal legal positivism and the plurality of methodological approaches in relation to law. The second, the ambiguity of the "internal" – "external" distinction. The third, on conventionalism in general and interpretive conventions in particular. The fourth, on natural law and (methodological) anti-positivism. The fifth, on participants and acceptants, cognitivists or non-cognitivists, and the last, on the law as a reason for action.

Keywords: internal legal positivism, internal and external points of view, methodological anti-positivism, interpretive conventions, participants, acceptants, reasons for action

In what follows, I will respond to some of the comments and criticisms expressed by the colleagues who participated in a discussion of my book, *Positivismo jurídico 'interno'*. Above all, I would like to thank Paula Gaido, who had the idea to organize a seminar at the University of Buenos Aires on the central arguments in my book, as well as the debate here in *Revus* (this also includes contributions from colleagues who could not be present at the seminar). I was honoured to receive these remarks. Some of the arguments that came up during the discussion helped me strengthen my ideas. Others alerted me to the need to correct my wording to make my assertions more effective. In any case, it has been a pleasure to have the opportunity to retrace the path I took and to rethink various problems in light of meaningful ideas. Both the volume and the subtlety of the comments require a response that a normal journal article cannot provide. For this reason, I can only address some of the many topics covered. I hope, however, that this response can trigger further conversations. I take this opportunity to thank every one of the participants. Their contributions have enrichened my work, and they will undoubtedly encourage me to keep thinking about the various ways of understanding the law.

I fully concur with many of the ideas expressed by my colleagues. A few of their suggestions, however, are based on misunderstandings or misinterpretations which I think can and should be avoided. I will try to point to at least some of these errors, the warning of which, in my opinion, will also serve as answers to them. Finally, I would like to point out that some of my critics opinions, even if they refer to very specific issues, presuppose genuine disagreements about the

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general approach to the study of the law. In other words, they presuppose an alternative philosophical view that, by hypothesis, is considered preferable. In this regard, a full response would require carrying out a comparative evaluation of the different views in order to select the one that could prove most appropriate, all things considered, and not to limit the evaluation to the specific idea under discussion. Unfortunately, in the present context it is impossible to provide such a general evaluation.

For now, I will focus on six of the issues that arose during the discussion.

1 THE POSSIBILITY OF AN INTERNAL LEGAL POSITIVISM AND THE PLURALITY OF METHODOLOGICAL APPROACHES IN RELATION TO LAW

One of the main ideas I tried to underline in my text is the importance of marking a clear distinction between ontological and epistemological issues in relation to law. This distinction allows me to take a cognitivist (and objectivist) position with respect to the question of the possibility of knowing norms (legal or moral) without abandoning a non-cognitivist (and subjectivist) thesis when it comes to explaining the way in which norms exist. With respect to the latter ontological question, I subscribed to some of the theses advanced by John Searle in his theory of social reality, which I believe are compatible with Hart's explanations of the existence of legal norms.[1] As for the epistemological question, my main aim was not to defended an internal legal positivist approach, but to show its possibility - a possibility that some theories explicitly deny, but which in any case is implicitly rejected by accepting certain theses and concepts, such as those of Guastini's sceptical interpretivism, the cognitivist interpretivism of Dworkin and Atria, or some forms of natural law theories.

Considering the aim of my work, Jorge Rodríguez is right in pointing out that I do not critically examine the reasons given by both realists and interpretivists to support the thesis of the impossibility of an internal legal positivism.[2] Indeed, in my book I do not elaborate the arguments that might be advanced against or in favour of the legal theories I challenge. This is because my interest was not in evaluating these positions, but rather in emphasizing one point: their commitment to what I have called 'the impossibility thesis.' In this respect, my only point was to emphasize that these positions are based on presuppositions that make the methodological approach of normative or internal legal positivism conceptually impossible. In other words, they are based on prem-

1 Searle 1995; Searle 2010; Hart 1961.

2 Rodríguez 2020: 81.

ises according to which any attempt to identify or know a normative content necessarily involves the adoption of a justificatory commitment. For them, it is impossible to explain, analyse, describe, or identify norms from a relatively neutral perspective.

For this reason, I will not here develop a response to the arguments - to which Rodríguez refers - against Dworkin's interpretivism and his thesis of the impossibility of external skepticism, as I have not done in my book. It is only worth mentioning that, according to the analysis I propose, and assuming the concepts Dworkin proposes, the so-called 'external skepticism' is indeed impossible. Such an impossibility is implicit in Dworkin's theses about what *interpreting* and *identifying a normative concept* mean, theses that are based on the superposition of different senses in which it is possible to adopt internal and external points of view. Consequently, a (metatheorical) external skeptical position becomes possible only when one takes note of the ambiguity of the internal-external opposition and distinguishes the sense I have called 'semantic' from the sense I have called 'pragmatic' or 'practical.'

In my text, I have defended not only the possibility of studying a normative phenomenon without making a practical commitment to it, but also the possibility of the coexistence of different methodological approaches in the study of legal concepts and institutions. This idea is apparently so obvious and innocuous that hardly anyone can explicitly deny it. In fact, what the criticized theories deny is not the possibility of different methodological approaches *tout court*, but particularly the possibility of normative or internal legal positivism, i.e., a relatively neutral study of legal norms or concepts. As for the complementarity of different methodological perspectives, I fully agree with Véronique Champeil-Desplats when she focuses on the thesis of methodological pluralism, which we should accept in order to approach the understanding of law.[3] But precisely because I accept this thesis, I disagree with her when she says that it leads to a "possible grief which must be directed toward a certain generality, abstraction, and an essentially logical-deductive approach." [4] If we accept this plurality of approaches, there is no reason why abstract studies of a logical-deductive character should be left behind. There is nothing either in the idea of plurality or in the specific methodological approaches that Champeil-Desplats defends (e.g., that of Bobbio or that of the Scandinavian realists) that requires or justifies abandoning abstract studies. In any case, I also agree that this multiplicity of approaches and disciplines used for the study of law calls into question the precise demarcation of what constitutes the theory of law. This is an issue that troubles Champeil-Desplats but that I have not considered in my work.

3 Champeil-Desplats 2022.

4 Champeil-Desplats 2022: 101.

In the last chapter of my book, one might get the impression that I take a radically relativistic perspective, in the sense that all of the theories that can emerge from the possibility thesis seem *equally good*. This, however, was not my intention, since the thesis I present aims only to show that, contrary to the claims of the interpretivist positions, all these methodological options are *equally possible* but not equally plausible, and that to make this possibility viable it is essential to recognize the ambiguity exploited by those who deny it.

Thus, in my book I did not intend to highlight the advantages of a certain methodological perspective, but rather to defend its possibility. In the words of Pablo Rapetti, my considerations are from 'analytical (meta) theory' and focus on analysing and criticizing a specific group of theoretical considerations. In particular, those that preclude the possibility of a theory of law that seeks to identify, analyse and, in general, understand norms (not empirical data) without necessarily adopting a justifying position in relation to them. This type of approach, the merits of which have been highlighted by authors such as Hans Kelsen and Herbert Hart, makes it essential to distinguish or separate what the criticized positions assimilate when they ambiguously assume that the study of a normative content requires the adoption of an internal point of view. Specifically, on the one hand, it is a matter of distinguishing the assumption of an internal point of view in an epistemological sense (as an essential methodological perspective to discern norms) from the assumption of an internal point of view in a practical sense (a committed stance necessary for the existence and continuance of norms). On the other hand, it is necessary to distinguish the assumption of an external point of view in an epistemological sense (the methodological perspective of someone who knows empirical data) from the assumption of an external point of view in a practical sense (a possible neutral attitude, toward both empirical data and norms). Only if these distinctions are accepted is normative legal positivism possible, since this approach aims to analyse law (a set of norms) without necessarily adopting a practical commitment to it. Consequently, its study requires an internal point of view in an epistemological sense and an external point of view in a practical sense.

2 THE AMBIGUITY OF THE DISTINCTION BETWEEN 'INTERNAL' AND 'EXTERNAL'

According to the analysis I have offered, the impossibility thesis, which I criticize, is made plausible by the ambiguity of the classical opposition between internal and external point of view. I have therefore attempted to remove this ambiguity by showing that the opposition between the terms 'internal point of view' and 'external point of view' assimilates two separate questions. In particular, assuming an internal point of view to describe or refer to a normative

content (semantic or legal), as Peter Winch suggested, is not equivalent to, nor does it require, assuming the internal point of view of the acceptants to which Herbert Hart referred. Thus, we are not required to make a practical commitment, especially a moral one, for or against the content in question. In the debate we are dealing with here, the only participant who claims that this ambiguity should not be our concern is Pablo Rapetti. He believes that such ambiguity does not deserve attention.[5]

First, according to Rapetti, a proposal like the one he advocates is capable of explaining the kind of enterprise that normative legal positivism seeks to achieve. Among other merits, it allows us to grasp or refer to the content of legal concepts (it is not clear whether it could also refer to the content of legal norms), and at the same time it is not an example of normative-justificatory discourse, i.e., it does not imply the acceptance of such content. Now, unlike the one I propose, this approach is not an example of descriptive language.[6] Rather, it would have a special status: analytical, reconstructive. I will not discuss here this kind of reconstructive enterprise, which I have fully accepted in other contexts. The crucial point concerns whether Rapetti's proposal can bypass the distinction I have introduced or, in other words, whether it can ignore the necessary connection—implicit in the ambiguous idea of the internal point of view—between understanding the content of legal concepts and taking a committed standpoint toward them. Unfortunately, the answer is no. If the ambiguity is ignored, and especially if we do not reject the arguments that necessarily link any attempt to analyse the semantic content (of concepts or legal norms) with an attempt to take a practical, justificatory stance, Rapetti's proposal is as impossible as internal legal positivism. In other words, Rapetti proposes understanding legal theory as an analysis of legal concepts that is not morally committed, but would be no logical space for such an analysis if we do not introduce the distinction I propose. If we ignore the proposed distinction and maintain ambiguity, it is impossible to refer to, analyse, or reconstruct legal concepts without adopting a normative-justificatory approach.

In his proposal Rapetti does not use the expressions 'internal point of view' and 'external point of view,' and because he does not do so, it does not seem necessary for him to deal with their ambiguity. But even if we use language that does not explicitly rely on the complex distinction between internal$_1$/internal$_2$ and external$_1$/external$_2$, the problem remains and cannot be solved, unless we emphasize that referring to the content of concepts or norms (i.e. adopting what I have called an 'internal point of view$_1$') does not mean or require committing to or adopting a particular justificatory position with respect to them (i.e. adopting what I have called an 'internal point of view$_2$'). Rapetti wants to open

5 Rapetti 2021: 86, 92.

6 Rapetti 2021: 97.

a logical space between a normative-justificatory discourse and a *reconstructive* (non-descriptive) discourse, but to do so he must reject the thesis of the impossibility, according to which it is neither possible to *describe* the content of legal or social concepts nor to *reconstruct* or *analyze* them without making a practical-normative commitment.

In short, although Rapetti's proposal is an alternative to internal legal positivism, it falls within the scope of this methodological approach. Therefore, it necessarily presupposes a distinction between two meanings of the expression 'internal point of view'. If we accept that Rapetti's analytical-reconstructive discourse refers to legal concepts, then it is an internal discourse$_1$. However, he proposes that analytical-reconstructive discourse is a *sui generis* discourse, which is neither descriptive nor normative. But even under the hypothesis that one accepts this particular type of internal discourse$_1$, one must also accept that it is either committed (for or against) to what it refers to (i.e. it is made from an internal point of view$_2$) or it is relatively neutral (i.e. it is made from an external point of view$_2$). In Rapetti's conception, analytical-reconstructive discourse is clearly a discourse that assumes an external point of view$_2$.

Second, in my book I have on the one hand, described the contrast between an internal and an external point of view$_1$ as a semantic contrast. On the other hand, I have described the contrast between an internal and an external point of view$_2$ as a pragmatic contrast. I now see that this characterisation was misleading, for it suggests a general distinction which is not implied by my proposal and which I do not want to defend. This distinction I am introducing emphasises the independence between two matters: the object of our discourse (the thing we talk about) and the practical attitude with which we speak *on a particular occasion*. However, the separation of these two matters does not generally presuppose the independence between semantics and pragmatics.

I agree with Rapetti that it is convenient to "soften the distinction between semantics and pragmatics."[7] But even if one accepts a connection, and unless a radical subjectivism is adopted, it can be denied that the meaning of a discourse is determined by the individual attitude of the speaker *in every occasion of use* (unless the speaker is stipulating for a limited context). In other words: according to the perspective I have adopted, meanings do indeed depend on pragmatic attitudes. In the legal field, for example, as Scataglini points out, they depend on the acceptance of certain interpretative conventions.[8] This does not mean, however, that in specific occasions of use we cannot distinguish between what the agent talks about and what she says about it from the practical attitude of approval or disapproval with which she does so. In any case, in order not to suggest a separation that the distinction introduced does not imply, it might be

7 Rapetti 2021: 92-93.

8 Scataglini 2020: 125.

better to abandon the labels 'semantics' and 'pragmatics' when presenting it, as long as we keep in mind that the two aforementioned aspects are independent of each other, which presupposes that (except in cases of stipulation) the meaning of language is not decided by the speaker at every occasion of use.

Rappeti's comments force me to further specify what I have tried to express. The contrast between internal and external point of view$_1$ refers exclusively to the object of the discourse, to what a statement refers to. Internal discourse$_1$ refers to (conceptual or normative) contents. External discourse$_1$ refers to the empirical world, to data that we can perceive with our senses at a particular place and time. In this respect, as I will explain later, my wording needs to be corrected. As Rodríguez warns, in my text I defend the idea that internal discourse$_1$ is always presented from the third-person perspective and that it is always descriptive.[9] I should clarify that this limitation should not be considered a defining element of internal discourse$_1$ in general, but rather of the internal discourse$_1$ proposed by a positivist legal theory, the possibility of which emerges from the distinction between the two senses of the contrast between internal/external point of views. Indeed, as I highlighted frequently, a first-person normative discourse, such as Dworkin advocates in his interpretive theory, is also an example of internal discourse$_1$. It is therefore important to emphasise that this type of discourse, characterised solely by having a semantic or normative content as its object, can have a descriptive as well as a normative status. And if one accepts Rapetti's suggestion, it could also be an example of a 'reconstructive' *tertium genus*.

In addition to the distinction between internal and external points of view$_1$, I have also contrasted two types of attitudes toward an object that are mutually exclusive and jointly exhaustive: a normative-justifying attitude that is committed in practical terms (the internal point of view$_2$) and a neutral attitude that is not justifying or committed in practical terms (the external point of view$_2$). As I have just recognized, it might be confusing to present this last opposition as having a 'pragmatic' character. Not because it does not have it, but because it suggests something I do not want to defend, namely, that an agent can have only these two pragmatic attitudes. That is not what I intended to claim. An agent can have multiple, and very different, attitudes that vary considerably in intensity. The idea is that any attitude an agent has can either be committed in practical terms, i.e., by taking a normative-justificatory position toward what is being referred to, or it is uncommitted, thus being in a relatively neutral position. Indeed, the terms I use here should be explained in more detail. For example, when I say that a discourse is used with an 'uncommitted' attitude, I am referring to the absence of a justificatory stance of an ultimately moral kind. In a different sense of the term, the use of any discourse is always committed. Descriptive discourse is indeed committed to the value of truth.

9 Rodríguez 2020: 85, 86.

Still maintaining the ambiguity, i.e., without using the distinction between $internal_1$/$internal_2$ and $external_1$/$external_2$, Rapetti highlighted the necessity of an ulterior distinction between first- and second-order statements.[10] Unfortunately, it is not clear how we should understand this distinction. Moreover, it is interesting to note that the lack of precision exploits once more the ambiguity of the idea of internal point of view. On one side, the distinction between first- and second-order discourses seems to point into a division within the type of practically committed statements; the ones referring directly to the world are first-order (such as the legislator or the acceptant discourses), while the ones that refer to the (conceptual or normative) contents are second-order (such as the dogmatic discourse or that of the theory of law). This is the distinction Rapetti seems to point at when he says that internal first-order statements are the ones emitted by participants who constitute the practice, while law scholars use internal second-order statements.[11] However, it is also possible to say that the first-order statements are those referring to the contents of the norms or specific legal institutions, existing in a particular time and place (for instance, the statements of the acceptant, judges, or legal scholars), and that the second-order statements are those regarding general theory (that is, statements made by legal philosophers who analyse concepts). Hence, the contrast between first- and second-order statements carries the same ambiguity the importance of which Rapetti denies. In my opinion, we gain in precision when we distinguish the different types of statements that emerge once the ambiguity has been eliminated: statements referring to the empirical world and those referring to normative or conceptual contents. Within the latter group, we can surely distinguish among the statements referring to the content of specific regulative norms, the content of different theories, or the content of particular concepts or semantic norms. However, we must keep in mind that each and every one of these types of statements can be uttered from an internal point of $view_2$, this is, with a practically committed attitude of a participant (whether this is a citizen, judge, legal scholar or legal theorist is not important at this point) or from an external point of $view_2$, this is, with the attitude of a neutral observer (again, it is irrelevant whether this is a citizen, judge, legal scholar or legal theorist).

The works of Rodríguez and Scataglini are of great use in relation to the type of distinctions emerging from the disambiguation I have advocated for. They have both identified the impreciseness I highlighted.[12] Rodríguez's work additionally suggests an important amplification of the proposed distinctions.[13]

10 Rapetti 2020: 86.

11 Rapetti 2020: 88.

12 Rodríguez 2020: 87; Scataglini 2020.

13 Rodríguez 2020: 88: "However, when referring to an institution or a social practise, whether exclusively in terms of empirical facts or in terms of normative content, it is possible to formulate either purely descriptive statements or normative or evaluative statements about it..."

First, when introducing the distinction between discourses and studies emitted from an internal or external point of view, I was mainly guided by an interest in capturing the different types of *possible theories of law*. In particular, I was guided by the possibility of a descriptive and relatively neutral theory of institutional concepts and legal norms. This interest explains (but does not justify) some of my affirmations. It is true that the statements proposed by the theory, the possibility of which I would like to highlight, refer to normative concepts or contents (they are statements made from an internal point of view$_1$) and they are neutral: formulated *exclusively from a third-person perspective* (emitted from an external point of view$_2$). As I have previously mentioned, this is a defining element of this position. However, and as Rodríguez rightly points out, this does not imply that every statement referring to normative concepts or contents is neutral (i.e. released from an external point of view$_2$). In this sense, he rightly claims that "it seems incorrect to sustain that every use of an institutional concept or every reference to normative contents is just a *formulation of purely descriptive statements*".[14] In line with Rodríguez's claims, in my work I have said, for example, that interpretivist theories analyse legal concepts by formulating internal statements$_1$ and that they do so from a morally committed point of view, i.e., from an internal point of view$_2$. In general, justificatory theories such as Dworkin's, critical theories such as Ferrajoli's or Atria's, or analytical theories such as Rapetti's do not formulate *purely descriptive* statements, they use and make reference to normative contents. In other words, they formulate internal statements$_1$. To sum up, this is a necessary correction to my work: internal statements$_1$ are not always and not necessarily descriptive or neutral.

Second, the distinctions I have suggested can be extended. As Rodríguez claims, there is no problem in defending that, from internal$_2$ or external$_2$ points of view, it is only possible to formulate statements referring to normative contents. Nonetheless, it is also perfectly plausible to admit that predicates directly referring to 'the world' or empirical states of things (i.e., external statements$_1$) can be emitted with either a committed or a neutral attitude. In my terms, they can be formulated from an internal point of view$_2$ or an external point of view$_2$. It is true that in this context, the main interest of solving the ambiguity of expressions such as 'internal point of view' or 'external point of view' has to do with highlighting the possibility of two types of theories of legal concepts and contents: neutral theories, such as the one proposed by legal positivists, and committed theories, such as the one suggested by interpretivists. At the same time, by deleting the ambiguity we open the door to the differentiation between different types of discourse and speech in general. In other words, the presented considerations endorse a wide classification that takes into consideration, on the one side, the different types of objects that can be described by a statement (the empiri-

14 Rodríguez 2020: 88. Italics are mine.

cal world, or abstract representations of it, i.e., intentional contents) and, on the other side, the different types of attitudes from which a statement can be emitted (neutral or committed). In this sense, we can identify four types or situations:

(1) The situation in which, with a committed attitude (from an internal point of view$_2$), statements referring directly to the empirical world are emitted (form an external point of view$_1$). For example, a legislator establishing killing as a forbidden action.

(2) The situation in which, with a committed attitude (from an internal point of view$_2$), statements referring, not to the empirical world but to normative concepts or contents are emitted (from an internal point of view$_1$). For example, the interpretivists legal theorist who studies courtesy or any other legal institution.

(3) The situation in which, from a neutral point of view (from an external point of view$_2$), statements regarding the empirical world are emitted (form an external point of view$_2$). For example, the speaker who describes a landscape or the physical movements of a type of practice. Or, the legal theorist according to the methodology of legal realism.

(4) The situation in which, from a neutral point of view (from an external point of view$_2$), statements regarding normative concepts or contents are emitted (from an internal point of view$_1$). This last situation is the one I have dedicated most attention to in my paper. It is the one considered impossible by interpretivists and that, as we have seen, would include a descriptive enterprise, but also an analytical-recontsructivist one.

As we can see, this classification makes no distinction between statements that refer to the content of particular legal institutions and statements that refer to the content of general legal concepts. And it is important that this remains so, not because the distinction is of little importance, but because the classification aims to show that they are internal statements$_1$ in both cases. In general, and without abandoning the distinction that I have thoroughly highlighted in my work, we can assert that in both cases the speaker refers to norms: in the first case to rules and principles of a particular legal order, in the second case to rules or principles of a semantic nature that determine the meaning of some expressions.

3 ON CONVENTIONALISM IN GENERAL, AND INTERPRETATIVE CONVENTIONS IN PARTICULAR

I fully agree with Scataglini that it is incorrect to equate conventionalism as an ontological theory of law and conventionalism as a theory for identifying the content of a legal system.[15] Indeed, I have accepted that the content of a law

15 Scataglini 2020: 128.

depends (among other things) on the conventional rules regarding the use of language, but I have denied that the ontology of law is adequately explained by conventionalism. The reason is that this view reduces the existence of norms to a set of behaviours, beliefs, and attitudes of a group of actors. In contrast, I have defended a non-reductivist and 'realist' view regarding the existence of an 'institutional reality': facts and entities whose existence depends on, but is not reducible to, the beliefs, attitudes, and behaviours of a social group.

In relation to the epistemic question about the content of a particular legal system, in the third chapter of my book, which discusses Eugenio Bulygin's theory, I expressed some doubts regarding the possibility of maintaining, in specific circumstances, the distinction proposed on his book *Normative Systems* between a (descriptive) relevance thesis and a (prescriptive) relevance hypothesis. Particular doubts arise when claiming that the determination of the content of a legal right is dependent on a variety of interpretative practices or conventions that make it controversial. In this regard, Gabriela Scataglini points out that this question does not arise if we correctly distinguish between superficial and deep conventions. Specifically, the point is that even if interpretive conventions are superficially controversial, deep conventions (a set of background criteria that can be 'identified and described') eliminate indeterminacy or instability in the identification of the descriptive relevance thesis.[16] In a sense, I completely agree with this claim. If there are conventions (regardless of whether they are deep or superficial) that can be 'identified and described', the problem does not arise. Scataglini, however, does not seem to recognize that the existence of uncontroversial deep conventions is not an answer to my concerns, but rather a situation in which the hypothesis that explains my concerns does not arise. Indeed, if there are deep interpretive conventions about which there is no controversy (as opposed to what happens on the surface), then the problematic situation does not exist. The question is: what happens in a hypothetical case of a controversy, for example, in situations where there is no deep convention, or where there are multiple coexisting superficial and deep conventions that guide the identification in incompatible ways? Given this hypothesis, which does not deny that conventions can have a superficial and a deep level, it becomes clear that Scataglini's true argument against the possible indeterminacy or instability of the relevance thesis is not based on the distinction between superficial and deep conventions, but in the belief – not argued for and highly problematic - that it is *always* possible to identify and describe the correct option, i.e., that the controversy is always and only superficial because at a deeper level we can always find a determinate answer. Of course, I am not denying that it is always possible to describe the terms of a controversy or to report what the various interpretive alternatives are. Under the hypothesis of controversy, however, identifying

16 Scataglini 2020: 128, 130.

the content of law seems to require an act of choice between such alternatives, a choice that goes beyond the description of said alternatives. Scataglini does not develop this point, she merely denies that this choice is necessary, and assumes that behind every controversy there is a content (essential? deep?) that is not controversial and that - and on this we would all agree - since it is not controversial, it can always be identified by a mere description. If we accept that there can be multiple existing interpretative conventions, even assuming, as Scataglini does, that the hypotheses identifying their content are descriptive, we will consequently necessarily have a multiplicity of hypotheses, and we will have to decide which is the best. In other words, the identification of what is to be considered the system's descriptive thesis of relevance is not the result of a mere description, but of a choice between different descriptive hypotheses.

As you can see, I am not arguing here against the distinction between superficial and deep conventions, nor am I claiming that deep conventions do not exist. What I am saying is in line with legal realism which teaches us that the coexistence of multiple interpretive conventions not only does not eliminate discretionary decisions, but constitutes a source of indeterminacy and leads to them. To accept this point is not to accept the realist thesis that the identification of the law and the thesis of the relevance of a system would *always* be indeterminate. For the same reasons stated here, it is moreover doubtful that, as Scataglini claims, exclusive legal positivism can accept, without limitations, that the law depends on deep interpretive conventions. Because the existence of deep interpretative conventions does not exclude the possibility of controversy about the content of the law, exclusive positivism cannot admit that the law depends on them, without restrictions. And this, as Scataglini notes, is not because such conventions can lead to morality or because in such a case the law would cease to be ontologically a conventional object; the reason is that if the law depends on unrestricted interpretive conventions, its identification may be indeterminate and may depend on discretionary acts. For this reason, I understand that a position such as Bulygin's, which seeks to defend a clear distinction between descriptive and prescriptive theses about the content of a law, could be supported by a conceptual thesis such as that of exclusive legal positivism—a thesis that holds that the law is the result of the intention of an authority and, therefore, only the interpretive conventions that aim to capture this data count for the descriptive determination of its content. In short, law is not the result of *sans phrase* interpretive conventions. A limitation is introduced: the relevant conventions when it comes to descriptively identifying the content of a legal institution are those that allow us to know what the authority intended to say.

4 ON (METHODOLOGICAL) IUSNATURALISM AND ANTIPOSITIVISM

As Legarre and Sánchez Brígido correctly note, in my work I have not dealt in depth with the analysis of natural law in general, and even less with its different versions.[17] Only on a few occasions have I alluded to this perspective, for example, to point out that, as a theory of law, it would be fully compatible with an approach also shared by a positivist theory that understands law as a system of norms. As Legarre recalls, I emphasized that Alchourrón and Bulygin's notion of system suggested in *Normative Systems* is applicable to law regardless of which natural law or positivist conception one uses to approach it.[18] Another point that Legarre does not explicitly discuss is whether the adoption of a natural law theory necessarily implies the adoption of an anti-positivist method. An obvious corollary of my proposal - also implicit in Alchourrón and Bulygin's perspective by virtue of what I have just said - is that it does not. In other words, it is possible to claim that law is necessarily linked to moral norms without thereby rejecting the possibility of a neutral, descriptive, or analytical approach to its study. This is what the possibility thesis defends: a normative object—such as law in a natural law perspective—can be described and analysed from a relatively neutral position. With this I am not claiming that natural law theories actually adopt a neutral method or attitude. I am only saying that this is possible if we reject the notion that the study of a normative object necessarily requires a normatively committed method of inquiry (for or against) with respect to its object.

My biggest disagreement with Legarre and Sánchez Brígido relates to an idea that both take for granted: that there is only one correct answer to the metatheoretical question of which method to use to approach the study of law. In this regard, Legarre does not doubt that there is one correct approach among the various natural law approaches (that would be Finnis's).[19] In the same line, Sánchez Brígido suggests that there is only one correct way to understand legal concepts (the functional conception), and, as he tries to show, if the concept is functional, its method of analysis is not a matter of choice because there is only one appropriate method for that (the non-neutral approach proposed by moral philosophy).[20]

But Sánchez Brígido's position wavers. At first, he seems to not accept the thesis of the impossibility of approaching a normative object, endowed with moral value, from a descriptive and neutral point of view. Without discussing this thesis, he seems to advocate for a weaker idea: the methodological option of internal positivism would be incomplete and superficial because it does not

17 Legarre 2020: 99; Sánchez Brígido 2020: 107, 116.

18 Legarre 2020: 104-105; Alchourrón & Bulygin 1971: online §§ 54–61.

19 Legarre 2020: 98.

20 Sánchez Brígido 2002: 121.

take a stand on the moral value of law.[21] In this context, I understand that legal positivism can easily accept the criticism of incompleteness: its analysis is not, and does not claim to be, complete. On the other hand, it would be easy to refute the superficiality thesis. The results obtained by applying the method of normative positivism are anything but superficial. However, I will not dwell on this point.[22] It is more important to highlight the argument that supports the claim of incompleteness and superficiality, which ultimately leads to a conceptual impossibility. The reason why a neutral approach is incomplete and superficial is that the concept of law is in fact a functional concept, and the analysis of a concept of this kind *requires* a moral, committed approach.[23] I will now offer my reply to this argument.

First, I do not think that there is only one concept of law (nor democracy, constitution, family, etc.). At the same time, it seems even more difficult to accept that the study of law should always be guided by only one kind of interest, and that 'the' theory of law in this sense is necessarily only of one nature. In my opinion, depending on the interest guiding a study, it would be appropriate to focus on a particular concept, which – using the categories considered in this context – may be structural, functional, or mixed. From this perspective, it would be misleading to ask whether the concept of law is structural, functional, or mixed, since the question is based on a false assumption.

Sánchez Brígido focuses on the attempt to show that *the* concept of law is functional. Without endorsing such a thesis, we can accept that in certain contexts we share a single concept ('our concept', the one actually used at a certain time and place) and that we are interested in analysing it. In such a case, a reasonable conclusion is that such a concept is functional. The question is: could the method of normative legal positivism analyse this kind of concept? Sánchez Brígido's answer is clear: strictly speaking, this is impossible because the only correct way to analyse a concept is to assume the interest that guides natural law theories. As mentioned, the analysis of the concept of law implies or requires an evaluation of moral nature. I must admit that, if the latter were true, I would fully agree with Sánchez Brígido. That is, if we assume – which I think is absurd – that because something satisfies normative standards and has moral relevance, it only admits one type of analysis that is also moral, then the necessity/impossibility thesis follows. But that assumption is one of the points at issue.

In my book I have tried to show that it is possible to reject the idea that the study of a normative or evaluative object necessarily requires a morally committed method. Sánchez Brígido's work does not take into account the considerations I have offered to refute this necessity, in particular, the idea that it is

21 Sánchez Brígido 2020: 108, 121.

22 Redondo 2020: 120.

23 Sánchez Brígido 2020: 119.

based on, and exploits, an ambiguity that leads to the conclusion that understanding and analysing a normative content (i.e., adopting an internal point of $view_1$) necessarily requires adopting a non-neutral method (i.e., adopting an internal point of $view_2$). In other words, the arguments that can be made against the central idea of the proposed natural law examples are not evaluated or considered. These are examples that overlap and conceptually link the attempt to understand and explain evaluative data with the need to evaluate them (i.e. to accept or criticize them) by adopting a committed position.

Many legal positivists claim that there are good reasons to focus on a structural concept of law (democracy, jurisprudence, the state, etc.), but this does not mean that they deny the possibility of identifying functional concepts of law (democracy, jurisprudence, the state, etc.). This triviality allows us to highlight one of the central points of the disagreement: the assumption that there is only one true way to understand legal concepts, and only one way to study what those concepts refer to. This does not deny the possibility of correct answers in general. It does, however, presuppose that there is not just one useful method of investigation, and that different perspectives do not merely coexist but complement each other and contribute to the understanding of a subject matter. It is also for this reason, and contrary to what interpretivism proposes, that it is important to maintain the distinction between theoretical and metatheoretical or conceptual questions (which are not theses about the use of words). On the basis of this distinction, it can be said that in my book I have admitted that, in theoretical disputes, referring directly to the object of study, we presuppose the existence of correct answers. However, this does not mean admitting that there is only one correct answer in metatheoretical disagreements about how to understand the terms and/or the method with which to delimit the object. In this sense, these latter disagreements are different from 'theoretical' disagreements.

5 PARTICIPANTS AND ACCEPTANTS, COGNITIVISTS OR NON-COGNITIVISTS

As Rapetti notes, my use of the terms 'participant' and 'acceptant' needs clarification. I extensively covered the notion of acceptance in a previous book and it is not my intention to return to the subject on this occasion.[24] In that book I distinguished the concept of belief from acceptance. Besides what I explained on that occasion, and following Hart's doctrine, I have always taken a broad conception of acceptance. Someone accepts a content (a type of behaviour, a semantic rule, or a legal norm) when she adopts a *favourable* practical attitude toward it that manifests itself in a disposition to act. And this is independent

24 Redondo 1999: ch. 5.

of the reasons, if any, why the agent accepts. This means that the notion of 'acceptant' describes someone who has simply internalized a pattern of behaviour and tends to act almost automatically, without his favourable disposition having been adopted in a rationally grounded way. It also describes someone who consciously adopts a policy in favour of a particular course of behaviour, and the true believer who holds to its intrinsic rightness. For the current discussion, however, it is more appropriate to focus on the notion of participant, which in a sense is even broader. Indeed, it refers to anyone who takes a committed attitude, either for or against, with respect to the content of a behavioural practice. In particular, I have tried to distinguish two types of mutually exclusive and jointly exhaustive attitudes in my work: that of the participant who adopts a committed practical attitude and, in this sense, accepts a *favourable or unfavourable* normative 'theory' with respect to certain behaviours, and that of the one who abstains from this evaluation and, consequently, adopts a neutral attitude, i.e., is *not* committed to any type of normative theory, *either favourable or unfavourable*, always with respect to certain contents or behaviours.

My interest was primarily in trying to understand the position in which a scholar finds himself in front of a normative object (semantic rules or legal institutions).[25] With respect to this kind of object, which is part of what is called 'social reality,' I have emphasized that the position of the participant—as opposed to that of the neutral observer—has ontological relevance. It depends on the participants whether institutional facts and entities come into existence and, above all, whether they are maintained or extinguished. Rapetti's challenge to this point, however, is that a cognitivist perspective is not adequate to account for the attitude of the participants.[26] I cannot present his arguments here, but I think it is useful to clarify my position. At the risk of being reiterative, I understand that the difficulty Rapetti points out arises when the ontological questions about the existence and the type of existence of a particular kind of object are not distinguished from the epistemic questions about the possibility and appropriate way of understanding or studying it. As for the epistemic question, following Searle, I have adopted a cognitivist position and language. I have admitted the possibility of (more or less objective) knowledge of entities that are ontologically subjective. In other words, entities and facts that are explained in non-cognitivist terms, and whose existence depends entirely on the attitudes, feelings, emotions, preferences, and beliefs of the participants. In this sense, I want to clarify that whether participants see themselves as cognitivists or non-cognitivists, my thesis is that the normative entities that a scholar claims to know and can know (i.e., in relation to which we can be cognitivists) depend entirely on the subjective attitudes of the participants that constitute

25 However, as I said at the beginning, following Rodríguez, there would be no problem in extending the proposal to include the speaker who refers directly to the empirical world.

26 Rapetti 2020: 92 mainly.

and keep them alive. Participants are defined by the fact that they adopt practical attitudes in favour of or against certain contents, not by the fact that they believe in their truth or falsity. This is certainly not a cognitivist explanation of participants' attitudes.

I do not think it is useful to resort to Hart's categories, the ambiguity of which I have tried to remove. If, like Rapetti, one advocates a non-cognitivist reading of "Hart's internal statements", it remains unclear whether these "internal" statements are those made by participants for a practical purpose and that have ontological relevance for the existence of rules, or whether they are made with the purpose of identifying, knowing, understanding, or explaining existing rules (semantic or legal), and *can* be uttered with a neutral attitude. In my text, I have not engaged in the debate between cognitivist and non-cognitivist readings of "internal statements" precisely because this debate overlooks the distinction between ontological and epistemic issues that I insisted on in the previous paragraph and, at the same time, ignores the fact that there are two different things to be explained that Hart did not distinguish precisely when speaking of "internal statements": (i) the statements that are committed from a practical point of view – statements uttered either by citizens, legal scholars, judges, theorists, or philosophers, and that have ontological relevance (statements committed from an internal point of view$_2$), and (ii) the statements that aim to identify, understand, describe, or analyse a normative content (which I have called internal statements$_1$) and that can also be uttered by citizens, legal scholars, judges, theorists, or philosophers, whatever their practical standpoint. Strictly speaking, I believe that the best theory to explain statements (i) expressing a practical attitude of commitment is a non-cognitivist theory. However, I have deliberately chosen to use cognitivist language. In this context, it is irrelevant whether these statements made from the internal point of view$_2$ are *analysed* as expressions of preferences or emotions (i.e., in non-cognitivist terms) or of agents' beliefs (i.e., in cognitivist terms). The reason is that the issue under debate is not the best explanation for these kinds of statements made from a committed internal point of view, but the fact that they should not be confused or equated with statements called "internal" in another sense: statements that refer to the content of concepts or norms.

As for the non-cognitivist position Rapetti advocates, an important clarification is required. Although he claims to adopt Hart's position, his semantic expressivism resembles a skeptical view and, in my opinion, would have been firmly rejected by Hart. From Hart's perspective, the content of norms depends on conventions and paradigmatic agreements that can be the subject of knowledge in clear cases.[27] And in this case, the statements that identify such content are

27 In this sense, although it would require further analysis, Hart would disagree with Rapetti in asserting that according to the expressivist semantics he accepts: "the meaning of our statements is a function of our mental states".Cf. Rapetti 2020: 92-93.

not necessarily expressions of acceptance. Applying the distinction introduced above, Hart could be said to take a non-cognitivist position with respect to statements made from an internal point of view$_2$. They express an agent's positive attitude and have ontological relevance. At the same time, however, Hart generally holds an intermediate, partially cognitivist theory with respect to internal statements$_1$, i.e., with respect to discourse, which he claims captures the content of linguistic rules and legal norms. According to Hart, in clear cases it is possible to issue internal statements$_1$ that only express knowledge, i.e., it is possible to be mistaken about the clear content of a convention or paradigmatic agreement. In difficult cases that the rules leave indeterminate, any statement that identifies their content certainly expresses an act of decision and not an act of knowledge: it is necessarily an internal statement$_1$ issued from an internal point of view$_2$.

6 ON LAW AS A REASON FOR ACTION

In the second chapter of my book, I have tried to establish in what sense a positivist position can account for legal normativity. My analysis is based on two assumptions that not all positivists accept. First, that every law is a normative phenomenon, that is, that while not all of its provisions are normative, some of them genuinely are. Second, that genuine rules are defined in terms of reasons for action.[28] With this objective in mind, I have explored the various senses in which the reasons that genuine rules establish can be understood, distinguishing two substantive senses and one formal sense. Applying these concepts, genuine norms can be understood as: (i) substantive reasons in a subjective sense (considerations that we believe or accept as relevant to our motivation), (ii) substantive reasons in an objective sense (considerations endowed with justificatory weight, independent of our beliefs and attitudes), (iii) reasons in a formal sense (considerations that function as justificatory premises for a conclusion, independent of their objective substantive weight and motivational force). Monti critically evaluates each of my proposals, drawing on a set of considerations that I mostly share, although I do not believe they support the conclusions he reaches. I could not address each of his sophisticated arguments in this context, so I will instead focus exclusively on the central theses I intended to defend in the relevant chapter of my book.

First, considering the notion of reason in a psychological, subjective sense, I have asked myself whether genuine norms that law intends, and sometimes achieves to establish, can be reasons in this sense? I have argued that this is not the case, that it would not be appropriate to understand law's typical normativity as reasons in the motivational sense. Literally, I have argued:

28 Redondo 2018: 93.

[I]f the concept of reason is understood in subjective terms, the status of a 'genuine' rule that generalization would acquire by virtue of its function as reason in the reasoning of individuals would be very *difficult to control*. A minimally liberal position should restrict the thesis that the law proposes 'genuine' rules only to the law-applying organs, and not to citizens. Otherwise, one would have to admit that the law, through its rules, seeks to control not only the behaviour of citizens but also their reasonings.[29]

In other words, the thesis that law claims to constitute reasons in a subjective sense should be confronted with an empirical difficulty and a normative difficulty: It is indeed problematic to know and therefore control the psychological states of individuals, but moreover it would be unjustified to do so from a liberal point of view. In this respect, Monti exaggerates my thesis and thus distorts my objection. On his reading, I would argue that knowing mental states is impossible.[30] And consequently, he reminds us of something I have not tried to deny: "It is simply false that it is epistemically impossible to determine whether someone accepts a rule as a reason or not".[31] On this basis, Monti sees no difficulty for positivism to uphold the thesis that law aims for its rules to be in fact constitutive of motivations that guide action. At the same time, however, his argument admits both the empirical and the normative difficulty concerning the control that law should exercise. In his words: "the law (say judges) could not control that actors act as it intends them to act"[32] (i.e., it could not control whether norms have actually operated as motivational reasons). At the same time, Monti argues that it is neither problematic nor specifically anti-liberal "that the law merely requires us to act for certain reasons, *insofar as it does not intend to control whether or not we actually do so*".[33] Indeed, I agree it is not at all anti-liberal to admit that the law intends something we do not admit it controls, but it is quite absurd. It is not easy to understand the *ratio* by which one can argue that it is plausible for the law to intends X (in this case, the motivation of addressees) if we simultaneously admit that it is implausible for it to control whether X is in fact verified. In sum, although Monti tries to offer a consideration against my proposal, he actually offers an even stronger reason to endorse it. His thesis—which I share—about the anti-liberal character of the control by the law (or the judges?) of whether or not its norms operate as reasons in the psychological sense, underlines not only the anti-liberal character, but also the paradoxical character that the claim of constituting reasons in this sense would have, since it would be forbidden (always from a liberal point of view) to control whether what it claims actually takes place.

29 Redondo 2018: 126. Italics are added.

30 Monti 2020: 138, 141 ss.

31 Monti 2020: 142.

32 Monti 2020: 142.

33 Monti 2020: 143. Italics are mine.

As for the objection about the rationality of understanding rules as motivational subjective reasons, Monti says that he agrees with my conclusion, though for different reasons. I cannot analyse his proposal here, but it should be noted that it rests on a general distinction between two kinds of reasons for action: practical reasons and reasons of the right kind. In his example (which presupposes the problematic thesis that beliefs can be intentionally decided) getting a million dollars offered to us to adopt the belief that *p* is a practical reason for doing so, but it is not the right kind of reason because it is not associated with the truth of *p*.[34] According to this classification, the moral theory of utilitarianism is ruled out *ab initio* as a possible framework for justifying/motivating actions because it does not offer the 'right kind of reasons' for evaluating a situation. I agree with Monti that this approach could provide an alternative basis for a conclusion similar to the one I have tried to endorse. The point is that this approach does not in itself show its priority over others, and it is not apparent in what sense it points to a deficiency in what I have proposed in my book, and in respect of which it is presented as a critique.

Second, as for legal positivism possibly sustaining that genuine norms that the law tries to establish are substantive reasons in an objective sense, Monti's first critique of my claims is that I do not develop this point enough, but he later admits that I do offer an argument.[35] It should be recalled that my general question is to what extent legal positivism can admit that the genuine rules it intends to create are practically relevant, i.e. generate reasons for action. With this question in mind, I have argued for the logical incompatibility between the theses of legal positivism and the thesis that such rules are substantive reasons in an objective sense. I would say that the argument of logical incompatibility is perhaps the strongest argument that can be offered for concluding that legal positivism cannot endorse the thesis in question. Certainly, this line of reasoning enables the conclusion, advocated by many authors, that it is legal positivism that should be abandoned, not the thesis that the genuine rules by which law seeks to guide its addressees are indeed substantive reasons in an objective sense. But in this context, the abandonment of legal positivism is not under discussion, neither in my work nor in Monti's.

Although it does not explicitly appear in Monti's commentary, I believe that the fundamental disagreement lies in the fact that, in my view and not in his, law is, by definition, a practical or normative phenomenon and that this normativity is explained in terms of reasons for action. Hence the urgency or need to explain in what sense law is normative or, in other words, manages to create 'genuine norms' that, by hypothesis, provide reasons to their addressees.

34 Monti 2020: 146.

35 Monti 2020: 148.

Monti tells us nothing about whether law is a normative phenomenon endowed with a practical character. The only thing that emerges from his comments is that this property cannot be attributed to every legal norm. In fact, this is one of the theses that, according to Monti, legal positivism necessarily accepts: "(T2. It is possible that a legal norm requires A to perform Φ and yet A has no reason to perform Φ)".[36] I fully agree with this. But as I said, from my point of view, in some sense the law—and not each of its norms—actually provides reasons for action. Otherwise, the idea that law is defined as a normative phenomenon endowed with a practical nature cannot be understood.

Monti's considerations in no way attack what I have defended in my work. They simply speak to something else. Specifically, in the first place, we both agree that it is perfectly *possible* for legal positivism to admit the weak idea that the law claims to constitute substantive-objective reasons. My point is that legal positivism cannot sustain the thesis that the typical or defining normativity of law is explained by these kinds of reasons. And the justification for this claim is obvious, because if it were to explain legal normativity in moral terms, it would contradict one of its central theses: the separability of law and morality. In this sense, legal positivism cannot explain legal normativity in terms of substantive-objective reasons.

According to Monti, "Legal positivism is compatible, in fact, with the thesis according to which having a legal obligation to Φ consists in having reasons of a certain kind to Φ."[37] This cannot be considered a criticism because it is the starting point of my reasoning. If what we call law in general (i.e., not every legal norm) is a normative phenomenon endowed with practical relevance, this means that it generates reasons of a certain type. The question is what type of reasons are legal reasons according to legal positivism.

Monti's answer is clear: according to him, moral facts are those that explain the authority of law to create reasons.[38] The existence of legal reasons, which Monti constantly equates with the existence of legal obligations, depends on the existence of moral facts.[39] By way of conclusion on this point I will only say two things. First, the legal positivism that upholds this thesis recognizes that its theoretical tools are incapable of explaining the practical nature of law. My intention, by contrast, was to show that positivism can explain that the genuine norms the law seeks to establish (but does not always succeed in doing so) have practical relevance, and that these norms are in themselves a type of reason for action, not based on the existence of moral facts or reasons. Second, if one accepts, following Hart for example, the thesis that law by definition has practical

36 Monti 2020: 149.
37 Monti 2020: 149.
38 Monti 2020: 149.
39 Monti 2020: 149.

character, then the kind of legal positivism that admits that the practical character of law depends on moral facts contradicts (or abandons) the thesis of the non-necessary connection between law and morality. According to this view, law is necessarily connected to morality because its practical character, i.e., its ability to provide reasons for action, depends on moral facts.

In my book, I have argued that to the extent that positivism admits that law necessarily aims to constitute reasons for action, it must understand this notion from a formal perspective: as a kind of premise that requires a certain form of justificatory reasoning. The notion of reason in the 'formal' sense should not suggest that law constitutes reasons in a weakened or vacuous sense. On the contrary, the notion of reason understood this way is highly relevant and of great interest. At the same time, the fact that typically legal normativity is explained this way does not mean that law does not in fact claim or provide substantive reasons. It means that, according to positivism, the typical form in which law seeks to affect the practical reasoning of its addressees—ordinary and institutional—is not necessarily substantive. Its specific practical character lies in the form of the reasoning it imposes: the rules by which it seeks to guide behaviour constitute a certain kind of invariably relevant reasons/premises that, by virtue of being so, carry a double pragmatic commitment. Explaining the way in which genuinely legal rules provide reasons for action in this way is consistent with legal positivism, but certainly not in itself a merit. The merit of this approach, as I have tried to show, is that it captures a typical feature of law, which in turn is not affected by the objections that arise when the notion of reason is understood in a substantive sense.

By abandoning the sense of reasons for action in which the discussion normally takes place (reasons in the substantive sense), none of the usual objections to rule-following apply. In this sense, I think Monti's comments have missed my point. It is true that if, as Monti suggests, we continue to argue that law is intended to offer reasons in the substantive sense, we can—and should—offer arguments to overcome the objections that arise. I have, however, taken a different path. I have tried to provide arguments in favour of the thesis that that law offers reasons in a formal sense and, from this perspective, there is no reason to assume responsibility for overcoming such objections. In short, the following should be clear: according to the position I defend, law does not claim to constitute the kind of reason that gives rise to the usual criticisms discussed in the literature.

As I have suggested, genuine rules are invariably relevant reasons/premises. They are expressed in formally indefeasible conditionals and are associated with a twofold practical commitment of a linguistic nature (especially pragmatic): to apply the same reason to all the cases that fall in within its scope, and in the case that it does not determine the final conclusion, to identify the reasons which justify that conclusion. To better understand the idea of the indefeasibility of

the genuine norms that law offers, I have thought it was important to bring up the distinction between two ways in which norms can be considered defeasible, something related to one aspect of the debate between universalism and particularism. Though, the rich debate between universalism and particularism encompasses a wide range of issues and goes well beyond this opposition.

How does the thesis I am arguing relate to the debate between universalists and particularists? From a perspective that conceives of the notion of reason in a substantive way, the particularist position denies the immutability of the relevance of the reasons that the law would offer, while the universalist position affirms it. The position I propose, while not assuming that the law offers substantive reasons, is compatible with and allows for the expression of a universalist thesis. Only provisions that are understood as indefeasible reasons/premises are capable of expressing universally relevant substantive reasons. By contrast, the position I propose is incompatible with the notion that law offers substantive reasons in a particularist sense, since particularism precludes the twofold pragmatic commitment associated with the notion that norms are invariably relevant in a formal sense.

I understand that abandoning the notion of reason normally used in the debate, i.e. in the 'substantial sense', can cause confusion. However, if we do not highlight this, it is not possible to understand what I am trying to argue. I think Monti is right in pointing out that the choice with which the literature usually confronts us (i.e. legal reasons are either invariably relevant substantive reasons or are mere compendiums lacking in themselves any justifying or motivational force) can be considered a false dilemma. In my proposal, this dilemma is dissolved because the claim that legal norms are invariably relevant in a formal sense shifts the focus of the discussion and moves it away from the two extremes. On this reading, legal positivism does not hold that legal norms are invariably relevant substantive reasons, nor that they are mere compendiums devoid of any independent motivational force. Rather, as I have argued, it holds that they are indefeasible statements-premises in the formal sense, which impose a certain practical commitment with respect to the linguistic act of justifying a decision.

Now, when the formal sense of reason is assumed, legal norms are necessarily either invariably relevant reasons (indefeasible conditionals) or they are not. That is, they are defeasible conditionals (they allow for the introduction of additional conditions of application that are not foreseen in advance and coming from the context of application). *Tertium non datur.* In this sense, Raz's position – despite Monti's assertion to the contrary – does not constitute a third option. Both his proposal and that of Alchourrón and Bulygin—which are the two positions I have taken as examples— presuppose that legal norms, regardless of their substantive force (objective or subjective), are understood in a formal sense as indefeasible conditionals capable of expressing invariably relevant reasons.

I understand that Monti disagrees with my proposal to conceive of legal norms as invariably relevant reasons in a formal sense. However, whether one finds this interpretation convincing or not, however, it is necessary to keep it in mind when reading my work, since otherwise one is ascribing to my words a different meaning from the one I have tried to give them.

In short, according to the analysis I propose, the notion of a 'genuine' norm presupposes the recognition of the logical indefeasibility of the statements that express it. Consequently, to say that the law offers genuine norms is to say that the law offers reasons/premises that impose a certain kind of identification and application on those who follow them. At the moment of identification, these 'genuine' norms exclude any consideration that has not been provided in advance by the law as a condition of application, and at the moment of application, they require a certain external linguistic behaviour: a certain way of justifying the decision by the one who follows the rule. The latter, as we have seen, does not mean that they can constitute substantive reasons in an objective sense, nor that they require that those who follow them do so motivated by their acceptance.

I close this response sincerely thankful for the opportunity to discuss my work. I can see now that the misunderstandings and some of the disagreements are due to poor presentation on my part. I hope I have been able to provide some more clarity here. In any case, each of the comments was greatly appreciated. They have all made me consider my proposal carefully, and the sharper the criticism the more stimulating the challenge has been to present adequately what I wish to defend.

Bibliography:

Agüero-SanJuan, S. (2022). Sistema jurídico e identificación del derecho. Una posible respuesta bulyginiana a «La teoría positivista de Bulygin. Un análisis crítico» de María Cristina Redondo. *Doxa. Cuadernos de Filosofía del Derecho,* 45, 549-579. https://doi.org/10.14198/DOXA2022.45.20

Alchourrón, C. & Bulygin, E. (1971). *Normative Systems*. Springer-Verlag.

Andrade Moreno, M. (2022). Variedades de positivismo y ontología social. *Anuario de filosofía jurídica y social*, 38 (por publicarse).

Arriagada Cáceres, M. B. & Navarro Gezan, L. (2022). El *necesario* placer de discutir con Redondo. *Anuario de filosofía jurídica y social*, 38 (por publicarse).

Carbonell Bellolio, F. (2022). La distinción entre semántica y pragmática y la posibilidad de un positivismo jurídico "interno". *Anuario de filosofía jurídica y social*, 38 (por publicarse).

Carrio Sampedro, A. (2022). Sobre la existencia y conocimiento de normas. Algunos comentarios y observaciones críticas a los presupuestos ontológicos y epistémicos del Positivismo jurídico «interno» de Cristina Redondo. *Doxa. Cuadernos de Filosofía del Derecho,* 45, 495-522. https://doi.org/10.14198/DOXA2022.45.18

Champeil-Desplats, V. (2022). Un positivismo jurídico "interno": ¿por qué? ¿cómo? *Revus. Journal for Constitutional Theory and Philosophy of Law,* 48 (online).

De la Fuente Castro, O. (2022). Positivismo jurídico, interpretativismo e institucionalismo. Comentario al capítulo IV de Positivismo jurídico «interno» de María Cristina Redondo. *Doxa. Cuadernos de Filosofía del Derecho,* 45, 581-602. https://doi.org/10.14198/DOXA2022.45.21

Hart, H.L.A. (1961). *The Concept of Law*. Oxford University Press.

Kristan, V. & Lojo, A. (2021). ¿Un normativismo "redondo"? El positivismo jurídico "interno" a examen. *Discusiones*, 26, 211-251. https://doi.

org/10.52292/j.dsc.2021.2497
Legarre, S. (2020). Positivismo jurídico "interno" a la luz del derecho natural. *Revus. Journal for Constitutional Theory and Philosophy of Law,* 42, 97–105.
Legarre, S. (2022). "Internal" legal positivism in the light of natural law. *Revus. Journal for Constitutional Theory and Philosophy of Law,* 48 (online).
Lojo, A. (2022). Los problemas epistemológicos de las reglas genuinas en «Positivismo jurídico 'interno'» de María Cristina Redondo. *Doxa. Cuadernos de Filosofía del Derecho,* 45, 523-547. https://doi.org/10.14198/DOXA2022.45.19
Monti, E. (2020). Redondo sobre la normatividad del derecho. *Revus. Journal for Constitutional Theory and Philosophy of Law,* 42, 137–154.
Monti, E. (2022). Redondo on the normativity of law. *Revus. Journal for Constitutional Theory and Philosophy of Law,* 48 (online).
Moreso Mateos, J. J. (2022). La normatividad en el positivismo jurídico interno. A modo de colofón. *Doxa. Cuadernos de Filosofía del Derecho,* 45, 621-627. https://doi.org/10.14198/DOXA2022.45.23
Ramírez Ludeña, L. (2022). La imposibilidad del positivismo jurídico interno. *Doxa. Cuadernos de Filosofía del Derecho,* 45, 603-620. https://doi.org/10.14198/DOXA2022.45.22
Rapetti, P. A. (2021). Positivismo jurídico interno: ¿'hurra', 'buh', 'ehhh…'? *Revus. Journal for Constitutional Theory and Philosophy of Law,* 44, 85–99.
Rapetti, P. A. (2022). Internal legal positivism: "Hurrah," "Boo," "Ehhh…"? *Revus. Journal for Constitutional Theory and Philosophy of Law,* 48 (online).
Redondo. C. (1999). *Reasons for action and the law*. Springer
Redondo, M. C. (2018). *Positivismo jurídico "interno"*. Klub Revus.
Redondo, M. C. (2022). El positivismo jurídico interno. Algunas ideas bajo la lupa. *Anuario de filosofía jurídica y social*, 38 (por publicarse).
Riffo Elgueta, E. (2022). ¿Qué puntos de vista importan en la teoría del derecho? *Anuario de filosofía jurídica y social*, 38 (por publicarse).
Rodríguez, J. L. (2020). Sobre la posibilidad de un positivismo jurídico interno. *Revus. Journal for Constitutional Theory and Philosophy of Law,* 42, 79–95.
Rodríguez, J. L. (2022). On the possibility of an internal legal positivism. *Revus. Journal for Constitutional Theory and Philosophy of Law,* 48 (online).
Sánchez Brígido, R. (2020). El concepto de Derecho como concepto funcional. *Revus. Journal for Constitutional Theory and Philosophy of Law,* 42, 107–123.
Sánchez Brígido, R. (2022). The concept of law as a functional concept. *Revus. Journal for Constitutional Theory and Philosophy of Law,* 48 (online).
Scataglini, M. G. (2020). Convenciones interpretativas y positivismo jurídico. *Revus. Journal for Constitutional Theory and Philosophy of Law,* 42, 125–136.
Scataglini, M. G. (2022). Interpretative conventions and legal positivism. *Revus. Journal for Constitutional Theory and Philosophy of Law,* 48 (online).
Searle, J. (1995). *The Construction of Social Reality*. Penguin Books.
Searle, J. (2010). The Construction of The Social World. The Structure of The Human Civilization. Oxford University Press.
Zorzetto, S. (2022). Normative legal positivism: from metaethics to politics. *Isonomía*, 54, 134-166. https://doi.org/10.5347/isonomia.v0i54.463

Synopsis

Tomasz Zygmunt

An intuitive approach to judicial expertise

SLOV. | *Intuitiven pristop k sodnemu izvedenstvu.* Raziskave kažejo, da je izvedensko delovanje na številnih področjih utelešeno v izvedenski ravni intuicije. Zdi se, da to drži v predvidljivih okvirih s fiksnimi pravili. Vendar dokazi kažejo, da tako izvedensko znanje obstaja tudi med predstavniki bolj naravoslovnih področij, kot so gasilci ali strokovnjaki za umetnost. Avtor preučuje, ali se lahko pri sodnikih pojavi neke vrste izvedenstvo, utelešeno v izvedenski intuiciji. Zagovarja tezo, da je mogoče doseči izvedensko intuicijo v obsegu nekaterih vrst sodnih situacij, ki jih sestavljajo pravni problemi z objektivnim pravnim standardom za njihovo reševanje. Vendar pa pravna intuicija ni učinkovita takrat, ko gre za pravne težave brez takega standarda, zato je v tem pogledu ni mogoče razviti do izvedenske ravni. Avtor obravnava dva vzorčna primera primerljivih pravnih problemov: takega, ki ustvarja za sodnike povsem novo normativno vprašanje, in takega, ki ustvarja konflikt med sodniškimi intuicijami, pogosto glede na razmerje med pravom in moralo. V obeh situacijah ni vidnih zakonitosti (ponavljajočih se vzorcev pravne prakse), ki bi jih bilo treba prilagoditi, zato je nemogoče izvajati deliberativno prakso – obliko usposabljanja, ki je nepogrešljiva za razvoj izvedenske intuicije – za pravno odločanje. Zdi se torej, da je – kljub usposobljenosti in izkušnjam sodnika – pravno intuitivno izvedensko znanje nemočno pri določanju celovitih odgovorov na nekatere pravne sodne primere.

Ključne besede: strokovnost, strokovna intuicija, razlogovanje, težki primeri, lahki primeri

ENG. | Research shows that expert performance in many fields of activity is embodied in an expert level of intuition. This appears to be true in predictable domains with fixed rules. However, evidence suggests that this type of expertise also exists among representatives of more naturalistic domains, such as firefighters or art specialists. This paper considers whether a kind of expertise embodied in expert intuition can occur in judges. It supports the thesis that it is possible to achieve expert intuition in the scope of some types of court situations consisting of legal problems with an objective legal standard for solving them. However, legal intuition is ineffective in cases involving legal problems with no such standard, and thus it cannot be developed to the expert level in this

respect. The paper discusses two model examples of comparable legal problems: those that generate a completely novel normative issue for judges, and those that create a conflict between judicial intuitions, frequently regarding the relation between law and morality. In both of these situations there are no visible environmental regularities (repetitive patterns of legal practice) to adapt, and hence, it is impossible to perform a deliberate practice – a form of training indispensable for developing expert intuition – for legal decision-making. Legal intuitive expertise, therefore, appears to be powerless in determining the holistic answers to some legal court cases, despite the skills and experience of the judge.

Keywords: expertise, expert intuition, legal reasoning, hard cases, easy cases

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Synopsis

Silvia Zorzetto

A constructivist conception of legal interpretation
Some critical remarks

SLOV. | *Konstruktivistično pojmovanje pravne razlage.* Avtorica obravnava številna vprašanja, ki so osrednja za vrednotno, vendar pozitivistično pojmovanje prava in pravne razlage. Zlasti po nekaterih razmišljanjih o tem, ali in v kakšnem smislu je teorijo prava mogoče šteti za aksiološko in/ali metodološko superiorno, se obravnavajo nekatera klasična vprašanja teorije pravne razlage: razlike med noetično in dianoetično razlago, *interpretatio legis* proti *iuris*, ter enostavne in težke primere. Analiza se nato osredinja na zahtevo po pravilnosti, ki je neločljivo povezana z razlogovanjem, na njegove pragmatične konotacije, na njegove kontroverzne odnose s tezo o tako imenovani ločitvi prava in morale ter na etični konformizem. Avtorica trdi, da je koncept pravne razlage, ki ga je predlagala Isabel Lifante, namesto tega nenevtralen koncept prava, ki prispeva h krepitvi dionizične in herkulske pravne prakse.

Ključne besede: pravna razlaga, noetično proti dianoetičnemu, *interpretatio iuris*, trditev o pravilnosti, konformizem, pravna država

ENG. | This essay explores a number of issues central to a value-based yet positivist conception of law and legal interpretation. In particular, after some reflections on whether and in what sense a theory of law can be considered axiologically and/or methodologically superior, some classic issues in the theory of legal interpretation are discussed: the distinctions of noetic versus dianoetic interpretation, *interpretatio legis* versus *iuris*, and simple versus difficult cases. The analysis then focuses on the claim to correctness inherent in legal reasoning, on its pragmatic connotations, on its controversial relations to the thesis of the so-called separation of law and morality, and to ethical conformism. I argue that the conception of legal interpretation proposed by Isabel Lifante is instead a non-neutral conception of law that contributes to the reinforcement of a Dionysian and Herculean legal practice.

Keyword: legal interpretation, noetic vs. dianoetic, *interpretatio iuris*, claim of correctness, conformism, rule of law

interpretatio iuris, and doubtful cases – 5 Interpretative arguments: The claim to correctness and pragmatic acceptability – 6 The value-laden approach and the separation between law and morality – 7 Conformism and the rule of law – 8 Once prescription is the best description

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Synopsis

Paula Gaido

El método y el objeto de la teoría del derecho según Cristina Redondo

SLOV. | *Metoda in predmet pravne teorije po Cristini Redondo.* V delu »*Notranji« pravni pozitivizem* si Cristina Redondo prizadeva artikulirati metateoretične predpostavke pristopa, usmerjenega v preučevanje prava, ki pojasnjuje njegov specifični normativni značaj. Pri tem med drugim zagovarja dve glavni tezi: (1.) pravne norme nujno konstituirajo razloge v formalnem smislu, ne glede na vsebinsko pravilnost vsebine, ki jo izražajo; (2.) pravna teorija je lahko moralno nevtralna glede na svoj predmet. To pomeni, da je po Cristini Redondo mogoče oblikovati povsem deskriptivne izjave, ki se nanašajo na vsebino prava; to pomeni, da jih je mogoče oblikovati z vidika, ki ne predpostavlja sprejemanja te vsebine. Izraz »notranji« pravni pozitivizem je Redondo izbrala za opis vrste metodološkega pristopa, ki omogoča pozitivistično teorijo prava *à la Hart*. Avtorica povzame glavne teze, ki jih Redondo zagovarja v svoji knjigi, in sledi osrednjim vprašanjem, ki so bila v središču razprave v *Revusovem forumu* o »*Notranjem« pravnem pozitivizmu*, objavljenem v tej reviji.

Ključne besede: pravna metodologija, pravna normativnost, notranji pogled, zunanji pogled, Redondo (Cristina)

ENG. | In *'Internal' Legal Positivism*, Cristina Redondo attempts to articulate the metatheoretical presuppositions of an approach directed to the study of law that explains its specific normative character. In doing so, she argues for, among others, two main theses: (i) legal norms necessarily constitute reasons in a formal sense, regardless of the substantive correctness of the content they express; (ii) legal theory can be morally neutral with respect to its object. This means that, according to Redondo, it is possible to formulate purely descriptive statements that refer to the content of law; that is, it is possible to formulate them from a point of view that does not presuppose the acceptance of that content. The expression "'internal' legal positivism" is the terminology chosen by Redondo to account for the type of methodological approach necessary for a positivist theory of law à la Hart to be possible. In this article, I will summarize the main theses defended by the author in her book and trace the central questions that have been at the heart of the discussion at the *Symposium* on *'Internal' Legal Positivism* published in this journal.

Keywords: legal methodology, legal normativity, internal point of view, external point of view, Redondo (Cristina)

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Synopsis

Jorge L. Rodríguez

On the possibility of an internal legal positivism

SLOV. | *O možnosti notranjega pravnega pozitivizma.* V svoji zadnji monografiji Cristina Redondo odlično zagovarja t. im. »notranji pravni pozitivizem«, tj. stališče, da je izjave, ki se nanašajo na vsebino prava kot normativno tvarino, mogoče oblikovati kot povsem opisne izjave, ki nimajo predpostavke, da njen avtor pritrjuje opisani vsebini. V tem komentarju so predstavljeni trije pomisleki: prvi podvomi, da avtorica na primeren način izpodbija trditev, da normative tvarine brez omenjene predpostavke ni mogoče opisati; drugi se nanaša na utemeljitev avtoričinega razlikovanja med pogledi od znotraj in pogledi od zunaj; tretji pomislek pa izpostavlja neuravičenost sklepov, ki naj bi avtorico vodili pri kritičnem ovrednotenju interpretativističnih teorij, kakršno je zagovarjal Dworkin.

Ključne besede: pozitivizem, realizem, pogled od znotraj, pogled od zunaj, interpretativizem, skepticizem

ENG. | In her latest book Cristina Redondo provides an excellent defense of the position she qualifies as *Internal Legal Positivism*, according to which it is possible to formulate statements referring to the content of the law, conceived as a normative entity, that are purely descriptive and expressed from a point of view that does not presuppose their acceptance. In this paper I will restrict myself to three rather marginal observations, raising some doubts, first, about the strategy of contesting the so-called impossibility thesis; second, on a point related to the two senses of the distinction between the internal and external points of view that Redondo proposes to differentiate and, third, regarding a consequence that derives from it for the critical evaluation of interpretivist theories such as Ronald Dworkin's. I then formulate some conclusions of that analysis.

Keywords: positivism, realism, internal and external points of view, interpretativism, skepticism

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Synopsis

Véronique Champeil-Desplats

An "internal" legal positivism: Why and how?

SLOV. | *»Notranji« pravni pozitivizem: Zakaj in kako?* Po poglobljeni metodološki razpravi o pomembnih avtorjih pravne teorije María Cristina Redondo zagovarja možnost »notranjega« pravnega pozitivizma, ki v nasprotju z dogmatičnim pristopom analizira pravo brez utemeljitve. Trdi tudi, da bi bila ontološko-institucionalna koncepcija prava najprimernejši način za izvedbo te analize. Predlog odpira več vprašanj: Kako natančno je možno analizirati pravo z notranjega vidika? Kaj je korpus, ki ga je treba preučiti? Je institucionalni pristop k pravu, če ne edini možen, najboljši? Ta komentar resno obravnava teoretične predloge Maríe Cristine Redondo in raziskuje možnost utemeljitve notranjega pozitivizma na različnih ontoloških konceptih prava.

Ključne besede: pravni pozitivizem, pravna znanost, družbene vede, epistemologija

ENG. | After an in-depth methodological discussion of important authors of legal theory, María Cristina Redondo defends the possibility of an "internal" legal positivism, which, unlike a dogmatic approach, analyzes law without justifying it. She also argues that an ontological-institutional conception of law would be the most appropriate way to carry out this analysis. The proposal raises several questions: How exactly is it possible to analyze law from an internal point of view? What is the corpus to be studied? Is an institutional approach to law, if not the only possible one, the best? This commentary takes María Cristina Redondo's theoretical proposals seriously and explores the possibility of basing an internal positivism on different ontological conceptions of law.

Keywords: legal positivism, legal science, social sciences, epistemology

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Synopsis

Pablo A. Rapetti

Internal legal positivism: "Hurrah," "Boo," "Ehhh…"?

SLOV. | *Notranji pravni pozitivizem: 'hura', 'bu', 'eh …'?* Avtor kritično analizira del argumentov iz nedavne monografije »Positivismo jurídico 'interno'« Cristine Redondo. Osredotoča se na umanjkanje razprave o tem, kdo je udeleženec (pravne prakse). Obenem izpostavi, da je razlikovanje med notranjim in zunanjim pogledom, ki ga avtorica monografije uporabi z namenom oblikovanja njej ljube oblike pozitivistične metateorije, neskladno z ekspresivistično predstavitvijo pravnega jezika prvega reda. Glede na to, da je najboljša predstavitev pravnega jezika prvega reda sporno teoretično vprašanje, bi bil meta-teoretičen okvir načeloma bolj primeren, saj se do tovrstnih vprašanj ne opredeljuje vnaprej. Končno ponudi alternativno strategijo, ki lahko vodi do metateoretičnega modela, ki je podoben avtoričinemu, a ne zaide v prej omenjeni probem.

Ključne besede: notranji pravni pozitivizem, udeleženci, pravni teoretiki, semantični ekspresivizem

ENG. | This paper offers a focused analysis of Cristina Redondo's latest book, *Positivismo jurídico "interno."* I first point out the lack of a discussion regarding what a *participant* (of the legal practice) is. I then emphasize that Redondo's distinctions between the internal and external points of view, which she offers in order to shape her favoured form of positivistic metatheory, are incompatible with an expressivistic rendition of first-order legal language. Since what constitutes the best rendition of first-order legal language is a controversial *theoretical* matter, a *meta*theoretical framework would be, in principle, preferable to others since it does not prejudge such a matter. Finally, I suggest an alternative strategy to arrive at a metatheoretical model similar to Redondo's, but which does not incur that particular problem.

Keywords: internal legal positivism, participants, legal theorists, semantic expressivism

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Synopsis

Santiago Legarre

«Internal» legal positivism in the light of natural law
Images and objections of natural law in contemporary analytical jurisprudence

SLOV. | *»Notranji« pravni pozitivizem v luči naravnega prava.* Avtor se v tem članku osredotoča na rabo pojma »naravnopravna teorija« v knjigi *Positivismo jurídico "interno"* Cristine Redondo. Avtor ugotavlja, da je analiza naravnopravne teorije v knjigi pomanjkljiva. Prvič zato, ker ji avtorica pripisuje redukcijo pravnih norm na moralne norme, ki v pravi »naravnopravni teoriji« ne obstaja. Drugič zato, ker avtorica ne upošteva dveh naravnopravniških načinov izpeljave pozitivnega prava iz naravnega prava. Poleg tega naj bi avtoričin prikaz naravnopravne teorije zgrešil dejstvo, da so tudi krivični zakoni po tej teoriji zakoni. Končno pa avtor pokaže, da je teorija Redondove združljiva z naravnopravno teorijo.

Ključne besede: naravno pravo, pravni pozitivizem, Redondo (Cristina), Akvinski (Tomaž), Finnis (John)

ENG. | This article focuses on the use of the term and the concept "natural law theory" in Cristina Redondo's book *Positivismo jurídico "interno"*. The article notes how Redondo's analysis of natural law theory is lacking in that the idea she attributes to that theory of reducing legal norms to moral norms is absent in true "natural law theory". For this theory there are two ways of deriving positive law from natural law, which Redondo does not account for. Furthermore, her understanding ommits the reality that according to natural law theory unjust *laws* are laws. Finally, this article tries to show posible ways in which Redondo's theory may be compatible with natural law theory.

Keywords: natural law, positivism, Redondo (Cristina), Aquinas (Thomas), Finnis (John)

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Synopsis

Rodrigo E. Sánchez Brigido

The concept of law as a functional concept

SLOV. | Pojem prava kot funkcionalni pojem. V svoji monografiji Positivismo jurídico "interno" Cristina Redondo trdi, da je pravna teorija lahko moralno nevtralna. Bistveni del njenega zatrjevanja je utemeljen na kritiki protipozitivi¬stičnega pojmovanja prava, ki ga zagovarja Fernando Atria, po katerem opisna oziroma moralno nevtralna teorija prava ni mogoča, ker je pravo funkcionalni pojem. Avtor tega besedila zatrjuje, da Redondova kritika ni sklepčna, čeprav ima tudi Atrijevo pojmovanje prava določene probleme. Obstajali naj bi namreč dve naravnopravniški teoriji, ki pravo razumeta kot funkcionalni pojem, pa zato še nimata težav, ki pestijo Atrijevo razumevanje. Ena od teh teorij trdi, da je pra¬vo funkcionalna vrsta. Druga teorija trdi, da je pojem prava normativno-funk¬cionalni pojem. To pojmovanje se izogne ne le kritikam, ki jih predstavi Cristina Redondo, ampak tudi standardnim ugovorom pozitivistov. Če je omenjeno poj¬movanje pravilno, potem pravna teorija ne more biti moralno nevtralna.

Ključne besede: pravna teorija, nevtralnost, pojem prava, funkcionalni pojmi, pravni pozitivizem, naravnopravna teorija

ENG. | In her book Positivismo jurídico "interno", Cristina Redondo claims that legal theory can be neutral from a moral point of view. An essential part of her argument is based on the criticism of an anti-positivist conception of law developed by Fernando Atria according to which, since law is a functional concept, no descriptive or morally neutral theory of law can be provided. The essay claims that, while Atria's conception of law encounters some difficulties, Redondo's criticisms miss the mark leaving their impact inconclusive. More importantly, there are two kinds of natural law theory that also claim that law is a functional concept but that do not face Atria's difficulties. One such theory seems particularly suitable for avoiding not only Redondo's criticism but also standard objections from the positivist camp. If this type of theory is correct, a theory of law cannot be morally neutral.

Keywords: concept of law, functional concepts, legal positivism, natural law theory, neutrality, philosophy of law

Summary: 1 Introduction – 2 Positivism and anti-positivism according to Redondo – 3 The problem of neutrality – 4 Two alternative accounts – 4.1 "Law" as a functional kind – 4.2 "Law" as normative-functional notion – 5 By way of conclusion

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Synopsis

María Gabriela Scataglini

Interpretative conventions and legal positivism

SLOV. | *Razlagalne konvencije in pravni pozitivizem*. Trditev, da je vsebina prava odvisna od »razlagalnih konvencij« pravne prakse, pomeni, da vsebine pravil ne določa vedno njihov dobesedni pomen. Če dobesedno razlago besede (z razširitvijo ali ožanjem njenega običajnega pomena) oziroma dobesedno razlago pravila (npr. tako, da upoštevamo neko izjemno okoliščino, četudi ni izrecno omenjena) odrinemo na kraj in če trdimo, da nam to nalaga pravo, potem vstopimo na področje implicitnega ali neizrecnega pomena. Toda, kaj to sploh pomeni? Gre za merila, ki so implicitna v družbeni praksi prava (tj. v razlagalnih konvencijah »brez omejitev«) ali pa zgolj za to, kar je zakonodajalec implicitno določil (tj. v razlagalnih konvencijah »z omejitvami«)? V luči omenjenega razlikovanja, ki ga je nedavno izpostavila Cristina Redondo, se v tem komentarju razpravlja o Redondovi razčlembi »teze o relevantnosti« in »hipoteze o relevantnosti« v pravnem sistemu, kritično pa se izpostavi avtoričino trditev, da se izbira med »neomejenimi« in »omejenimi« razlagalnimi konvencijami odraža v izbiri med vključujočim in izključujočim pravnim pozitivizmom.

Ključne besede: razlagalne konvencije, izključujoči pravni pozitivizem, globoki konvencionalizem, družbena praksa

ENG. | The thesis that the content of law depends on the "interpretative conventions" of legal practice implies that what the rules establish is not always determined by their literal meaning. To leave aside the literal interpretation of a word (by extending or limiting its ordinary meaning) or the literal interpretation of a rule (for example, by considering a circumstance as an exception, even if it is not explicitly mentioned), and to argue that *it is what the law requires* means entering the realm of the implicit. But what is «the implicit»? Does it consist in the criteria implicit in the social practice of law (i.e., in the interpretative conventions «without restrictions») or only in what the legislator has implicitly established (i.e., in the interpretative conventions «with restrictions»)? In light of this distinction, recently pointed out by Cristina Redondo, I discuss some of the questions she raises about the «relevance thesis» of the legal system as something other than the «relevance hypothesis», and I critically discuss her view that the choice between the interpretative conventions «without restrictions» and those «with restrictions» implies a choice between inclusive and exclusive legal positivism.

Keywords: interpretative conventions, exclusive legal positivism, deep conventionalism, social practice

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Synopsis

Ezequiel Monti

Redondo on the normativity of law

SLOV. | *Redondo o normativnosti prava*. V svoji zadnji knjigi Cristina Redondo zagovarja novo teorijo o normativnosti prava. Po tej teoriji naj bi pravo ne terjalo, da se pravna pravila razume kot vsebinske razloge za ravnanje, niti naj bi pravo ne stremelo k temu, da se pravna pravila tako uporablja. Namesto tega naj bi pravo stremelo le k temu, da se pravna pravila pripozna kot logično neuklonljiva pravila, ki služijo kot premise v formalnih argumentih. Tako naj bi bila pravna pravila razlogi zgolj v jezikovno-formalnem smislu, neodvisno od njihovega učinka na zapovedanost ravnanj. Avtor tega komentarja vsa omenjena stališča argumentirano zavrača.

Ključne besede: pravna normativnost, pravila, razlogi za ravnanje, uklonljivost, partikularizem

ENG. | In her latest book, *Positivismo jurídico "interno"*, Cristina Redondo defends a novel account of the normativity of law. According to Redondo, the law does not claim legal rules to be substantive reasons to act as they require. Rather, she argues, law only intends legal rules to be recognized as logically non-defeasible rules to be used as premises in formal arguments whenever they apply. Thus, the law claims legal rules to be reasons only in a linguistic-formal sense, independently of their impact on what people ought to do. Here, I shall argue that Redondo's arguments against the view that law intends legal rules to be substantive reasons (or to be treated as such) are misguided, and that her own positive proposal according to which law claims legal rules to be reasons in a merely formal sense ought to be rejected.

Keywords: legal normativity, rules, reasons for action, defeasibility, particularism

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Synopsis

María Cristina Redondo

Internal legal positivism refined: A reply to the critics

SLOV. | *Izpiljeni notranji pravni pozitivizem: Odgovor kritikom.* V tem članku si avtorica prizadeva odgovoriti na nekatere komentarje in kritike avtorjev, ki so sodelovali v razpravi o njeni knjigi »*Notranji« pravni pozitivizem*. Kritike je združila v šest točk. V prvi razpravlja o možnosti notranjega pravnega pozitivizma in pluralnosti metodoloških pristopov v razmerju do prava. V drugi o dvopomenskem razlikovanju med »notranjim« in »zunanjim«. V tretji o konvencionalizmu na splošno in posebej o interpretativnih konvencijah. V četrti o naravnem pravu in (metodološkem) antipozitivizmu. V peti o udeležencih in pritrjevalcih, kognitivistih ali nekognitivistih in v zadnji o pravu kot razlogu za ravnanje.

Ključne besede: notranji pravni pozitivizem, notranja in zunanja stališča, metodološki antipozitivizem, interpretativne konvencije, udeleženci, pritrjevalci, razlogi za ravnanje

ENG. | In this article I will try to answer some of the comments and criticisms raised by authors who participated in the discussion of my book *'Internal' legal positivism*. I have grouped the criticisms into six points; the first, on the possibility of an internal legal positivism and the plurality of methodological approaches in relation to law. The second, the ambiguity of the "internal" - "external" distinction. The third, on conventionalism in general and interpretive conventions in particular. The fourth, on natural law and anti-positivism (methodological). The fifth, on participants and acceptors, cognitivists or non-cognitivists, and the last, on the law as a reason for action.

Keywords: internal legal positivism, internal and external points of view, methodological anti-positivism, interpretive conventions, participants, acceptors, reasons for action

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