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Proceedings of the First Civil Law – Common Law Forum in Legal Theory

Methodology and Legal Theory

Methodology and Legal Theory. Foreword

Andrea Dolcetti, Jordi Ferrer Beltrán**, Giovanni Battista Ratti****

In 2009, the first Oxford-Girona annual seminar in Legal Theory was organised with the purpose of providing an occasion to discuss work-in-progress by legal philosophers based in these two Universities[1]. After four successful seminars, the University of Genoa was invited to join this initiative. As a result, an international workshop on legal interpretation and legal philosophy, with speakers from the Universities of Oxford, Girona, and Genoa, took place at St. Hilda's College, Oxford, on 10 April 2015[2].

Most recently, our annual seminar evolved into the Civil Law - Common Law Forum in Legal Theory, with the aim of facilitating the exchange of ideas between legal philosophers trained in civil and common law traditions. In developing this new format, we decided to broaden participation in the event, while maintaining a single theme to guide discussion. This year, the Forum focused on methodology and legal theory.

The following section includes articles based upon papers presented and discussed at the Civil Law – Common Law Forum in Legal Theory, which took place on 19-20 June 2019 at the University of Genoa, under the auspices of the Tarello Institute for Legal Philosophy. The authors of these articles are: Stanley Paulson (Washington University of St. Louis and the University of Kiel); Pablo Navarro (University of Girona and Conicet, Argentina); Corrado Roversi (University of Bologna); Lucila Fernández Alle (University of Girona); Dan Priel (York University, Toronto); Luca Malagoli (University of Genoa); and Carolina Fernández Blanco (University of Girona).

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[1] The first Oxford-Girona seminar in Legal Theory took place at the University of Girona on 14-15 December 2009.

[2] Most of the papers discussed at this workshop were subsequently published in the 2016 issue of *Analisi & Diritto*.

By approaching the theme of methodology and legal theory from a variety of perspectives, these authors offer the readers of *Analisi & Diritto* thought-provoking articles on Kelsenian methodology (Paulson, Navarro), the artifact theory of law as a methodological tool (Roversi and Fernández Alle), the methodology of naturalism and realism (Priel and Malagoli), and current approaches to the rule of law (Fernández Blanco).

Despite the breadth of methodological and theoretical issues discussed, all these articles share a commitment to the rational reconstruction of legal phenomena through the fundamental tools of analytical jurisprudence – most importantly, a focus on conceptual analysis, attention to the is-ought dichotomy, and an appreciation of the distinction between empirical and analytical propositions.

Over the course of the two days, in this year's Forum, the original ideas and arguments at the core of these articles benefitted from the insights of scholars with different legal backgrounds and philosophical sensitivities. The academic conversation sustained by our Forum thrives on diversity – for this reason, we are planning to strengthen the plurality of views that animate our meetings. In publishing these articles, we hope that this conversation will continue and be enriched by further ideas and contributions.

The Neo-Kantian Dimension of Kelsen's Legal Theory and its Limits

Stanley L. Paulson *

Abstract

It is well known that Hans Kelsen, in the name of a purity thesis, purports to rule out all fact-based legal theories as well as those based on morality. Having done so, he requires a neo-Kantian argument as a means of grounding his legal theory. The argument does not, however, prove to be sound. That leaves us with the question: what status ought to be ascribed to Kelsen's neo-Kantianism? I argue that, despite the problems, it must be preserved as a part of the Pure Theory of Law. The alternative is distortion.

Keywords: Hans Kelsen. Neo-Kantianism. Purity Thesis. Legal Cognition. Legal Science.

1. Introduction. Two Problems

On legal interpretation, Hans Kelsen is an outlier, to wit: his views on legal interpretation have little in common with traditional views in the field. In place of traditional legal interpretation, Kelsen substitutes his doctrine of the *Stufenbau*.

> Given the dynamic character of the law, a norm is valid because and in so far as it was created in a certain way, that is, in the way determined by another norm; and this latter norm, then, represents the basis of the validity of the former norm. The relation between the norm determining the creation of another norm, and the norm created in accordance with this determination, can be visualized by picturing

* Christian-Albrechts-Universität zu Kiel, Juristisches Seminar, Leibniz Straße 6, D-24118 Kiel, Germany, *spaulson@law.uni-kiel.de*. As so often in the past, I have once again occasion to thank my colleagues in Genoa for their warm hospitality, welcome criticism, and generous support, to wit: Pierluigi Chiassoni, Paolo Comanducci, Riccardo Guastini, Giovanni Battista Ratti, and María Cristina Redondo. Warm thanks, too, to Bonnie Litschewski Paulson, who gave me discerning and sanguine advice. And I wish to thank Robert Alexy for his gracious hospitality and many good conversations.

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> a higher- and lower-level ordering of norms. The norm determining the creation is the higher-level norm, the norm created in accordance with this determination is the lower-level norm[1].

This statement depicts a relation between a higher- and a lower-level norm. What is more, the relation as depicted has been brought to completion, that is, the lower-level norm has been issued. How does the legal official arrive at the lower-level norm? The answer, from the standpoint of Kelsen's legal theory, has two parts. The legal scholar, in the name of legal science, "fills in the frame" of the general norm by providing what amounts to a list of its possible interpretations[2]. Then the legal official chooses an entry from the list, which is issued as the lower-level norm.

But this phenomenon gives rise straightaway to the problem of constraints, to wit: Let us suppose the legal official deliberately or unwittingly chooses something that does not appear on the list. What then? I return to this issue, what I am calling the problem of constraints, in section 4 below.

And there is a second problem, which has to be considered quite apart from the resolution of the problem of constraints. This problem, what I am calling the philosophical problem, takes as its point of departure Kelsen's purity thesis. The purity thesis precludes, in legal science, an appeal to the facts and, likewise, it precludes an appeal to values. What is left? Kelsen resorts to a neo-Kantian transcendental argument, and the stakes are high. That is, Kelsen's alternative to fact-based legal positivism[3] is workable only if his neo-Kantian argument is viable. Whether it is takes us to the philosophical problem, which I set out in section 5.

To set the stage for a closer look at these problems, I have worked up two sections of material on the background. Specifically, I begin, in section 2, with Kelsen's purity thesis and with two concepts of law that are prominent in his theory. Then, in section 3, I turn to Kelsen's neo-Kantian characterization of legal cognition; this amounts to an elaboration of the first of his two concepts of law.

Having set the stage in this way, I turn in sections 4 and 5 to the problem of constraints and to the philosophical problem respectively. In a brief concluding section, I take up the problem of Kelsen's "official theory", his neo-Kantian inspired theory. What remains of the "official theory" if neither of the problems I adumbrate is resolved?

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1 Kelsen 1992, §31(a): 63-64.

2 See Kelsen 1992, §36: 80-81; Kelsen 1960, §45(d): 348-349, Kelsen 1967a: 350-351.

3 I use "fact-based legal positivism" as a generic term, covering a number of different positivistic approaches to the law, e.g. "public law positivism" (*staatsrechtslicher Positivismus*) in the nineteenth century (Gerber, Laband), "statutory positivism" (*Gesetzespositivismus*) in fin-de-siècle circles, Hart's theory as the standard-bearer of legal positivism in the Anglophone world, and legal realism in both its American and Scandinavian forms. I distinguish all of these from Kelsen's Pure Theory of Law, which, as I argue, is conceptually distinct from fact-based legal positivism in its various forms.

2. The Purity Thesis and Two Concepts of Law

I want briefly to return to the quotation above, depicting Kelsen's *Stufenbau*. The question arises: why does Kelsen supplant the traditional theories of interpretation with this unorthodox approach? The problem is that the traditional theories are normative. In the tradition, Kelsen reports, those engaged in legal science focus their efforts, every time around, on providing the sole correct interpretation, the «*one* correct decision»[4]. This tack, as Kelsen sees it, is tantamount to endorsing a policy, an endorsement that is by definition value-laden. And his purity thesis (*Reinheitsthese*) – precluding every appeal to fact and to value – rules out such endorsements, and in so doing it also rules out the traditional theories of interpretation.

But – the next query – why purity? Kelsen believes that traditional views in legal theory distort our understanding of the law. To eliminate the distortions that arise from an appeal to the causal sciences on the one hand and that arise from an appeal to the value-laden fields, morality and politics, on the other, requires a purity thesis. Purity sets «the limits within which cognition must remain, and these limits, particularly for legal science, are very narrow»[5]. As Kelsen is already arguing in his early treatise, *Main Problems in the Theory of Public Law* (1911), the limits set by purity amount to a two-fold constraint. Purity precludes the purported explanations stemming from the reduction of legal norms to causal propositions in sociology and psychology, as well as the purported justifications stemming from morality and politics. Kelsen, as early as *Main Problems*, offers a statement on these approaches:

> [T]he question of the basis of the validity of the law, on both of [these] readings, is legally irrelevant. Either the question addresses the motive for lawful behaviour and is therefore a psychologico-sociological problem, or the question aims at moral justification and therefore has a place only in ethics[6].

To be sure, the first part of Kelsen's statement is imprecise in that he addresses not the norm but the motive for lawful behaviour. To offer an explanation of this or that motive for compliance with the law is not incompatible with the purity thesis, which is addressed to the norm itself, precluding the reduction of the norm to a factual proposition. The purity thesis thereby rules out – to take the most straightforward example – Karl Olivecrona's view in early work to the effect that legal norms are nothing other than «natural cause[s]»[7].

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4 Kelsen 1992, §36: 81; Kelsen 1960, §45(d): 349, Kelsen 1967a: 351. See also Kelsen 1950: xvi, quoted in the text at n. 20 below.

5 Kelsen 1920: v, in Kelsen 2014: 266.

6 Kelsen 1911: 353, in Kelsen 2008: 482.

7 See Olivecrona 1939: 16. For a modern statement of legal realism, in an idiom altogether diffee rent from Olivecrona's, see Leiter 2008.

Far from making claims based on the causal sciences, far from making recommendations drawn from ethics or politics, the legal scholar's task is limited to setting out the possible meanings of the general legal norm in question.

> The task of a scientific commentary is first of all to find, by a critical analysis, the possible meanings of the legal norm undergoing interpretation; and, then, to show their consequences, leaving it to the competent legal authorities to choose from among the various possible interpretations the one which they, for political reasons, consider to be preferable, and which they alone are entitled to select[8].

What is one to make of Kelsen's reference to political reasons? If the judge makes a choice of this or that interpretation for «political reasons», as Kelsen puts it, is this not an egregious violation of the purity thesis? Not at all. The judge is taking decisions *outside* the sphere of legal science.

Indeed, Kelsen renders the distinction – inside and outside the sphere of legal science – in well-nigh canonical terms.

> [T]he law *qua* ideal subject-matter (*als geistiger Sachgehalt*) is a system, and therefore an object of normative-legal cognition (*normative-juristische Erkenntnis*), while the law *qua* act – both motivated and motivating, both psychological and physical – is power, legal power, and as such an object of enquiry for social psychology or sociology[9].

Kelsen's distinction is to be understood in terms of two concepts of law. The first concept, which has as its focus legal science, is *the law qua object of legal cognition*. The second concept, which has as its focus the social sciences, is *the law qua acts of will* or, as I prefer to call it, *the law qua politics*. This latter concept of law also has a bona fide legal dimension, captured by empowerment.

At any number of points in Kelsen's writings, there are allusions to the distinction between two concepts of law as well as statements of one or the other of the concepts. Here is a brief sampler, beginning with the second concept of law:

> If legal science is not to merge into the natural sciences, the law must be contrasted with nature as sharply as possible. And this is especially difficult to do since at least part of the essence of the law (or what at first blush is usually referred to as law) appears to occupy the realm of nature, to have a thoroughly natural existence[10].

Law is to be contrasted with nature. At the same time, however, «part of the

[8] Kelsen 1950: xvi.
[9] Kelsen 1992, §48(e): 106.
[10] Kelsen 1992, §2: 8, see also Kelsen, 1960, §2: 2, Kelsen 1967a: 2.

essence of the law» is found in the natural world. Kelsen goes on to explain what he means. The «thoroughly natural existence» of the law is found in acts of will, the paradigmatic element of the second concept of law, the law qua politics.

At another point in his text, Kelsen invites attention to the first concept of law, the law qua object of legal cognition:

> To comprehend something legally can only be to comprehend it as law. The thesis that only legal norms can be the object of legal cognition is a tautology, for the law – the sole object of legal cognition – is norm, and norm is a category that has no application in the realm of nature[11].

Instead of speaking of two concepts of law, might one not render Kelsen's distinction more aptly by speaking of two points of view? This shift could be misleading. Kelsen's distinction between two concepts of law is a direct reflection of his general distinction between *Sein* and *Sollen*, between "is" and "ought". The distinction, in other words, represents a difference in kind[12], and this might well be missed if one were to speak simply of two points of view.

The distinction between two concepts of law, for all its interest, is not without problems. In particular, legal cognition – part and parcel of Kelsen's first concept of law – turns up as the wild card. Beginning very early in his work and reaching to the end of the classical or neo-Kantian period in 1960[13], Kelsen distinguishes between legal cognition and natural cognition, both of which, he argues, are constitutive. Thus, given that certain conditions obtain, cognition of a lawmaker's act of will *constitutes* the act as a legal norm.

I turn, in the next section, to a handful of textual details respecting Kelsen's idea of legal cognition.

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[11] Kelsen 1992, §5: 11.

[12] On first glance, one is tempted to say that the distinction in question is to be understood ontologically. But this view is problematic. Both kinds of object in Kelsen's theory – those found in the natural world and those found in what Kelsen identifies as the sphere of the "ought" – are found in Kant's *phenomenal* world. There is no suggestion in Kelsen's texts that he is flirting with an ideal sphere comparable, say, to Kant's noumenal world or to Frege's "third world". Indeed, the only textual support for an ontologically venturesome reading of ideality in Kelsen's work stems from his talk, in the opening pages of the *Hauptprobleme* (1911), of "two worlds". But this language simply reflects what Kelsen has drawn from Georg Simmel, and from Arnold Kitz, both of whom he is quoting here, see Kelsen 1911: 7-8, in Kelsen 2008: 86; Simmel 1892-1893, vol. 1: 8-9; Kitz 1864: 74. Both writers defend the fact-value distinction, but neither is making an ontological claim.

[13] I have worked up a periodization of Kelsen's development in terms of three phases: the early phase, critical constructivism, runs from 1911 up to circa 1920, then the classical or neo-Kantian phase from there up to 1960, and finally the late phase (*Spätlehre*) from 1960 up to 1971. See Paulson 1998; Paulson 1999; and Paulson 2017: 882-894. For a sceptical view on questions of a periodization vis-à-vis Kelsen's work, stimulating and artfully drawn, see Chiassoni 2013.

3. Neo-Kantian Legal Cognition

Legal cognition serves as the core of Kelsen's surrogate for traditional legal interpretation. In considering his development of the notion, I take up bold statements of Kelsen's on legal cognition. They stem from writings of Kelsen's in 1928, 1953, and 1960. My special interest in these statements turns on the function assigned by Kelsen to cognition. Kelsen would have us understand this function constitutively, and it purports to set limits on what can count as a valid legal norm.

Both legal cognition and natural cognition are constitutive, Kelsen contends, although he pays little attention to the details of the latter. In major texts of the classical period, he depicts the constitutive dimension of legal cognition in expressly neo-Kantian terms. Three statements, as noted above, are of special interest. They count as Kelsen's most outspoken statements of the first concept of law, the law qua object of legal cognition. And it is most clearly here that Kelsen appears to have replaced traditional legal interpretation with legal cognition understood constitutively.

In *Philosophical Foundations* (1928), the first of the texts in which the constitutive dimension of cognition figures centrally, Kelsen refers to what is, in his view, the greatest failure in the traditional theory of knowledge. He has in mind the notion of transcendent objects independent of cognition. This is the failure of the "copy theory of knowledge"[14]. Cognition, he writes,

> must play an *active*, *creative* role vis-à-vis objects of cognition. It is *cognition itself that, out of the material given to it by the senses, creates its objects according to its own immanent laws.* This nomological characteristic of cognition guarantees the *objective* validity of its results[15].

Here Kelsen emphasizes the affinity of the Pure Theory of Law to Kant's theory of knowledge. As Kelsen puts it, «in place of *metaphysics*, a *critical theory of knowledge*, in place of the *transcendent*, the *transcendental*»[16].

The second of the statements offering an outspoken neo-Kantian gloss on the law qua object of legal cognition is found in Kelsen's initial revision of the first edition of the *Pure Theory of Law*, a revision that appeared in French translation in 1953.

> We can thus state simultaneously that the propositions formulated by legal science are hypothetical judgments and that legal norms constitute the object of this

[14] The copy theory, whose name stems from the idea that our sensations are "copies" of independently existing objects, is familiar from British empiricism.

[15] Kelsen 1928, §34: 62 (Engl. trans.: 434).

[16] Kelsen 1928, §34: 62 (Engl. trans.: 435).

> science. Here there is no contradiction. Without question, one can regard the norms created and applied within the framework of a legal system as having the character of legal norms only if they are [cognized] by legal science. It is the role of this science to attribute to certain acts the objective meaning of legal norms, but this does not prevent us from stating that legal norms are the object of legal science or, what amounts to the same thing, that the law is a system of norms. This definition is in complete harmony with Kant's theory, according to which cognition creates its object, for we are speaking here of an epistemological creation and not a creation of man's handiwork in the sense that one speaks of the legislator creating a law. Similarly, natural phenomena, which are the object of the causal sciences, are created by the causal sciences in a purely epistemological sense[17].

Here «the propositions formulated by legal science» are propositions about legal norms, reflecting Kelsen's view as initially introduced in 1941[18]. For my present purposes, the more significant doctrine emerging from this text pertains to the role played by legal science in "creating" or "constituting" legal norms. What does it mean when Kelsen writes: «the norms created and applied within the framework of a legal system [have] the character of legal norms only if they are [cognized] by legal science»?

In a quotation drawn from the second edition of the *Pure Theory of Law* (1960), Kelsen expressly explicates cognition in terms of its constitutive dimension.

> It is […] correct that, in the sense of the Kantian theory of knowledge, legal science as cognition of the law, as with all cognition, has a constitutive character and therefore "creates" its object in comprehending it as a meaningful whole. Just as the chaos of sensory perception first becomes a cosmos through the ordering cognition of science, that is, becomes nature as a unified system, so it is that the wealth of general and individual legal norms issued by legal officials – that is, the material given to legal science – becomes a unified system free from contradiction, a legal system. This

[17] Kelsen 1953a: 53-54 (trans. here Anne Collins and Bonnie Litschewski Paulson); the monot graph represents Kelsen's own revision of the first edition of the *Reine Rechtslehre* (1934), a revision coming seven years ahead of his greatly expanded second edition. Kelsen's full statements of the neo-Kantian constraint include the text quoted at n. 19 below, which is drawn from the second edition of Kelsen's *Reine Rechtslehre*.

[18] Kelsen first introduces legal propositions (*Rechtssätze*) in the technical sense, his descriptive "ought"-propositions, in his 1941 paper, *The Pure Theory of Law and Analytical Jurisprudence* (Kelsen 1941), repr. (with omissions) in Kelsen 1967b: 266-287, 390 (notes), and they also receive attention in Kelsen 1945: 45 *et passim*, albeit in the guise of "rules of law", an unfortunate translation. Legal propositions emerge, appropriately labeled, in Kelsen 1953a, where, at 51, Kelsen distinguishes «*les norms juridiques* (*Rechtsnormen*), created by the legal system, from *les propositions* (*Rechtssätze*) that stem from legal science and that describe these norms» (the German-language insertions are there, in the French translation). See also Kelsen 1960, §16: 73-77, which contains his most complete statement on legal propositions during the classical period; the corresponding statement in Kelsen 1967a: 71-75, is marred by the rendition of *Rechtssatz*, just as in Kelsen 1945, as «rule of law».

> "creation", however, has a purely epistemological character. It is altogether different from the creation of objects by means of human labour or the creation of the law by means of the legal authority[19].

In all three statements, legal science appears to be constitutive, serving to create its object. The question arises as to whether Kelsen's claim is viable. As noted above, an argument here will have to be neo-Kantian in character, for Kelsen has ruled out every appeal to facts and to values. I return to this problem, the philosophical problem, in section 5 below. First, however, I want to take up what I have dubbed the problem of constraints. The problem can be stated quite simply: what happens if the legal official chooses and applies an interpretation of the general legal norm that is not found in the list worked up by the legal scholar in "filling in the frame"? To put the same question a bit differently: Does the legal scholar's list constrain the legal official?

4. The Problem of Constraints

The quintessential task of the legal scholar, according to Kelsen, is to cognize the general legal norm with an eye to drawing from it the possible individual legal norms contained, so to speak, therein. In the Foreword to his treatise on *The Law of the United Nations* (1950), Kelsen reiterates his view that the task of interpretation – the task of legal cognition – is to set out the various possible readings of the higher-level norm, that is, the possible individual legal norms that can be drawn from the general norm. Here Kelsen distinguishes between the task of legal science («the task of a scientific commentary») and the political role of the lawmaker («the competent legal authorities»). (The relevant text is quoted at fn. 8 above.)

Then, in the same paragraph of *The Law of the United Nations*, Kelsen ups the ante. He explains that it is the task of the legal scholar to provide *all* possible readings of the general norm.

> A scientific interpretation has to avoid giving countenance to the fiction that there is always but a single "correct" interpretation of the norms to be applied to concrete cases. This fiction, it is true, may have some political advantages. A party who sees his claim rejected by the legal authority may support this [rejection] more easily if he can be persuaded that another decision, another "correct" decision, was not possible. […] Besides, the scientific method of exhibiting on the basis of a critical analysis all possible interpretations of a legal norm, even those which are politically undesirable and those which permit the conjecture that they were not intended by the legislator, may have a practical effect which largely outweighs the advantage of

[19] Kelsen 1960, §16: 74-75, Kelsen 1967a: 72.

> the just mentioned fiction. Showing the legislator how far his product lags behind the goal of any law-making function, *i.e.* the unambiguous regulation of inter-individual or interstate relations, may induce him to improve his technique[20].

The puzzling reference to «all possible interpretations» aside[21], what does Kelsen mean by his reference to the legal scholar's «critical analysis» of the possible interpretations of a legal norm? There is no suggestion that the legal scholar is to employ the canons and strategies of traditional legal interpretation, although there is no reason to assume that Kelsen would object to their employment in this context. In his express rejection of the canons and strategies of traditional legal interpretation, he has in mind the legal scholar who is employing them with an eye to the «single "correct" interpretation». Legal scholars, as noted in section 2 above, are to confine themselves to a *descriptive* account in "filling in the frame". If the canons and strategies of traditional legal interpretation promote this enquiry, Kelsen has no objection.

Still, the constraints stemming from the purity thesis are real, ruling out for legal scholars any endorsement of values whatsoever – and thereby of policy. The material found in those statutes already enacted, those judicial decisions already handed down, and those administrative regulations already issued serves as the basis of the legal scholar's effort to set out the possible readings of the norm in question. Policy considerations and recommendations lie beyond the legal scholar's bailiwick.

This is Kelsen's position not only in the treatise on *The Law of the United Nations*, but also in both editions of the *Pure Theory of Law*, where we find his well-known view that the general legal norm is to be understood as a "frame":

> [T]he norm to be applied is simply a frame within which various possibilities for application are given, and every act that stays within this frame, in some possible sense filling it in, is in conformity with the norm[22].

Also in the *Pure Theory of Law*, Kelsen sets out the distinction between non-authentic interpretation, which is the legal scholar's interpretation, and authentic interpretation, which is represented in the legal official's act of will, the issuance of a legal norm.

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20 Kelsen 1950: xvi.

21 Dreier 1990: 149, at n. 342, writes that the idea of capturing all possible alternatives is illusory, and he quotes Merkl to the effect that science would be able to set out the conceivable interpretations «only as a list of examples, not as a taxonomic enumeration». See Merkl 1917: col. 395, in Klecatsky, Marcic, and Schambeck 1968: 1185-1191, at 1187, 2nd edn: 970-982, at 971, in Merkl 1993-2009, vol. I/1: 116-122, at 118.

22 Kelsen 1992, §36: 80; Kelsen 1960, §45(d): 348, Kelsen 1967a: 351.

> [T]he interpretation of the law by means of legal science, as non-authentic interpretation, must be unequivocally distinguished from [authentic] interpretation by means of legal officials. The former is a purely cognitive determination of the meaning of legal norms[23].

What if the legal official, following the dictates of authentic interpretation, issues a norm that is not found on the list? Kelsen's answer is spelled out clear as a bell in the second edition of the *Pure Theory of Law*:

> [I]n the course of authentic interpretation – that is, the interpretation of a norm by the legal organ who is to apply this norm – not only can one of the possibilities determined by the cognitive interpretation of the norm be realised, but also a norm can be created that is altogether outside the frame represented by the norm to be applied[24].

If this thesis of Kelsen's is his last word, it undermines not only the constitutive dimension of cognition but also raises questions about the viability of the legal scholar's enterprise. The issuance of a legal norm that falls outside the "frame" stems solely from the legal organ, a state of affairs that would not be possible if a constitutive dimension of legal science, drawn from neo-Kantianism, truly prevailed. And if the legal scholar's enterprise, as depicted by Kelsen in the "official theory", were viable, the legal organ could not override the list of interpretations represented by the work of legal scholarship.

The philosophical problem, to which I now turn, underscores the difficulties encountered here and adds still more difficulties.

5. The Philosophical Problem

Kelsen's Kantian-inspired argument is a transcendental argument[25], suitably modified to apply in the standing disciplines, here legal science[26]. In what follows, I divide the discussion on transcendental arguments and the philosophical problem that stems from them into eight sub-sections, namely: (a) transcendental arguments

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[23] Kelsen 1960, §47: 352, Kelsen 1967a: 355.

[24] Kelsen 1960, §46: 352, Kelsen 1967a: 354. This text of Kelsen's is by no means his only statement on the question. In a number of papers written during the 1950s, Kelsen gives expression to the same position. See e.g. Kelsen 1953b: 151, in Klecatsky, Marcic, and Schambeck 1968: 611-629, at 618-619, 2nd edn: 499-514, at 505.

[25] The expression "transcendental" was first employed in medieval philosophy; the transcendentals (*unum*, *bonum*, *verum*) were familiar as basic features of being that transcend classification into genera and species. Kant, departing radically from this tradition, uses "transcendental" to speak of cognition that is concerned «not so much with the objects of cognition as with how we cognize objects, in so far as this may be possible *a priori*» (Kant 1998, B 25).

[26] On the problems in applying the transcendental argument within one or another of the standing disciplines, see Paulson 2013: 53-57.

generally, (b) the transcendental question, (c) Kelsen's basic norm as shorthand for a transcendental argument, (d) Kant's progressive and regressive forms of argument, (e) the neo-Kantians' transcendental argument in its regressive form, (f) Kelsen's transcendental category, (g) the unfolding of the argument, and (h) an assessment of Kelsen's argument.

(a) Transcendental arguments generally. Transcendental arguments are not straightforward proofs in formal logic; rather, they unfold indirectly[27]. As Eckart Förster writes, they proceed – with an eye to conclusions about our conceptual scheme – «by showing that alternatives to these conclusions are incoherent»[28].

I might note, *en passant*, that there have been no fewer than three rounds of transcendental arguments in what is, broadly speaking, the Kantian tradition. First and foremost, there is Kant's own transcendental argument, the notoriously difficult and prolix "transcendental deduction" in the transcendental analytic of the first *Critique*. Second, there are various transcendental arguments collected under the rubric of the "transcendental method"[29] in the work of the fin-de-siècle neo-Kantians. While Kant's overriding concern with his transcendental argument was to make the idealist philosopher's case on behalf of the existence of the phenomenal world, the neo-Kantians, Kelsen among them, presuppose the phenomenal world and proceed by applying aspects of the transcendental philosophy in the standing disciplines (*Einzelwissenschaften*). And, in a third round, there are the initiatives of Peter F. Strawson, which have given rise to a cottage industry on transcendental arguments in analytic philosophy over the past half-century[30].

(b) The transcendental question. Kant begins with a reference to traditional metaphysics, which, he remarks, has been more a "combat zone" than a field «entering upon the secure path of a science»[31]. The puzzles of metaphysics give rise to Kant's transcendental question, which is, as always, about *possibility*. As he writes in the *Prolegomena*:

> My intention is to convince all of those who find it worthwhile to occupy themselves with metaphysics that it is unavoidably necessary to suspend their work for the present, to consider all that has happened until now as if it had not happened, and before all else to pose the question of "whether such a thing as metaphysics is even possible at all"[32].

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[27] Kant's transcendental "deduction" is not a proof in formal logic either. It proceeds, so Dieter Henrich, in a way akin to legal argument where the issue in question is traced back to its source. See Henrich 1989.

[28] Förster 1989: 10.

[29] A familiar statement on the "transcendental method" is Natorp 1912, repr. in Flach and Holzhey 1980: 197-225. The expression "transcendental method" does not occur in Kant's writings.

[30] See Strawson 1959a: 35-36; Strawson 1959b. Stern 1999 is a representative collection of papers and includes a lengthy bibliography.

[31] Kant 1998: B xiv-xv.

[32] Kant 1911: 255 (preface).

Properly understood, Kant writes, the purpose of metaphysics is «to extend our *a priori* knowledge»[33]. Thus, as a part of his programme, Kant recasts the transcendental question in terms of the very possibility of "synthetic *a priori* judgments", that is to say, the question of whether substantive judgments arrived at independently of experience «are possible»[34].

Kelsen poses his own transcendental question. In a philosophically rewarding, short monograph, *The Philosophical Foundations of Natural Law Theory and Legal Positivism* (1928), he writes: «How is positive law qua object of cognition, qua object of cognitive legal science, possible?»[35].

In the second edition of the *Pure Theory of Law* (1960), he poses the question anew.

> [H]ow, without appeal to a meta-legal authority like God or nature, is an interpretation of the subjective sense of certain material facts as a system of objectively valid legal norms that can be described in legal propositions (*Rechtssätze*) possible[36]?

(c) Kelsen's basic norm as shorthand for his transcendental argument. In answering the transcendental question, Kelsen once again employs the characteristically Kantian language of possibility.

> Provided that only the presupposition of the basic norm makes possible the interpretation of the subjective sense of [certain material facts] as their objective sense, that is, as objectively valid legal norms, the basic norm can be described in its characterization by legal science – applying by analogy a concept of Kant's theory of knowledge – as the logico-transcendental condition for this interpretation[37].

Kelsen is arguing that the presupposed basic norm designates the logico-transcendental condition that makes possible the objective validity of legal norms. His label, the "logico-transcendental condition", is an elliptical reference to a neo-Kantian transcendental argument that is addressed to legal science[38]. Why legal science? Kelsen argues that legal science, which attributes to «certain acts» the ob-

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[33] Kant 1998: B 18.

[34] Kant 1998: B 20-23.

[35] Kelsen 1928, §36: 66 (Engl. trans.: 437).

[36] Kelsen 1960, §34(d): 205, Kelsen 1967a: 202.

[37] Kelsen 1960, §34(d): 204-205, Kelsen 1967a: 202.

[38] For an unmistakable allusion to a neo-Kantian transcendental argument, see Kelsen 1992, §16: 34, a text of 1934. Earlier, Kelsen takes up aspects of Fritz Sander's wildly ambitious Kantian reconstruction of the law, worked up by Sander by appealing to the transcendental analytic of Kant's first *Critique*. See Kelsen 1922. Kelsen's paper, along with Sander's early papers to which Kelsen is replying, is reproduced in Sander and Kelsen 1988.

jective validity of legal norms[39], can accomplish this only if it has the right sort of support, which must take the form of a transcendental argument. It must take this form, Kelsen is arguing, because every other possibility is precluded by the purity postulate. Kelsen adduces his transcendental argument in what the literature calls the regressive form. I return to Kant for an explication.

(d) Kant's progressive and regressive forms of argument. Kant's transcendental argument is found in both progressive and regressive forms[40]. As he develops the argument in the first *Critique*, it reflects the progressive form, which begins with a strikingly weak premise, the data of consciousness, and moves ultimately to the existence of the phenomenal world. Where Kant's transcendental argument is understood as a response to the sceptic[41], the argument, if sound, shows that the sceptic cannot help but undermine his own position in the course of defending it. For he, too, must begin with the data of consciousness, and he is then drawn ineluctably along into the further reaches of the argument against him.

Contrariwise, the starting point of Kant's transcendental argument in its regressive form is a very strong premise, the fact of experience (*Erfahrung*) and so the existence of the phenomenal world. But there is a catch: the regressive form of Kant's transcendental argument presupposes the progressive form, and Kant simply offers it as a heuristic device. Otherwise, the very strong initial premise of the argument in its regressive form would be question-begging.

(e) The neo-Kantians' transcendental argument in its regressive form. Everything changes as soon as we turn to the neo-Kantians, including Kelsen. The transcendental argument that turns up in their work reflects something of the regressive form of Kant's argument, but *without* a progressive counterpart. The form of their argument looks like this.

1. *P* (given).
2. *P* is possible only if *Q* (transcendental premise).
3. Therefore, *Q* (transcendental conclusion).

In the first premise, "*P*" stands for the material that is given, and, in the second premise and the conclusion, "*Q*" stands for the presupposed category[42]. From what is given, we "regress" to the transcendental category without which what is given would not be possible.

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[39] See the text quoted at n. 37 above.

[40] Kant regards the regressive form of the argument as a summary statement of the progressive form. In Kant 1911: 277 (note), Kant alludes to the regressive form of the argument. On the distinction between the two forms of the argument, see Paulson 1992: 322-332.

[41] On Kant's transcendental argument as a reply to the sceptic, see e.g. Forster 2008.

[42] The argument is rendered formally valid by adding the trivial premise – call it premise *1a* – to the effect that if *P* is given, as in premise *1*, then *P* is possible.

A strong initial premise – the "fact of science", as the neo-Kantians put it[43] – is given. The task, then, is to make the case for the *very possibility* of *P* by showing that *P* implies *Q*, the transcendental category.

*(f) Kelsen's transcendental category***.** Kelsen writes that the legal "ought" designates «a transcendental category»[44], but he does not pursue the idea. Instead, his most effective expression of the idea of a transcendental category in legal science is imputation (*Zurechnung*)[45]. By appeal to imputation, he is in a position to set out, between material fact and legal consequence, a connection that runs parallel to the causal connection between facts.

> If the mode of linking material facts is causality in the one case, it is imputation in the other, and imputation is recognized in the Pure Theory of Law as the particular lawfulness, the autonomy, of the law. Just as an effect is traced back to its cause, so a legal consequence is traced back to its legal condition. The legal consequence, however, cannot be regarded as having been caused by the legal condition. Rather, the legal consequence (the consequence of an unlawful act) is linked by imputation to the legal condition[46].

Thus, imputation is to be understood by analogy to causation, and imputation serves as the presupposed juridical category, corresponding to "*Q*" in the second premise and the conclusion of Kelsen's transcendental argument.

(g) The unfolding of the argument. Some of the machinery of Kelsen's argument is now in place. How exactly, then, does the argument unfold? I begin with the state of affairs that would obtain if the argument were sound, taking Kelsen's purity thesis as the point of departure[47]. It precludes every appeal to fact-based legal positivism and to natural law theory, the traditional views on the character of the law. In other words, it precludes every appeal to facts and to values. The purity thesis,

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[43] «If […] I take cognition not as a form and manner of consciousness, but as a *fact* that has established itself in science and that continues to establish itself on given foundations, then the enquiry is no longer directed to a subjective fact; it is directed instead to a fact that, to whatever extent self-propagating, is nevertheless objectively given, a fact grounded in principles. In other words, the enquiry is directed not to the process and apparatus of cognition, but to its result, to science itself. Then the unequivocal question arises: from which presuppositions does this fact of science derive its certainty?» (Cohen 1883: 5). Compare, on the fact of science, Kelsen: «The possibility and the necessity of a normative theory of law is shown by the very fact of legal science over a millennium, which, in the guise of dogmatic jurisprudence, serves – so long as there is law at all – the intellectual requirements of those who concern themselves with the law» (Kelsen 1992, §16: 37).

[44] In Kelsen 1992, §11(b): 23, heading of the sub-section.

[45] Support is lent to the rendering of *Zurechnung* as "imputation" by Kelsen's own occasional use of the Latin *imputatio* in place of *Zurechnung*; see Kelsen 1911: 138, 194, 209, 503, in Kelsen 2008: 244, 306, 322, 650.

[46] Kelsen 1992, §11(b): 23-24.

[47] See Paulson 2013: 45-49.

according to some of Kelsen's critics, gives rise to a dilemma. They assume that the two traditional views, taken together from a suitably abstract standpoint[48], exhaust the field: *tertium non datur*. And, the critics continue, the purity thesis, in ruling out both traditional views, goes too far. Kelsen faces the dilemma of either abandoning the purity thesis or confronting nihilism, the result of mindlessly adhering to the purity thesis. Kelsen appeals to Kant and thereby escapes the dilemma. More precisely, he appeals to the category of imputation, which he draws from his neo-Kantian reconstruction. The category of imputation, evaluated from the standpoint of the purity thesis, withstands scrutiny. Or so Kelsen contends.

*(h) An assessment of Kelsen's argument***.** The sketch above is roughly the picture we would have if Kelsen's argument were sound. But it is not sound. It fails to comport with a basic requirement of all transcendental arguments, namely, that every alternative explanation of the fact of science, every explanation that would undermine the second premise in Kelsen's transcendental argument, be eliminated. Kelsen believes he has accomplished this, but he has not. Even if we were to recognize Kelsen's arguments against naturalism and psychologism as sufficient for the elimination of fact-based legal positivism, these arguments do not address natural law theory, which Kelsen all too often simply dismisses out of hand. At this juncture in Kelsen's work, cogent argument is conspicuous by its absence. Natural law theory – for purposes of the transcendental argument – remains a viable alternative to Kelsen's Pure Theory of Law. The presence of a viable alternative undermines the truth of the second premise in Kelsen's transcendental argument and, therefore, its soundness[49].

Another factor, completely overlooked by Kelsen, is the problem of *quartum non datur*. Kelsen introduces *two* complexes as a means of representing his version of legal positivism – first, his stance against naturalism, reflected in the neo-Kantians' fact-value distinction, and, second, his stance against morality and politics, reflected in the legal positivist's separability principle. These two complexes generate four distinct species of legal theory. Thus, even if Kelsen's dismissal of fact-based legal positivism and natural law theory were granted, he would not have, without further ado, an argument addressing the issue posed by *quartum non datur*.

In concluding this section, one might ask: how is it that Kelsen defends the trappings of a transcendental argument if the argument is clearly seen to be unsound? The deceptively simple answer is this. Kelsen *believes* that neither of the traditional theories, fact-based legal positivism and natural law theory, is defensible. He rejects fact-based legal positivism on the ground that legal norms yield, on the fact-based positivist's analysis, causal claims. Here the most obvious example, at any rate from

[48] I would have "suitably abstract standpoint" understood as saying, *inter alia*, that legal realism counts as a species of fact-based legal positivism, see n. 3 above.

[49] See Paulson 2012: 75-78.

Kelsen's standpoint, is Georg Jellinek's legal theory[50]. And Kelsen rejects natural law theory on the ground that it is nothing more than ideology. Thus, he reasons, there are no alternatives to his Pure Theory of Law.

6. The "Official Theory" and Other Concluding Remarks

Kelsen on legal interpretation – along with the related fields, legal cognition and legal science – proves to be a wide-ranging and multifaceted motif. The point of departure is straightforward: the doctrine of the *Stufenbau* supplants traditional legal interpretation. But then Kelsen is confronted on the various *Stufen* – the levels of the hierarchical construction – with questions familiar from traditional legal interpretation. To cope with them, he takes as his point of departure a distinction between two concepts of law, the law qua object of legal cognition and the law qua politics. Legal science captures the first concept, and lawmakers' acts of will are the focal point of the second. The lawmakers' acts of will are ostensibly constrained by legal science, whose operative notion, cognition, purportedly sets down necessary limits on what counts as a valid legal norm.

At this point, as we have seen, Kelsen faces serious problems. The putative constraint on lawmakers that stems from legal cognition falls short of the mark. It may serve as an ideal, but not as a bona fide constraint. Quite apart from any constraint set by legal science, all shades of acts of will do in fact turn up as legal norms, and Kelsen recognizes them as legal norms.

If Kelsen's notion of legal cognition – and with it the first concept of law – is neo-Kantian in origin, then what impact does its falling short of the mark have on the neo-Kantian dimension of Kelsen's Pure Theory of Law? Simply to excise the neo-Kantian dimension would, I believe, be a mistake, removing far too much that is characteristic of Kelsen's legal theory. An analogy illustrates the point. Even if no-one nowadays is prepared to defend Plato's doctrine of forms or exemplars on the merits[51], by the same token, no-one is suggesting that the doctrine be excised from the Platonic dialogues. The very idea is fanciful, eliminating in one fell swoop a great deal of what is rightly associated with Plato. Similarly, *mutatis mutandis*, for Kelsen.

Instead, Kelsen should perhaps be read on two tracks: in terms of both the neo-Kantian dimension, which informs much of what Kelsen is doing during the lengthy classical period, and a default position, which might be called the legal re-

[50] On Jellinek, see Paulson 2018: 286-294.

[51] See e.g. the interesting critique of Platonism, based on uninstantiated properties, kinds, and relations, in Loux 2006: 40-45 *et passim*.

alist dimension of Kelsen's theory[52]. The first track, what I have dubbed the "official theory", is an ideal, and from this neo-Kantian standpoint, it is entirely appropriate to speak of a necessary constraint set by legal science on legal validity. The second track, legal realism, is marked by contingency, and its stance on legal validity is drawn, not surprisingly, from acts of will qua legal norms.

It is of interest that something comparable takes place in the field of Kelsenian norm theory. On the one hand, he is bound and determined from the very beginning to reject the imperative and all that it portends. Indeed, in *Main Problems* (1911) he allows himself to set out utterly fanciful statements in response to Karl Binding's norm theory. Kelsen contends that when the literal use of an expression has no legal application, then its metaphorical use in the law is illegitimate. For example, "to transgress" (*übertreten*), understood literally, is directed to a limit, and to transgress the limit is to exceed it. This literal use has no legal application, and therefore its metaphorical use in legal contexts is illegitimate[53]. Ultimately, this audacious polemic against the imperative theory leads, in the 1930s, to Kelsen's empowerment theory of legal norms, which he pursues right up to and including the second edition of the *Pure Theory of Law*. Here *the very form* of the legal norm represents a departure from the imperative theory. And this is Kelsen's "official theory" in the field of norm theory. Alongside it, there is a great deal of language in Kelsen's writings that would suggest an endorsement of something like the old-fashioned imperative theory. Here, too, the official theory goes off in one direction, while the default position meanders off in another.

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[52] See Chiassoni 2013.

[53] See Kelsen 1911: 273, in Kelsen 2008: 293, drawing on Binding 1872-1919, vol. II/1, 2nd edn, §1: 7.

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Purity and Constraints in Legal Theory. Some Remarks on Paulson's Analysis of the Neo-Kantian Dimension of Kelsenian Theory of Law

Pablo E. Navarro *

Abstract

Hans Kelsen rejects both natural law theories and fact-based positivism. Rather, following certain ideas inspired by the neo-Kantian philosophy, he attempts to preserve a clear separation between law and facts as well as between law and morality. As it is well-known, Kelsen's Neo-Kantian ideas are combined with other theses extracted from a positivistic vision of the law. However, as Stanley L. Paulson shows in his very fine paper about the limits of the kelsenian doctrine, Neo-Kantism and positivism cannot be easily articulated in a coherent picture. In particular, Paulson analyses two closely connected problems. On the one hand, the relation between legal interpretation and the 'irregular' creation of norms (i.e., *the problem of constraints*) and, on the other hand, the limits of purity (i.e., *the philosophical problem*). In this paper, I will briefly comment on both problems mentioned by Paulson. First, I deal with the philosophical problem and I focus on (i) the distinction between 'Is' and 'Ought' and (ii) the rejection of Natural Law Theories. Second, I analyse the problem of constraints and I pay attention to certain consequences that stem from the validity of *irregular* norms.

Keywords: Neo-Kantism. Legal positivism. Pure Theory of Law. Natural Law.

1. Introduction

Hans Kelsen rejects both natural law theories and fact-based positivism. Rather, following certain ideas inspired by the neo-Kantian philosophy, he favours a "pure" explanation of the law. As it is well-known, his *Pure Theory* attempts to preserve

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a clear separation between law and facts as well as between law and morality[1]. Kelsen's Neo-Kantian ideas are combined with other theses extracted from a positivistic vision of the law[2]. However, as Stanley L. Paulson shows in his very fine paper about the limits of the kelsenian Neo-Kantian legal theory[3], both traditions cannot be easily articulated in a coherent picture. In particular, Paulson analyses two closely connected problems that reveal an internal tension in Kelsen's theory. On the one hand, the relation between legal interpretation and the "irregular" creation of norms (i.e., *the problem of constraints*) and, on the other hand, the limits of the idea of purity (i.e., *the philosophical problem*). A dilemma arises because Kelsen's answers to the problem of constraints seem to be at odds with his solution to the philosophical problem. Finally, Paulson concludes that Kelsen fails in his neo-Kantian defence of the purity of legal theories.

In this paper, I will briefly comment on both problems mentioned by Paulson. First, I deal with the philosophical problem and I focus on (i) the distinction between "Is" and "Ought" and (ii) the rejection of Natural Law Theories. Second, I analyse the problem of constraint and I pay attention to certain consequences that stem from the validity of *irregular* norms like "unconstitutional" norms or *contra legem* judicial decisions[4].

Finally, I would like to stress that, in my opinion, Paulson offers an excellent reconstruction and I can imagine no better presentation of Kelsen's ideas. So, my complaints are not directed against the Paulson's paper, but rather they are mainly addressed to the *Pure Theory of Law* itself.

2. Legal Science and the Philosophical Problem

The *philosophical problem* analysed by Paulson is about the possibility of legal cognition and, by the same token, about the nature of legal science. To the extent that science and truth are intrinsically connected, an answer to the philosophical problem must shed some light on the meaning and truth-condition of scientific legal statements. According to Kelsen, a true legal statement is neither an empirical

[1] The main neo-Kantian ideas in the *Pure Theory* are the following ones:
1) Legal norms are ideal entities belonging to a specific dimension (the "ought to be" world),
2) Validity, understood as binding force, is the specific existence of a legal norm,
3) Legal science is normative and legal cognition has a constitutive character,
4) The unity of a legal system depends on a non-positive (or transcendental) norm, i.e. the Basic Norm.

[2] For example, (e.g., the rejection of natural law, a clear distinction between prescription and description, etc.).

[3] Paulson 2019.

[4] In my analysis, I will put aside many important issues raised by Paulson's paper, e.g., the distinction between two concepts of law in the *Pure Theory*. Although such issues deserve closer inspection, they cannot be examined here.

statement (i.e., it does not refer to sociological regularities, psychological dispositions, etc.) or a moral proposition (i.e., it does not refer to the moral status of certain actions). Indeed, a true legal statement like "It is legally obligatory that the President of Argentina resides in Buenos Aires" *means* something different from (a) As a matter of fact, the President of Argentina resides in Buenos Aires, and (b) It is morally required that the President of Argentina resides in Buenos Aires. Factual or moral statements like (a) or (b) can also be true, but they do explain neither the specific meaning or truth-conditions of legal statements.

Kelsen claims that only the Pure Theory provides a scientific approach to legal phenomena. His insistence on the "purity" of a legal theory can be understood as a corollary of a more fundamental idea: the distinction between "is" and "ought". However, there are two different versions of such a distinction and it is worth mentioning the role that they play in Kelsen's philosophy. As Bulygin says[5],

> On an ontological interpretation (that is predominant in Kelsen's early writings) the thesis of a sharp separation between is and ought is related to his distinction between two radically different realms or worlds: the world of ought and the world of is.

It seems to be clear that our "ordinary" world can be placed in an empirical dimension (i.e., the realm of "is" or a "physical world"). For this reason, classical positivism endorses "the facticity thesis": the law can be explained in terms of a concatenation of facts (like the will of the sovereign). However, as Paulson stresses, «in place of the legal positivist's facticity thesis, Kelsen introduces a normativity thesis, which calls for an explication of law […] altogether independently of fact»[6]. The problem is that Natural Law Theories also subscribes the normativity thesis and, therefore, the insistence on the distinction between two different worlds would be irrelevant for discarding the reduction of law to morality.

However, Kelsen believes that Natural Law Theories also violate the separation between "is" and "ought". For this reason, he stresses that this *Pure Theory* «attempts to answer the question of what and how the law *is*, not how it ought to be»[7]. From this perspective, the difference between legal and moral statements could be seen as a conceptual distinction between positive law (or the law as it is) and an *ideal* law (or the law as it ought to be from a particular moral perspective)[8].

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5 Bulygin 1990: 33.

6 Paulson 1996a: 797.

7 Kelsen 2005: 1. See also, Kelsen: 1992: 7.

8 This separation also seems to cover the distinction between explicit legal materials and their logical consequence. In this respect, logically entailed laws would not be valid if legal authorities had not prescribed them. Such entailed norms only show the law as it ought to be from a rational perspective, but they are not part of a legal system. (See, for example, Kelsen 1991: 46-49. See, also Marmor 2001: 69-70).

This new interpretation of the separation between "is" and "ought" is a semantic distinction. As Bulygin stresses, this semantic distinction «means that prescriptive propositions cannot be inferred from descriptive propositions alone and, conversely, that descriptive propositions do not follow logically from prescriptions alone»[9]. For example, Kelsen says[10]: «Nobody can deny that the statement: "something is" […] is fundamentally different from the statement: "something ought to be" […] Nobody can assert that from the statement that something is, follows a statement that something ought to be, or vice versa».

It would be tempting to ground the semantic distinction on the ontological interpretation of the division. This would be tantamount to say that legal statements mean something different from factual propositions *only because* there are two different worlds. According to the ontological interpretation, it seems that the difference between "is" and "ought" is somehow "outside" of our theories; it would be something that belongs to our complex "*social* nature". In this respect, both natural law theories and fact-based positivism would be defective because they do not pay attention to the double dimension (i.e., ontological and semantic) of the fundamental distinction between "is" and "ought". On the contrary, the *Pure Theory* would be the unique conceptual tool that properly explains such distinctions and can take into account the specific meaning of legal statements. This is a weak interpretation of the "purity" of the *Pure Theory*.

However, a stronger interpretation of the requirement of theoretical purity would conclude that the normative dimension of empirical phenomena is not something already given, but it is a division constructed (or epistemologically created) by our philosophical reconstructions. If, as Paulson reminds us, both legal and natural cognition is constitutive, it follows that the difference between "is" and "ought" is also constituted by our theories. Thus, criticisms of natural law or fact-based positivism cannot be articulated in terms of misrepresentation of a given social reality, because – strictly speaking – there is no such a reality outside of our theories. Moreover, if the semantic distinction between "is" and "ought" is entailed by the ontological division, from the rejection of this last category, it would also follow the abandonment of the semantic distinction.

3. The Philosophical Problem and the Rejection of Natural Law

How is it possible to grasp the specific legal meaning of certain acts? Where could that specific legal meaning arise once the connection between law and morality or the reduction of the law to empirical regularities is rejected? As Paulson's

[9] Bulygin 1990: 33.
[10] Kelsen 2005: 5-6.

shows, Kelsen answers these questions by means of a regressive version of a transcendental argument. However, Paulson (2019: 15-17) reminds us that the regressive version is based on a progressive version, and it is far from clear that pure legal cognition can assume such a progressive version. I cannot deal here with this philosophical puzzle, and I agree with Paulson on his general criticism of the limits of Kelsen's strategy.

As Paulson (2018: 18) remarks, Kelsen introduces a "middle way" in jurisprudence in order to deal with the separability between law and morals as well as the separability of law and facts[11]. According to Kelsen,

(a) Positive law is normative, but – contrary to Natural Law theories – the validity of positive norms is not drawn from morality, and

(b) Positive law is a social phenomenon, but – contrary to fact-based positivism – positive norms are not a kind of empirical generalizations nor legal statements are disguised factual propositions.

To the extent that such different versions of the separability refer to logically independent possibilities, there are four conceptual possibilities, but Kelsen only analyses three options, and makes no comments on, for example, the plausibility of a Natural Law Theory that accepts not only the conceptual union of law and morality but also the reduction of the normative dimension of social phenomena to plain factual regularities. Thus, strictly speaking, Kelsen's transcendental arguments are defective because his analysis of traditional legal theories is incomplete.

However, Paulson (2019: 18) also claims that Kelsen fails because his analysis overlooks a «basic requirement of all transcendental arguments, namely that every alternative explanation of the fact of science… be eliminated» According to Paulson, Kelsen's arguments:

> do not address natural law theory, which Kelsen all too often simply dismisses out of hand. At this juncture in Kelsen's work, cogent argument is conspicuous by its absence. Natural law theory – for purposes of the transcendental argument – remains a viable alternative to Kelsen's Pure Theory of Law.

It is clear that Kelsen rejects traditional forms of natural law doctrines, but in the quotation introduced above, Paulson seems to suggest that such a rejection is not founded on a "cogent argument". On the contrary, in my opinion, Kelsen provides a detailed criticism of Natural Law Theories. From his rejection, we could draw two general conclusions

First, according to Kelsen, both legal and moral norms lack truth-values. So, moral norms are not inherently valid, and our reason cannot "discover" the *true* morality. Therefore, moral cognition – as well as legal cognition – needs another

[11] See also, Paulson 1992a: xxv-xxix, and Paulson 2000: 279-293.

starting point in order to attribute a normative dimension to our social world. Second, if moral norms are prescriptions, somebody (e.g., God) prescribes them, but in this case, such moral prescriptions would be valid norms only if a certain Basic Norm is presupposed. Thus, Natural Law Theories face a dilemma: on the one hand, they need to assume a Basic Norm that allows us to regard some individuals as authorities and their requirements as valid moral norms. On the other hand, they claim that some moral norms are inherently valid. In the first case, the transcendental argument is still alive, and, in the second case, the argument is self-defeating.

4. The Problem of Constraints

The *problem of constraints* analysed by Paulson (Paulson 2019: 18-20) arises from two different ideas: (a) the constitutive nature of legal cognition, and (b) the evidence that some norms are irregularly created (henceforth, irregular norms). For example, unconstitutional norms or *contra legem* judicial decisions are paradigmatic examples of irregular norms[12]. According to Kelsen, the task of legal scholars is constitutive and this means that the scope of alternative interpretations identified by legal science is equivalent to make explicit all possible norms that an authority can create in the process of applying the law. However, it is undeniable that legal authorities often choose an option that is not included in the interpretative frame of a general norm provided by legal science. As Kelsen claims that such irregular decisions are valid, it follows that "interpretative frames" are only a euphemism because the validity of a norm is not founded on the content of a higher norm. This view leads *Pure Theory* to the *problem of constraints*.

In general, I agree with Paulson about the internal tension in the *Pure Theory* and I would only add three ingredients to his original recipe (a) the interpretative frame, (b) legal disagreements, and (c) the tacit alternative clause[13].

(a) The interpretative frame: One of the most important tasks of legal scholars is to identify the general norms that judges have to apply in order to justify their solutions to particular cases. This task often requires the interpretation of certain texts (*norm-formulations*). Contrary to the traditional doctrines of interpretation, Kelsen rejects that only one single interpretation can be drawn from norm-formulations, and consequently he emphasizes that legal scholars have to provide *all* possible readings of a certain authoritative text.

[12] It must be pointed out that Paulson deals with the irregular creation of law and the tacit alternative clause in his classic Paulson 1980: 172-193. I cannot do justice here to the subtlety and complexity of his paper.

[13] On the internal tensions of the Pure Theory, see also Paulson 1996b: 49-62.

However, it is impossible to elaborate an exhaustive and definitive list of all imaginable meanings of ordinary linguistic sentences[14]. For example, if a certain authority, e.g., a judge, correlates the norm-formulation with the meaning M, this option must be included in our list because it is a *possible* meaning (as something different from *conventional*, *admissible* or *reasonable* interpretations of a certain text). Thus, taking seriously the idea of "all possible readings" of a certain norm-formulation, the problem of constraints disappears. Strictly speaking, no possible decision would be outside the frame of "all possible" interpretations.

In order to reject formalism in legal interpretation, Kelsen only needs to claim that there is always an interpretative frame that contains "more than one" interpretation of a certain norm-formulation. As a particular norm cannot be drawn from a disjunction of different general norms, the application of a general norm would always involve a creative element. In other words, «the relation of the legislation to the constitution and the relation of the judicial decision to the statue which is to be applied cannot have a merely logical character»[15], and conversely, the fact that, for example, a judicial decision is in conformity with the content of the statute to be applied «does not mean that the derivation of the lower from the higher norm is merely a logical operation»[16].

(b) Legal disagreements: the metaphor of "*the* interpretative frame" suggests that legal science always provides only *one* frame. However, interpretative disagreements in law seem to be pervasive. Thus, according to a certain frame, the list includes a particular interpretation *A*, but another frame B regards such an interpretation as something inadmissible. Insofar as legal cognition constitutes the frames, lawyers cannot be wrong about the scope of their own lists. So, we need a meta-legal science that incorporates in a new larger frame both opposites first-level interpretative frames.

(c) The tacit alternative: Kelsen believes that in the process of application of norms, every higher norm can be read as including a tacit alternative that validates irregular lower norms. This is the solution that Kelsen maintains throughout his work to the problem of the conflict between norms of different levels. In this respect, legal science must emphasize that every general norm, e.g. a constitutional norm and its alternative clause "form a unity". For this reason, the problem of constraints vanishes because legal cognition assumes (and reveals) a frame that contains not only the possible meanings of a norm-formulation but also the implicit alternative content of legal norms of a hierarchical normative system.

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14 See, Endicott 2000: 59-62.
15 Kelsen 1965: 1155.
16 Kelsen 1965: 1155.

5. Concluding Remarks

The internal tension in the *Pure Theory* would require a radical solution, for example, the elimination of one of the conflicting alternatives. Nevertheless, Paulson suggests that Kelsen should perhaps be read on two tracks: the "official theory" and the "default position". The first is somehow an ideal «which informs much of what Kelsen is doing during the lengthy classical period» (Paulson 2019: 20) and the second one is rather a realistic view on the legal phenomena[17].

However, it is unclear why "the official theory" is an "ideal"[18], and I do not understand why legal science should pursue an impossible ideal. Moreover, it seems to be that Kelsen himself progressively abandoned the Neo-Kantian thesis in favour of a more positivistic perspective. In this respect, it is clear that «the Pure Theory of Law is emaciated by Kelsen's abandonment of the Neo-Kantian foundation that had made the theory, in its classical form, well-nigh unique»[19].

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[17] Although Paulson seems to associate "the default position" to a form of legal "realism", it is not altogether clear that this would be the only interpretation of Kelsen's doctrines. See, for example, Kletzer 2005: 46-63.

[18] For example, Ronald Dworkin (1977: 149) claims: «It is perfectly understandable that lawyers dread contamination with moral philosophy, and particularly with those philosophers who talk about rights, because the spooky overtones of that concept threaten the graveyard of reason. But better philosophy is now available than the lawyers may remember […] There is no need for lawyers to play a passive role in the development of a theory of right against the state, however, any more than they have been passive in the development of legal sociology and legal economics. They must recognize that law is no more independent from philosophy than it is from these other disciplines».

[19] Paulson 1992b: 273.

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Law as an Artefact: Three Questions

Corrado Roversi *

Abstract

Artifact theories of law are aimed at explaining the nature of law, that is, answering the ontological question of legal philosophy in terms of the ontology of artifacts in general. In recent years, some legal theorists (particularly Luka Burazin, Jonathan Crowe, Kenneth Ehrenberg, and Corrado Roversi) have been putting forward artifact theories of law to deal with several classic legal-philosophical problems, such as the role of functional explanation in the legal domain, legal normativity, the relation between law and morality, the relation between authoritative production and recognition, and the role of officials in the construction of legal systems. In this paper, I will formulate three questions an artefact theorist of law could be asked, and I will try to answer them, in the process highlighting and weighing the theory's pros and cons. The first question will be, Is there just one artefact theory of law or are there many? Here, I will consider whether the different artefact theories of law that have so far been put forward can be traced to a common root: yes, I will argue, and to a significant extent. The second question goes directly to the point: What are the explanatory advantages of an artefact theory of law? I will argue that an artefact theory can do a good job at explaining two typical dialectics of the legal domain identified by legal philosophy, namely, the dialectic between the production of law and its recognition (a dialectic exemplified in the debate between legal positivism and legal realism), and the dialectic between two different kinds of legal interpretation (teleological and in terms of legislative intent); on the other hand, I will show that an artefact theory typically has greater difficulty than a straightforward socio-ontological account in explaining authority and emergent institutions. Given this balancing of reasons in favour of and against an artefact theory, my last question will be, why, then, should we choose an artefact theory over a socio-ontological theory of law? Here I will argue that there is no direct opposition between the two approaches: An artefact theory

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can be seen as specifying a socio-ontological account, in a way that fruitfully addresses the hypostatizing aspect of legal experience.

Keywords: Artifacts. Metaphysics of law. Social ontology. Institutions.

1. Introduction

Recent developments in legal philosophy have shown that the metaphysics of artifacts can have an impact on the question of the nature of law. While the so-called «ontological problem», as Norberto Bobbio was wont to call it[1], has always been a part of legal philosophy, several important legal philosophers have been raising significant doubts about the possibility of addressing the question in a meaningful way. Brian Leiter, for example, has argued that to outline a universal "nature" of legality is a theoretically hopeless enterprise: «If, in the history of philosophy, there is not a single successful analysis of the "necessary" or "essential" properties of a human artefact, why should we think law will be different?»[2]. Frederick Schauer has maintained that it is impossible to single out a universal nature of law encompassing all its possible instantiations in terms of necessary, essential properties: «If concepts can change […], and no one appears to have argued that the concepts attached to artifacts are in some mysterious way non-revisable or immutable, then there is no reason to believe that the concept of law cannot change in much the same way»[3]. Brian Tamanaha has put forward a pluralistic conception under which the idea of a single nature of law should be replaced with that of several different, context-dependent and historically determined structures, each with its own nature: «There is no unique way to categorize social artifacts, so we should not expect there to be a single correct concept or set of characteristics»[4].

If there is one element these statements clearly share, it is their assumption that law is an artifactual entity, or rather, that its *nature* is artifactual. Hence, it seems that behind all these skeptical conceptions there lies at least one tenet about the nature of law, namely, that law is an artifact. A few legal philosophers have recently been developing artifact theories of law, namely, theories that appeal to the ongoing discussion on the metaphysics of artifacts to explain some features of law, legal systems, and legal institutions. Moreover, a recent collection of essays collects the views of several leading legal theorists (among whom Brian Bix, Kenneth Himma, Brian Leiter, Andrei Marmor, Frederick Schauer, and Kevin Toh) on the topic of

1 Bobbio 2011: 47 ff.
2 Leiter 2011: 669-70; see also Leiter 2018: sec. 3.
3 Schauer 2018: 37; see also Schauer 2012.
4 Tamanaha 2017: 60.

law's artefactuality[5]. If law is an artifact, what does that mean? Can we derive some interesting consequences from this very broad and generic statement? In this paper, I will describe the main features of artifact theories of law and try to balance their merits and problems. In particular, I will address three questions about an artifact theory of law. The first question will be whether, despite the variety among such theories, it is possible to speak of a single artifact theory of law built around their common traits: This is an important question, for in addressing it, we will be able to determine whether we are dealing with a coherent conception or rather with a cluster of loosely related but ultimately incompatible views. The second question regards the explanatory advantage of this theory, namely, whether there is a significant theoretical gain to be had from it. Finally, the third question asks why we should prefer an artifact theory of law over a socio-ontological approach, one that underscores the social and institutional character of legal institutions. Indeed, if we proceed from the assumption that legal institutions are artifactual, we should expect to end up with a conception of law that emphasizes its being the outcome of arbitrary creation rather than social emergence. Hence it becomes crucial to understand how sociality can be fit into an artifactual picture of law. In the three sections that follow, I will address these questions in turn and then draw some conclusions.

2. Towards a Unified Artifact Theory of Law

2.1. *The Metaphysics of Artifacts*

Philosophical discussion about the metaphysics of artifacts revolves around three concepts: intention, function, and history. Most authors in this field point out that an essential property of artifactual kinds lies in their being *intentionally* created. Risto Hilpinen, in particular, traces the existence of an artifact, as well as its belonging to a given artifactual kind, to an author's intention to produce something of that kind and to an author's accepting that the final result is that kind of thing[6]. Amie Thomasson argues that artifacts depend on a «controlled process of making […] involving imposing a number of intended features on the object»[7], and that these creative intentions must include a «substantive concept» of the thing to be created[8].

Other authors underscore in particular the functional nature of the features that are intentionally imposed by an author on his creation. In the work of Peter

5 Burazin, Himma, and Roversi 2018.
6 Hilpinen 1993.
7 Thomasson 2007: 58-9.
8 Thomasson 2003: 600.

McLaughlin[9] and Karen Neander[10], the functionality of artifacts is explained in terms of their makers' and users' intentions. More specifically, Lynne Baker argues that artifacts have an intended proper function as their primary-kind property, and this makes it possible to distinguish between an artifact and the material aggregate it is made up of [11], thus showing that it is possible for artifacts to have an independent metaphysical standing[12].

Functional features have also been used to explain the peculiar metaphysics of artifacts within a historico-evolutionary framework: drawing on Ruth Millikan's concept of a direct proper function, meaning the function in virtue of which instances of a given kind are reproduced in the context of an evolutionary history[13], Beth Preston has outlined a nonintentionalist view on which an artifact is such in virtue of its having a history of selection or reproduction serving a specific purpose[14]. Along similar lines, Crawford L. Elder analyses artifactual kinds as a specific instance of "copied kinds," namely, kinds of things (be they biological systems or artifacts) that are selected and reproduced to serve a specific proper function by reason of their shape and historical placement[15]: this, in Elder's view, applies as well to cultural artifacts, like etiquette and other kinds of social norms[16].

Neither the intentions of makers, nor the function their artifacts are meant to fulfil, nor their historical development can on their own explain the metaphysics of artifactual kinds. An objection typically raised against a pure "intention model" is that artifacts built with a certain intention can be used for purposes that differ significantly from what was originally intended – they can even take on purely accidental functions (artifacts are "multiply utilizable", in Preston's sense[17]) – and another typical objection is that, on this model, any kind of technical construct can be an artifact simply in virtue of its having been intended by an author, even if this author's intentions have no actual support[18]. On the other hand, a pure "function model" finds an obvious counterexample in all those artifacts that have been built with no clear function in mind (a typical case being works of art, at least on a specific interpretation of them[19]); and if function is considered a primary-kind or essential property, as in Baker's theory, then in cases in which an artifact is repurposed over the course of its history, we should wind up with a different kind, and hence

9 McLaughlin 2001, chap. 3.
10 Neander 1991.
11 Baker 2004.
12 Baker 2008.
13 Millikan 1984: 27-8.
14 Preston 1998: 243 ff.; Preston 2009: 226.
15 Elder 2007: 38-9.
16 Elder 2014: 40 ff.
17 See Preston 2009: 227-8.
18 Houkes and Vermaas 2010: 51.
19 See Thomasson 2007: 57.

with two coincident objects of two different kinds[20]; moreover, even an artifact's intended function may not suffice to determine its membership in a given artifactual kind, because to this end it may be necessary to look at other factors, too, such as its shape and structural features[21]. Finally, a purely historico-evolutionary theory will be hard put to it to explain artifacts of new design and prototypes lacking any evolutionary history[22], and it may also prove to be circular, for it is not clear how you can identify an artifactual kind by referring to the proper functions of its instances, and hence to the previous instances whence comes its reproduction, if you have no substantive concept of the kind that makes it possible to identify such instances[23].

This intertwining of counterarguments shows that for a satisfactory account of artifactual kinds we need to draw on elements extracted from all the three models, and it also shows why these models are almost never taken in their "pure" form but instead combine in various ways. Both Hilpinen and Thomasson, for example, underscore that the creative intentions in play must be successful[24]: this brings an element of objective functionality to their theories, but without ruling out the possibility of malfunctioning or borderline artifacts (the success condition posited in their theories is qualified by stating that intentions need to be "largely" successful). Hilpinen concedes that, in most cases, function is a crucial conceptual element of artifactual kinds[25], though Thomasson insists not on «intended *functions*» but on «intended *features*» broadly conceived[26]. Thomasson, moreover, states that «artifactual kinds are notoriously historical and malleable in nature»[27]. Baker insists that her account needs both intentions and function, so much so that artifacts, on her view, are essentially intention-dependent objects[28]. Preston does not underestimate the role of intentions, either, though she lays emphasis on the *collective* intentions behind the *reproduction* of an artifact rather than on the *individual* intentions behind its original production[29], and it seems that, in a sense, Elder places the same focus on reproduction within a context, as if the construction of prototypes from scratch were to be considered a borderline case for artifacts[30].

In the literature, we can also find models that explicitly merge features from the intention, function, and history conceptions. An example is that of Wybo Houkes and Pieter Vermaas, who put forward an intention-causal-evolutionary (ICE) theory

20 Houkes and Vermaas 2010: 146-7.
21 See Thomasson 2007: 57-8, along the lines of Bloom 1996.
22 Houkes and Vermaas 2010: 63-4, and a possible reply in Preston 2013: 164-77.
23 See Thomasson 2009: 205.
24 Hilpinen 1993: 160; Thomasson 2003: 598.
25 Hilpinen 1993: 161.
26 Thomasson 2007: 58, italics added.
27 Thomasson 2007: 62.
28 See Baker 2009: 83.
29 Preston 2003: 611; 2009: 231.
30 Elder 2007: 39-40.

of functions on which technical artifacts are the outcome of design processes based on a belief that the object produced will lead to the desired goal if properly manipulated according to a use plan[31]. In this model, although design depends crucially on the designers' intention, this intention (and this is where the model is not purely intentional) must be based on a supposedly real causal mechanism: the belief that the use plan will in fact achieve the desired goal must be warranted, and this leads to an evolutionary history of reproduction based on a communicative chain in which the warranted ascription of function and the relevant use plan are transmitted[32]. While Houkes and Vermaas's mixed model is meant to account for technical artifacts, and hence is particularly suited to a functionalist approach, Randall Dipert's historico-intentional model is meant to also explain artifacts whose function is not as clear, particularly in works of art. In Dipert's view, artifacts are intentionally modified objects whose features explicitly communicate their artifactual nature (this in contrast to tools, or instruments, which do not have this communicative feature[33]); and useful, technical artifacts are only one type of artifact (the other types being the communicative, the expressive, and the artistic[34]). Hence, the property of being an artifact is historical: it amounts to having a deliberative history that traces back to plans, meaning that a hierarchical system of interrelated intentions has been put into place by its author so that other cognitive agents who interact with the artifact will form certain beliefs which they will act on[35]. In Dipert's view, attributing a deliberative history to an artifact is also the best way to understand its functional properties. Thus, he considers his historico-intentional conception to be necessary as well to a non-naïve functionalist approach[36]. It is important to keep Dipert's historico-intentional model of the metaphysics of artifacts distinct from Paul Bloom's intentional-historical account of the conceptualization of artifacts, on which account an artifactual object is to be categorized under a given kind if it can be traced to a maker's intention to produce an object of a kind we have already encountered[37].

An immediate and preliminary difficulty must be addressed if these models are to usefully contribute to an artifact theory of law. Which is to say that, whereas these models propose to explain the metaphysics of *material* objects, law, legal systems, and legal institutions are inherently immaterial: they mainly consist of representations, and their physical substratum, when present, is relevant only insofar as it supports these representations. Moreover, these representations are inherently social, and hence collective, whereas material objects can be exclusively individual:

31 Houkes and Vermaas 2010: chap. 4.
32 Houkes and Vermaas 2010: 80-4.
33 Dipert 1995: 127.
34 See Dipert 1993: 102-7.
35 Dipert 1993: 54 ff., chap. 7.
36 Dipert 1993: 91 ff.
37 Bloom 1996.

as Thomasson notes, «[u]nlike social and institutional objects, the existence of artifacts doesn't seem to presuppose any collective intentions of any kind – it makes perfect sense to suppose that a solitary human could create a knife, though not a government or money»[38]. So the question comes up, how can a philosophy of material culture contribute something important to a domain of abstract, inherently social entities?

That artifacts may be abstract is a possibility that does find discussion in the philosophical literature. Dipert, for example, contrasts the abstractness of novels with the more "sensuous" qualities of other kinds of works of art, and he claims that abstract artifacts «typically involve more conscious interpretation»[39], which is certainly an interesting point that could apply to law as well. And Hilpinen, for his part, qualifies literary works as types, setting them in distinction to all the copies that can be made of them, these copies being tokens[40]. «In the case of music and literary arts», he explains, his theory leads «to a view of the identity of works of art which resembles David Lewis's conception of works of fiction, according to which a fiction should be identified by an act of storytelling and not just by the text produced by such an act»[41]. Elsewhere, Hilpinen clearly states that «[o]ntologically, an artifact can be a concrete particular object such as the Eiffel Tower, a type (a type object) which has or can have many instances (for example, a paper clip or Nikolai Gogol's *Dead Souls*), an instance of a type (a particular paper clip), or an abstract object, for example, an artificial language»[42]. But it is certainly Thomasson's theory of fictions that deals most clearly with the case of immaterial artifacts. Thomasson sets out an artifactual theory of fictions proceeding from two kinds of existential dependence: *historical* and *constant* dependence. As artifacts, fictions and fictional characters are *historically* dependent (for their existence) on an author's intentions, but in virtue of their abstract nature they are also *constantly* dependent on a given text[43].

Thomasson discusses as well what she calls "public" artifacts, in which connection she also deals with the *social* nature of artifacts. Drawing on Dipert's idea of artifacts as objects specifically conceived to communicate their nature, Thomasson clarifies that some artifacts are explicitly built with some receptive features intended to signal that they belong to a given kind, so that the specific audience to which this membership is signalled can interact with such artifacts in an appropriate way, that is, in accordance with an appropriate set of shared social norms[44].

38 Thomasson 2007: 52.
39 Dipert 1993: 163.
40 Hilpinen 1993: 171 ff.
41 Hilpinen 1993: 173.
42 Hilpinen 2004.
43 Thomasson 1999: 13-4, chap. 3.
44 Thomasson 2014: 49-51.

Examples of this kind are churches and flags. Such public artifacts, as Thomasson explains them, blur the distinction between artifactual and institutional kinds, precisely because some of their intended features depend on social norms, and social norms depend not simply on the intentions of the *makers* of artifacts but rather on the *shared* intentions that are formed within a group[45].

With these models and qualifications in mind, we can now turn to artifact theories of *law*.

2.2. *Artifact Theories of Law*

Artifact theories of law were developed in close temporal proximity (from 2014 to 2018), and in large part independently, by four authors: Luka Burazin, Jonathan Crowe, Kenneth Ehrenberg, and myself[46].

Burazin adopts an intention model, drawing substantially on Hilpinen and Thomasson[47]. In his theory, artifacts are used not to explain legal *institutions* – an idea he qualifies as "not new"[48] – but to explain law as a legal *system*. Legal systems are conceived by him as "abstract institutional artifacts", combining the intention-authorial model of artifacts with a socio-ontological conception framed along the lines of Searle and Thomasson. On this approach, artifacts are objects that, in order to come into being as objects of a given kind, depend on a largely successful authorial intention[49]: A screwdriver depends on a designer's intention. Institutions, by contrast, consist of constitutive rules that set forth existence conditions for tokens of institutional kinds and are based on collective acceptance[50]: I can be said to be standing in line at the post office only if the line of people I am in correctly instantiates the shared rules about what a line of people at the post office is. Hence, institutional artifacts are institutional objects whose existence conditions in constitutive rules require an author[51]. In the case of legal systems, the relevant authors

[45] Thomasson 2014: 55.

[46] It is important to note, however, that several authors have previously worked on the analogy between legal institutions and artifacts, though they did not systematically develop the analogy by bringing to bear the philosophy of technology and artifactual kinds. Thus, for example, Bruno Celano (1999: 249-58) attributes to Hans Kelsen the view that legal norms are "intentional artifacts" (*artefatti intenzionali*), namely, meanings (*contenuti di senso*) based on a creative, authorial act of lawmaking and whose efficacy is of general scope, a view that in several respects resembles the one developed in full-fledged artifact theories of law. Cristiano Castelfranchi and Luca Tummolini (2006) have also put forward a theory of institutions in general as coordination artifacts, namely, «artifacts such that the recognition of their use by an agent and the set of cognitive opportunities and constraints (deontic mediators) are necessary and sufficient conditions to enable a multiagent coordinated action» (*ibid*., 320).

[47] Burazin 2016, 2018.

[48] Burazin 2016: 385.

[49] Burazin 2016: 388-9.

[50] Burazin 2016: 393-4.

[51] Burazin 2016: 395.

are the legal officials, and what constitutes the system is their shared concept of validity, of primary and secondary rules, and of the overall constitutional framework[52], while collective acceptance of the fundamental constitutive rules defining legal authority is rooted in the social community[53]. What we have here, then, is a two-layered ontological structure of developed legal systems: a social *norm* of recognition coupled with a *rule* of recognition, the former embraced by the members of the *community* (perhaps tacitly, but necessarily in the we-mode[54]), the latter shared among *officials*[55]. Burazin holds that not all systems are developed and structured in this way. It can also happen that, at an initial stage of development, the social norm of recognition simply unifies a set of social norms into a body constituting the legal system[56], in which case the authors of the legal systems are the members of the community themselves[57]. This genealogical dimension is meant to capture some features of the historico-evolutionary model for explaining artifacts. Indeed, drawing on Thomasson, Burazin concedes that the authorial concept behind artifacts can change diachronically, and hence that in the mind of officials the concept of a legal system is "susceptible to change"[58]. Finally, Burazin applies to legal systems the success condition that Hilpinen and Thomasson introduce to address the problem of support in creating technical artifacts, to which end he translates this condition into a requirement of social validation: a legal system as conceived by officials must correspond to an actual practice of norm-following and of applying sanctions in case of noncompliance[59].

Crowe, too, previously espoused an intention account of artifacts drawn mainly from Hilpinen[60]. What he theorizes, however, is not a two-*layered* ontology, like Burazin's, but a two-*sourced* one, putting forward an intention-acceptance theory of artifact kinds. Artifacts, and institutional artifacts in particular, can be the outcome of an authorial intention, *or* they can be the outcome of collective acceptance[61], either case requiring a successful realization[62], meaning that the artifact cannot come into being absent that intention or acceptance. It is a crucial role that this "success condition" plays in Crowe's view (indeed, the condition is drawn here, too, from the intention model, where its purpose is to avert the problem of actual support in fulfilling a technical function). Given that, in Crowe's conception, the features that

52 Burazin 2016: 398.
53 Burazin 2016: 397.
54 Burazin 2018: 114-9
55 Burazin 2018: 120.
56 Burazin 2018: 120.
57 Burazin 2016: 396.
58 Burazin 2016: 398.
59 Burazin 2018: 129-34.
60 Crowe 2014.
61 Crowe 2014: 747.
62 Crowe 2014: 748 ff.

explain artifacts are mainly functional, if law (as an artifact) is to be non defective, it must be able to actually perform its function, which is typically that of serving as a "deontic marker," meaning that law «marks the boundaries of permissible social conduct»[63]. This functionalist approach leads Crowe to bring in some elements of a pure function model of artifacts in support of a natural-law conception. In his view, law must be able to create a sense of social obligation, and its "metaphysics of malfunction"[64] therefore entails that, if law fails to include a core moral content, it will be defective[65].

Like Crowe, Ehrenberg also moulds an artifact theory of law within a functionalist framework[66], but unlike Crowe he does not inject any natural law into this framework but rather insists on the *function* of law as a crucial part of any legal-positivistic explanation of it[67]. A crucial element of Ehrenberg's theory lies in the *desiderata* that Preston posits for any theory of artifacts[68], and in particular in the idea that artifact functions must be "multiply realizable", that artifacts must be "multiply utilizable", and that they can malfunction. In Ehrenberg's view, law is a specific genre of social institutions conceived as "abstract institutionalized artifacts": «It is the broadest institution whose function it is to generate and/or validate institutions»[69]. There is no function peculiar to law: law is not a "functional kind" in the sense that anything fulfilling that particular function is necessarily law[70], because several other kinds of social institutions can perform the most general function of law[71], namely, creating or modifying normative reasons for action for the members of a given social community. Moreover, and coherently with Preston's historico-evolutionary model, Ehrenberg argues that the functions of legal institutions can vary and change, and even be "phantasmatic", and legal institution can malfunction in several ways, to the point that they can even be defective in creating normative "deontic powers" when they run out of recognition within a community[72]. Here, again, it is crucial to refer to Searle's model of institutional facts: the institutionality of law makes it possible to clarify how abstract legal artifacts can have a degree of per-

63 Crowe 2014: 751.
64 Baker 2009.
65 Crowe 2014: 754-5.
66 Ehrenberg 2014, 2016, 2018.
67 A functionalist account along legal-positivistic lines has also been developed by Kenneth Himma (2018), who argues that legal systems as artifacts have the conceptual function of regulating behaviour as a means of keeping the peace, and they do so by means of authorized coercive-enforcement mechanisms.
68 See Preston 2009: 214 ff.; Ehrenberg 2016: 120 ff.
69 Ehrenberg 2016: 12, 191.
70 Ehrenberg 2016: 50, 76-7.
71 Ehrenberg 2016: 121-2.
72 Ehrenberg 2016: 119-28.

sistence and continuity even without any actual recognition[73], whereas the artifactuality of law explains a crucial aspect of its normativity. Just as Dipert shows that artifacts typically "communicate" their artifactual nature, and Thomasson clarifies how "public artifacts" serve a specific recognitional function, Ehrenberg holds that a typical function of law (a macro-function) is to signal that some institutions are in fact legal, so as to make it explicit that political authority intends these institutions to be valid in the most general way and to shape and reframe the community members' reasons for action[74].

This insistence on phenomena of repurposing, modification, and diachronic evolution also figures centrally in my own "historico-intentional" model of the artifactuality of legal institutions[75]. This model takes up Dipert's concept of "deliberative history" by tracing artifactuality to a historical property rooted in an original "creative process" consisting of authorial intentions and in a series of further modification, reinterpretation, and development processes[76]: legal institutions are therefore, on this view, the outcome not just of an original authorial intention but also, and more significantly, of a *history* of intentions. Moreover, my model makes use of a concept in Houkes and Vermaas's intentional-causal-evolutionary theory of technical artifacts: the concept of a "use plan". In Houkes and Vermaas's theory, artifacts are connected with use plans, understood as ordered, goal-directed sets of actions that must be carried out using the object in question in order for it to fulfil its function[77]. Similarly, in my view, legal institutions as immaterial artifacts have an interaction plan in conditional form (if X, then normative consequence Y follows) specified by constitutive rules. Legal institutions are thus immaterial rule-based artifacts[78]. Moreover, just as Houkes and Vermaas argue that it must be possible to ascribe some causal support to artifactual functions, I make the argument that a legal institution's constitutive rules and the related interaction plans can work only if based on collective acceptance as a general mechanism. Here, again, the argument is crucially predicated on Searle's theory of social institutions. Differently from Crowe, and similarly to Burazin, I do not assume that an artifact theory needs to be connected with any specific theory of law's functionality: legal institutions can serve different purposes. But, similarly to Crowe, I stress that the artifactuality of legal institutions makes them reason-based objects[79]: they are subject to evaluation on the basis of technical and teleological rationality. Moreover, the historico-intentional nature of legal institutions as artifacts is such that, in my

73 Ehrenberg 2016: 108 ff.
74 Ehrenberg 2014: 263 ff.; 2016: 137-9, 175 ff.; 2018: 182 ff.
75 Roversi 2016, 2018.
76 Roversi 2016: 218 ff.; 2018: 95-9.
77 Houkes and Vermaas 2010: 18 ff.
78 Roversi 2016: 224-5, 226-40.
79 Roversi 2016: 225-6, 230-1.

view, their nature and content may not be entirely transparent to us or immediately fixed by actual intentional states in the legal community[80]. The view I take here in regard to legal institutions as artifacts is similar to what in Elder's aforementioned historico-evolutionary model is argued about artifacts broadly and cultural artifacts more specifically.

From this brief presentation we should be able to appreciate in what respects the artifact theories of law so far developed differ and what they have in common. They are certainly different, to an extent, in their object: Burazin's focus is on legal systems, Crowe's and Ehrenberg is on law as a genre of legal institutions, mine is on legal institutions broadly. This partial difference in focus, however, does not imply that the relative theories cannot be combined. Indeed, they can be conceived as more or less specific ways to describe law's artifactuality: the artifact "law," in Crowe's and Ehrenberg's sense, makes it possible to qualify legal systems in Burazin's sense and legal institutions in my sense as *legal* artifacts. Further, Crowe's and Ehrenberg's specific insistence on law's functionality does not stand in contradiction to Burazin's model or mine, both of which take a quite neutral view on this point. Indeed, Ehrenberg's view of jurisprudents as "modest joiners" – meaning that they are open to the possibility that functional attributions to legal institutions can vary and be qualified as well on the basis of empirical and historical research[81] – seems perfectly compatible with my and Burazin's neutral stance on functionalism. The most idiosyncratic result of the insistence on law's functionality seems to be Crowe's claim that law's artifactuality can lead to a sort of rationalistic natural-law view, particularly because neither my model nor Burazin's or Ehrenberg's is predicated on a strong cognitivist conception of morality. But to some extent this gap can be filled, to which end it should be pointed out that (*i*) Crowe embraces a context-dependent cognitivist view, on which "natural law is objective and normative, but nonetheless socially embodied, historically extended and dependent on contingent facts about human nature"[82]; (*ii*) Ehrenberg acknowledges that legal institutions are meant to have a distinctive general effect on reasons for action; and (*iii*) my own model connects the defectiveness of legal artifacts with considerations of (technical or teleological) rationality.

There are clearly several common elements to these theories, to the point that they can form the basis on which to put forward a unified artifact theory of law. This unified theory is one I would describe as follows. Law is a genre of abstract institutional artifacts, in the sense that, within a social community, it is collectively recognized to confer a specific status on other institutions, signalling that these institutions are meant by political authority to hold generally and to shape the com-

[80] Roversi 2018: 103-5.
[81] Ehrenberg 2016: 139 ff.
[82] Crowe 2019: introduction.

munity members' normative reasons for action. Legal institutions are thus created as institutional, abstract artifacts in this framework: they are rule-based artifacts built to enable or foreclose interaction among human agents. In *informal* contexts, they are simply the outcome of a creative process rooted in human intentions – an outcome that, at some point in the development of this process, is collectively recognized as such, namely, as having created an institution. Like a tree that becomes a bench, certain regular activities become normative, and the institution that develops with them begins to be referred to as "that institution" and as "legal". In *formal* contexts, collective acceptance supports constitutive rules defining the conditions of legal authority and hence the status of legal officials. Legal institutional artifacts thus become the outcome of the creative intentions of legal officials. The most general legal artifact in this sense is a legal system, meaning a set of legal institutional artifacts defining the conditions under which legal norms are valid and may be produced and applied. On the basis of these conditions of validity, several other institutional sub-artifacts can be created. In informal and formal contexts alike, legal artifacts need collective acceptance as the mechanism enabling them to actually work, that is, to accordingly shape the community members' normative reasons for action. In all cases, in other words, the makers' intentions must find a significant degree of success, that is, it must be that they are actually practiced and enforced. To this end legal artifacts must integrate considerations of rationality in two forms: technical rationality, serving as a basis on which to determine whether a legal artifact is properly framed to achieve its purpose, and teleological rationality, on which basis to determine whether this purpose can find meaningful support in the community. These considerations of rationality are very much context-sensitive, so the approach they require is a "modest" one, open to empirical research, particularly when it comes to defining the purpose of a given legal institution.

Let us now consider some explanatory advantages of this unified artifact theory of law, as well as some of its problems.

3. The Explanatory Value of an Artifact Theory of Law

3.1. *The Advantages*

Having laid out the main features of an artifact theory of law, we know that this can be framed as a unified theory. That was our first question, so we can turn now to the second one: Given such a unified theory, why should we use it to work out the metaphysics of law? What are its explanatory advantages?

The first such advantage relates to the normativity of law. It is a central concern of legal philosophy to explain how law can provide normative reasons for action, especially so when working within a legal-positivistic paradigm, where it is critical that a theory be able to explain whether, and if so how, law can have a norma-

tive force that cannot be reduced to that of morality or that of merely prudential considerations. This independent normative force has been compellingly explained by Ehrenberg[83], who does so by embedding an artifact theory in a functionalist framework, showing that law as an institutional artifact can gain its independent normative force in virtue of both its institutionality and its artifactuality. To be sure, Ehrenberg explains law's normativity by drawing on Searle's theory of desire-independent reasons for action, thus implying that an explanation of law's normativity in terms of its institutionality is not a merit of an artifact theory *per se*[84]. However, the theory does have the merit of pointing out that law's normative force can depend in part on the normativity of recognition typical of normative artifacts, as Ehrenberg argues in line with Dipert and Thomasson[85]. Moreover, as Auke Pols shows through Dancy's model of practical reasoning, artifacts can indeed provide reasons for action by prescribing or enabling action[86]. Hence, it seems that an attempt can be made to connect legal normativity with the general, inherent normativity of artifacts.

Despite these achievements, however, it is doubtful that the normativity of artifacts can fully explain the normativity of law and of social institutions. On the contrary, there are reasons to think that the converse is true, namely, that the normativity of *artifacts* has a social dimension. As Marcel Scheele has shown, the definition of an artifact's "proper use" often depends on the formation of "opinion groups", to the effect that «social features are necessary conditions for justified ascription of proper functions»[87]. Houkes and Vermaas similarly show how an artifact's use plans become normative on the basis of a process of testimony (between designers and users, and among users in a community) that reflects a process of "social entrenchment" and "institutionalization"[88]. Moreover, where artifacts are concerned, normativity always depends on a technical, hypothetical structure, and there is reason to doubt that the same holds necessarily for law as well. It could instead be argued that law can provide us with robust, normative, and context-independent reasons for action[89]. So the contribution an artifact theory of law can give in answering the problem of law's normativity can at best be partial.

In my own work, I argue that an advantage of an artifact theory of law is that it is well-suited to account for a typical dialectic in legal theory: that between the legal authorities' *production* of law – the core element of law in traditional formalistic legal positivism – and the community's *recognition* of law, as well as the *enforce-*

83 Ehrenberg 2016: chap. 7.
84 Ehrenberg 2016: chap. 7, sec. E.
85 Ehrenberg 2014: 263 ff.; 2016: chap. 7, sec. F; 2018: 182 ff.
86 Pols 2013.
87 Scheele 2006: 32.
88 Houkes and Vermaas 2010: 114.
89 A discussion of this question can be found in Ehrenberg 2016: chap. 7, sec. C.

ment through which the law becomes effective in the community, which interest is instead central to legal realism[90]. This dialectic could be understood in light of the double existential dependence of immaterial, abstract artifacts[91], meaning that, on the one hand, these artifacts are *historically* dependent for their existence on an original, authorial creative process, but at the same time their continued existence is also *constantly* dependent on a collective recognition lacking which they would expire. In light of that dialectic, we can work together two of the core tenets of legal realism and legal positivism[92]. Central to legal realism is the insight that norms are shaped and modified in the practice of their application, so much so that concepts like "legislative intent" or the "true meaning of a provision" can be thought to be illusory. So interpreted, an artifact can be explained only in light of (a) its *user function*, namely, the function it comes to have within a certain community of users, and (b) its constant dependence on its gaining actual recognition within that community. On the other hand, a crucial assumption of formalistic legal positivism is that norms and legal institutions find their content in the original authorial act of the legislator and in the latter's creative intention: so interpreted, an artifact can be explained only in light of (a) its *design function*, namely, the function as imagined by its original designer, and (b) its historical dependence on an original act of creation. So, by drawing a distinction between user and design function, and another one between historical and constant dependence, an artifact theory of law can show that both formalistic legal positivism and rule-sceptic legal realism are reductionist accounts, in that they capture only one relevant aspect of the phenomenon they intend to explain[93].

The intertwining of the concepts of function, authorial intention, and history that lies at the core of the metaphysics of artifacts can also illuminate some aspects of legal interpretation – and here I would count a third advantage of an artifact theory of law. In legal interpretation a distinction is traditionally drawn between originalist interpretation – based on the idea of the legislator's original intent or the provision's original linguistic meaning – and dynamic, evolutionary (or also teleological) interpretation, which underscores the need to adapt provisions to new circumstances the legislator either did not or could not foresee[94]. If we look at this distinction from the point of view of an artifact theory of law, we can see it as a particular application of a more general distinction made in the interpretation of ar-

[90] Roversi 2018: 99 ff.

[91] As discussed in Thomasson 1999: chaps. 2 and 3.

[92] Here I understand legal realism mainly along the lines of Scandinavian legal realism, and so as a general theory about the nature of law and not as a contingent description of legal adjudication, as Leiter (2007: chap. 1) instead interprets American legal realism.

[93] A similar point is argued by Bruno Celano (1999: 254), explaining Kelsen's "principle of effectiveness" in terms of "intentional artifacts".

[94] See for example Guastini 2011: 100-1.

tifacts. Dipert, for example, points out «two possible goals for the interpretation of artifacts [...]: 1. Historicism or antiquarianism. To determine the historical genesis and history of an artifact: that is, finding out, as best one can, an object's deliberative history. 2. Functionalism. To determine the most useful function an object can now be conceived as having»[95]. Of course, there is an important peculiarity of legal interpretation. As Dipert points out, when we interpret artifacts, «the pursuit of the function of an object – how we should conceive of and use it – should [...] always be our chief aim», and understanding an artifact's history is useful only because this «sometimes is the best way to achieve an understanding of its function»[96]. This does not necessarily hold for legal artifacts. Here, evolutionary arguments are not inevitably more relevant than originalist ones, and indeed the contrary can often be true. That is because legal artifacts are authoritative: they trace their origin to political authority, and as a result the original function envisaged by the designer carries a special, authoritative status compared to the normal status of an artifact's author. But the intertwining of those interpretive arguments in the context of law is simply an instance of interpreting artifacts generally conceived. A full-fledged theory of legal interpretation along similar lines is developed by Crowe, drawing on the interpretation of artifacts generally conceived[97].

3.2. *The Limits*

The just-mentioned peculiarity in the interpretation of legal artifacts – namely, that legal artifacts are authoritative in a way other artifacts are not – brings out an important limit of an artifact theory of law, a limit that can be expressed in a succinct formula: authors are not authorities. Even though, as Houkes and Vermaas show, designers of artifacts can have a special status in attesting to an artifact's use plan, the status of political authority with regard to legal artifacts cannot be subsumed under that of designers[98]. Legislative intent is not binding simply because of a special epistemic access that legislators have to the content of the provisions they enact: what makes such intent binding, rather, is that legislation is supposed to express an exercise of legitimate political power. In a sense, the relation here is reversed: with artifacts, we become authors in virtue of our having *made* the object, but where provisions are concerned, we need to first have authority (the authority conferred on us within a community) – *only then* can we proceed to enact the provision we intend to enact. Hence, there is a crucial dimension of law – the problem of the legitimacy of legal authority – that an artifact theory cannot adequately capture in terms of the

[95] Dipert 1993: 87.
[96] Dipert 1993: 90-1.
[97] Crowe 2019: chaps. 11-12.
[98] Houkes and Vermaas 2010: 110 ff.

author-user relation. As Crowe argues, an option we can pursue in order to attack this problem would be to change our theory of legitimacy accordingly, for example by shifting the source of legitimacy from authority to social coordination[99].

There is another significant challenge confronting an artifact theory of law. As Burazin has aptly stated[100], in conceiving of law as an artifact, we seem to be making the assumption that all legal institutions have authors and that these authors can be clearly identified, but of course institutions have an extensive evolution, and very often they emerge within a community as the outcome of a process that lacks explicit authors and can very well be tacit. How can an artifact theory of law explain this customary nature of the origin of legal institutions? This is a crucial problem, and one that is not confined to the customary origins of law. In taking up this problem, for example, Dan Priel argues that an account of law in terms of artifacts and design intentions is inconsistent with common law practice: in his view, lurking behind the idea that legal institutions are the outcome of an explicit design is a rationalistic ideology according to which law is «a tool designed by humans to ultimately attain a better life», which means "a more moral life"[101]. The common law, on the other hand, is framed according to a traditional view under which «law… is not put in place where custom fails; it is a continuation of, a manifestation of, custom»[102].

Customs and custom-like legal practices are a problem that has been addressed by all scholars who have engaged with the artifact theory. Burazin speaks of "informal institutional artifacts"[103], having the community as a whole as their original author, and indeed he concedes that the artifact theory of law seems «to adopt a very broad concept of authorship… The artifact theory of law does not preclude collective authorship and accepts as authors a wide range of persons, including those who sustain the artifact in question and its active users»[104]. Similarly, as mentioned, Crowe includes collective acceptance among the possible creators of an artifact, precisely to account for those customary-like phenomena in which (as in the case of a tree becoming a bench) artifacts emerge as kinds of socially created objects: These he calls "unintentionally created artifacts"[105]. Ehrenberg clarifies that customs, at a certain point, come to be based on a conscious decision to «raise the level of the customary rule to the point of seeing it appropriately officially or communally enforced»[106], which amounts to something close to Burazin and Crowe's "collective authorship" phenomenon. In a similar vein, my model introduces the concept of

[99] Crowe 2019: chap. 10.
[100] Burazin 2016: 399.
[101] Priel 2018: 259.
[102] Priel 2018: 264.
[103] Burazin 2016: 396.
[104] Burazin 2016: 399.
[105] Crowe 2014: 746.
[106] Ehrenberg 2016: 123.

"recurrence" artifacts, namely, artifacts created by recurrent action «whose content is in some sense related to the artifact but is not an intention to create an artifact of that kind»[107].

Now, to be sure, these solutions require to a certain degree that the concept of an artifact be "stretched" – something that some may not be ready to accept. Thomasson, for example, explicitly excludes terms like *path* and *village* from the class of artifactual kinds, limiting her discussion to what she calls "essential artifactual" terms, understood as «terms that necessarily have in their extension all and only artifacts, considered as such (as intended products of human action)»[108]. Hilpinen, on the other hand, explicitly accepts the existence of collective artifacts[109], and in this class includes (well-designed) towns, where the parts have been produced «in such a way that each part fits its surroundings architecturally and aesthetically, and contributes to the 'wholeness' of the town»[110]. However, such a stretching of the concept of an artifact is something that other authors call for in the legal domain even in an extreme way: Leiter, for example, suggests that «we think of the category of 'artifacts' more broadly, as the category of phenomena that *result from human action*, which are *responsive to human interests*, and which are not otherwise natural kinds»[111]. Indeed, that legal artifacts require a broader conception of artifacts may well be not so much a shortcoming of those theories as a significant improvement of artefact theories of law over theories of other kinds of artifacts. First, one is not forced to assume a priority of material, authored artifacts in explaining artifacts in general. And, second, the general observation that artifacts can be the outcome of emergence, rather than of explicit creation, can help us understand several instances of material artifacts as well. Not all material artifacts are like screwdrivers. Some are like Gothic churches: they can be incomplete, defective, even contradictory in their design plans, and may have taken a long time to become the way they are now. This is something a general theory of artifacts needs to be able to explain, and here the general theory can gain a lot by drawing on a theory of legal artifacts in particular.

[107] Roversi 2016: 221.

[108] Thomasson 2003: 593.

[109] Hilpinen 1993: 167 ff.

[110] It is important to note that these collective artifacts, in Hilpinen's view, collect artifacts having their own authors, whereas the collectively created artifacts envisaged by artifact theorists of law are single artifacts created through an act of recognition which is collective, and which may even extend over time.

[111] Leiter 2018: 11.

4. Law as an Artifact and Social Ontology

The problem of customs and emerging institutions, and its tension with the concept of an artifact, brings into light another major challenge that an artifact theory of law must face, a challenge that deserves a separate treatment. All these theorists agree that legal artifacts are socially rooted; that they very often simply depend on collective recognition, which is in itself creative; and that in this sense they are "institutionalized" or "institutional". It wouldn't be unreasonable to ask, therefore, why we should prefer an artifact theory of law over a socio-ontological account relying on the idea of institutions based on collective acceptance. This is the third and final question that will be discussed here.

There is one thing that needs to be clarified, however, before we take up this question. Which is to say that, in a sense, an artifact theory of law *already is* a socio-ontological account. There is no frontal opposition between these two accounts, because legal institutions, conceived as artifacts, are described by all the artifact theorists of law as based on collective recognition and acceptance. An artifact theory of law does not claim to *replace* a socio-ontological, institutional theory of law, but rather proposes to *specify* such a theory, by stating that crucial to an understanding of the nature of law is the process by which abstract artifacts are constructed on the basis of collective recognition – a process through which legal institutions are hypostatized as abstract artifactual objects. So the question, more accurately framed, is not why an artifact theory of law should be preferred over a socio-ontological account – for if the theory is justified, so is its account of law – but rather whether the added element an artifact theory of law brings to a socio-ontological account is really needed.

In a sense, this question lies at the core of a recent article that Miguel Angel Garcia Godinez has written in direct criticism of Burazin's artifact theory of law. Garcia Godinez claims that legal systems are *not* abstract institutional artifacts but rather institutional legal practices, and that collective recognition is a fundamental ontological element of law: «Burazin has no reason at all to claim that his artifact characterisation explains anything about legal systems. [...] He would have to be more interested now in finding the institutional requirements for law and legal systems to exist, e.g., collective recognition and constitutive rules, rather than those for artifacts to come about»[112]. In this way, Garcia Godinez argues that, although one part of Burazin's theory deserves to be salvaged – this being the socio-ontological part – the part connected with artifacts does not work. Let us consider some of his criticisms more in particular.

First, Garcia Godinez points out that in an imagined primitive society where law began to emerge, no concept of legal officials was available: Collective intentionality

[112] Garcia Godinez 2019: 127.

therefore could not create the abstract artifact "legal official" as required by the authorship condition for an artifact's existence[113]. However, neither Burazin's theory nor the unified version of the artifact theory of law previously described proceeds from any assumption that original, informal legal institutions were created "from scratch" on the basis of an already perfectly determined concept. Indeed, as we saw in the previous section, all artifact theorists of law seek to account for customs by looking at their progressive emergence rather than by imagining any straightforward act of creation. But, as Burazin himself notes, a legal custom must in the end have a "recognizable form" as something we can speak of – a substantive concept that can very well emerge gradually but which, at some point, must be fixed as "that institution"[114]. Drawing on Neil MacCormick, Garcia Godinez appeals to the classic institutionalist example of queuing as a nonformal convention based on implicit rules that people can recognize if needed[115]. Artefact theorists might reply here that if people can recognize the practice of queuing, and start referring to that practice as the institution to be followed in certain contexts, then they have a concept of that practice and have collectively created the artifact. The same could be said of the concept of a legal official and, gradually, of a legal system as a system of legal norms.

Again drawing on MacCormick, Garcia Godinez further holds that legal officials cannot have a substantive concept of the legal system, the reason being that there is no clearly defined purpose or function that legal systems are supposed to fulfil[116], nor does Burazin specify one. This argument assumes that the substantive concept required for a legal artifact to be created must necessarily include a clearly and fully specified purpose for that artifact, but neither Burazin's theory nor the unified artifact theory of law previously described makes or even requires such an assumption. Burazin explicitly embraces Thomasson's idea that functional features are not the only kinds of features that matter in placing an artifact within a given kind[117], and indeed, in specifying the substantive concept of the legal system held by legal officials, he lists structural and source-related features along Hartian lines rather than functional ones: «If one remains within the framework of Hart's theory, it is reasonable to assume that the concept adopted by the officials of the legal system includes at least the following two features: that the legal system is a system of valid legal rules, i.e., rules that are members of one and the same system of rules, and that the legal system is structured as a union of primary and secondary legal rules»[118]. Moreover, even if an artifact theory of law is set in an explicitly functionalist mould, as in the case of Ehrenberg's theory, there is no need for such

[113] Garcia Godinez 2019: 122-3.
[114] Burazin 2016: 395.
[115] Garcia Godinez 2019: 123-4.
[116] Garcia Godinez 2019: 123.
[117] Burazin 2016: 389.
[118] Burazin 2016: 397-8.

a theory to assume that the purpose of legal institutions must be clearly stated from the outset. Indeed, the enterprise of understanding and singling out the purpose of legal institutions can be undertaken modestly, as Ehrenberg does[119], and hence as an enterprise for which legal theory must enlist the help of sociology.

There is, finally, another argument that Garcia Godinez raises against Burazin's artifact theory, objecting not to the author condition but to the success condition (which Burazin draws from Hilpinen), namely, the requirement that legal artifacts find some successful realization in some kind of collective, norm-abiding behaviour. Here, Garcia Godinez's objection is twofold: Burazin fails to clarify (*a*) how we can be sure that our collective behaviour corresponds to the right kind of collective recognition (how we can know that what is being recognized is an artifact and not, say, a game or some kind of idiosyncratic construction in the minds of individuals) and (*b*) how collective recognition can provide reasons for action[120]. We have already discussed the problem of the reason-giving nature of artifacts when we considered the challenges that may be raised against the artifact theory of law: Legal artifacts cannot by themselves give a complete picture of law's normativity. As noted, however, and as Ehrenberg in particular illustrates extensively[121], artifacts do give several kinds of reasons for action: prudential reasons to act in a certain way if we want to interact with the artifact effectively, normative reasons to treat them as such, namely, as artifacts of the kind they belong to (according to Thomasson's and Dipert's normativity of recognition), and, when institutionalized, desire-independent reasons for action connected with a given institutional context (as Searle clarifies with regard to institutions). Hence, in the matter of normativity, an artifact theory of law seems to enrich, rather than weaken, a purely socio-ontological account. The same holds for deriving collective action from collective recognition. Of course, one can behave in a certain way for any kind of reason other than a rule, but is it really meaningful to take such a strong sceptic attitude when speaking of behaviours constituted by an artifact's interaction plan? If Garcia Godinez embraces this scepticism, then he should be ready to apply it to pure institutionalist accounts as well: How can he be sure that people queuing at the grocery store do so for normative reasons rather than for purely aesthetic ones?

None of the objections raised by Garcia Godinez seem to invalidate an artifact theory of law. That said, the general thrust behind his objections still stands: Do we really need to reinforce a purely socio-ontological account with artifacts? What, after all, do artifacts add to the socio-ontological picture, given that they are based on that picture? There are several possible answers to this question. On the one hand, reasoning from an ontology of artifacts certainly strengthens functionalist analyses

[119] Ehrenberg 2016: chap. 6, sec. C.
[120] Garcia Godinez 2019: 124-5.
[121] Ehrenberg 2016: chap. 7.

if we think, with Crowe and Ehrenberg, that functionalism solves important problems in legal theory. On the other hand, as Burazin suggests, if the nature of law is shown to depend on creative intentions, «this insight might provide additional support for and justify the use of conceptual analysis when theorising about the nature of law»[122] (even though, as we saw at the outset, Brian Tamanaha and Brian Leiter would derive the exact opposite conclusion from the artifactuality of law). Further, the mysterious nature of constitutive rules in social ontology could find some explanation if embedded in the more ordinary, daily domain of artifacts, and the range of questions relating to an artifact's technical rationality can shed light on the ambiguous normativity of those rules.

But there is a more general consideration to be made here. An artifact theory of law focuses on the peculiar way in which the legal domain is a domain of abstract objects, and not simply of facts about people behaving in a certain way and believing certain things. It explains how law can be made up of hypostatized, symbolic things, and how these things can organize normative behaviour. As Continental legal realists knew very well, this "objectual" aspect of law is not parasitic or irrelevant: Leon Petrażycki, for example, deals with it in terms of his theory of projections[123], while Axel Hägerström[124] speaks of hypostatization in this theory of pseudo-judgments[125]. Both authors thought that this is a kind of illusion, in which pseudo-assertive judgments are made while in reality there is only an expression of emotions. An artefact theory, as I interpret it, aims at capturing this aspect of legal reality without arriving at the conclusion realists want to draw. Hypostatization is not a fallacy: it is rather a feature of the human mind, and an explanation of law should take this feature into account. It has been argued, for example, that from an evolutionary standpoint the characteristic capacity of human beings to attribute legal status and build hierarchies of competence has evolved from the same development of the brain that made it possible to build objects endowed with symbolic value, like ornaments, or with sacred ritual meaning, as in the case of religious burials[126]. In the construction of symbolic artifacts and the construction of legal institutions we have two aspects of the same, distinctly human ability. Law is not simply a matter of socially shared norms: it consists of normative structures charged with symbolic value, and to ignore this metaphysical feature of the legal domain, or to dismiss it as a mere "illusion", would be tantamount to dismissing an important part of its genealogy. An artifact theory of law, then, enhances the explanatory capacity of a pure socio-ontological account by showing how law is embedded within

[122] Burazin 2016: 387.
[123] Leon Petrażycki 1955: 40.
[124] Axel Hägerström 1917: 69.
[125] In this regard, see also Fittipaldi 2016: 451–3, and Pattaro 2016: 325–7, respectively.
[126] Dubreuil 2010: chap. 3.

the broader, distinctly human practice of building artifactual objects (material or immaterial) endowed with symbolic meaning. But, of course, we need the socio-ontological background to explain the shared, inherently collective nature of these objects.

5. Conclusion

In this article, I have set out to answer some questions about the meaning and significance of an artifact theory of law. To begin with, I have shown how, even if the different artifact theories so far advanced depend on different models of the metaphysics of artifacts, it is possible to merge these theories within a single, unified account. In a word, an artifact theory of law explains law as made up of abstract, immaterial artifacts of a specific kind, in that they require us to interact on the basis of constitutive rules grounded in collective acceptance, making such artifacts in this sense institutionalized.

Second, I have discussed the main advantages of this account, while also pointing out the main challenges it faces. An artifact theory of law can explain several aspects of the reason-giving nature of legal artifacts, as well as the dialectic between the production and recognition of law that lies at the core of the debate between legal positivism and legal realism. Moreover, I have argued that the intertwining of different models in the metaphysics of artifacts can also be illuminating in understanding some features of legal interpretation. However, insisting on the artifactual character of legal institutions could be taken to entail that the crucial moment for these institutions' existence lies in their creation, and consequently that all legal institutions need an author – a conclusion immediately falsified by the original, customary nature of law. Also, the author's "authoritative" status over the use of an artifact is much weaker than the normative legitimate status of political authority: artifactual authorship cannot explain legal authority. I have tried to show that customs and emerging institutions are not necessarily a problem for an artifact theory, but I conceded that the concept of authorship assumed by a theory of this kind is broader than is usually assumed, and that the question of legitimacy falls outside its scope.

Third, and finally, I have discussed the relation between an artifact theory of law and a purely socio-ontological account. Given that all artifact theories of law assume socio-ontological concepts like those of collective recognition or constitutive rules, one might ask whether the theory can replace a socio-ontological explanation, and if so how. Here, I have argued that an artifact theory of law is not meant to replace a socio-ontological account but rather to improve on it, and that its contribution consists, among other things, in explaining the "objectual" aspect of legal institutions, namely, the nature of legal structures as symbolic, normative objects – a

characteristic owed to their genealogy and evolution and grounded in the cognitive capacities of the homo sapiens.

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Some Consequences of Law's Artifactuality: Comments on Roversi's Theory

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Abstract

Roversi's theory of law as an artifact raises some interesting questions, some of them concerning what kind of analysis follows from the characterization of law as a socio-ontological entity, if any. In this paper, I will present some remarks regarding the different ways to understand the artifactuality of law, and how they may affect our theories to explain legal phenomena and legal institutions. Against the scepticism about legal phenomena founded in its artifactual character, I will argue that this premise, as it is defended by Roversi, actually takes us closer to a non-sceptic kind of analysis. Then, I will defend the idea that a conceptual analysis of law as an artifact needs to provide an explanation of the changeability of law and legal institutions and I will present different candidates to that purpose. Finally, I will consider whether the relation between structure and function – present in every artifact – can affect the unity of Roversi's theory.

Keywords: Law as an Artefact. Conceptual Analysis. History. Function. Structure.

1. Introduction

In recent works some legal philosophers have defended, under different versions, the idea of law as an artifact. While that statement is not entirely new, their novelty resides in the way they have enriched this discussion by introducing different philosophical theories of artifactual ontology[1]. The general thesis shared by the theories of law as an artifact, is that law – whether if by using this term we are referring to legal systems, legal institutions or the very concept of law – is a human

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[1] See Burazin, Himma, Roversi 2018.

creation of some special kind; one in which the interconnections among intention, function and history seem to play a key role.

Along these lines, Roversi's «*Law as an artifact: three questions*» presents an insightful contribution to legal philosophy, insofar as he develops the distinctive features, as well as the advantages and limitations. of an artifactual theory of law. The author addresses three questions concerning the artifactual character of law and its analysis in terms of artifactual ontology. First, he considers and defends the possibility of a unified theory of law as an artifact, combining the main currently existing versions of it. Then he critically examines the explanatory possibilities of this theory, pointing out its advantages and problematic aspects. Lastly, he tackles the issue concerning how fruitful can an artifactual theory of law be, in comparison with other socio-ontological approaches.

The aim of this paper is to discuss possible implications of applying this kind of theories to the analysis of legal phenomena. Some of these implications may derive from attributing (any) certain ontological nature to law, while others can be seen as a consequence of Roversi's view in particular. I will start by pointing out two observations based on some aspects of the ontology of artifacts in general, drawing from this some tentative conclusions about the kind of analysis of law this ontology allows to make. While the first of these ontological observations addresses the relations between artifactuality of law and conceptual analysis of law, the second one deals with the changeability – or, as Schauer calls it – the malleability of artifactual concepts and, again, how is this reflected on the kind of analysis an artifactual theory of law gives room to. Both comments can be derived from the artifactual ontology of law and can be linked with artifactual theories of law in general. I will conclude introducing a final observation, based on the relation between structure and function of the artifact law/legal institution and assess how this can affect the unity of Roversi's theory, considering the inclusion of a functional account of law as an artifact.

Roversi presents a solid and coherent version of a theory of law as an artifact. Its strength relies, in my opinion, on two methodological choices: the first one consists in the construction of a general and unified theory of law as an artifact, as a set of theses, kinds of explanations and propositions that combine the three main elements of artifactual ontology: intention, function and history. The second methodological choice that contributes to the strength of the theory consists in placing it alongside with other ontological explanations of law, as an approach that isn't in competition, but completes instead the account of law in terms of its social ontology. Let me begin by a very brief review of his work.

Roversi starts by locating the questions about the possibilities and advantages of an artifactual theory of law within a wider problem, namely, the ontological problem. Whatever the scope of an inquiry into the nature of law may be, what is shared – with a few exceptions – by sceptic and non-sceptic conceptions about that sort of

inquiry, is that law is an artifact, so it doesn't only make sense but it is fundamental to know what we talk about when we make this assertion and what are the consequences of it. He tackles this task, as said before, by analysing three questions. The first one is an inquiry into the existence of either several or, instead, one unified theory of law as an artifact. After presenting the main versions of these theories, and their respective philosophical background, he explicitly defends the second of these choices and proposes a unified theory of law that encompasses the intentional, the functional and the historical features of law. While there might be significative differences among the artifactual theories of law that he describes and takes into account, he considers that this «[…] partial difference in focus, however, does not imply that the relative theories cannot be combined. Indeed, they can be conceived as more or less specific ways to describe law's artifactuality»[2].

This unified theory is the first step to fully get into the analysis of the real advantages and limitations of an artifactual account of law. The advantages can be seen in the way an artifactual theory of law solves three classical problems in legal philosophy: first, it contributes to an account of law's normativity; second, it explains the dialectic between construction and recognition/enforcement of law – a dialectic that is expressed by the formalist and realist account of law as two distinct aspects of the same phenomenon – and; third, it explains legal interpretation, specially the dialectic between originalist and teleological accounts. However, Roversi also notes the problematic aspects of this kind of analysis of law: it has problems explaining both authority – for designers' or creators' epistemic or conceptual privilege cannot be taken as authority –. And, lastly, it also has some problems explaining unintentional or customary aspects of law, although there are some possible answers to this last kind of problems.

Finally, given the previous balance of advantages and problems an artifactual theory of law presents, Roversi evaluates the advantages of an artifactual account of law in terms of what can be added to a more general theory of social ontology. Theories about artifactual ontology are, after all, theories about a particular kind of social entities and law – or some aspects of it – has already been explained as a social institution or as an institutional fact. So, what is the contribution of this particular kind of theory of social ontology? Roversi, after addressing some objections related to this problem, concludes that, besides from strengthening a functionalist analysis of law and supporting the use of conceptual analysis of law, an artifactual theory of law gives an account of the objectual aspect of legal institutions as symbolic normative objects.

[2] Roversi 2019: 52.

2. Theorizing about Artifacts: Conceptual Analysis and Accounts of Change

I agree with the possibility of analysing legal phenomena, legal institutions and the concept of law in terms of artifactual kind of objects or artifactual concepts, respectively, for it captures and, most of all, stresses the character of being socially created and the interconnections between intention, function and history, all of them crucial to a fully understanding of law's ontology.

However, accepting this ontological character of law may have certain consequences that need to be addressed. Let me start with the two issues related to the ontology of artifacts and the kind of analysis an artifactual theory of law can pursue: the first issue deals with the possibility of a conceptual analysis of law in terms of necessary or essential properties, and the kind of explanation an artifactual theory of law can give; in other words, are artifactual theories of law committed to the necessary character of the elements of law – either legal systems or institutions – that aims to explain? Aware of this problem, Roversi says: «While the so-called "ontological problem" […] has always been a part of legal philosophy, several important legal philosophers have been raising significant doubts about the possibility of addressing the question in a meaningful way»[3]. Despite the fact that some theories of law ground their scepticism about law's *nature* on the artifactual character of law, Roversi builds his theory on a certain socio-ontological view and this is a way of inquiring into law's nature. This means, in Roversi's reconstruction of the sceptical conceptions of law, that «If there is one element these statements clearly share, it is their assumption that law is an artifactual entity, or rather, that its *nature* is artifactual. Hence, it seems that behind all these sceptical conceptions there lies at least one tenet about the nature of law, namely, that law is an artifact»[4]. He comes back to this idea at the end of his paper, when assessing the relevance and advantages of these theories, since he considers that one possible additional positive aspect of it could be that if the nature of law depends on creative intentions, «[…] this insight might provide additional support for and justify the use of conceptual analysis when theorising about the nature of law»[5]. This, however, and as Roversi himself notes immediately after, is what authors like Leiter and Tamanaha precisely deny due to the artifactual character of law. This, of course, is a critical issue for many kinds of analysis of law, and I'm not suggesting that is a problem only present in theories of law as artifacts: the possibilities of a conceptual analysis of law constitute a more general methodological kind of problem. But I do think it is important to stress that there are two distinguishable understandings of the artifactuality of law and each one of them arise different questions and poses different difficulties:

[3] Roversi 2019: 42.
[4] Roversi 2019: 42.
[5] Roversi 2019: 62.

one of them admits the possibility of some necessary elements of law, even if these aren't of course essential in the same way elements of natural objects are. The other one, while founded on this artifactual character of law, stresses its dependence on human acts and their interests and the incompatibility of this with a possibility of inquiring what are the necessary elements of law, in other words, what is the nature of law. The difference is clear and, most importantly, it leads to radically different conclusions about the *nature* of law, about whether there is even such a thing and about the methodology adequate for its analysis.

Conceptions as Leiter's or Tamanaha's about the artifactuality of law emphasize this characteristic as one that excludes the possibility of even inquiring into a certain nature of law. The mere fact of accepting that law is a human creation, subject to historically and intentionally determined changes and with functions ascribed according to authoritative reasons, demonstrate that nothing such as necessary elements of law can be found, for such an inquiry would entail a contradiction: humanly created objects don't have and cannot have necessary features. Let's illustrate this kind of theorizations. Leiter, for instance, correctly considers that human artifacts answer to human interests, and then adds: «[...] thus their nature and character is hostage to changing needs and wants. Even so, we can try to take a conceptual snapshot of these artifacts that answers to our current concerns. We can try to say what an artifact is *here and now,* with the boundaries of the characterization to be specified»[6]. Leiter's analysis is, actually, a defence of legal positivism and, as such, argues about issues somewhat different to those at stake here[7]; however, the particularity of this analysis is that he incorporates a metaphysical point as part of his argument, namely, that law is an artifact and artifacts can be made of almost anything. The main and decisive difference between natural and artifactual kinds is paramount in Leiter's view: while natural kinds typically have micro-constitutions – something that determines that certain objects belong to that specific kind, artifactual kinds do not –: «Things on the artifact side of the divide, needless to say, do not have distinctive micro-constitutions, but perhaps they can have essential or necessary properties of some other kind?»[8]. After rejecting the possibilities of some sort of artifactual necessary property based on functions of the type "artifact" or on the notion of an intentional author/creator, Leiter denies this possibility. What would be, then, the feature that determines, according to him, that a given object or phenomenon belongs to the artifactual kind? He answers this question giving a concept of artifacts sufficiently broad to avoid some of the problems he detects

6 Leiter 2018: 15. See also, Leiter 2011: 666.

7 The discussion between positivistic and non-positivistic theories of law deals with fundamental issues concerning the demarcation between law and other normative domains. The ontological question of law is not necessarily exhausted, however, by the issue of demarcation.

8 Leiter 2018: 9.

when we identify artifacts with either a given function or with an author's intention. According to his view, we should «think of the category of "artifacts" more broadly, as the category of phenomena that result from human action, which are responsive to human interests, and which are not otherwise natural kinds»[9]. However, this is a suggestion as to what concept of artifact would be useful to understand law on those terms, but it does not solve yet the problem of the distinctions between natural and artifactual kinds, something that nevertheless seems to be decisive in his argument. It appears to be three important aspects about the artifactuality of law in Leiter's analysis: first, that law as a type falls under the artifactual kind of objects and artifacts, as just stated, are phenomena or objects that result from human action which are responsive to human interests. Second, natural and artifactual kinds are distinct not because the objects pertaining to each kind have different nature, or different essential features, but because the former do have them, while the latter do not. Third, the distinction between natural and artifactual kinds may be gradual, but this is not enough reason for abandoning it. This is clearly the idea expressed in the following paragraph:

> [...] there is a way to mark the artifact/natural kind distinction, which seems to commit me to artifacts having some necessary features after all. Everything turns here on the sense of "necessity": if the artifact/natural kind distinction is theoretically fruitful, as I think it is, then we need to say what that distinction is. As with natural kinds themselves, on the Quinean view, the boundaries could shift: in that sense, they are not necessary. But as theorizing stands today, if artifacts have essential features or functions, then someone should name them![10].

Another example of this understanding of the artifactuality of law can be found in Tamanaha's work – though his thoughts on this are somewhat different to Leiter's and so are the consequences of each of those views –. Tamanaha considers that

> There is no unique way to categorize social artifacts, so we should not expect there to be a single correct concept or set of characteristics. The inability to fix groupings shows up in the fact that each theory of law fastens on a different set of features, i.e., governmental social control, institutionalized norm enforcement, union of primary and secondary rules[11].

This paragraph shows, as well as for Leiter, an understanding of the artifactuality of law in such a sense that excludes the possibility of finding necessary elements of law. In the same way as before, in this case there seem to be no way of fixing an

[9] Leiter 2018: 11.
[10] Leiter 2018: 14-15.
[11] Tamanaha 2017: 60.

artifactual kind by some necessary features. Artifactuality here, once again, doesn't have essential characteristics whatsoever.

Theories as the ones developed by Roversi, Burazin, Ehrenberg, however, can't be taken as sceptical at all because the acknowledgment of law as a particular kind of artifact is precisely the starting point of an inquiry into its nature – or character, to put it on less essentialist terms –. This is why Roversi explores a wide range of philosophical accounts of artifacts: these are not sceptical philosophical conceptions about social ontology, but theories built on the necessary elements of different fragments of the social world. Looking at the first question addressed in his work, concerning the possibility of a unified theory of law as an artifact, it is made clear that his understanding of artifactuality does not commit him to a sceptical conception of law. The different approaches of artifactual ontology conveyed by his view can explain several aspects of legal phenomena as a kind of artifact. The fact that the former is part of the latter is not a contingent feature of a particular legal system.

These theoretical considerations in Roversi's view, show a different understanding of the artifactuality of law. Compared to the previous notion, in this case: first, the type law – legal institutions, the concept of law and legal systems – are a specific type of artifactual objects. The concept of artifact may vary to some extent, but this is not problematic. Second, the main difference is that the distinctive feature of artifacts is not characterized as a lack of essence, but as a different and complex one. Finally, as for the distinction between natural and artifactual kinds, this is not an issue especially developed by Roversi, as a consequence of the previous point: inquiring into the socio-ontological kind that law belongs to – and its necessary features – is a theoretical enterprise that is not threatened by its distinction from natural kind objects. To sum up, this understanding of the artifactuality of law, endorsed by Roversi as well as by other proposals along these lines, starts from this general assumption to look into the nature of an object of social kind.

Now, if it is possible to ask questions about law's artifactual nature, or law's essential – and artifactual – features, this amounts to say that conceptual analysis of law as an artifact is a possible and valuable endeavour. At his point, given the assumption of an artifactual character of law as presented by Roversi, it might be asked what sort of conceptual analysis can this admit?

In addressing this issue, it would be useful to make use of Jackson's categories of modest and immodest conceptual analysis in order to ask ourselves to what extent is conceptual analysis of an artifactual kind of object – such as law – possible. According to this philosopher, conceptual analysis can be given either a modest or an immodest interpretation. An immodest interpretation of conceptual analysis draws a conclusion about the nature of the world. From a different – and modest – perspective, however, we would be giving an account about another statement that belongs to our discursive practice. The immodest role or immodest interpretation of conceptual analysis is discarded by Jackson, for he believes that it draws

conclusions too strong to hold about the world and, besides, impossible to demonstrate – for what could we possibly demonstrate by means of a language and a way of thinking that is not our language and our way of thinking? How could we even talk about such a thing? –. He, then, says: «[...] the role for conceptual analysis that I am defending in these lectures is the modest role: the role is that of addressing the question of what to say about matters described in one set of terms *given* a story about matters in another set of terms»[12].

Posing and examining this question is important in order to take into account some of the consequences of an analysis of this kind. In this sense, stating that a given phenomenon or kind of object has a certain property is not coherent with the denial of the existence of any property that can be taken as necessary, even if by "necessary" we should here understand constant in any possible world that would be *understandable to us*.

It is important to note that this is not an objection to Roversi's theory. As a matter of fact, I think these tentative observations are absolutely compatible with his view. Furthermore, his theory, in my opinion, can only be properly understood as a non-sceptic theory of law, and of law's ontology. The point is not only about a discussion between sceptic and non-sceptic conceptions about law's ontology and how the premise of artifactuality can be understood from one or the other point of view. The interesting question is, rather, whether this premise entails either a sceptic or a non-sceptic point of view about law and I think the latter interpretation to be much more promising than the former.

The second issue related to the ontology of artifactual kinds bears a connection with the changeability of artifactual kind concepts and, also in this case, how this can have an impact on the scope of the analysis. The problem, here, has to do with the possibility of accounting for change in law – and, in consequence, for changing concepts – and whether this is possible or not from an analytical perspective. There are, indeed, different possible features of artifacts that show how phenomena of this kind is variable, context dependent at least to some extent. But one of the key features of artifactual objects is that they change through time and usage. This is a crucial point when pursuing a philosophical analysis of these kind of objects. And it is also why we can find at least some theories about artifactual ontology that take this – the temporal or historical character of this objects – as a decisive criterium. Roversi's unified theory of law as an artifact encompasses a historical-intentional kind of analysis, especially useful to explain the ontology of legal institutions. Drawing on Dipert, he says that,

> [The] insistence on phenomena of repurposing, modification, and diachronic evolution also figures centrally in my own "historical-intentional" model of the arti-

[12] Jackson 1998: 44.

> factuality of legal institutions. This model takes up Dipert's concept of "deliberative history" by tracing artifactuality to a historical property rooted in an original "creative process" consisting of authorial intentions and in a series of further modification, reinterpretation, and development processes: legal institutions are therefore, on this view, the outcome not just of an original authorial intention but also, and more significantly, of a *history* of intentions[13].

When Roversi develops his historical-intentional account of law, he talks mainly about legal institutions and how these change over time, due to explicit decisions of the authority, or to the use of the institutions or even both factors. This is a possible path to explain the temporal feature of law's artifactuality. I will here present three more theoretical models aimed at explaining this particular feature of law as an artifact. After doing so, I will assess the possibility of considering these theoretical projects as models of conceptual analysis.

Talking about a changing artifact, such as law, amounts – at least partially – to explaining that we talk about a changing concept as the same one and, moreover, that we are referring to the same phenomena in a fundamental sense. The point is not irrelevant, and it raises an important methodological question, suggested above: if the object that we theorize about is one that changes over time, how is it possible to do this from an analytical perspective? In other words, can we somehow make conceptual analysis about a temporally changing object? Let's first consider Schauer's work on the artifactuality of law. Schauer makes the distinction between a descriptive conceptual analysis and a prescriptive one, saying that the latter consists in an evaluation of what we want that concept to be. The value of this last kind of analysis, rests on the possibility of deciding – to some extent and with obvious limitations – what "direction" do we want the concept to take. Even if this is not a way of saying that a concept of law – or whichever concept – is whatever we want it to be, it acknowledges one important role to a normative-theoretical project, one that is built upon the concept of law we have within our own culture. His idea of the kind of legal theory that can account for the temporal changes of the concept of law in a prescriptive way, is clear in the following paragraph:

> Because our concepts might be at some future time different from what they now are, then there is, in theory, an enterprise of concept revision, and, therefore, another enterprise that would consist of prescribing what some revised concept ought to be […]. Insofar as all of this applies as much to law as to any other artifact, we can now see that one form of normative legal theory would be that of prescribing what our concept of law ought to be. How should a culture understand law, and should it understand law in a way that is different from the way it now understands it? Insofar as a theorist might wish to answer or at least address this question, she can be said

[13] Roversi 2019: 51.

> to engage in a particular form of prescriptive or normative legal theory, prescriptive or normative not at the level of specific laws or legal institutions, but at the level of a more global understanding of the concept of law itself[14].

Sally Haslanger defends a similar idea through her proposal of an ameliorative analysis of concepts of social kind. While conceptual analysis in philosophy can involve different kind of theoretical projects – descriptive, normative, etc. – part of deciding how our analysis will be depends on certain characteristics of the concepts themselves and, also, on some methodological assumptions. In the case of concepts of social kind – particularly those whose use has a decisive political impact, like "race" and "gender" – she defends the relevance of a conceptual analysis, as well as a descriptive one. But, besides from this, the philosopher talks about an ameliorative analysis of concepts, one that assumes that the only relevant description of what something, is not reduced to a dominant manifest meaning of a term. This explains why a genealogical inquiry into the history of use of the concept becomes of significant importance in order to evaluate what do we want some of our concepts to be. In her own words:

> The genealogist is especially keen to explore cases in which the manifest and operative concepts come apart, that is, when the operation of the concepts in our lives is not manifest to us. If one assumes that the task of philosophical inquiry is simply to explicate the dominant manifest meaning of a term, then any genealogical inquiry – almost any externalist inquiry – will seem revisionary. But philosophical inquiry – even philosophical inquiry that takes its goal to be the analysis of our concepts – should not define itself so narrowly, or else it is in danger of collapsing into lexicography (an interesting endeavour, to be sure, but not our only option)[15].

Finally, also Lariguet argues for a model of philosophical investigation that combines conceptual and historical analysis. In a nutshell, the philosopher thinks that philosophical investigation can combine both conceptual and historical analysis, without having to face any dilemma between one another: the historical aspect of it, would demand an investigation of the history of use of the concepts of philosophical interest, while the conceptual aspect of the analysis it is linked to its necessity and its universality: «History, from an analytical perspective such as the one I defend, is valuable; but it is so insofar as it's true that it helps us to better understand our problems […]»[16]. We deal with concepts, from this point of view, because we are interested in its referential anchorage and their history of use is relevant in that

[14] Schauer 2018: 38.
[15] Haslanger 2005: 19.
[16] Lariguet 2016: 233.

regard[17]. The image is completed with a notion of necessity based on a kripkean view: something can be necessary and *a posteriori*, or contingent and *a priori*. Both these categories would allow us to think about elements of law – as a changing artifact – that are necessary but regarding which we still don't have full knowledge and also about contingent elements that define some features of our concrete legal practices as they are.

What observations can we draw from these synthetized different versions of philosophical analysis of changing concepts? After having gone through these different accounts, can we arrive at some interesting conclusions about the possibility of a conceptual analysis of law as an artifact, focusing now on its changeability feature? I think the first thing that needs to be acknowledged is that a theory of law as an artifact such as Roversi's, presents at least one possible account of the changeable character of legal phenomena and, in particular, of legal institutions. This is particularly clear if we focus on the historical-intentional approach to artifactual objects, because this model can explain such objects through their deliberative history; however, the account for change is not excluded from the other approaches considered. Take, for instance, the case of the functional approach: the functions can and do change and a unified theory of law as an artifact can take this fact into account, without losing the possibility of finding necessary conceptual features of law.

There is an example – a sort of problem presented by Roversi as a case that his theory can solve –, that can be understood in this way. One of the advantages an artifactual theory of law is considered to have in explanatory terms concerns the dialectic between production and recognition/enforcement of law. Roversi's proposal is that this dialectic should be understood in light of the double existential dependence of immaterial abstract artifacts – an analysis developed by Thomasson to deal with this kind of objects –[18]. This requires that we consider two different types of ontological relations: on one hand, an historical dependence on production and, on the other, a constant dependence on collective recognition. When thinking about the production/recognition pair as explained by these two diverse relations of dependence, we are acknowledging that a theoretical approach can account for two perspectives that can seem incompatible at first sight.

It could still be argued that the elements tracked by any of the approaches here unified in a theory, are only necessary inasmuch as we are talking about a particular legal institution or legal system, in a specific moment and place. However, I think it is possible to interpret Roversi's theory as compatible with a wider analytical scope, such as the one proposed by Lariguet by the combination of historical and conceptual analysis. The advantages and limitations of such an approach would

[17] Lariguet 2016: 234.

[18] Roversi 2019: 54-55. For the distinct types of dependence relation, see Thomasson 1999, chapter 2.

need further evaluation that can't be made here. But examining this possibility is certainly a fruitful theoretical task given, first, the artifactuality as a certain social ontological structure and, second, the possibilities of conceptual analysis of historical and changing aspects of law. If this is the case, two more consequences follow: first of all, the artifactuality of law is not a reason for abandoning any attempt of conceptual analysis in terms of necessary elements of law, but a starting point for exactly that kind of analysis. Second, the changeability of law – legal phenomena in general and the concepts used to refer to it – don't suppose a problem for conceptual analysis if we re-define what constitutes a necessary element of a social and artifactual kind of object.

3. A Unified Theory of Law as an Artifact: Some Inquiries into The Functional Approach

In the previous section, I made two observations given the artifactual character of law. I would now like to briefly comment on Roversi's proposal as a unified theory and whether this is compatible with some aspects of the functional approach. The aim of this last comment is to evaluate some discussions about the possibility of functional kinds and the relation between function and structures, and whether these issues can affect the thesis of a unified theory of law as an artifact.

Theories dealing with the ontology of artifacts in general, as well as theories of law as an artifact, usually combine the functional perspective with some explanation other than function. But even on those cases, theories emphasizing this aspect receive some critiques. If we try to identify an artifact by its function, we will find some problems: first, we tend to classify malfunctioning artifacts as a subclass of functioning ones. Second, we could find other objects that perform – or that can perform – the same function. The possibility of dividing kinds of artifacts according to the different function they perform is problematic, because not all the artifact belonging to a certain kind can and do perform its proper function and other artifacts with a different proper function, might actually perform the same function. As a consequence of this, both the purpose – or function by design, if any – and the actual function are, at the same time, over and under inclusive as criterium to divide into kinds. This is, of course, a well-known problem, but it can be even clearer through some examples. A chair's proper function is to be used to sit and that is, usually, its actual function. Now, if I don't have much furniture at home, I can use chairs to put books on them. And, if I have no chairs at all, I can sit on pillows on the floor. On the first case, my chair is still a chair though it performs a different function than the proper one. On the second case, other objects can fulfil the same function. The same happens with law, if we consider, for instance, that its function is to guide conduct. Law may not guide conduct and, even if or when it does, other

normative domains – such as morality – seem to have the same function[19]. Now, is this problem solved if we combine the functional approach with the intentional and the historical-intentional one? In a way, it does, though maybe not entirely.

Considering these problems with functional kinds, Roversi's theory stresses the importance of combining those three elements relevant in explaining artifacts – function, intention and history – thus conceiving a unified theory: «This intertwining of counterarguments shows that for a satisfactory account of artifactual kinds we need to draw on elements extracted from all the three models, and it also shows why these models are almost never taken in their "pure" form but instead combine in various ways»[20]. Regarding the functional approach, Roversi mainly considers Ehrenberg's work – although he also includes Crowe as a functionalist in this sense –. This model of functional explanation of law, following Ehrenberg, understands artifact functions as multiple realizable – they can be realizable by other artifacts – and it also considers that artifacts can malfunction. Law, on this understanding, is not a functional kind, but it does have a macro-function which is «[…] to signal that some institutions are in fact legal, so as to make it explicit that political authority intends these institutions to be valid in the most general way and to shape and reframe the community members' reasons for action»[21]. Moreover, according to this view many functions change, or legal institutions that were supposed to fulfil them might not work. But law does have that crucial function which consists in signalling that some institutions are in fact legal, communicating its character of valid legal institutions[22].

However, one issue remains unanswered since, even combining these features of artifacts, how should we make sense of the relation between function and structure? An answer to this question would have, of course, also consequences regarding the kind of analysis of law, considering that this is an artifact.

It is not unusual to deal with structure and function of law and legal institutions as incompatible aspects of the same object or phenomena. If, for example, we theorize about private law, we can either focus on the structure of this area of law – by examining the structure of its main institutions, such as contracts – or, on the other hand, we can try to grasp the function fundamentally deployed by those private law institutions. However, and this is the relevant – and tricky – point of matter: both of these ways of approaching the problem seem to be elusive in the following way: we can't fully grasp one of them without the other. Structure and function are intertwined in a way that is not completely transparent and straightforward. Sometimes, it seems clear that we first identify an object by its structure, but we need to

19 See Ehrenberg 2016: 121-122.
20 Roversi 2019: 45.
21 Ehrenberg 2016: 137-139. See also Dipert 1995: 127-130.
22 Roversi 2019: 50-51.

know how it works and what it is used for in order to understand it. However, even knowing its actual function, we will probably find other institutions with the same function and, even more importantly, shifts in that function. Those shifts can be seen diachronically – by looking at the history of the institution – but also more "locally", for it is not unusual to find legal institutions – and artifacts in general – fulfilling more than one function. So, to re-define the limits of our object of study, we may need to go back to its structure. However, that structure may also need to be re-defined in terms of the function we know that institution has, and so on. Roversi takes this relation into account: Summarizing Ehrenberg's position on the matter, he points out that «[…] even an artifact's intended function may not suffice to determine its membership in a given artifactual kind, because to this end it may be necessary to look at other factors, too, such as its shape and structural features»[23].

In a paper about tort law, Dan Priel also talks about precisely this elusive character of the structure and function in that particular institution, observing that there is a normative and political decision to be made when characterising tort law by its structure or by its function; it is a normative-political decision because it is not determined by a given nature of the object, in this case, tort law[24].

There are, however, other ways to explain the relation of structure and function in which the alternative between either one or the other is not really an alternative but instead both need to be considered and combined in the analysis. Tuzet, for instance, considers that structure and function are connected insofar as structure serves function and function depends on structure, and he makes an interesting methodological point regarding both:

> We must treat questions and answers differently. I praise atomism concerning questions. Questions must point at specific features; to be fruitful they must address specific issues of the topic one is about. Hence, we must distinguish *why*- questions from *what*- questions. If we don't, only conceptual confusion will ensue. On the contrary answers must be integrated. To have a full understanding of a given phenomenon, we must put together the answers to the different questions about it. So, I praise holism concerning answers[25].

The relation between structure and function, to sum up, can be theoretically used in different ways: we could consider them incompatible with each other for the analysis of an object and make a justified decision about which methodological approach – one that stress either structure of function – is best in each case or type of cases. Another option is to treat both structure and function as combinable in the analysis, although not answering the same kind of question: an inquiry on the

[23] Roversi 2019: 45.
[24] Priel 2018: 321-322.
[25] Tuzet 2018: 237-238.

structure will tell us what a legal institution is, while an inquiry on its function would answer why do we have that institution and how it is used. In a way, we might want to add, even if methodologically we seem to be compelled to make this distinction, understanding how an institution works – and what is its function – is to understand, too, what that institution is. There is, in my opinion, no other way to explain why we cannot fully comprehend one without the other. The functions of any artifact, while changeable, are not superficial features of it – or, at least, not necessarily so –.

The account of the structure/function relation bears consequences concerning the possibility of a unified theory of law, such as the one Roversi defends. If we identify structure with some set of features a given institution was intended to have, then we could interpret the relation structure/function as a manifestation of the interrelation between intention and function of an artifact. A theory purporting to combine such features, would then have to opt for a methodological approach that cannot but take both structure and function into account. This could be accomplished through an historical-intentional kind of explanation. Along these lines, Roversi's approach, following Dipert, understands that by attributing a deliberative history to an artifact we can better understand its properties, and this would count as a non-naïve functionalist approach[26]. If so, then the structure/function elusiveness wouldn't be an obstacle to a unified theory of law as an artifact. If, however, we think that there is nothing inherent to any artifactual object – such as a legal institution – that determines the fact that we should look into its structure or its functions or both to understand what it is, this could pose a problem for a unified theory of artifacts, since we would have two different possible and apparently incompatible explanations of the same phenomena, mutually exclusive; and, as just said, nothing about the phenomena itself could guide us into following one or the other methodological path.

I think we can conclude, without risking circularity, that if we accept the artifactuality of law – legal phenomena and legal institutions – we cannot but try to offer an analysis that considers structure and function as part of its character. One way of doing this is endorsing a historical-intentional approach, like the one included as one of the elements of Roversi's theory. The history of use of any artifact can probably explain the fact that, sometimes, a certain structure has more relevance in a given interpretation, while function in other. Whether this constitute immodest conceptual analysis or not, depends, at least partially, on an answer to the questions examined in the previous section. If the answer is positive – and historicity can be part of a conceptual sort of inquiry – then the notion of a unified theory is not problematic at all. If, instead, the historicity of an artifact is seen as a way of showing rather accidental features of law, then we could question the decision to

[26] Roversi 2019: 46. See also Roversi 2018: 95.

include this diachronic dimension in a theory of law. Leaving this aspect out of an explanation, however, would represent a loss in our understanding of socially created phenomena.

4. Final Remarks

An artifactual theory of law is not only possible but also an interesting and challenging way to explain legal phenomena and legal institutions. Some of these challenges have to do with the kind of analysis of law we can make given its artifactuality. There are at least two ways to approach this issue: one of them is considering the artifactual character of law as part of a sceptical kind of theory. Under this interpretation, since law is an artifact, there is not such a thing as a nature of law. A different interpretation of law's artifactuality sees this statement as a starting point to dig into, precisely, what makes it so, what is its character and how this helps us understand legal phenomena. Roversi's unified theory of law as an artifact can be understood in the latter sense. The question about the possibility of conceptual analysis of law as an artifact implies giving some explanation of the changeability of law and legal institutions. Here too there are different views that can be defended. I think that conceptual and historical analysis can be combined in a non-dilemmatic way, as part of a search for necessary elements of the analysed phenomenon. Finally, the unified character of a theory of law as an artifact needs to account specially for the relations between the structure and the function of the artifact law – and of legal institutions –. Once again, the history of use of those objects can help us understand that connection.

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Evidence-Based Jurisprudence: An Essay for Oxford

Dan Priel *

Abstract

This essay is part of a broader attempt to put some flesh on the bones of naturalistic jurisprudence. My general aim in this essay is to show that much contemporary jurisprudence takes a very narrow understanding of its subject matter, and gives priority, to the point of exclusivity, to one methodological approach – analytic philosophy – over all others. Unlike naturalistic analytic philosophy that welcomes ideas and data from other disciplines, the approach that dominates jurisprudence sees legal philosophy as concerned with certain questions that are uniquely philosophical and to which other disciplines have little to contribute. Some have challenged my past characterization of analytic jurisprudence as "isolationist." My first aim in this essay is to show that this narrow approach is real. I begin by providing some empirical evidence on the narrowness of work in analytic jurisprudence (with special reference to work coming from Oxford). After showing that, I present some ways in which a naturalistic alternative would build on ideas or data coming from disciplines other than philosophy. In addition, I argue for two additional ways in which naturalistic jurisprudence differs from the current dominant approach. First, I suggest it should take the study of legal practice as central to its endeavor; and second, I suggest that legal philosophers themselves may be a relevant subject of study.

Keywords: Analytic jurisprudence, naturalistic jurisprudence, methodology, nature of law.

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I spent several years at Oxford, and I have fond memories of my time there. It is the perspective that comes with distance that has led to see more clearly the shortcomings of the approach dominant there. This essay is thus meant, as they say, as "constructive criticism". I presented an earlier, and quite different, version of this essay at University College London and I thank participants there for their mostly receptive reactions and comments. I also thank Roger Cotterrell for his comments on that early version. Finally, I thank my hosts at the University of Genoa for the invitation to present some of my ideas on naturalistic jurisprudence (Priel unpublished), and for their great hospitality during my time there.

1. The Bad Old Days

> It used to be, in the Oxford of the sixties, that a delicate shudder of incomprehension stood for an argument. Those days have passed. (Dennett 2007: 202 note 5).

Indeed. It's not that there have not been criticisms of the state of analytic jurisprudence, but for a long time, it seems, the delicate shudder was enough. Perhaps more than enough. At times, it seems, the preferred approach was simply to ignore the criticisms, because those who made them were just not smart enough, or knowledgeable enough, to know what they were talking about. As for criticism based on ideas or information coming from other disciplines, those were considered largely irrelevant for the philosophical inquiries about the nature of law.

At last, the criticisms seem to be starting to sink in. Not yet calling for a radical change, mind you, but at last meriting a response. Perhaps it is the growing volume of the critiques, perhaps it is the fact that it is no longer possible to take seriously the suggestion that the critics don't understand the issues or are not familiar with the relevant literature; or perhaps it is the creeping sense that analytic jurisprudence is in a bad place. The new approach is thus one of conciliatory open-mindedness: «ours is a broad church» (Dickson 2015: 207, 230); «positivists simply believe there to be more than one province in the empire of legal philosophy» (Green 2008: 1037)[1]. The new message is welcoming and inclusive: "Go ahead and do what you want to do, we are not stopping you! There is great value in your work. But by the same token we ask that you let us continue doing our thing." In this spirit of intellectual openness and pluralism, it is those dismissive of conceptual jurisprudence who appear closed minded (Dickson 2015: 219).

That's progress, of sorts, but in my view it does not go nearly far enough. In this essay, I hope to show that in practice the dominant approach to jurisprudence, reflected in purest form by many legal theorists based at Oxford, is not open and inclusive, but isolationist and dismissive. One of the hallmarks of the isolationist approach to jurisprudence is a lack of professional interest, and even ignorance, of ideas and data from disciplines other than philosophy. The assumption, still going strong today, is that however interesting such work may be, most of it is of no relevance for the legal philosophers. After demonstrating with some empirical evidence that this remains the reality within analytic jurisprudence, I turn to presenting some ideas on what an alternative approach would look like. In doing that I hope to contribute to discharging the yet-unfulfilled promise of a naturalistic approach to jurisprudence. Naturalism has come to mean many things; one of them – the focus of my attention in this essay – is that philosophical questions are not special or

[1] Similarly, Gardner (2012: 297 note 75): «[William Twining's] interests strike me as no less legitimate than mine».

unique. They are not to be answered by splendid segregation from the inquiries of other disciplines, nor do they enjoy any kind of logical priority over other questions. I substantiate this claim by presenting examples of how disciplines other than philosophy could be used to address traditional jurisprudential questions.

2. Is "Oxford Jurisprudence" a Real Thing?

> [There exists] some mythical, composite figure whom we may call the compleat Oxonian [who believes] that only those who have received formal training in technical philosophy are entitled to be taken seriously in matters of general legal theory or philosophical jurisprudence. If that were true, the only jurists, past or present, to whom we should pay any attention are Professors H.L.A. Hart and Ronald Dworkin. (Gilmore 1974: 813.)

For those on the inside, the suggestion that Oxford controls what people can write may look like a ridiculous conspiracy theory: «It is not as if there is an Office of Jurisprudence somewhere in Oxford's High Street, or in Washington Square, that gets to license research programmes» (Green 2012: 158). But from the outside, Gilmore's description still rings true. To be sure, some things have undoubtedly changed. In Britain, analytic jurisprudence is not the only game in town. There are different currents and perspectives, but analytic legal philosophy is still a very dominant approach, not least because of its continued perceived prestige and prominence in the leading law schools at Oxford, Cambridge, and London in England, and Edinburgh in Scotland (*cf.* Cotterrell 2014; Duxbury 2004). And within analytic jurisprudence, Oxford remains very dominant, arguably the most influential place in the English-speaking world.

Even if we take analytic jurisprudence to be nothing but the application of the methods of analytic philosophy to questions relating to law, there are certain more specific commitments that seem particularly popular at Oxford. These are loosely derived from the work of Hart, recently described in a book celebrating the fiftieth anniversary of its bible as «the founder of the 'Oxford school' of jurisprudence» (Duarte d'Almeida et al. 2013: 11). One aspect of the Oxford school is a belief in the distinctness of legal philosophy from other interdisciplinary approaches[2], an insistence that legal philosophy is distinct from the rest of the looser category of legal theory (Endicott 1996), and a rather sharp separation of legal philosophy from the practice of law. Not quite part of the official doctrine, but very much part of its everyday practice, is a certain sneering attitude toward all other forms of inquiry

[2] According to Lacey (2006: 953), «Hart was relatively impervious to historical and sociological criticism, precisely because he saw his project as philosophical and therefore immune to the charge of having ignored issues that seem central to historians and social scientists».

about law, including other interdisciplinary approaches. The view is very much that legal philosophy is more philosophy than law, and that only philosophy holds the keys to knowing what law "actually is".

Against this background, Julie Dickson's claim to openness, made in a recent essay, is welcome. For contrary to statements by other legal philosophers, Dickson has said that she considers the words "jurisprudence" and "legal philosophy" synonymous (2015: 214), and that there is no serious basis for distinguishing legal philosophy from broader jurisprudence on the basis of any «alleged disciplinary credentials, and methods of inquiry» (2015: 211). This sentiment is not new. Almost a century ago, Roscoe Pound (1931: 711) wrote that «in the house of jurisprudence there are many mansions. There is more than enough room for all of us and more than enough work». Despite the magnanimous tone of these words, Pound wrote them at the end of a scathing attack on the work of the legal realists. But the attack backfired, because, as Llewellyn (1931) has shown, his critique did not target views actually held by the realists. As I argue in this essay, the new mood of open-mindedness in analytic jurisprudence similarly does not match reality.

Dickson's essay from which I have just quoted, itself provides a good illustration of my point, so it may be appropriate to start with it. In describing her broad-mindedness, Dickson writes (2015: 216): «Many […] morally evaluative methodological stances – such as those pioneered and developed by Ronald Dworkin, John Finnis, Jeremy Waldron, Maris Köpcke Tinturé, Stephen Perry and Nicos Stavropoulos, employ rich, subtle arguments regarding the character of evaluative concepts in general, and the character of the concept of law in particular». Later in her essay Dickson mentions another list of scholars – «HLA Hart, Joseph Raz, Ronald Dworkin, John Finnis, Neil MacCormick and Brian Leiter» (2015: 226). These two lists are revealing. All those in her first list passed through Oxford (or are still there). With the exception of Dworkin (who took the Oxford undergraduate degree in law, and of course was Oxford's professor of jurisprudence for many years) all others have an Oxford DPhil with a focus on legal philosophy. Of those on the second list, all except for Leiter have had a long affiliation with Oxford; Leiter himself has a Ph.D. in philosophy. Apparently, inclusion in the broad church of jurisprudence requires either passing through Oxford or acquiring a Ph.D. in analytic (legal) philosophy, preferably both.

These lists are not a coincidental and they are pertinent to the question whether contemporary legal philosophy is isolationist. Dickson's claim, that she and other legal philosophers adopt a "broad church" approach to jurisprudence, is an empirical one. To see whether it is true, it can and should be tested. In order to do that, I compiled a list of all scholars cited in Dickson's *Evaluation and Legal Theory* (2001), and in her recent essay in which she made this claim. There are twenty-eight different people cited in the book, there are twenty three cited in the article. With regard to each of these names, I examined three questions. First, whether they had an Oxford affiliation at one point of their career either as students or as academics (although not

necessarily at the time of writing the cited piece). Second, I examined who on the list had a Ph.D. with a focus on philosophy. I used this as a proxy for interest in analytic philosophy. This is obviously a highly imprecise proxy, as it excludes various historical figures (such as John Austin, Jeremy Bentham, and even Hart) who were philosophers but lived before doctorates became an academic norm. I nevertheless chose it because it is a fairly easily ascertainable measure. (I was also uncertain about some of the people cited. I counted all of them as a "no"). Finally, I identified all analytic legal philosophers. Obviously, this is a less precise category than the previous ones, but I tried to be fairly restrictive in my classification. (The full lists and my classifications are available upon request). The results are presented in Tables 1 and 2.

Table 1: Citations in Dickson, *Evaluation and Legal Theory* (2001)

	Number of people	*Percentage*
Oxford affiliation	11	41%
Doctorate in philosophy	15	56%
Analytic legal philosophers	23	82%

Table 2: Citations in Dickson, 'Ours Is a Broad Church' (2015)

	Number of people	*Percentage*
Oxford affiliation	14	41%
Doctorate in philosophy	15	56%
Analytic legal philosophers	20	82%

Though revealing in themselves, these figures grossly undercount the Oxford legal philosophy focus in Dickson's work for they count each person cited once, regardless of the number of times he or she is cited. When the number of citations is taken into account (something I did only for the book), Dickson's narrow focus becomes much clearer. The *combined* number of citations of all five non-philosophers cited in her book is eight[3]. This number is significantly lower than the number of citations to Ronald Dworkin (thirty-three times), John Finnis (twenty-nine), H.L.A. Hart (twenty-two), Stephen Perry (sixteen), or Joseph Raz (sixty-one times), far and away the person Dickson cites most. A weighted count of citations in *Evaluation and Legal Theory* shows that more than ninety-eight percent of them are to analytic legal philosophers; and at least seventy-five percent of the citations are to people who have had an Oxford affiliation at some point in their lives.

[3] This includes a sociological text written by two writers and cited twice, which is counted as four citations. If counted only twice, the total number of citation to non-legal philosophers is six.

Two quotes, a book and an article, all from a single author, do not yet prove a point, but they are indicative of an attitude that can hardly be described as intellectually "broad". A wider perspective is provided by examining the jurisprudence syllabus available for Oxford students on the Oxford Law Faculty website. Here, presumably, one finds the works deemed most important for providing a balanced introduction to the entire field.

The syllabus I have, from the year 2015, contains one hundred and fifty three items. It is far more revealing than any single book. Using the same three categories used before, Table 3 collects the findings about the syllabus.

Table 3: Items in the syllabus of Oxford's undergraduate jurisprudence course

	Number of items	*Percentage*
Oxford affiliation	94	61%
Doctorate in philosophy	86	56%
Analytic legal philosophers	124	81%

Again, these figures underrepresent the reality. Once again, I used a Ph.D. in philosophy as a proxy for an in analytic philosophy, despite the fact that it excludes people like Hart and Dworkin, as well as Aquinas, David Hume, Jeremy Bentham, and John Stuart Mill. I was fairly restrictive in my characterization of writers as legal philosophers. It would not be preposterous to think of John Rawls, Robert Nozick, Judith Shklar, or Mill as legal philosophers with respect to some of their writings, but they were all excluded from this category. Even with such a conservative classification, only ten percent of the items were written by someone who does not fall into at least one of the three categories. In this category one finds pieces like Holmes's "Path of the Law" (1897) or Kornhauser's article "The Normativity of Law" (1999), which shows how little even these pieces stray outside the narrow boundaries of analytic legal philosophy[4].

Even within the domain of jurisprudence itself, works perceived to be insufficiently "analytic" are ignored. The legal realists' works – perhaps due to the misrepresentations of their views in Hart's *Concept of Law* (on which see Taylor 1972; Livingstone 1988: 156-66) – are still treated as some curious, and perhaps peculiarly American, phenomenon. While one is supposed to have close familiarity with the

[4] The latter piece is particularly interesting: Kornhauser is a legal economist who wrote important, well-known pieces on the influence of legal rules on private ordering and on decision-making in collegial courts (Mnookin & Kornhauser 1979; Kornhauser & Sager 1986). The latter piece has been widely discussed by philosophers writing on joint agency, but it is the only the work on the normativity of law that fits the narrow confines of analytic jurisprudence (as presently understood) that made the cut.

complete works of Hart and Raz, when it comes to the writings of Karl Llewellyn, Jerome Frank, or Felix Cohen, their ideas, if they are to be considered at all, are read through the eyes of others. It is notable that in the Oxford syllabus the realists' works are *never* read; rather they are filtered through someone else's presentation (someone who presumably puts them in a more respectable "analytic" form). Perhaps because their own works are not read, one still finds serious distortions of their views (Priel 2012a)[5].

The heavy focus on people who have had an affiliation with only one university and on analytic legal philosophy does not fit the claims that analytic jurisprudence (at Oxford) is a "broad church". In any other field that claims to provide knowledge, it would be considered statistically improbable that one university is responsible for more than half of all valuable knowledge. This intellectual isolationism is particularly notable given that it comes from scholars who are most insistent on the universality of the claims of analytic jurisprudence and to intellectual openness. With that, it must be just an odd coincidence that more than half of the ideas worth imparting to students come from scholars who passed through a single university, their own, with the *entire* academic world making up the rest[6].

What these data suggest is that Dickson's church metaphor was apt, although not quite for her reasons. Contemporary analytic jurisprudence is a high church, with Oxford as its Vatican. This church considers only a very narrow set of questions, using a very narrow set of methodologies, with answers coming from a very small band of individuals (who as Gilmore suggested decades ago, mostly passed through Oxford), as the right approach to jurisprudence. In this exclusive high church, different theoretical perspectives and other disciplines other than philosophy do not have much to contribute to, let alone challenge, the fundamental framing of the subject.

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[5] Gardner (2005: 332) provides a useful example. He speaks of Hart's «resistance to the Quinean reduction of the conceptual to the empirical, for which the comically self-styled "realists" of American law schools are the muscular henchmen. (Comical because, in Hart's Aristotelian perspective, American Legal Realism stands to reality much as the German Democratic Republic stands to democracy.)» No-one who has read the work of the best-known realists, Karl Llewellyn or Jerome Frank, would have attributed such views to them. Llewellyn (1950: 8) rejected «the contemporaneous polysyllabic professionalized academic discipline, applied to "law"». Instead, he opted for a «general serviceable life-wisdom about some body of material and its homely but basic meaning for life and for man». Frank (1950: 477-479) wrote enthusiastically about Aristotle, and compared him favorably to the legal pragmatists of his age. Both were also fierce critics of approaches we would today call "naturalistic", at least in the sense of seeing value in the application of natural science methods to law (Priel 2018: 467-468).

[6] It will not do to say, as some have suggested to me, that the over-representation of Oxford academics on the syllabus is due to the fact that it attracts scholars with a particular interest in certain questions which the syllabus there tends to focus on. To say this is to affirm precisely what Dickson has sought to deny, namely that there is a fundamental distinction, and no real connection, between analytic jurisprudence and other interdisciplinary approaches to the study of law.

Importantly, this is not just a claim about Dickson and fellow analytic legal philosophers' professional interests. In an era of specialization one might perhaps be forgiven for limiting one's research to a particular set of questions and methods, but the same cannot be said of a broad survey for students, especially if (to quote Dickson again), there is no basis for drawing meaningful distinctions on the basis of "alleged disciplinary credentials, and methods of inquiry". If the church of jurisprudence at Oxford is broad, why are so many theoretical approaches to law end up on its *Index liborum prohibitum* that its students never get to see?

The inescapable conclusion is that there may be many rooms in the broad church of jurisprudence; and by the looks of it there are doors connecting all of them, except for one. The room dedicated to philosophical jurisprudence is a chamber apart. And it is evidently the most important one, so important that students need hardly even hear about what happens in the others. Within that room, some space is reserved for a few heretical voices, but these voices are different in a very restrictive sense. All of them adhere to the methodology of analytic (legal) philosophy and use philosophical writings as their primary source; and almost all of them have passed through the Oxford crucible. Even these writers, it seems, are allowed in only as part of a moral tale on what happens when one strays from the rightful path[7]. Beyond this, works that do not fit the narrow criteria of analytic legal philosophy are not deemed to have anything valuable to contribute to our understanding of law in general.

3. A Naturalistic Alternative

> It is a capital mistake to theorize before one has data. Insensibly one begins to twist facts to suit theories, instead of theories to suit facts. (Conan Doyle 2014: 105.)

How can this mismatch between a commitment to an approach that eschews disciplinary distinctions be reconciled with the reality just described? Dickson's own essay provides the answer. For in it she defends a view, very dominant among analytic legal philosophers these days, that presupposes a fundamental distinction

[7] This is almost the official role of Dworkin's work at Oxford, where, for daring to question parts of the catechism, the church suggested excommunication. Dickson herself (2001: 22-23) doubted Dworkin's credentials as an analytic philosopher. Gardner (2004: 173) denied him the title of "philosopher", reducing him to the rank of a mere "theoretically ambitious lawyer". Within the church it is hard to imagine a greater slight. (Gardner 2012: 184 tones down the language ever so slightly.) The year 2011, which marked the fiftieth anniversary of the publication of *The Concept of Law* (Hart 1961), was celebrated with a series of lectures on the book (later published in a book), as well as a new edition of Hart's book. The same year was also the twenty-fifth anniversary of *Law's Empire* (Dworkin 1986). That anniversary passed without mention.

between philosophy and other interdisciplinary approaches to the study of law. Dickson calls it a «staged inquiry» approach (Dickson 2015: 229). Dickson is not the first to defend such ideas on the basis of a fundamental distinction between a conceptual inquiry into the nature of law and a sociological (Raz 2009: 44-45, 103–104) or normative (Dickson 2001: 135-136) one.

This view assumes that knowing what "counts as" law has priority over studying it empirically or evaluating law's merits. Though intuitive, this approach suffers from serious problems (Priel 2010; 2019). I begin my response to it by showing how unusual is the idea of staged inquiry, where theory precedes empirical data. I then present a short survey of various interdisciplinary approaches that, despite claims to intellectual inclusiveness, end up being excluded from analytic jurisprudence. While I do not make any claim here to the "right" way of doing naturalistic jurisprudence, I aim to show that the issues and questions asked by these perspectives are often similar to the ones asked by analytic legal philosophers, only that they are addressed in a more empirically-informed way. If taken seriously, these suggestions lead to quite dramatic changes to jurisprudential practice. I follow this with two further suggestions: The first is that legal philosophers should take a greater interest in legal practice; the second is that a naturalistic approach recognizes that scholars themselves are human, not mere conduits of abstract ideas. This means that a naturalistic perspective should look at legal philosophers themselves, their backgrounds and information, as methodologically relevant information to the examination of the validity of their substantive conclusions.

3.1. *Theory after Practice*

In questioning naturalism in jurisprudence, Dickson has argued that the naturalistic stance amounts to abandoning the very possibility of theorizing about an important aspect of human life. In her words (Dickson 2011: 489), naturalism in jurisprudence implies we should

> abandon the idea that [jurisprudence] can ever come to any adequately supported conclusions about what law is actually like. This seems quite a startling conclusion – that theoretical inquiry regarding a familiar social institution having far-reaching effects on the lives of those living under it cannot yield knowledge of that social institution itself.

Two things immediately stand out. The first is the commitment, so fundamental to jurisprudence influenced by Hart, to engaging in the question "what law is actually like" along with the view, repeated no less frequently, that law is a social or cultural practice. Put any social or cultural practice (examples: marriage, courtesy, football) in the quoted passage and it will be immediately apparent just how odd

this juxtaposition is (Priel 2019, 2020): Not many subscribe today to the view that there is something that marriage is *actually* like; and yet it is assumed without argument that law is different. The second point is that even if there is an answer to this question, it is assumed but never explained why that it is the job of philosophers to find the answer to it with respect to law, but not any other practice.

Again, consider this question: Is there a way of identifying a single "concept" of what marriage is from the compound of different, and often conflicting attitudes to marriage. In addition to popular attitudes, there are sometimes also definitions adopted by some political body entrusted (by whom?) with determining the boundaries of the category. Thus, in the case of the marriage, there are legal definitions, although those differ among jurisdictions and are not always accepted by those subject to the law. Even if one were to try to distill a single concept out of all this, the division of labor between the philosopher and the sociologist would *not* be that the philosopher discovers that pre-sociological nature and the sociologist finds the different attitudes people have with respect to this category. Nor is it going to be to that the sociologist gathers the data and the philosopher then "theorizes" it. If there is a philosophical puzzle here it is whether, and if so how, one can speak of a single concept when all we have are different, possibly conflicting, attitudes of different people. This question too is unlikely going to be answered without empirical input.

Much of the "what law actually is" enterprise rejects this view. The dominant view insists that the answer to this question does not depend on people's views on the matter, but on a priori philosophy (Green 2012, 2016; Marmor 2013: 213; *cf.* Endicott 1997). Dickson's staged inquiry is an affirmation of this, as is her astonishing suggestion in the words quoted in the beginning of this section that naturalistic philosophy undermines the very possibility of theorizing about law. Implicit in this claim is the dismissal of one of the most familiar methods of theorizing phenomena in the world (of which, presumably, law is one), namely by empirically investigating them and generating a theory from the data.

Here is one concrete example. Neuroscientist V.S. Ramachandran was intrigued by the phenomenon of synesthesia. By his own description, he began with an interest in «show[ing] that synesthesia is real», by describing more precisely the ways in which it was manifested in different people. Only then, and on the basis of these empirical findings, he was hoping «to propose a theory of exactly what is going on in [synesthetes'] brain» (2011: 76). He also thought that "as an additional bonus" he could use his ideas to explain the problem of qualia, the subjective feel that conscious experience has (the redness feel of a red shirt, the sweet feel of sugar). Ramachandran thus suggested that even this longstanding philosophical puzzle, the so-called "hard problem" of consciousness, was to be tackled not by a priori reflection, but by theorizing on the basis of empirical data. As he further explained, «[t]his is the way science works: Begin with simple, clearly formulated, tractable questions that can paved the way for eventually answering the Big Questions, such

as "What are qualia", "What is the self", and even "What is consciousness?"» (2011: 115; Ramachandran & Hubbard 2006).

The attitude reflected by this dominant attitude in jurisprudence is not just that it assumes that "theorizing" law is fundamentally different from theorizing other empirical phenomena in the world. It is also how isolated legal philosophy is from very dominant views in the discipline under whose banner legal philosophers claim to march. If, for example, philosophers of mind had taken the same stance as the dominant view to jurisprudence, they would have called for a "staged inquiry" on a whole range of concepts and problems, insisting that they must first determine what mind, consciousness, or memory are, handing over their conclusions to scientists to work with. If the staged-inquiry view implies the rejection of naturalistic jurisprudence, we have to conclude that the scientific (naturalistic) study of the mind, which seems to flourish without waiting for philosophers telling us first what a mind actually is, implies a denial of the very possibility of theorizing about the mind. While views such as this have not completely disappeared (e.g., Hacker 2015, coincidentally or not, based in Oxford, and one of Hart's former students), it is very much the minority in the field. Many works in philosophy of mind these days *build on* works in evolutionary biology, cognitive psychology, developmental psychology, neuroscience, computer science, and more. If a naturalistic approach to the study of the mind does not undermine the possibility of theorizing, one is entitled to ask why Dickson thinks that law is different.

The same is true of examples closer to the study of law. Economic depressions are a social construction, and the same methods used to study and theorize about them, as well as their potential social effects (e.g., on crime, or for the rise of extreme political parties), can be used for theorizing law. Philosophers, including philosophers of economics, do not consider the question what a recession "actually is," or whether a recession and economic depression belong to different ontological categories. That they do not do so does not mean that theorizing these phenomena is impossible. That they do so on the basis of a naturalistic approach does not require them to doubt that the economy is a "social institution having far-reaching effects on the lives of those living under it".

If there is a difference between the study of synesthesia and economic depressions it is that the latter are probably more multifaceted and complex, which is why if one were trying to study what "recessions actually are like", in all likelihood they would encounter the question "what do you mean by this?" (*cf.* Howarth 2000). One can plausibly say that a recession "actually is" many things, not just because there are different kinds of recession, but because it is plausible to disagree about what a recession "actually is about." A microeconomist, a macroeconomist, a political scientist, and a sociologist may have different answers to this question. None of them, however, turn to philosophers to theorize the topic for them first.

Perhaps law *is* different, but this view is not without its costs (Priel 2019), be-

cause it implies that law is a kind of sui generis phenomenon that is hard reconcile with the idea that law is just another "social institution". My methodological point is that because of the isolationist attitude in jurisprudence, there is no recognition of the existence of robust challenges to them outside the narrow confines of analytic jurisprudence. While it is possible that legal philosophers are right and everyone else is wrong, greater openness and awareness even just to other areas of philosophy, would have made it apparent that there are challenges to the staged-inquiry view that need to be answered.

3.2. *Taking Real Interest in Empirical Work on Law*

The naturalistic approach, as conceived of here, assumes there is no good answer to these challenges. It therefore rejects the staged-inquiry approach. This implies that legal philosophers cannot simply say, "ours is one approach among many, albeit one that by its nature need not take much interest in other perspectives". The challenge to this view is precisely that for work in analytic jurisprudence to have any value it must *incorporate* these other perspectives. The aim of this section is to illustrate this claim by showing several ways by which answers to jurisprudential questions could be enriched by engagement with other disciplines.

That such a change is necessary may be bolstered by the fact that any fair-minded assessment of developments in legal theory (broadly conceived) in the last few decades will conclude that contributions by analytic legal philosophers have not been the most notable. Rather, there is a perception, shared by legal philosophers themselves, that their subject now has a «navel-gazing tendency» (Dickson 2004: 117) to engage in «hair-splitting arguments» (Marmor 2011: 95). Opening up to other perspectives may be a way of moving forward.

Economics. Like it or not, economic analysis of law has been the most influential, and arguably the most innovative, *jurisprudential* development of the last fifty years in the English-speaking world. That economics is not classified as part of philosophy (and by implication not part of jurisprudence) is simply the result of academic disciplinary divisions, not of subject matter. Much of economics is an elaboration of a particular moral and political theories. This is why Adam Smith and Jeremy Bentham, who worked before the disciplinary split, are treated as significant figures in both areas. It is true that disciplinary splits often lead to substantive and methodological differences that make cross-disciplinary conversation difficult. But the fact that economics is now treated as a separate subject from moral and political philosophy does not alter the fact that its fundamental questions are the same as those of moral and political philosophers. The point of all this is to say that if moral and political philosophy are deemed relevant for jurisprudence, there is no basis for treating economics differently.

Interestingly, the origins of law and economics are quite old and in part can be

traced to Jeremy Bentham (Posner 1998). Mentioning Bentham in this context is valuable because the way his ideas have been used in contemporary analytic jurisprudence is a good illustration of the narrowness of its focus. Bentham is hailed as a seminal figure in legal philosophy, and yet of his enormous corpus only a tiny fraction, quite literally a few pages that supposedly show him to be a legal positivist[8], is deemed worthy of attention. Everything else Bentham wrote about law, staggering in both quantity and range, but which does not fit jurisprudence properly so called, is ignored.

Returning to our times, economic analysis of law has had considerable influence on academic thinking about law, and yet it has no trace in Dickson's writings (or, for that matter, in the Oxford jurisprudence syllabus). To be sure, the impact of economics on law has been particularly dominant in the United States, but it is now spreading to other countries. It is also undergoing modifications, with a much greater emphasis, like in economics more generally, on empirical studies. In any event, to say that there is no point in discussing these ideas in a university in the UK, because these ideas have not had much impact there, is inevitably to concede that jurisprudential ideas are local. So it must be something else.

The foundations of economics, and economic analysis of law, are broadly consequentialist. In today's divide in the legal academy a "philosophical" approach is almost invariably non-consequentialist and thus placed in opposition to economic approaches. But despite repeated denunciations, consequentialism and utilitarianism remain live philosophical options, and their defenders have written about their relevance to the public domain, even if they should not be considered the basis for interpersonal morality (Kaplow 2007; Goodin 1995). The same is also true of cognate approaches like game theory, rational choice, evolutionary models of social action, and others. These ideas may be relevant to discussions of authority, normativity, legal change, and others. When considering these approaches and perspectives, contemporary analytic legal philosophy once again stands out in comparison to other areas of philosophy, and not in a good way. The same isolationist attitude of legal philosophers one sees in relation to "legal theory" (broadly conceived) is repeated in relation to ideas that figure prominently in contemporary analytic *political* philosophy.

Law and Politics. The twentieth century has seen a significant expansion of the role of the state, and a corresponding expansion in public law. The latter now far surpasses private law in volume and significance. The use of law in this way has eroded the boundaries between law and politics. You will not know this from reading the writings of analytic legal philosophers, either when writing on law in general or when writing on substantive areas of law. There, it is still contract, tort, prop-

[8] Even that tiny bit is based, as Schofield (2003; 2010) has shown, on a misreading of Bentham's work.

erty, and criminal law that more-or-less make up the whole of the law, reflecting (roughly) the state of the law around the middle of the eighteenth century[9]. An aspect of this is the focus on the relationship between law and morality, a relationship that superficially fits better these areas of law, and the almost complete neglect of the vast literature discussing the relationship between law and politics.

To give just one example of its potential relevance to core jurisprudential questions, the literature on law and politics strongly suggests that Hart's account of adjudication in terms of linguistic core and penumbra, with the core dominated exclusively by linguistic meaning, is a poor fit to reality. Hart himself (1983: 5-6, 7-8) acknowledged as much. And yet Hart's views are still taught, and even in broad terms defended (Marmor 2011: ch. 6), without any serious acknowledgement of the impact of politics. Beyond the fact that it is attention to the connection between law and politics that (in different ways, in different places) affects legal interpretation, it also undermines the search for the boundaries of law. Concern with this question is sometimes justified for its potential practical relevance (Green 1994: 208; Shapiro 2011: 25). But this idea loses all its force if the different ways law and politics interact in different jurisdictions (as they arguably do: Priel 2013a) imply that the boundaries of law are similarly different for different jurisdictions.

Another missing area is *comparative law*, or at least *comparative jurisprudence*. The assumption is that law is, for all its apparent differences, a unitary phenomenon, that it has *a* (singular) nature that legal philosophers are trying to explicate. It is assumed that deep down all law has a single nature to be captured by a single account (law as a union of primary and secondary rules, law as a plan). This assumption, which in most work in analytic jurisprudence is simply taken for granted, has been challenged by legal theorists who have engaged in comparative work (Atiyah & Summers 1987: 411-420; Ewald 1998; Priel 2013a, 2017). This point is particularly relevant to discussions within comparative-law literature about the significance of legal culture. It is remarkable that legal philosophers these days insist that «law is a cultural product *par excellence*» (Marmor 2005: 78), that it is a «social construction» (Green 2012b), and yet have nothing to say about this cultural aspect. Consider just how odd it would be to have an account of fashion that insisted that fashion was a social construction and a cultural product but then had nothing to say about the influence of culture on it, but obsessed over the question of boundary ("is street fashion *really* fashion?") and insisted that such questions had a definite, a priori answer. Once again, if we acknowledge the possibility that certain things would "count as" fashion in certain times and places but not in others, an argument is needed

[9] Criminal law is the most obviously public of these "common-law" areas of law. Yet even here, the state has been conspicuously absent in legal philosophers' writings, who treat the subject as applied interpersonal morality. For evidence and critique of this approach see Thorburn (2011) and Chiao (2018).

to explain why the same is not true of other cultural products. At a minimum, the claim that there is no real divide between legal philosophy and other approaches is hard to square with the lack of interest in the cultural aspects of law, which would be revealed by the work of comparative lawyers and historians, not philosophers.

Ignoring these contingent cultural aspects of law also leads to ignoring certain "philosophical" questions. Even assuming that deep down all law has one nature, what role does culture play in it? Indeed, *if* law has one nature, how do its cultural (contingent, local) aspects interact with its universal aspect? Is the universality of the nature of law just a fact, maybe a coincidence? Or is there something deeper about law that guarantees that it will have but a single nature? If such a thing exists, would not *that* feature be an obvious subject of study? If there is no such thing, what is the basis for the assumption that law has a single nature? All these questions are potentially challenging to the whole field of analytic jurisprudence as currently understood. By defining comparative law out of bounds, they can be ignored.

A close subject which by and large is completely absent from analytic jurisprudence is *legal history*, despite its potential for showing how different is the contemporary understanding of law from what it used to be in the past. Similarly, the history of jurisprudence is ignored, despite its relevance for contemporary jurisprudential debates (Barzun & Priel 2015; Postema 2015: 884-893). Legal history, like comparative law, provides a host of examples of law, in ways that can challenge all kinds of universalist claims about law, and cast doubt on the search for a timeless nature of law (Tamanaha 2017). Greater attention to the history of jurisprudence also weakens the image, still popular (e.g., Duarte d'Almeida 2015: 707; although see Priel 2020), of legal philosophy as a kind of progressive science.

In this sense legal history is a source of factual information, more data to help construct better theories of law. But attention to history is not limited to factual information or to the critique of universalistic claims. Time and history are significant for theoretical analyses of law. This may seem surprising, because history and naturalistic jurisprudence may not look like obvious allies. Philosophical naturalism often seeks to model itself on scientific methodology, which is generally impervious to history, including its own (Priel 2012b: 279). But much of science, including some of the natural sciences, is thoroughly embedded in time. Perhaps the most obvious example is biology. As Dobzhansky (1973) put it, in what has since become something of a slogan among evolutionary biologists, «nothing in biology makes sense except in the light of evolution». Even if not taken literally, it captures an important truth. One sentence in Dobzhansky's essay is especially pertinent to the present discussion: «Without [the] light [of evolution, biology] becomes a pile of sundry facts – some of them interesting or curious but making no meaningful picture as a whole» (1973: 129). This remark is significant, because it provides a fundamental challenge to the dominant (anti-naturalistic) view of jurisprudence that assumes that without

identifying a timeless nature we can make no sense of the law[10]. Evolutionary theory shows that the essentialist a priori approach is not the only way of generating order. Another way of doing so is by investigating the history of phenomena.

One may think that these ideas are not easily transferable to human affairs and that they are not particularly related to legal history. But evolutionary ideas have been used in this context as well. There is work in economics and political science that shows the importance of path dependence to the shape of many aspects of our life take, including – of greatest relevance to jurisprudence – to social, political, and legal institutions (e.g., Pierson 2004; Gillette 2000). This work often blends theoretical models with historical narrative.

To give just one example that is particularly relevant to jurisprudence, consider the question of law's authority. This question is one of the holy grails of jurisprudence, and in line with the essentialist ideology of analytic jurisprudence it is usually assumed that there is just one correct answer to it. But just as natural history shows that some organs (most famously, vision organs) have evolved independently more than once, and that these different organs reflect different solutions to the same problem, it is possible that law and legal authority evolved more than once on the basis of different ideas of authority (Priel 2020).

History is also important to the way we classify things, especially artifacts (Bloom 1996). Given current jurisprudential obsession with classification and concepts, it is again a mark of the isolationist attitude in jurisprudence that its practitioners have largely ignored psychologists' work on concepts. To see the potential relevance of such work, consider the question that troubled some legal philosophers interested in discovering the "nature" of law. After concluding their accounts, theorists offering more "positivistic" answers have discovered that their accounts are over-inclusive, in that they have a hard time distinguishing "real" law from other institutional sets of rules, such as rules of clubs, religious organizations, or education institutions. Some (e.g, Raz 1990: 150-54; Shapiro 2011: 218-24) have attempted to add further limiting conditions to their account to distinguish the genuine article from the fakes. These solutions are invariably ad hoc, and easily challenged with counterexamples. The reason they are sought is because in the essentialist view it is assumed that there must be some *real* difference between the two, one that explains why we call one set of institutional rules "law" but not others. An empirically informed view of concepts, one that recognizes that concepts and classifications are often a matter of history rather than a different nature, would show this enterprise of distinguishing law from these other categories as not just pointless, but probably

[10] It is the view captured in Dickson's words mentioned above about the contradiction between naturalism and theorizing about law. It is the view also reflected in Gardner's (2012: 279) remark that «[i]f law is not a valid classification, then nor is Cheyenne law, international law, Scots law, shari'a law, or Roman law».

misconceived. A linguistic category may exist due to an accident of history, or perhaps one that serves certain practical purposes, even if it does not correspond to any "real" categorical distinction. Why do classify the rules issued by a state as *laws* but do not normally include the rules of a university within this category? Convenience, accidents of history, and linguistic path dependence, are a perfectly good answers.

This work on the historical aspect of concepts and categorical classification is a good lead to a more general discussion of *psychology*, perhaps the most obvious area of potential interest for legal philosophers (*cf.* Priel 2011). Following Hart, it is now standard practice to say that legal philosophy must analyze legal practice from the "internal point of view". What Hart meant by this is not entirely clear, because he used the term in somewhat different senses. One of them was his insistence that attitudes are essential for an adequate explanation of human action, and that an account of norm-governed behavior that limited itself to observed behavior will not do.

This idea, although sometimes treated as a major contribution, is just an application of very familiar ideas from other branches of the philosophy (especially the philosophy of social explanation and history). These ideas were quite familiar by the time Hart invoked them (as shown in Priel 2020). Sixty years on, this attitude is still very much with us. Marmor (2013: 227) wrote that «[i]t is difficult, if not impossible, to explain anything in the social realm without invoking people's beliefs (and attitudes shaped by those beliefs, etc.)». This statement is quite clearly false[11], but if one really accepts it, it seems odd not to take any interest in the field dedicated to the study of beliefs.

If there is resistance to turning to psychology, it may be because Hart used the internal point of view in another sense. As Hart later acknowledged, he was alluding here to a hermeneutic approach to the explanation of action, one that historically has been hostile to the application of scientific methods to the study of human affairs.

This attitude was very deeply ingrained at Oxford of Hart's days (on skepticism in Oxford toward psychology see Collins 2012: 203; toward sociology see Halsley 2004: 102; toward political science see Hayward 1991: 93-95). Given the state of the social sciences in the 1950s, such views might have been defensible then. Specifically with respect to psychology, still in the throes of behaviorism, Hart and his contemporaries' skepticism is understandable.

What is now known as "the cognitive revolution" was premised on the idea that people's cognition is not a black box, and that mental processes that can be the subject of scientific study. Starting in the late 1950s, its impact on psychology has been

[11] Large chunks of economics and sociology are premised on the idea that one can explain quite a lot about the "social realm" without invoking people's beliefs. Here is one example, out of hundreds: crime tends to increase with inequality.

profound, and it has also deeply influenced the philosophy of mind as well. These new ideas then migrated to other social sciences, eventually making it to legal scholarship as well. But not to legal philosophy, which still largely operates with a model for the explanation of action based on reasons for action as a rational response to what one finds in the world. Much of the best-known work in cognitive psychology in the last half-century has been dedicated to showing that human action is often driven by unconscious motivations that are sometimes not fully apparent to the humans they motivate. Specifically, people may consciously think they are acting for certain reasons, when they in fact may be acting for others (Wilson 2002; Eagleman 2011).

It is interesting to compare the reaction of economists and legal philosophers to the potential challenge that these and other psychological insights have brought to their methodological assumptions. Economists too used an empirically false account of human action. When psychologists began challenging it, there was initially considerable resistance to implementing their ideas into economic models. With time, however, "behavioral" ideas became part of mainstream economics. (Economic analysis of law incorporated many of these behavioral insights as well.) By contrast, legal philosophers have barely acknowledged the existence of this literature or addressed its potential challenges to the underlying model of human behavior found in much jurisprudential work. Despite legal philosophers' commitment to the importance of the internal point of view, when reading contemporary works in analytic jurisprudence, it is as if the cognitive revolution never happened[12].

One way in which these studies may be relevant to legal philosophers is in explaining the role of law in practical reasoning. Within jurisprudence, the question is analyzed in terms of legal rules as reasons for action. As such, legal rules are said to be weighed against, exclude, or amplify other reasons. But if these possibilities rest on an implausible account of human psychology, they may not adequately explain the ways law influences human action. For example, in an attempt to provide an account of adjudication, Raz conceded (2009: 181) that his account was based on the «accepted theory of the practice rather than the practice itself». While analyzing the theory of the practice is a valuable subject of study, it has obvious limitations. As Raz himself noted, to see whether the account he offered actually matched reality would require an empirical study «going well beyond the examination of the law reports». But such empirically-informed work is not a different topic, one that could be easily separated from an empirical "sociological" study, because what the theory of the practice is, is itself an empirical question, influenced by the practice itself.

[12] Mikhail (2007: 750–5) criticized Hart for ignoring these developments when they were beginning to take shape in the 1960s. What are we to say about the fact that they are ignored more than half a century later?

3.3. Taking Real Interest in the Practice

So far I have suggested that legal philosophers should look beyond philosophy books for insights on law. Now I make a more radical suggestion: that legal philosophers should look more seriously at legal practice. Ironically, legal philosophers could learn *that* by greater awareness of the work of other philosophers. To anyone who turns to the work of philosophers of science after reading legal philosophy, one of the immediately noticeable differences is just how deeply engaged these philosophers are in the scientific questions they discuss. To be a philosopher of science today does not mean abstract ruminations on "what is science?", but requires being able to understand the actual questions and debates that scientists engage in. In the works of philosophers of science, it is not uncommon to find detailed descriptions of experiments, mathematical or chemical formulas, verbal descriptions or visual depictions of scientific models. Close engagement with the subject does not make one a philosophical sell-out (or, at best, a theoretically ambitious scientist), but marks one as a serious scholar.

The jurisprudential equivalent of this would be detailed engagement with the way lawyers construct their arguments or the ways they organize their subject-matter. Of course, works of this sort exist: MacCormick's *Legal Reasoning and Legal Theory* (1978) is a well-known example, but one also notable for not having a significant follow-up. On the contrary, later writers have seemingly repudiated its premise that legal philosophy has much to say on these questions. For if MacCormick has sought to show the connection between jurisprudence and legal practice, the new message is that this is not really philosophy. I mentioned already the chastisement directed at Dworkin for daring to engage with legal practice. As a result, one of the aspects of law that possibly makes it unique in comparison to other social practices, and as such presumably precisely the aspect of law that should be of most interest for legal philosophers, is largely ignored.

One possible reason why this topic has been sidelined is because it is quite evident that modes of argumentation differ from one legal system to another, and as such do not fit the stricture of limiting legal philosophy to the essential and universal. MacCormick was indeed careful to dispel any perception that he discovered «necessary truths about legal reasoning everywhere» (1978: 8). By today's restrictive standards, that would render his study out of bounds. Again, the comparison with philosophy of science is revealing. A lot of work by philosophers of science focuses on the differences in modes of reasoning, methods of investigation, and practices among the different sciences. Models of science that work well for theoretical physics may not necessarily be equally successful for accounting for organic chemistry, and those may be different from what one finds in population biology or macroeconomics. By the same token, not everything about the methods of legal analysis that

explains German law well may be true of English law. Perhaps more intriguingly, not everything true of English law may be true of American law (*cf.* Priel 2017). This does not mean this work should not be of interest to legal philosophers.

3.4. *Legal Philosophers Are Part of the Inquiry*

Following the discovery that science is done by humans and not by truths-generating machines, some philosophers of science have argued that this fact may have some relevance to the core questions of philosophy of science (e.g., Hull 1988)[13]. If scientists are a proper subject of sociological study, and if the actual process of scientific discovery of interest to philosophers of science, then, once again, why are legal scholars or even legal philosophers any different? The kind of problem that a sociological study of science is concerned with is very similar to the one that potentially afflicts legal philosophy. The problem, in brief, is explaining how humans with all their foibles, biases, and limitations, can reach objectively true answers. This is not just a sociological question, but a philosophical one as well.

As mentioned, legal philosophers similarly seek to discover «what law is actually like» (Dickson 2011: 489), or what «counts as» law (Green 2016: 179). And they insist that they are after truths, even timeless truths, about these matters (Marmor 2011: 118). Given these aspirations, similar to those of many scientists, it is fair to ask whether they have reliable methods for doing that. One reason for doubts appears in John Stuart Mill's description of an aspect of the work of Bentham. According to Mill (1969: 102, referring to Bentham 1988: 28) lawyers treat concepts like private property or felony, «words without a vestige of meaning when detached from the history of English institutions», words whose meanings are «mere tide-marks to point out the line which the sea and the shore, in their secular struggles, had adjusted as their mutual boundary» as reflecting «distinctions inherent in the nature of things». In less colorful terms, the charge is that lawyers confuse the familiar with the essential. Precisely because the discovery of essential truths and universal boundaries is the proclaimed aim of legal philosophy, its practitioners face the same problem.

The remarkable achievements of science at increasing our knowledge of the world are the result of the incorporation and refinement over the centuries of certain methods designed to guarantee the reliability of its results, as well as an attitude of doubt toward the familiar, commonsensical, and even the (seemingly) self-evident. There is plenty of evidence that these methods are not infallible, but they have an impressive track record. Jurisprudence cannot claim for itself a sim-

[13] The sociological study of science has been subjected to some very well deserved scorn. But recognizing that scientists are human is potentially highly relevant for the study of scientific method. Kitcher (1998) offers a balanced view from a naturalistic perspective.

ilar record, in part because it is based on accepting the familiar. All we have are repeated assurances that legal philosophers are not studying local, shifting words meanings but are looking for (and somehow finding) what law actually is, the real category. For reasons offered elsewhere, I doubt that what they claim to be finding even exists; but assuming it does, it is necessary to ask for the basis for philosophers' confidence that their methods give them access to these real categories. Because a naturalistic approach to jurisprudence does not think of (legal) philosophers as disembodied minds, but as situated humans, it notes that the problem Bentham and Mill attributed to lawyers potentially afflicts legal philosophers as well. The less one knows about law in the past or in different jurisdictions, the easier it is to think of familiar features of contemporary Western law as «self-evident truisms» (Shapiro 2011: 15-16; but see Tamanaha 2011).

There is thus no reason to question the value of this "sociological" study of legal philosophy, as it is relevant to familiar methodological and epistemological problems. The methodological problem of discovering jurisprudential truths makes it an obvious subject for a naturalistic study of jurisprudence, just as analogous studies have proven valuable for a naturalistic philosophy of science. And the comparison to science poses a serious, potentially devastating, challenge to the entire enterprise of identifying what "counts as" law, *even if such a question has an answer*. To put it simply, legal philosophers have not shown that they have any reliable means for performing this task. Even worse, it is rarely even acknowledged that there might be a problem.

It is true, as Coleman (2002: 350) has said, that the «track record» of the social sciences is weaker than that of the natural sciences, but it is not clear why (as he also argued) this weakens the case for naturalizing jurisprudence in comparison with other areas of philosophy. If this is meant to suggest that the sociological study of law struggles with the same problems of attaining truths, this is true. However, the right comparison is not between the natural sciences and the social sciences, but between the social sciences and analytic jurisprudence. And by that measure, the track record of legal philosophy in answering the question "what is X?" is worse[14].

Given the diversity of legal phenomena and the potentially different attitudes toward it that people of different backgrounds may have (attitudes that may be constitutive of what law is for anyone who thinks that the "internal point of view" matters), the question of the diversity of those who largely rely on introspection for discovering timeless truths about law is clearly pertinent. Here is Dickson's (2011:

[14] Coleman (2002: 350) also conflates naturalism with the idea that a reductive (fine-grained, individualistic) micro-explanation is superior to a more holistic (coarse-grained, social) macro-explanation. But the two are not the same. Many naturalistic philosophers defended the value of macro-explanation (e.g., Jackson & Pettit 1990).

491) response to the charge that Oxford legal philosophers are not a representative sample of society:

> [S]urely this cannot be a contemporary cause of Oxford legal philosophers' intuitions being so allegedly unrepresentative and unreliable? Speaking anecdotally, and based admittedly on only those facts I am aware of regarding colleagues and friends, I detect more variety than homogeneity in the respective social backgrounds of my Oxford legal philosophical colleagues[15].

If the search for what "law actually is" is the search for something that is independent of culture and society, then presumably the diversity of Oxford legal philosophers would not matter. Every human, regardless of his or her background will learn the way of accessing categorical reality after a few years of training at the right university. If, however, law, like all other social practices, is a cultural product, then the scholar should be on alert for the possibility that her perspective may be limited and unrepresentative. Dickson's remarks suggest she thinks that lack of diversity in perspective can lead to an inaccurate theory of law. Her response is not that such concerns are irrelevant, but that the diversity among Oxford legal philosophers is sufficient to address the concern. That, however, is an empirical claim. How plausible is it? A recent article suggested that many of the findings of experimental psychology are suspect if they are thought to tell us about human nature, because they are based on studies conducted on people who are "WEIRD": Western, Educated, Industrialized, Rich, and Democratic (Henrich et al. 2010; also Arnett 2008; of particular relevance for philosophers are Stich 2010). The same point, only much more so, applies to Dickson's response. How many of the Oxford legal philosophers grew up in a developing country? How many grew up in a non-democratic regime? How many of them grew up poor? How many of them have a criminal record? How many spent time in prison? How many of them are high school dropouts? (Probably none.) How many have a university degree? (Undoubtedly all.) What percentage of them are Muslim? What percentage are Chinese or Indian (together more than a third of the world's population)? Are half of them women? How many of them are conservatives? Do the percentages of all those reflective of the general population in Britain? In the world? Even more narrowly, how many of them practiced law? How many have a civil law background?

No general survey of the matter has been conducted, but we do have some empirical data that can help us examine Dickson's hypothesis, and it yields some troubling findings. For we may think of the *scholarship* of legal philosophers as an

[15] Dennett (2013: 53-54) warned against the use of the "surely" as a rhetorical device that hides the absence of an argument in support of a questionable assertion. This passage is no exception. (Hart, incidentally, was a notorious abuser of this adverb-as-argument technique.)

anecdotal survey on views about the nature of law, and though a tiny and highly unrepresentative sample of the population, its findings are revealing. However unrepresentative are legal philosophers of the general population, the scholarship of legal philosophers, even just at Oxford, shows considerable divergence of views on the nature of law even among this small group. The tiny sample of legal philosophers also suggests that the distribution of views on legal philosophy is not entirely random. For example, there seems to be a correlation between one's degree of religiosity and one's acceptance of some version of natural law theory. (I fully acknowledge that this is an empirical speculation based on very anecdotal data which may turn out to be false.) If this is correlation is indeed true, what can explain it? That a legal theorist's personal beliefs on matters that are separate from law affect his or her views about the nature of law has potentially very serious implications on the reliability of any claims to jurisprudential truth made by a legal philosopher.

It seems that the only alternative explanation on offer is that divergent views about law among legal philosophers is due to the fact that some understandings of law are «confused, mistaken, insufficiently focussed or vague» (Dickson 2011: 494). Dickson used these words when referring to lay people who may use the law but fail to have a clear understanding of what it is they are using. But given the deep disagreements among, say, Raz, Finnis, and Dworkin about "what law is", and as no other explanation for these long, persistent disagreements is on offer, we must conclude that the same must be true for at least two of them. And these are just the differences among three Oxford-based legal philosophers. Such problems are everywhere. In the standard story that considers jurisprudence as concerned with timeless truths it is just a wild coincidence that ideas we now identify as "positivist" began to emerge in Europe around the time as the emergence of the modern state; it is equally just a coincidence that Kelsen's ideas remain far more widely discussed in civil-law jurisdictions than in common-law jurisdictions.

These examples cast doubt on philosophical method as a reliable means for discovering timeless truths. A naturalistic approach to jurisprudence considers them as not merely "external" questions about the sociology of jurisprudence, possibly interesting in a gossipy kind of way but out of bounds when it comes to the pure science of jurisprudence. It sees them as serious puzzles, and potential challenges, to the current orientation of the subject.

3.5. With New Approaches Come New Problems

> The sort of people who believe that the important thing is to police the boundaries of law – who think it rewarding to ask whether the "law" applied at the Nuremberg trials of the Nazi war criminals was "really" law […] will come to seem as irrelevant to the theory and practice of law as the lesser medieval canonists whom they resemble. (Posner 1995: 79-80.)

Indeed. The question, then, for legal philosophy is whether it is doomed to irrelevance by continuing to deal with such pointless questions. My suggestion, here and elsewhere, has been that the way to avoid them is by opening up to new ideas. In this essay, I hope to have shown, at a minimum, that the disconnect between much of contemporary legal philosophy and other approaches to the study of law is real. It is a different question whether the isolationist attitude can be defended. I have attempted to show how work from other disciplines is relevant, and often challenging, to jurisprudential works of a more consciously philosophical outlook.

The alternative broached here is not without its own methodological difficulties. I will mention two. The first is the "jurisprudential bazaar" problem, namely the danger that without some kind of order, jurisprudence will end up as nothing more than a huge pile of facts about law (on this problem see Priel 2013b). The second problem is the "what's left?" problem. After legal philosophers have opened up to all other disciplines and incorporated their information and ideas, it may be doubted that there is anything left for them to do. These are not problems I can take up here in any detail. My brief response is that the two problems are related: against the mass of information coming from other disciplines, there is still a job of thinking and showing how it hangs together, and this is the task assigned to general jurisprudence. What exactly this means is something I have attempt to explain elsewhere (Priel unpublished).

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Muddle-headed lawyers? A Few Remarks on Brian Leiter's «Legal Positivism as a Realist Theory of Law»

Luca Malagoli *

Abstract

Commenting and discussing some thesis about American Legal Realism exposed in Brian Leiter's *Legal Positivism as a Realist Theory of Law* (2019), the article focuses on two main topics. First, I will try to highlight some connections of American Legal Realists with the philosophical scene of their time and, secondly, I will analyze (briefly) some aspects of Felix Cohen's functional jurisprudence that are maybe more philosophically interesting than Leiter's reading might induce to think.

Keywords: American Legal Realism. Pragmatism. Functionalism. Felix S. Cohen.

Foreword

Brian Leiter's essay is rich in themes, suggestions and ideas which deserve careful consideration and deep discussion-a task that, surely, can't be appropriately fulfilled in this brief commentary. So, leaving to more extended, detailed and in-depth analysis the central issues raised by the paper, I will focus only on a (relatively) lateral but not less interesting topic: the description of the American Legal Realism[1] proposed by professor Leiter.

More precisely, I will address two topics: 1) the connections of American Legal Realists with the philosophical scene of their time; 2) some aspects of Felix Cohen's functional jurisprudence that are maybe more philosophically interesting and less naïve than Leiter's less sympathetic reading might induce to think.

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[1] Or, less ambitiously, some aspects of the reconstruction proposed by Leiter.

1. *Lawyers Have Been Talking Philosophy.* Exploring the Connections of American Legal Realists with the Philosophical Scene of Their Time

Discussing the differences between American Legal Realism and Scandinavian Legal Realism, professor Leiter affirms that «the major American Realists» (such as Karl Llewellyn, Jerome Frank, Herman Oliphant, Max Radin and others) «were law professors, lawyers and jurists, with no philosophical training and, rather obviously, no aptitude for or interest in philosophical questions[2]». Further in the paper[3], Leiter refers to American Legal Realists as "muddle-headed", alluding presumably to this lack of interest in and aptitude for philosophical questions.

The only exception, Leiter remarks[4], was Felix Cohen, who earned a philosophy PhD that, however, according to Leiter, «served him badly[5]» (a statement on which I will return in a short while).

On the one hand, the observation of professor Leiter is obviously true: there is little doubt that, first and foremost, by training and by professional choice, American legal realists were lawyers and their path, so to speak, was surely the law.

Still, on the other hand, the observation is a bit puzzling. Indeed, a long tradition of studies (from the classic works of Morton G. White[6], Wiener[7] and Patterson[8] to those of Summers[9], Thomas Grey[10], and Susan Haack[11]) insisted, in different measures and different ways, on the importance of the link between pragmatism and the very roots of the American Legal Realism. Indeed, as everybody knows, Holmes (regarded by American Realists as their most relevant antecedent) was a member of the celebrated Metaphysical Club[12], usually considered the birthplace of pragmatism.

But, Holmes aside, even for many of the jurists labelled as "realists" in the proper sense (Llewellyn, Radin, Cohen, etc.), the connection with pragmatism is often highlighted as a matter of course in the literature. A (relevant) case in point is

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2 Leiter 2019: 5.
3 Leiter 2019: 23.
4 Leiter 2019: 5, n. 11.
5 Ibidem.
6 White 1947: 135-139 and, more extensively, White 1949.
7 Wiener 1949: 172-189.
8 Patterson 1953.
9 Summers 1982.
10 Grey 2014: 100-197.
11 Haack 2018.
12 About that membership, however, scholars have different opinions: if White, Wiener, and, more recently, Susan Haack highlighted Holmes' pragmatist side, Postema (Postema 2011: 47, n. 7, expressing skepticism about the "popular attempt" to read Holmes as a pragmatist) tends instead to relativize it. Nuanced are also the considerations of Thayer 1968: 50. A "middle-ground standpoint" can be found in Burrow 1994: 23-25.

the intellectual influence of John Dewey[13], whom, by the way, Fisher, Horwitz and Reed classified among the realists in their famous anthology[14].

Just to quote some of those who defended the thesis of a strong relationship between realism and pragmatism, and, particularly, of John Dewey's momentous influence, Patterson[15], analyzing some of the major antecedents of American Legal Realism (such as the work of Holmes, Pound and Cardozo) claimed that «whether pragmatism influenced these emerging ideas about law more, or less, than it was influenced by them is a question for the biographer or the historian. The cultural matrix was there, and from it came both pragmatism in philosophy and pragmatism in law[16]».

Furthermore, Patterson observed that many of those who took part in «various movements known as legal realism were devote admirers of Dewey: and through their teaching and writing pragmatism has become an important influence in law[17]».

In an analogous (but more radical) way, Summers, precisely for the above-mentioned reasons, proposed to classify Dewey alongside the realists under the general label of "legal instrumentalism[18]", arguing that, although Dewey was the only professional philosopher among them, still his contributions to legal theory were highly influential[19]. A more complex perspective is offered by Twining, who, in his assessment of Dewey's influence on the work of one of the most prominent realists, Karl N. Llewellyn, observed that, for Llewellyn, Dewey was «both the model realist and a symbol of the unfulfilled promise of Legal Realism[20]».

According to Twining, Llewellyn had reservations about several of Dewey's ideas (such as his theory of value and his logic) but highly admired his cast of mind and his method[21], which he aspired to apply to jurisprudence. In order to describe the role that the intellectual figure of Dewey played for Llewellyn, Twining suggests that «rather as Jeremy Bentham aspired to become the Martin Luther of jurisprudence, Karl Llewellyn's private ambition was to be seen as its John Dewey[22]».

Of course, all these accounts can be criticized: for example, Patterson might have overestimated the influence of Dewey, or Summers' proposal can be regarded

13 See, for example, Kalman 1986: 15-16.

14 See Fisher, Horwitz, Reed 1993: 185-194.

15 Patterson 1940. Of the same author, an also useful contribution is Patterson 1953: 537-539 (tracking the origins of legal realism in pragmatism) and Patterson 1953: 486-500 (examining Dewey's thought and evaluating is contribution to legal thinking).

16 Patterson 1940: 176.

17 Patterson 1940: 177. For an example of Dewey's influence on relevant legal scholars of the period, see Kalman 1986: 50 (remarking the relevance of Dewey's influence on Thomas Reed Powell).

18 Summers 1982: 23.

19 Summers 1982: 24.

20 Twining 2002: 131, n.126.

21 Ibidem.

22 Ibidem.

(with at least some good reasons[23]) as partially misleading.

Still, it is difficult to deny that, however debatable, these readings do capture an important element of the intellectual atmosphere in which American Legal Realism arose.

In fact, even Benjamin Nathan Cardozo, who clearly was an attentive and qualified observer of the rising tide of American Legal Realism, noted that one the most significant features of what he called «the ferment of the present-days interest […] in problems of legal philosophy[24]» was the somewhat novel "cross-fertilization" – sometimes difficult, to be sure, but always fruitful– of lawyers and philosophers in dealing with such problems. The distinctive aspect of that "ferment", to Cardozo's eyes, was exactly the fact that «the lawyers […] have been talking philosophy, or what they thought was philosophy; but then on the other hand philosophers have been talking law, or what they thought that it was law[25]». Cardozo quoted Dewey and Morris Cohen as relevant examples of philosophers (among many others, he added) that were giving relevant contributions to legal theory[26].

Of course, Leiter too recognizes[27] a pragmatist feature of legal realism, but only in the sense that what the realists sought to build up was a theory of adjudication that enables lawyers to predict what courts will do. In the paper presented at this seminar, professor Leiter affirms, in the same vein, that American Legal Realists «advanced no theses about the nature of law apart from these practical litigation-oriented concerns[28] […]».

This last sentence leads me to another point that, it seems to me, it is worth of attention.

Surely, it would be quite odd to deny the great attention given by American Legal Realists to the behavior of the courts, but this consideration must not lead to dismiss the broader theoretical ambitions of (at least) some of the major realists.

Of course, I have no space, here, for an extended analysis, but only for some hints.

On the one hand, if we follow Fisher, Horwitz and Reed in their commitment to a «generous definition of realism[29]» and we include Dewey in the group-portrait,

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[23] For example, the label of "legal instrumentalism" seems somewhat too broad, including (diss putably) a jurist like John Chipman Gray, whose work (despite his friendship with Holmes and James: see Wiener 1949: 173) seems to have rather tenuous links with the pragmatist tradition.

[24] Cardozo 1932: 8. Cardozo's speech is also historically relevant because it represents his (not so lucky) attempt of mediation in the famous debate among Roscoe Pound and Llewellyn concerning the "realistic jurisprudence". For more details, see Kaufman 2000: 456-458.

[25] Ibidem.

[26] Ibidem.

[27] See Leiter 2007: 52. I have no space, here, to analyze the sophisticated assessment of pragmaa tism that professor Leiter gives in Leiter 2007: 46-52.

[28] Leiter 2019: 5.

[29] Fisher, Horwitz, Reed 1993: xv.

we can notice that he was engaged in other philosophical issues regarding the law other than adjudication an judicial reasoning, such as a deep criticism of the concept of sovereignty[30] (one of the corner-stones of Austinian jurisprudence) or the notions of "force" and "coercion".

More appropriately for the main themes of Leiter's paper Dewey even attempted to analyze the concept of "costume" via key-concepts of his theory of social activity (the concept of "inter-action" and that of "trans-action") and elaborated also elements for a theory of legal sources[31] based on such revised costumes. In this sense, maybe it would be an interesting theoretical experiment trying to imagine a "Deweyan rule of recognition" and how Dewey would have reacted to the Hartian perspective.

On the other hand, even if we adopt a narrower conception of American Legal Realism and we focus only on the authors classically labelled as realists (concentrating, for example, on Llewellyn), Twining highlighted in many occasions that one of the principal concerns of Llewellyn, from the early stage of his work, was to develop a general theory, a picture of law which he referred to as "working Whole View[32]", and a theoretical vocabulary which could bridge the divide between law and other social sciences, especially sociology and anthropology, but also economic and political science[33].

This concern was, according to Twining, one of the major sources of the "law-jobs theory" that Lewellyn developed along his whole career (from a paper of the late Twenties and from his contributions to legal anthropology to his last works) and restated many times[34].

2. *Just a Fashionable Idea?* Some Observations about Felix Cohen's «Preposterous» Functionalism

Finally, to conclude my remarks, I think worthwhile recalling, as I said before, some aspects of Felix Cohen's functional jurisprudence, which, it seems to me, might be a more philosophically interesting, and less naïve intellectual endeavor than Leiter's presentation might induce to think (but, of course, maybe this is only the proof of my own philosophical shortcomings).

As I remembered before, Leiter claims[35] that Cohen arguably adopts an indefen-

30 See Dewey 1894.
31 See Dewey 1941.
32 Twining 2002:158.
33 Ibidem.
34 Twining 2002: 157.
35 See Leiter 2019: 5, n. 11. Leiter refers also to the related discussion in Leiter 2007: 68-73. On that discussion, therefore, I will now concentrate my attention.

sible version of rule-skepticism[36]. But does he? Was really Cohen a naive supporter of conceptual rule-skepticism?

In his catalogue of the faults of Conceptual Rule Skepticism[37], Leiter (following Hart) affirms that, in defining the concept "law" in terms of prediction of "what a court will hold", this perspective leads to a manifestly ridiculous reconstruction of judicial reasoning. For example, according to Conceptual Rule Skepticism, a judge[38] who must decide the question whether a franchisor can terminate a franchisee in Connecticut with less than sixty days' notice, would be engaged in a bizarrely Hamletic monologue: "What do I think I will do[39]?".

But, if we consult Cohen's work[40], we find, in truth, a more complex picture.

Considering, for example, a legal question such as "is there a contract?", Cohen makes clear that, when the realist *lawyer* asks such a question, she is indeed concerned with the actual behavior of courts, and she is trying to evaluate a number of factors in order to predict that behavior, such as ascertaining what courts are likely to pass upon a given transaction and its consequences, the elements in this transaction that will be viewed as relevant and important by these courts, the way in which those courts dealt with similar transactions in the past, the respective weight of the forces that tend to compel judicial conformity to the precedents that appear to be in point and, on the other hand, of the forces that, instead, tend to evoke new judicial treatment for the transaction in question, et cetera.

However, when a *judge* considers the question "is there a contract?", while writing her opinion, Cohen emphasizes[41] that she is not attempting to predict her own behavior: she is, indeed, raising the question of whether liability should be attached to certain acts, or not.

Indeed, according to Cohen, when a judge decides a case, far from being involved in the above mentioned Hamletic and quite absurd monologue, she is concerned with a complex value judgment, assessing and evaluating various elements such as the expectations based upon past decisions, the stability of economical transactions, the maintenance of order and simplicity in the legal system[42]. So, when deciding a case, the judge considers «the social context, the background of the precedent, the practices and expectations, legal and extra-legal, which have grown

[36] «Conceptual Rule-Skepticism is a claim about the nature of law, i.e., that it consists only in what courts say or in predictions of what courts will do». Leiter 2019: 10. At page 11, Cohen is defined as «arguably, a Conceptual Rule-Skeptic».

[37] See Leiter 2007: 69-72.

[38] Leiter 2007: 70.

[39] Leiter 2007: 70.

[40] Cohen 1960: 65.

[41] Cohen 1960: 67.

[42] Ibidem.

up around a given type of transaction[43]».

But, leaving aside his reconstruction of legal reasoning, there are other aspects of Cohen's theses that seem to put in doubt the charge of conceptual legal skepticism. Examining the "definition of law[44]" as "prophecies of what courts will do in fact" delivered by Holmes, Cohen states in clear words[45] that he is not very much interested in verifying if this definition is either true or false. What is relevant, form him, is the *usefulness* of the definition. Cohen's approach, so, seems to be heuristic, rather than descriptive or analytical[46]. Also in other writings, Cohen restated many times that, in his perspective, the value of a theory (not only in law, but also in other fields) consist in its aptness to put useful questions, in order to focus the critical attention upon facts and issues formerly considered unimportant, uninteresting, self-evident or even indecent[47].

So, rather than "disproving" or refuting other theories or advancing a comprehensive, self-sufficient and ultimate "definition" of law, the aim of Cohen's theory seems to be, in a typically realist fashion, to highlight questions and aspects neglected by other theories such as «how do rules of law work? Are certain rules of law, so-called, merely ritual observances which have no verifiable relation to the decisions of judges who recite them? To what extent are laws actually obeyed? […]. What are the social mechanisms and institutions that makes certain rules of law effective and leave others dead letters? When rules of law are obeyed or disobeyed, what conse-

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43 Ibidem.

44 Assuming that it was really meant as a definition: for a discussion concerning various interpree tations of Holmes' *bad man*, see Twining 1973 (especially 279-280).

45 Cohen 1960: 62-63.

46 It may be useful to point out that this kind of approach seems to share many similarities with some considerations of a classical pragmatist such as William James: «What now is a *conception*? It is a *teleological instrument*. It is a partial aspect of a thing which for our purposes we regard as its essential aspect, as the representative of the entire thing. In comparison with this aspect, whatever other properties and qualities the thing may have, are unimportant accidents which we may without blame ignore. But the essence, the ground of conception, varies with the end we have in view. A substance like oil has as many different essences as it has uses to different individuals. One man conceives it as a combustible, another as a lubricator, another as a food; the chemist thinks of it as a hydrocarbon; the furniture-maker as a darkener of wood; the speculator as a commodity whose market price today is this and tomorrow that. The soap-boiler, the physicist, the clothes-scourer severally ascribe to it other essences in relation to their needs.» (James 1879: 318-319). On this topic, see also Thayer 1968: 139, n. 12.

47 Cohen 1960: 77. In order to make his point, Cohen quotes many examples form history of science (such as Galileo's question regarding the speed of falling of bodies, compared to the natural philosophers interest for notions like "the perfect motion"), from history of political philosophy and economics (such as the influence of Marx even on non-socialist historians, that learned from his work to pay attention to elements such as the relationship between events or institutions and the prevalent system of production and distribution at the time and place) and from history of mathematics and logic (the advance achieved by Lobachevski and Riemann, investigating the consequence that follow from geometric assumptions other than those of Euclid).

quences actually follow from such conduct[48]?». To sum it up, the point of Cohen's approach seems to be a better and more articulated understanding of law-in-action.

In this perspective, so, judicial decisions can be studied as «a product of social determinants, and an index of social consequences[49]», without attempting to substitute all the different "definitions" that other views, with other aims and moving from different questions[50], can fruitfully develop[51]. Cohen, indeed, far from being a rough reductionist, seems to have a very keen sense of the complexity of the legal phenomena, and, so, his approach is open to the cooperation with other approaches, in order to reach a more comprehensive and synoptic vision of those phenomena[52]. In fact, Cohen remarks that there is a mutual interdependency among his approach and lines of inquiry such as those of analytical and historical jurisprudence[53]: in this sense, apparently there are no reasons for which his approach can't be compatible even with a line of inquiry like that of Hart.

To conclude this short defense of Cohen's philosophical reputation, let me add few words concerning a last (but not least) point-namely, Cohen's functionalism.

In his (quite severe) criticism of Neil Duxbury's *Patterns of American Jurisprudence*, Leiter affirms that, among various «examples of "fashionable" ideas that have swept American legal scholarships[54]» presented by Duxbury without the necessary critical examination, there is also «Felix Cohen's preposterous legal functionalism[55]».

In light of what I said before, it seems to me that the adjective "preposterous" might be a bit too harsh. Moreover, the description of functionalism as «a fashionable idea […]» that a law professor «lifts from some other discipline, applies to law and then pronounces a "theory[56]"» is perhaps somewhat unfair.

Indeed, it is true that Cohen adopted functionalism from debates in other disciplines, especially social sciences and, especially, anthropology. In fact, one of

48 Cohen 1960: 79.

49 Cohen 1960: 70.

50 Taking into consideration just one example, Cohen points out that the questions from which he starts his research are very different from those of which analytical jurisprudence has been concerned (such as: «What is the nature or structure of law?») or from those considered by historical jurisprudence (such as: «How as law developed?»). See Cohen 1960: 79.

51 Cohen 1960: 55.

52 «Legal philosophy is not a bad play in which each actor clears the stage by killing off his predecessors. Rather is legal philosophy, like philosophy generally, a great cooperative exploration of possible perspectives through which life's many-faceted problems can be viewed». Cohen 1960:154. See also this passage: «Obviously, [functionalism] is not the *only* way of gathering useful information, and, obviously, it is largely dependent upon the results of classificatory or taxonomic investigation, genetic or historical research, and analytical inquiries» (Cohen 1960: 55).

53 Cohen 1960: 79.

54 Leiter 2007: 100.

55 Ibidem.

56 Ibidem.

his starting point is the work of the anthropologist Bronislaw Malinowski[57], from whom he quoted a definition of functionalism: «Modern anthropology concentrates, above all, on what is now usually called the function of a custom, belief or institution. By function we mean the part which is played by any one factor of a culture within the general scheme[58]».

But it is also true that, like Llewellyn[59], Cohen seems to have moved a step further Malinowski and the "first-days" functionalism, understanding at least some of the problems that the sociologist Robert K. Merton will brilliantly outline later in his seminal *Manifest and Latent Functions*[60] (1949). For example, Cohen observes[61] that, sometimes, the formula "functional approach" «is used to designate a modern form of animism, according to which every social institution or biological organ has a "purpose" in life, and is to be judged good or bad as it achieves or fails to achieve this "purpose[62]"».

Here, Cohen seems to identify (partially, at least) and criticize some fallacies analogous to those dealt with by Merton[63], such as the postulate of universal functionalism (the idea that all institutions, customs, etcetera must have functions) and the postulate of functional unity of society (i.e. strong integration: the society considered like a biological organism). Hence, his reframing of functionalism[64] avoiding, for example, any direct reference to the "whole society". Besides, Cohen seems to understand that to attribute a "purpose" to an institution or a custom is misleading, because it conflates and confuses subjective "aims, purposes, intentions" with social "consequences". Finally, Cohen seems to detect the ideological commitments that such versions of functionalism can hide.

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57 Who, by the way, was also an influence for Talcott Parsons, one of the fathers of functionalism in sociology. See Stepién 2016: 40.

58 Malinowski (1934), quoted in Cohen 1960: 58, n. 65. In her important work, Laura Kalman (see Kalman 1986: 17) observes that, except for Lewellyn, realist did not find anthropology relevant and Cohen, despite his admiration for functional anthropology, ultimately ignored it. Indeed, he didn't engage in field-study such as that of Llewellyn; however, the work of authors such us Boas, Lowie and, indeed, Malinowski was regarded by him as very relevant. On these aspects of Cohen's thought, see Tuori 2017: 809-810.

59 Hoebel-Llewellyn 1941. See also the interesting considerations proposed by Twining 2002: 192, n. 44.

60 In Merton 1968: 73-138.

61 Cohen 1960: 47.

62 Ibidem.

63 Twining 2002: 192, n. 50.

64 See Cohen 1960: 80. Considered as a philosophy «functionalism may be defined as the view that a thing does not have a "nature" or "essence" or "reality" underlying its manifestations and effects apart from its relations with other things; that the nature, essence, or reality of a thing *is* its manifestations, its effects, and its relations with other things; and that, apart from these, "it" is nothing, or at most a point in logical space, a possibility of something happening». Considered as a method, functionalism «may be summed up in the directive: "if you want to understand something, observe it in action».

Of course, it would be really "preposterous" and ludicrous to maintain that the intuitions and insights of Cohen, or Llewellyn's more elaborated theoretical reflections, fully anticipated the analyses and conclusions of Merton's work: surely, they did not. Both, however, can be interpreted as contributing (in different measures, to be sure) to a tradition of social science which starts from authors such as Malinowski, was developed by Parsons[65], has been enriched and refined by Merton and then discussed with various perspectives by authors such as Goffman, Giddens, Geertz and Turner, among others[66].

So, if it was a fashion, it was, after all, a lasting and significant one in American social sciences.

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[65] About the debate concerning the extent of Malinowski's influence on Parson's thought, see Stépien 2016: 40.

[66] Ibidem.

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Current Approaches to the Rule of Law Are Not Enough for Latin America

Carolina Fernández Blanco *

Abstract

The heart of the rule of law (ROL) is the compliance of governments and inhabitants with the law. This central feature of the ROL can be described in alternative terms: if the ROL requires that the law guide governments and inhabitants, this is equivalent to the ROL demanding that the law be "efficacious". As it is identified in this paper, the most common and critical weakness of the ROL in Latin America is, unfortunately, the fragility of its most central point: governments and citizens have difficulty acting within the framework of the law. The central thesis of this work is to point out some deficiencies in traditional and non-traditional approaches to the ROL since both perspectives are quite oblivious about the efficacy problem. The paper also proposes that studies, as well as programmes and projects on the ROL, should include a serious approach to the problem of the inefficacy of the law and therefore a closer view of law-making processes, successfulness in law enforcement and, ex-post control of the efficacy of norms.

Keywords: Rule of Law. Development. Latin America. Efficacy.

0. Introduction

I. Academics and practitioners in the field of Law and Development have historically been concerned about strengthening the rule of law (ROL) in emerging or developing countries. After decades of academic debate and poor outcomes, there is a general feeling of disappointment. Nevertheless, the idea that the ROL is crucial for human and economic development has not been defeated. To overcome the mediocre results in achieving the ROL, different unorthodox[1] views have emerged.

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[1] Frank Upham coined the term rule-of-law orthodoxy and refers to it to generically describe

For some, the target should be a minimalist version of the ROL that can be universally practicable; for others, the ROL should be built in an "inclusive" way; finally, the most pessimistic thinkers believe that the ROL is not possible without a profound cultural change. This paper offers arguments explaining why these new approaches are ill suited to strengthen the ROL in the Latin American context.

Latin American countries share some characteristics that allow a joint analysis of this topic. First, they have a common legal culture and the same legal origin. Second, since the 1980s, most of them have been liberal and relatively stable democracies; they have rigid and written constitutions containing ample bills of rights and principles. Third, nearly all the countries in the region are part of the most important human rights treaties and accept the competency of, at least, the Human Rights Committee of the United Nations or the Inter-American Court of Human Rights. Finally, and unlike what happened in Africa and Asia, very early in their histories all the countries have adopted Western development goals[2].

II. The most common and relevant weakness of the ROL in Latin America is that governments and citizens – regarding some issues but not others – have difficulty acting within the framework of the law[3]. Nevertheless, difficulties in following and enforcing the law are not as widespread as to describe Latin American countries as weak or failed states.

In Latin America, the phenomena of secret, retroactive or impracticable laws are not frequent – at least not since the end of the last dictatorships –. Likewise, a lack of clarity of the law or legislative instability are not endemic to the region, nor do the phenomena occur more frequently than in other regions. I believe that anyone who reads this work and is familiar with the Latin American context will generally agree that the most common and critical weakness of the ROL in Latin America is, unfortunately, the fragility of its most central point. On many occasions, some of which are qualitatively relevant, authorities and inhabitants do not let legal norms guide their behaviour. Although the problem is usually presented this way, it is possible to describe this feature of the ROL in different terms: if the ROL requires that the law guide governments and inhabitants, this is equivalent to the ROL de-

programmes based on the assumption that «[…] sustainable growth is impossible without the existence of the rule of law: a set of uniformly enforced, established legal regimes that clearly lay out the rules of the game» (Upham 2002: 2). This work will not refer to "orthodox" approaches. Instead, it will allude to traditional or classic views and include in this typology a broader set of perspectives. Nevertheless, the word "orthodox", or more accurately its antonym, "unorthodox", is borrowed to express the idea that a set of new ideas exist about the ROL that sometimes breaks with the foundations of the ROL as traditional theories have conceptualized it.

2 Filgueira 2009: 3.

3 See García Villegas 2011: 161-184; García Villegas 2009; Nino 2005; Fernández Blanco 2013.

manding that the law be "efficacious"[4]. "Efficacy" is understood in this paper as the state of things that is present when a particular norm (or a set of norms if they serve the same purpose, e.g., "avoiding corruption") is followed on most occasions by the majority of the relevant people for whom it is intended[5].

The weakness mentioned above is, undeniably, an enormous obstacle that undermines the core functions and virtues placed on the ROL. If this diagnosis is correct, current theories and approaches to the ROL are ill suited to solve the problem since their proposals seem to ignore concerns about how to improve the efficacy of the law[6].

III. The starting point of this work is that the ROL is a precise, accurate and entirely rational construct whose value is universal and devoid of any cultural context. Although conceptions of the ROL differ, four core features are beyond discussion. First, the heart of the ROL is the compliance of governments and inhabitants with the law ("law" means here, and in the rest of this paper, state/formal law). Without this feature, there is no ROL. Second, the law has to have certain characteristics that allow governments and citizens to be subject to it. The famous "lists" proposed by

[4] Undoubtedly, there are other serious problems related to the ROL in the region such as the (circumstantial) lack of independence or impartiality of the judiciary, the low level accountability for officials due to non-compliance with the rules or the absence of strict application of the law (which results in the violation of equality before the law in a formal sense). However, this last group of problems is, in the context of Latin America, just another symptom of the main weakness since they are the manifestation of the breach by the authorities of what various constitutional principles and rules established.

[5] Navarro 1990; Navarro and Moreso 1996: 119-139. This paper utilizes the most widely used language by Spanish-speaking law theorists. Kelsen and other authors use the term "effectiveness" to refer to what I am calling "efficacy." In addition, Kelsen uses *effectiveness* to refer to both a) the fact that the norm is *obeyed* by the individuals subjected to the legal order and b) that the norm is *applied* by the legal organs, particularly the law courts), which means that the sanction in a concrete case is ordered and executed (Kelsen 2005: 11). In Italian, the use is also different. The terms "efficacy" and "effectiveness" are usually used in the opposite way to the one used here (Pino 2012: 174; Tuzet 2016: 207).

[6] This work will focus exclusively on duty-imposing norms and prohibitions and will leave aside power-conferring rules and permissions. The analysis will concentrate on the former since power-conferring rules and permissions are only indirectly included in the main problems identified about the rule of law in Latin America. Power-conferring rules and permissions are identified precisely for not regulating behaviours, so they are satisfied with any behaviour and are not susceptible to non-compliance (Vernengo 1983: 278). However, to make sense in practice, the power-conferring rules require the surrounding presence of prescriptive norms (see Alchourron and Bulygin 1991: 236). For example, it would make little sense to allow contracts without a subsequent obligation to comply with the agreement, a general prohibition on third parties to interfere in that contractual relationship, and so on. Notwithstanding that power-conferring rules and permissions are not included in this analysis, they are of paramount importance for development and largely determine incentives for investments that are generally associated with economic development processes (see Fernández Blanco 2018a: 205).

Hayek, Fuller and Raz[7], among others, are a partial enunciation of these characteristics. Third, the ROL needs a certain political/judicial organization (e.g., judicial independence or some kind of accountability mechanism among state political actors). Finally, a feature included in any conception of the ROL is equality under the law, at least in its formal version. Beyond those core points, the path becomes more slippery and debate continues about whether the ROL requires some specific content for the law or a broader concept of equality. Nevertheless, the four undisputed core points make the ROL a precise piece of social machinery[8].

If we accept that the ROL is *a precise, entirely rational, legal-political construct*, its value and virtues are valid for any country regardless of its culture or degree of development. The ROL is in this sense a "universal good"[9]. Nevertheless, each region or country may face specific and distinct difficulties in achieving a higher degree of the ROL.

The main purpose of this work is to point out some deficiencies in traditional and non-traditional approaches to the ROL. The paper also proposes that studies, as well as programmes and projects on the ROL, should include a serious approach

[7] Hayek 1979; Fuller 1978; Raz 1979.

[8] A more detailed "list" of ROL features is not regarded as necessary for this paper. The four pillars stated in the main text are enough for the proposed discussion. Nevertheless, the "precise social machinery" of the ROL is complete, in my understanding, with the reconstruction that follows. This reconstruction includes the minimum, non-contradictory requirements that give rationality to the basic structure of the ROL. The requirements are as follows. (1) The subjection of the authorities and persons to the law (or in other words, the inhabitants and the authorities must be guided by the law). (2) The impossibility of modifying the law if it is not according to procedures that were established in it. (2a) the impossibility of modifying the content of the law if there is a prohibition to do so in that sense or an obligation to maintain the content of the law. (Points (2) and (2a) are necessary consequences of the authorities' subjection to the law.) (3) For (1), (2) and (2a) to be possible, a relationship of hierarchy with at least one degree of difference between types of laws is necessary. (4) The existence of an independent law enforcement body (independent from the organs that create and execute it), and, (4a) some type of reciprocal control (accountability) between state actors when they violate the requirements established in (1), (2), (2a) and (4). (See O´Donnell 2002: 324.) (5) Laws should be public, general, clear and understandable, prospective, factually feasible and minimally stable. In order to guide the behaviour of people and officials, laws must try to create a consistent system. (6) Rules must be strictly and impartially applied to particular cases and (6b) access to justice (courts) must be broadly guaranteed. (7) Equality before the law is also part of any minimum agreement on the rule of law in force, but there is no agreement on what this equality means or how far it should reach. A few years ago, O´Donnell argued that, at this point, the consensus among political actors and thinkers was only about formal equality (O´Donnell 2002: 311-312). Today, however, acceptance of the idea of material equality is, for the moment, gradual. For example, no one would hesitate to affirm the need to create accessibility conditions for people with physical disabilities, but any discussion about affirmative action measures to create access to political positions for women will surely be more contentious. (8) All individuals (able to act) who are subject to the obligation to obey the legal order have the right/power to participate directly or indirectly in the process of creating the order itself and to integrate the bodies of political decision (point 8 is an adaptation of Bovero 2015: 49).

[9] Tamanaha 2004.

to the problem of the inefficacy of the law and therefore a closer view of the processes of law making, adjudication and ex-post control of the efficacy of norms.

1. Classic Perspectives on the ROL

In the classic group, I will include *formal* perspectives as well as *substantive* versions. The formal-classic group includes, among others, the works of A.V. Dicey, F. Hayek, L. Fuller, J. Raz, C. Nino and J. Waldron[10]. Naturally, these thinkers share some core ideas and disagree about other important ones, but we can still group them together. The formal-classic perspective supports the idea that the ROL can be achieved despite the law´s content and even if the legal system embraces unethical or unfair content[11].

One of the virtues of the ROL in this thin or formal conception is that «[…] it is a necessary condition for the law to be serving directly any good purpose at all»[12]. Thus, a system where human rights, democracy or other values are established by law but where the basic features of the ROL are not present is condemned to fail in achieving those laudable goals.

The second group of classic approaches includes those that postulate that law needs to have more than formal features but also specific content. In this group, the differences between the authors may be broader. Here we find those who think the ROL should include human rights and/or democracy[13] and/or property rights[14], and those who advocate for a view of the ROL that includes social welfare rights[15].

Ronald Dworkin is perhaps the best-known representative of the substantive approach. As I understand his work, however, it does not fit with any of the previous substantive views. Dworkin, unlike other scholars, does not think only about a list of rights or a list of political features (e.g., democracy) that the law should take into account to claim compliance with the ROL. He proposes that compliance with the ROL implies that judges should eventually recognize any moral right or duty even

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10 Dicey 1982 [1885]; Hayek 1979; Fuller 1978; Raz 1979; Nino 2005; and Waldron 2008, 2011.

11 «It is also to be insisted that the rule of law is just one of the virtues which a legal system may possess and by which it is to be judged. It is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man. A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies. This does not mean that it will be better than those Western democracies. It will be an immeasurably worse legal system, but it will excel in one respect: in its conformity to the rule of law». (Raz 1979: 212).

12 Raz 1979: 225.

13 See, among others, Ferrajoli 1995: 864; Hierro 1996: 288; Díaz 1975: 30, Bingham 2011: 136.

14 Cass 2004: 131.

15 Ferrajoli 1995: 864; Tamanaha, 2004: 91.

though positive law does not recognize them[16].

Dworkin's primary concern is how the judges should decide about rights and duties. This unidirectional concern is not an exclusive characteristic of Dworkin's approach; authors with both formal and substantive views have focused mostly on the role of the judiciary and not on the efficacy of the law. Perhaps the only classic author to modestly approach this issue was Joseph Raz, who thinks that the ROL has two aspects: «(1) that people should be ruled by the law and obey it, and (2) that the law should be such that people will be able to be guided by it. As was noted above, it is with the second aspect that we are concerned: the law must be capable of being obeyed. A person conforms with the law to the extent that he does not break the law. But he obeys the law only if part of his reason for conforming is his knowledge of the law. Therefore, if the law is to be obeyed it must be capable of guiding the behaviour of its subjects. It must be such that they can find out what it is and act on it»[17].

As stated, Raz's approach to the problem of the efficacy of the law is modest. It only proposes a set of general guidelines that, although necessary, are not enough to offer a more robust solution to how policymakers or legislators should work to accomplish the two aspects that Raz has in mind when talking about the ROL.

To sum up, neither the classic formal nor the classic substantive conceptions of the ROL provide strong arguments for discussion and debate about the efficacy of the law. As anticipated, after years of academic debates and projects to strengthen the ROL, different, renewed views of the ROL have emerged. These unorthodox conceptions are still far from addressing the problem pointed out as being most significant.

2. Unorthodox Views on the ROL also Fail to Address the Issue of the Efficacy of the Law

After the disappointing results of most of the ROL programmes carried out during the mid-1980s and 1990s in Latin America and other developing regions, a movement of critical thinking about ROL has emerged. Some of these new approaches are mentioned here as "unorthodox conceptions" of the ROL. These new

[16] «Some degree of compliance with the rule-book conceptions seems necessary to a just society. Any government that acts contrary to its own rule book very often – at least in matters important to particular citizens – cannot be just [...] But compliance with the rule book is plainly not sufficient for justice; full compliance will achieve very great injustice if rules are unjust» (Dworkin 1986: 12). «If, therefore, some case arises as to which the rule book is silent, or if the words in the rule book are subject to competing interpretations, then it is right to ask which of the two possible decisions in the case best fits the background moral rights of the parties» (Dworkin 1986: 16).

[17] Raz 1979: 214-215.

approaches are quite heterogeneous and sometimes do not even share the basic features identified as essential in classic approaches. Despite this fact, they all have something in common: they try to address the failures of the previous programmes and, in that effort, these new approaches seek to improve what they consider flawed about traditional theoretical approaches and "orthodox" programmes. I will refer separately to some of these new perspectives on the ROL[18].

2.1. *Rule of Law as a Universal Good: The Minimalist Approach*

Some authors have embraced a very thin or minimal conception of the ROL that does not even take into account the "basic" features provided by traditional formal approaches (e.g., clarity, stability, generality, prospectiveness and so on)[19]. Brian Tamanaha is one of the proponents of the idea of a "drained" ROL. He has an instrumental reason for suggesting this conception. In his work, the thin conception aims to build an approach that can be a "universal human good". I agree that the ROL is a universal human good. However, its universal value derives from being a piece of precise social machinery, as described earlier in this work.

According to this author, if the ROL were built in a minimalist way, it would be achievable in any socio-cultural environment: «A minimalist account of the rule of law would require only that the government abide by the rules promulgated by the political authority and treat its citizens with basic human dignity, and that there be access to a fair and neutral (to the extent achievable) decision maker or judiciary to hear claims or resolve disputes. These basic elements are compatible with many social-cultural arrangements and, notwithstanding the potential conflicts, they have much to offer to developing countries»[20].

In a more recent work, the author gives a more accurate description of his mini-

[18] See, among many others, Carothers 2006: 3-13; Hammergren 2002; Clark, Armstrong and Varenik 2007: 159-179; Trubek 2006; Méndez 2002.

[19] Guastini's vision of the ROL could be understood as "truly minimum" (Redondo 2009: 10), nevertheless, despite the initial formulation of what is the ROL, which is certainly laconic, the author says that the ROL has «[…] no practical import if the law does not state any substantive limits to the powers it confers». (Guastini 2002: 95). Guastini's point of departure is as follows: «By "rule of law" we shall understand the principle according to which any state act whatsoever should be subject to the law» (Guastini 2002: 95). Despite the seemingly narrow definition, Guastini clarifies that the ROL presupposes the existence of a rigid constitution. Otherwise, the legislative power would have no constitutional limits and would not govern, which is, for him, the very definition of the ROL (Guastini 2002: 95). He adds that, although the ROL is a formal principle, it would not have any practical relevance if the constitution did not impose limits on the parliament regarding the way in which laws should be sanctioned and if it did not establish a declaration or bill of rights and even, perhaps, certain principles (Guastini 2002: 95). Although the author does not opt for any particular right or group of rights that should be included in the bill of rights, his conception of the ROL quickly moves away from that first succinct version that contributes to the impression that his approach as minimalist.

[20] Tamanaha 1995: 476.

malist conception[21]. He built it taking the core idea from the pre-liberal conception where the main (and probably the only) aim of the ROL is to prevent tyranny[22]. Tamanaha supports the idea that this pre-liberal feature of the ROL needs to be combined with a requirement that is not purely pre-liberal. Otherwise, it cannot be an actual tool for preventing tyranny: the judiciary must possess some degree of independence or autonomy from the rest of the government apparatus[23].

As mentioned above, and as stated by Tamanaha, the requisites are universal because they cannot be objectionable even in societies that do not embrace a liberal ideology. The pre-liberal conception of the ROL plus judicial independence are acceptable for both liberal societies whose primary orientation is the freedom of individuals to pursue their own vision of the good and non-liberal societies where the community shares a common vision of the good[24].

In Tamanaha's construct, liberal requisites (public rules declared in advance, with the qualities of generality, equality and certainty) apply to Western societies and non-Western societies in some spheres but not in others. For example, the liberal rule of law might be useful, even in non-Western societies, in situations of interaction between strangers, as is the case in megalopolises, since other social ties and forms of restraint are often thin[25]. This conception holds that excluding the liberal features to some spheres of non-Western society will be less disruptive of existing relationships and social bonds, because the ROL can be alienating and destructive when they clash with surrounding social understandings[26].

As presented by Tamanaha, the minimalist approach seems to be only a (partial) solution for non-Western cultures, or in the best case, to some spheres of Western societies where traditional rules govern and, in addition, where freedom to pursue one's own visions of the good are not accepted or are not the primary aim of society. Genuine doubt surrounds the existence of such a sphere or community in the Latin American context. It is undeniable that native peoples or a remote rural community may have strong social ties and perhaps a different set of informal norms. Differences can even be found regarding some formal norms (e.g., related to land tenure), but except for some marginal cases, those communities have assimilated essential values of Western culture. We cannot assume that they will be better off if the law (whatever kind of law, including their own rules) is, for example, retroactive, secret, incomprehensible, and so on. What is more, it is doubtful that the pre-liberal requisites are achievable excluding the liberal ones. Does the law really limit the sovereign if it is applicable retroactively? Is it reasonable to subject officers to

21 Tamanaha 2002, 2004: 137-141.
22 Tamanaha 2002: 10.
23 Tamanaha 2002: 16.
24 Tamanaha, 2002: 10.
25 Tamanaha 2002: 29-30.
26 Tamanaha 2002: 30.

potential responsibilities if the law is unclear or if it is secret? In addition, the second requisite in Tamanaha's proposal (i.e., that the government should treat citizens with basic human dignity) is also difficult (if not impossible) to achieve if we neglect the "liberal" part of the rule of law.

Furthermore, although the idea of averting tyranny is of course commendable, if we limit the ROL to the prevention of tyranny it will not meet expectations regarding its relationship with development.

Beyond the preceding comments, Tamanaha's perspective does not explore the cornerstone of the ROL problem in Latin America. His proposal provides no answers about how to improve the first feature of the pre-liberal conception, namely, the limitation of government activity by law (i.e., the efficacy of the law). The author accepts that he has no "legal" solution for it and that, in fact, it is a matter of culture or a *mysterious* condition: «For the rule of law to exist, people must believe in and be committed to the rule of law. They must take it for granted as a necessary and proper aspect of their society. This attitude is not itself a legal rule. It amounts to a shared cultural belief»[27]. In addition, he says, that successful implementation of the rule of law is simply a pervasive belief on the part of the populace and officials[28], and these pervasive attitudes and believes, are «[…] the mysterious quality that makes the rule of law work»[29].

As presented by Tamanaha, the minimalist version of the ROL is, in conclusion, not a universal human good since it depends on something present in some countries but not in others. Coincidently, societies that have difficulties achieving higher levels of the ROL are the ones in which the pervasive cultural trait is not present. Finally, in Tamanaha's view, this effort to overcome the problem of cultural diversity or cultural relativism is disappointing since cultural traits are an unapproachable problem, at least from a legal perspective. Ultimately, how this author deals with the first pre-liberal feature places him not far from the cultural thesis (see below section 2.3) because the only way to cope with the problem of the inefficacy of the law is to change the culture in some way.

2.2. *Legal Empowerment: The Inclusive Approach*

If Tamanaha wanted to succeed in making the ROL a universal human good, the main concern of the so-called *inclusive approach* is to make the ROL work to alleviate poverty[30]. I share the idea that the ROL is essential for poverty alleviation

[27] Tamanaha 2012: 246.

[28] Tamanaha 2004: 119.

[29] Tamanaha 2004: 141.

[30] Before beginning to explain the principal characteristics of the inclusive approach, it is important to say that it is related to an initiative known as legal empowerment of the poor (LEP) that was hosted by the United Nations Development Program (UNDP) from 2005 to 2009. Currently, LEP

but disagree with the way this approach is developed[31].

The inclusive approach does not reject the Western model and implicitly assumes that it is achievable in any cultural environment. This acceptance allows it to include concerns about human rights, property rights and other features usually linked with Western ideals.

According to this approach, «The rule of law […] refers to a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency»[32].

The Western-oriented vision of the inclusive ROL eliminates the first criticism of Tamanaha's work: the inclusive approach is useful for Latin America precisely for its conception of human autonomy and freedom.

The main challenge that the inclusive approach makes is that there is a paucity of proof that the rule of law in its orthodox approach necessarily reduces poverty[33]. To overcome the disbelieve, they offer a set of ideas about ROL programmes that can be summarized as follows[34]:

a) A review of the kind of institutions for which ROL programmes are designed. The inclusive approach claims that donors should pay attention not only to state institutions but also to civil society (NGOs, religious institutions, community-based organizations). Civil society institutions can play an essential role in delivering justice to the poor[35].
b) People should have access to justice not only through the formal system but also by having easy access to alternative dispute resolution (ADR) and informal, hybrid or non-state mechanisms[36].

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initiatives are associated with some World Bank projects, to the International Development Law Organization (IDLO), to the Australian Agency for International Development and to the Open Society Foundations. Legal empowerment can be characterized as the use of rights and laws specifically to increase disadvantaged populations' control over their lives (Golub 2013: 5).

31 See Fernández Blanco 2018b: 83-110.

32 Kennedy 2008.

33 In this section when referring to "orthodox views" or similar terms we are not alluding to traa ditional or classic approaches to the ROL described in section 2, but to the narrow content attributed to this term by F. Upham (2006) see *supra* note 1.

34 The list only covers the principal features directly related with the ROL. Claims and concerns linked with other spheres of LEP are not included.

35 Golub 2006: 123-125.

36 Chapman and Payne 2013: 25; Domingo and O´Neil 2014: 14-15; Golub 2006: 117 ff.

c) Customary norms and legal pluralism should be taken into account. Accepting a society ruled by multiple sources of law requires a broader concept of legal operators. As a result, lawyers and judges should not be the only ones involved in dispute resolutions. Paralegals, for example, can navigate more easily across normative boundaries[37].
d) Top-down and bottom-up processes are necessary for generating effective reforms and for creating legal tools accessible to all citizens so that they can protect their assets and use them to create trust, obtain credit, capture investment, access markets, raise productivity and protect their rights[38].

It is beyond the scope of this work to conduct a general analysis of the inclusive approach. Instead, the focus will be on the potential problems or contributions regarding the ROL.

The idea of citizen participation in the process of law making (see above point (d)) is interesting from several perspectives: first, even indirectly, this approach has sought alternatives to achieve efficacy in implementing reforms; second, public participation in the law-making process could be the right path to achieve efficacy of norms. However, the law-making process has not been central to the promotion of most of the work and programmes carried out under the auspices of this approach.

Major concerns of the inclusive approach remain, as in some of the classic versions, with regard to conflict resolution. The innovation is the interest that this approach has demonstrated in the access to conflict resolution by poor or disadvantaged people. Notwithstanding the commendable objective and the acute understanding of the problem, this is the area where the approach generates significant doubts.

My understanding of the ROL is that it is hardly separable from state activity and responsibility. Of course, states can admit ADR in their territories, but it is difficult to assimilate it as a component of the rule of law itself. Replacing public adjudication for some private or non-public ADR model seems to be vanishing from at least some state duties. This is not an ideal solution to the problem of strengthening the ROL. The questions are relatively obvious: How can we ensure impartiality or independence, or other procedural guarantees, in processes entirely removed from the state apparatus? What kind of review or appeal can be guaranteed? What guarantees that these methods of conflict resolution satisfy one universal and rational criterion regarding the standard of proof?

In addition, the idea of having a justice system accessible to the non-disadvantaged or the non-poor populations, and other kinds of dispute resolution systems that serve only or mainly poor, disadvantaged or native populations is not a satisfactory option. It is especially at odds with the expectation that every person is

[37] Domingo and O´Neil 2014: 21.
[38] Commission on the Legal Empowerment of the Poor 2008: IV.

entitled, with full equality, to the same set of procedural guarantees. Guaranteeing access to justice for everyone under a state's jurisdiction is a duty of the state, and it should be addressed in a way that does not create second-class conflict resolution for disadvantaged inhabitants.

ADRs are aimed at resolving conflicts; this is not analogous to "delivering justice". A conflict can be settled in a way that does not result from the application of existing rules (be they formal, informal or traditional). In ADRs, it is not even required that the resolution be "fair". An unfair solution accepted by both parties or established by the paralegal or informal adjudicator is, in fact, a conflict resolution whether or not the disadvantaged person (or the most disadvantaged person) is defeated. Thus, not only does the ADR model leave aside the application of norms as a necessary rationale for adjudication, nothing intrinsic or inherent to ADRs guarantees that the most vulnerable are specially considered. Therefore, ADRs may be, in the best case, a broader opportunity for *formal access* to an instance of conflict resolution, but nothing guarantees that the adjudication is fair, consistent and impartial.

The ADRs, for the reasons set forth above, are not intended to set general parameters for the resolution of similar cases. Conflict resolution in ADRs is aimed at particular cases and is sometimes achieved through mechanisms that are not universally established. Thus, equality (which, at least in its formal version, is what integrates even formal approaches to the rule of law) is affected. In addition, in Latin America, the main objective of most of the procedural codes in public and private law is the search for truth. This objective is in no way necessarily or contingently present in the spirit of the ADRs. The former characteristic of the ADRs also results in an obstacle to the realization of a basic conception of equality because some citizens may have access to truth-finding processes while others might access ADRs that focus only on conflict resolution.

In short, the most consistent way to guarantee formal and substantial access to justice under any rule of law paradigm is to promote that the arm of justice of the state system goes further and is accessible to everyone[39].

Although some works of the inclusive approach are well aware of the risk of welcoming and developing legal pluralism, the risk is not carefully assessed. Legal pluralism is a double-edged sword, especially for this perspective built entirely on Western values and assuming that the ROL should be understood in a broad fashion that includes, among other features, human rights, equality and property rights.

Besides, it seems to be that the ROL has by definition (whatever definition of it is adopted) a particular relationship with formal norms. The formal legal order is only one subset of the different subsets of norms that structure any society, including the most developed ones. Nevertheless, recognition of this fact does not support

[39] A more extensive criticism of ADRs can be found in Mattei and Nader 2008; Giabardo 2017a, 2017b; Ferrer and Fernández Blanco 2015.

the notion that the ROL should have some function or relationship with norms that are not part of the subset of formal norms. Non-formal norms that do not oppose formal norms are one normative phenomenon that simply coexists with the formal system but with which the ROL has almost no relationship.

Finally, the inclusive approach is mainly focused on inter-personal or private law-guided relationships (the only ones that ADRs can settle and the ambit where legal pluralism is recognizable). This fact itself is not a disadvantage; the problem is that vertical relationships, those in which one or more state actors are involved, are practically disregarded in this perspective. The previous fact is, of course, a significant weakness in the effort to build a ROL conception that is actually inclusive of disadvantaged people.

2.3. The Cultural Counteroffensive: Culture Rules

The third and final unorthodox approach considered in this paper, unlike the previous ones, does not try to make theoretical adjustments to the concept of the rule of law or propose pragmatic innovations in its implementation. What it does put in serious doubt is that all cultures are compatible with the unquestioned version of the rule of law[40].

This cultural counteroffensive also has its roots in the poor results of ROL programmes carried out during the 1980s and 1990s: most of those programmes neglected cultural traits and therefore the ROL projects were implemented by transplanting successful institutions from the developed world to Latin America and other emerging countries. In addition, they had only one recipe that was assumed to work in every country. ROL programmes were designed in the unhappily famous "one-size-fits-all" fashion. The "discovery" of cultural diversity and the implausible success of transplanted institutions, plus the senseless of applying one recipe to every society, are behind the origins of this cultural counteroffensive in thinking about the ROL. Unfortunately, they provide only a partial and unsatisfactory response to these problems.

Samuel Huntington, in his book *Who Are We?* (2005), argues that the degree of development reached by the United States of America originates primordially from shared cultural qualities and religious traits (Anglo-Protestantism) and has a weak link with the political organization defined by the constitution and the other legal institutions of the country. In line with these thoughts, other authors, including Huntington, have dedicated much work to the cultural traits of developing coun-

[40] Before continuing, it is necessary to stipulate what we mean by "culture" or "cultural traits". Rosa Brooks' definition is acceptable. Brooks understands "culture" as the widely shared myths, assumptions, behavioural patterns, customs, rituals and social and historical understandings of a group (Brooks 2003:2286, footnote 50).

tries and have concluded, in the same vein, that there is little sense in promoting legal reforms when in fact it is "culture" that governs institutional changes. Therefore, the path to establishing the ROL and generating development begins with changing the culture. Then, formal laws might possibly be relevant.

Rosa Brooks, in her criticisms of orthodox ROL programmes, affirms, «The rule of law is not something that exists "beyond culture" and that can be somehow added to an existing culture by the simple expedient of creating formal structures and rewriting constitutions and statutes. In its substantive sense, the rule of law is a culture, yet the human-rights-law and foreign-policy communities know very little – and manifest little curiosity – about the complex processes by which cultures are created and changed»[41].

Even stronger is the following assessment of Lan Cao: «Although law does have an expressive function and thus certain laws make certain statements which could in turn influence social norms, this capacity to affect preferences and beliefs through law is questionable in countries where the rule of law is itself weak. For those countries, law is insufficient and culture change will be needed»[42].

As Amy Cohen remarks, this neo-cultural interventionist approach deploys a conceptualization of culture paradoxically analogous to the conceptualization of law that the turn to culture was intended to correct[43].

The idea that culture or cultural traits can interfere in the ROL and development is not new. Many authors (from Max Weber to the first wave of law and development practitioners and academics) have expounded it. Later, the so-called Washington Consensus and the processes of transition from socialism to market economies in Eastern Europe were quite indifferent to cultural diversity. The energetic rebirth of the cultural perspective is nevertheless broader and more in-depth, and it promotes wider interventionism than some previous, similar perspectives. Unlike the first wave of law and development practitioners, the focus is no longer on changing the idiosyncrasy of the legal elites (judges, lawyers, law professors). It envisions a more tentacular reach into the population – a shift in agents from Third World elite judges, lawyers, and legislators to virtually everyone[44].

I share two fundamental ideas of this approach, but only in their initial standpoints. First, it can be assumed that the cultural approach supports the idea that the ROL itself is almost a non-malleable or adaptable ideal. As mentioned previously, one of the starting points of this paper is that the virtues and benefits of the ROL are culturally blind and, although some features of the ROL can be discussed, the four core characteristics presented in the Introduction are not subject to any reduction

41 Brooks 2003: 2285.
42 Cao 2007: 360-361.
43 Cohen 2009: 516.
44 Cohen 2009: 516.

or obliteration. Nevertheless, recognizing that the basic features of the ROL are not negotiable is not the same as saying that "programmes" or "projects" to strengthen it should be built without taking into account cultural differences or specific problems that are present in each society. This marks an important difference: the cultural approach does not seem to accept that the ROL can be strengthened using different tools that are better suited to each culture. The cultural determinism behind this leads to the view that some cultures are inherently "good" and some inherently "bad" at achieving the ROL and/or development, and the only solution is to change the latter to make them suitable for ROL[45]. This determinism even stops them from exploring the idea that different tools can be used in each society to implement or strengthen the ROL: whereas the ROL is not adaptable, practical perspectives are not culturally blind and should be designed in a customized way.

The second point of the cultural approach that I initially agree with is that culture is not unchangeable. Cultures and cultural traits have transformed themselves since time immemorial and will never stop. In addition, there is nothing inherently wrong in changing cultural traits in a purposeful way (for example, to change discrimination against women in a given society). Nevertheless, a broader set of tools can transform cultural traits far beyond the proposed "cultural interventionism". Myriad unpremeditated or deliberated mechanisms can drive cultural changes. Among those mechanisms, the law – when it is efficacious – is a powerful tool, but so are scientific information, technological advances, economic booms, deliberation and so on.

The main problem of this approach is the specific weight that it places on "culture." Culture or cultural traits can be as influential as other features of a given society. As Amartya Sen has pointed out, «Our cultural identity is only one of many aspects of our self-realization and is only one influence among a great many that can inspire and influence what we do and how we do it. Further, our behavior depends not only on our values and predispositions, but also on the hard facts of the presence or absence of relevant institutions and on the incentives – prudential or moral – they generate»[46].

I am not persuaded that an "anti-rule-of-law" cultural trait actually exists as such: the evidence we have is only that certain laws are not efficacious, but we don´t know for sure if it is a cultural trait that obstructs their efficacy, or is it just that those laws are inadequately designed or ineffectually applied. In addition, even if we accept that such an "anti-rule-of-law" cultural trait exists, it cannot be an invincible hurdle. This idiosyncrasy can be – and in fact, many times is – neutralized when the law is designed correctly. In Latin American countries there are thousands of examples in which citizens and officers act according to what is established by law

[45] For a deeper criticism, see Sen 2004: 37-58.
[46] Sen 2004: 66.

and, thus, those rules are efficacious. Even in those spheres where the attachment to the law is especially weak include examples of well-designed acts that have been successful.

3. Some Ideas about How to Improve the ROL in Latin America

From classic perspectives to unorthodox views of the ROL, the core idea that "citizens and government must act within the framework of the law" is primarily associated with only one side of the problem, i.e., the citizens' and governments' attitude towards the law. The other side, "the legal side", is largely ignored.

Considered individually or jointly, the ROL "lists", however essential, establish only the minimum features that a law has to have to allow citizens and governments to follow it. The features proposed in the lists do not address the other central problem: for the ROL to exist people should not only be able to follow it, they must *actually* follow it. This criticism is directed not only at the formal or thin views; the substantive approaches did not demonstrate genuine concern about efficacy at all. They were and are involved mostly in discussions about the ontology of rights and their fundamentals, but rarely are they aimed at promoting or discussing efficacy as a critical factor.

On the other side of this indifference to efficacy, other groups of legal theorists have often been concerned with the efficacy of the law. Nonetheless, they usually approached it from a theoretical perspective. Contributions to discuss and clarify what is efficacy and how to distinguish it from the effectiveness and efficiency of the law are well developed but, unfortunately, it seems that the ROL world and the world of "efficacy" have never overlapped.

The rough and incomplete ideas that this paper explores to solve the efficacy problem can be grouped into three blocks: a) legal ideas about law-making processes; b) ideas about successful application of the law and c) ideas about the evaluation of the law after its implementation[47].

3.1. *First Block: Legal Ideas about the Law-Making Processes*

Traditionally, legal theory has been quite oblivious to the law-making process because there was a partially false assumption that legislative processes and the design of law are highly political issues and, consequently, legal theory has little to

[47] In this section, I will quote and discuss several authors and take into account some of their proposals. Nevertheless, I will not offer a critical view of their works because the aim of the section is only to present some ideas recently raised in the academic arena and to see how they can be connected with the issue of strengthening the efficacy of the law.

contribute to them. Fortunately, this is slowly changing, and several law perspectives have approached the topic. As Jeremy Waldron explained, it is not that legislatures are suffering from overall academic neglect, but in jurisprudence, at any rate, we have not bothered to develop any idealistic or normative picture of legislation[48].

Luc Wintgens, from a different angle, pointed out that this situation could be viewed from two perspectives. The "law" perspective justification was usually that: «Law has its own method of study, called legal dogmatics or, more broadly, legal theory of different sorts. The way law is created through the process of legislation does not appear on the screen of the legal theorist»[49]. Meanwhile, from the legislative side, the reasons given were as follows: «The legislator is a sovereign actor within political space, and cannot be bound to rules, at least not in the sense a judge is. If he were, he would not be a sovereign. On this view, the constitution is a political programme that steers legislation, not a set of binding rules for the legislator. As a result, the legislator is not considered a legal actor, only a political actor. Legislation then is a matter of politics: In severing law from its political origin, law-making is not a matter of legal theory»[50].

Nowadays the rigid conceptions presented above are slowly changing, and different perspectives have started to focus on the role of legislators and the legislative process from a legal perspective. Without intending to show a complete map of these perspectives, some of them are as follows:

- A rational theory of legislation is gaining terrain in legal-academic spheres as well as in the legislative field. One key aspect of this approach is to achieve a higher degree of law-efficacy through a rational law-making process[51]. This concern may be translated into a set of duties for legislators, including, at least, the necessity of arguing during the deliberation about potential problems associated with the efficacy of the future law in subjective and objective dimensions[52]. The subjective dimension should include, for example, reports on the degree of "demand" for a certain law by the group that will benefit from it and the degree of "disapproval" that is estimated in the group that supports the costs of the new law. It may also include the evaluation of informal norms that the new act is trying to neutralize and explanations about the incentives that the new law is generating to overcome informal rules. Finally, any ex-ante evaluation has to face the problem of the new potentially dysfunctional, informal rules and how to prevent them[53]. Those are only some preliminary ideas that should be expanded

48 Waldron 1995: 644.
49 Wintgens 2006: 1.
50 Wintgens 2006: 5.
51 See Oliver-Lalana 2008; Atienza 1997: 36 et seq.; Fernández Blanco 2018a: 347 ff.
52 Atienza 1997: 37.
53 Several explanations are usually given for why a norm has low efficacy (for example, techni-

and polished. The objective dimension may include, for example, the organizational structure that the new legal rule or set of rules needs to be efficacious or the financial issues that could challenge its efficacy.

- Another possible approach is to focus on strengthening the procedural side of legislative work. There are compelling reasons to believe that a direct relationship exists between deliberation and efficacy. Of course, the deliberation process that is the aim of this proposal should be serious, not just feigned, and considered practically and not in an idealistic, unrealistic or overoptimistic fashion. As Ekridge, Frickey and Garret explain, «Deliberation shapes and changes public preference on issues; it allows lawmakers to modify, amend or discard proposals on the basis of new thinking and information; and it facilitates the development of civic virtue in citizens. Deliberation, thus, is an end in itself, and it serves the larger instrumental purpose of improving public policy»[54].

Deliberation is an ideal epistemic situation[55] that not only increases moral reasons to obey the law but also provides it with "democratic authority"[56]. Deliberation has both intrinsic and instrumental value. The instrumental value lies in the fact that a number of individuals may bring a diversity of perspectives to bear upon issues under consideration, and that they are capable of pooling these perspectives to come up with better decisions than any one of them could have on their own[57]. Nevertheless, deliberation is not easy to achieve – especially in highly diverse legislatures. For that reason, Waldron proposes that the focus should be oriented to create a set of procedural rules for deliberation[58].

To sum up, it seems that deliberative processes enhance the likelihood of creating and designing efficacious laws. It is also clear that meaningful deliberation is not going to happen in a natural way, especially in highly diverse legislatures.

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cal-legislative problems that prevent its comprehension or difficulties in its enforcement). For some years, a significant contribution from political science and economics has provided other explanations for why a rule may have low efficacy: the tension or competition generated between legal norms and other non-formal rules. Societies work simultaneously with several normative subsets, and formal norms are only one of those subsets (Coleman 1990). It is possible to identify informal institutions that interact with formal institutions and have consequences on the efficacy and/or the effectiveness of legal norms. That is, informal rules can affect the reasons for compliance. Thus, for example, the presence of informal norms can diminish the fear of a sanction by reducing the possibility of being discovered in noncompliance and promoting a behaviour different from that indicated by the legal norm. In other cases, this tension can diminish the utility of complying with the rule because it is more costly to comply with than the alternative behaviour promoted by the informal rule.

54 Ekridge, Frickey and Garret 2007: 70.

55 Estlund 2007: 18.

56 Estlund 2007: 32-33; 145-169.

57 Waldron 1995: 655.

58 Waldron 1995: 660.

Therefore, one way to promote and strengthen deliberation processes could be through the establishment of procedural institutions for ordering and formalizing deliberation.

- The third and last idea about the law-making process is in some ways more theoretical than the previous two, but on no account is it unthinkable to translate it into realistic and viable projects. Some authors remark that for a law to be efficacious (or similar terms with the same or similar meaning), it has to be intelligible to the population for whom it is intended[59]. Intelligibility, in the way Postema uses it, is a deeper and broader concept than the one included, for example, in Fuller´s list, which only requires that rules must be "understandable" or in Hayek and Raz's lists when they refer to the "clarity" of laws. Intelligibility is linked with the *meaningfulness* that a certain law would have in the society or the group that it is intended to govern. In a similar sense, Berkowitz, Pistor and Richards explain that «[…] for the law to be effective, it must be meaningful in the context in which it is applied so citizens have an incentive to use the law and to demand institutions that work to enforce and develop the law»[60].

Veronica Rodríguez Blanco, although not interested specifically in the law-making process but in law authority and normativity, developed some similar ideas as the ones expressed above[61]. She asserts that a deeper engagement with practical reason and practical knowledge is vital for understanding the authority and normativity of the law: «[…] Agents engage in intentional action and show their engagement with practical reason when they comply with legal rules. Consequently, legislators and judges as law creators need to advance formulations of the law that make possible this practical engagement, if they wish their legal rules to be followed. This is especially true when legal rules require the performance of complex actions over time»[62]. The author continues with her idea as follows: «When legislators and judges create legal directives and legal rules they operate like the writers of instruction manuals though at a more complex level. They need to ensure that the addressees will decide to choose to comply with the legal rules or directives and thereby bring

[59] Postema 2008.

[60] Berkowitz, Pistor and Richards 2003: 167. These authors use the word "effectiveness" in the way I use "efficacy".

[61] Although Rodríguez Blanco's main concern is not about law making and efficacy, she accepts that the conclusions of her book may also be useful for that task: «[…] the most controversial legal process or *actuality* is neither the legal decision making nor the legislating, but rather the idea of following and complying with legal norms and rules. The book will concentrate mainly on the latter but I envisage that the conclusions of this book can be extended to the activities of legislating and judging». (Rodríguez Blanco 2014: 36).

[62] Rodríguez Blanco 2014: 23.

about the intended state of affairs […] Thus for the addressees with certain rational capacities and in paradigmatic cases, understanding the grounding reasons as good-making characteristics of the legal rules and legal directives will enable them to decide or choose to comply with the rule and will guide them through the different series of actions that are required for compliance with the rules and directives»[63].

The idea that legislators should pay attention to the role of practical reason is as appealing as the argument that they should make clear the grounding reasons for the law. This set of ideas is not hard to translate into a set of guidelines for legislators and programmes aimed to strengthen the ROL.

3.2. Second Block: Successfulness in the Application of the Law[64]

For several obvious reasons, the proposals presented in the first block are not a silver bullet to achieve a higher degree of efficacy. One compelling reason for this relative scepticism is that no matter how well designed a legal rule is, if there are no consequences for breaching it, its guiding power decreases substantively.

Law enforcement has a dual instrumental function in terms of the efficacy of the law: the first one occurs when, in a particular case after the law was broken, the state, through law enforcement mechanisms, mandates that in that particular case the rule infringed is made efficacious. For example, law enforcement may involve returning things to the *status quo* previous to the breach or may force those who have broken the law to comply with it (e.g. to pay evaded taxes). Additionally, this kind of relationship between enforcement and efficacy may have a deterrent (or incentive) effect on a person that was condemned or declared liable (special deterrence)[65].

The second relationship is perhaps more interesting and engulfing. When law enforcement is efficacious and efficient, deterrence will occur in a more general way (general deterrence), the more important channel to improve efficacy. Naturally, law enforcement can be more or less influential in general deterrence depending on the kind of legal rule. Some social norms are so deeply established that the general deterrence effect may be less visible. On the other hand, the efficacy of legal rules

[63] Rodríguez Blanco 2014: 72.

[64] The successful application of the law may be identified with the second Kelsenian meaning of effectiveness (in their use of the language, here called efficacy) (i.e., that the norm is *applied* by the legal organs, particularly the law courts, which means that the sanction in a concrete case is ordered and executed (Kelsen 2005: 11)). Note that the second sense used by Kelsen can be directly inversely related to the first one: where the law is efficacious (or effective) in the first sense, the necessity for efficacy (or effectiveness) in the second sense decays; inversely, when the efficacy in the first sense is low, the second sense becomes more relevant.

[65] Friedman 1975: 67-73.

with no social attachment, or that are perceived as unfair, useless or outdated, can be related more directly and proportionally with their enforcement. Cannibalism is not expected to increase if the enforcement fails, but parking meter payment infractions will definitively increase without enforcement[66].

Variations in the success of the law enforcement system sometimes create different scenarios that may lead to generalizations or inferences related to culture and its impact on law breaking (or more generically, inferences between cultural traits and the ROL). Those different scenarios could be a problem of general deterrence, not a cultural one. Take the example of Uruguay and Argentina, two neighbouring countries that share virtually all their cultural traits, whose economies were initially developed in the shadow of smuggling, and that enjoy very similar income and geopolitical situations. These two countries, however, seem to exhibit a profoundly different "culture of breaking the law". My modest appreciation is that such cultural differences about respect for the law do not exist or, at best, they are minimal: the primary cause of differences between both societies is success in law enforcement, which generates a higher level of compliance with legal rules in Uruguay[67]. By no means does this comparison between Uruguay and Argentina intend to present substantial evidence in favour of the position held in this paper, but it is still relevant, as an example of the abuse of explanations concerning the cultural issues criticized in section 2.3.

3.3. *Third Block: Evaluation of Law Efficacy*

The last set of ideas about improving the efficacy of law relates to the need to *evaluate* legal rules when they are already in force. These ex-post evaluation mechanisms can be implemented in several ways. Simple statistical measurements and/or regression analyses are probably the most traditional tools to evaluate efficacy and, sometimes, effectiveness[68]. Often, when the legal reform is radical, simple statistical measurement could be enough to determine behavioural responses to the change (efficacy) and to link these responses to specific changes in the social or economic arena (effectiveness). Nevertheless, when the reform is not sufficiently drastic, it is challenging to link the cause (legal reform) unequivocally with the results (identified social or economic changes that are the purpose of the legal reform). In such

[66] Friedman 1975: 68.

[67] According to the World Justice Project Rule of Law Index 2019, Argentina scores 0.58 (out of a maximum of 1) and Uruguay 0.71. Argentina ranks 12/30 and Uruguay 1/30 in the Latin American and Caribbean region, and globally they rank 46/126 and 23/126, respectively.

[68] Briefly, "effectiveness" as used here is the ability of a particular law to reach the social or economic objectives that led to its enactment. Naturally, this approach to the concept of effectiveness leads to another discussion that I will not address in this paper: the right methodology, if any, to determine the purposes or objectives of a given law.

situations, in the best case, a sense of correlation may be obtained, but it would not be possible to prove a cause-effect relationship.

Statisticians overcome the difficulty to establish "cause-effect" relationships by adding control variables. To explain it simply, if those variables exhaust all non-random factors then the cause-effect is proven, but if there is an omitted variable, the coefficient will be biased. Sometimes it is difficult to avoid bias because the available data may be incomplete or because the researchers' theoretical accounts of which variables correlate with the dependent and independent variables are incomplete[69].

Randomized impact evaluations are a third way to approach law evaluation. Although disputed, and not free from difficulties, this alternative is gaining ground as a governance tool in domestic and international ambits. The methodology of randomized studies or trials was initially developed in the hard sciences and is widely used in the pharmaceutical industry. The core idea is to select a population with similar qualities (therefore, "comparable") and divide the group in two: the first group (treated group) is receiving the new drug or treatment under evaluation and the other group is receiving a placebo or continuing with the standard treatment or drug. This methodology, at the end of the last century, was used by economists to evaluate the impact of development programmes and other public policies. Development programmes and public policies are almost always carried out under the framework of a specific law. Some scholars therefore proposed that it was possible and desirable to evaluate broader kinds of laws using randomized trials (not just laws relating to states' public policies or development programmes)[70].

This methodology is growing as an innovative way to evaluate the efficacy, effectiveness and the efficiency of the law. Naturally, it is not feasible to evaluate all laws using this method. For example, imagine that a new law is enacted to promote greater central bank independence[71]. It is, of course, beyond the possibilities of a controlled random evaluation to assess the efficacy or the effectiveness of this set of legal rules. Nevertheless, other laws have been evaluated under this methodology, and the results are of great interest not only for the evaluated policy but also for the design of future policies.

The story of the PROGRESA programme (subsequently renamed as "*Oportunidades*" and now called "*Prospera*")[72] in Mexico is the story of the official birth and growth of conditional cash transfers (CCT). It may be illustrative of the kind of results obtained from a randomized evaluation and it may demonstrate how I connect efficacy with the results of these trials. PROGRESA offers grants, distrib-

[69] Abramowicz, Ayres and Listokin 2011: 940.

[70] Abramowicz, Ayres and Listokin 2011: 940.

[71] Duflo 2004: 342.

[72] "Oportunidades" was renamed and adjusted in 2014. The new programme is called "Pross pera." In 2018 "Oportunidades" reached 24.13% of the Mexican population, around 31 million people (Source CEPAL).

uted to women, conditional on children's school attendance and preventative health measures (nutrition supplementation, health care visits, and participation in health education programmes).

In 1998, when Mexican government officials launched the programme, they made a conscious decision to take advantage of the fact that budgetary constraints made it impossible to reach the 50,000 potential beneficiary communities of PROGRESA all at once, and instead started a pilot programme in 506 communities. Half of those were randomly selected to receive the programme, and baseline and subsequent data were collected in the remaining communities[73]. The evaluations showed that PROGRESA was effective in improving health and education. Comparison between PROGRESA beneficiaries and non-beneficiaries shows that children had about a 23 percent reduction in the incidence of illness, a 1 to 4 percent increase in height, and an 18 percent reduction in anemia[74]. In addition, the comparison showed an average increase of 3.4 percent in enrolment for all students in grades 1 through 8 in the treated group. The increase was largest among girls who had completed grade 6: 14.8 percent[75].

At present, almost all countries in Latin America have a CCT programme, and countries outside the region have also adopted this policy. The laws enacting programmes like PROGRESA or other CCTs are complex aggregates of different types of legal rules (duty-imposing rules, power-conferring rules, prohibitions and so on). These legal rules and prohibitions are addressed to a variety of persons. For example, selected households have the right to enrol in the programmes; women have the right/obligation to receive the money each month; parents have the duty of sending their children to school and vaccinating them; budget administrators have the duty of making funds available each month; officers of the social security system have the duty of selecting households using a set of standards; school principals have the duty of accepting new students; and at the same time a cluster of particular and general prohibitions are established for beneficiaries and officers. It works like sophisticated machinery that requires all (or almost all) addressees to act within the framework of the law in order for it to work.

One result of the impact evaluation is the direct reflection of the efficacy of the law (compliance with duties and prohibitions): an increase in primary school enrolments directly reflects the efficacy of some legal rules (officers provided the budget on time, parents sent their kids to school, and schools accepted new students). Other results show more accurately the effectiveness of the law and, indirectly, its efficacy. The 23 percent reduction in the incidence of illness is a case in point: when effectiveness is reached, efficacy is an assumed pre-condition in almost all cases.

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73 Gertler and Boyce 2001.
74 Gertler and Boyce 2001.
75 Duflo 2004:345.

4. Conclusions

During the 1980s and 1990s, ROL programmes in Latin America were mainly aimed at a highly instrumental goal: achieving the objectives promoted by the so-called Washington Consensus. This instrumental purpose is perhaps the reason why the ROL programmes were fragmented and, at best, designed only to reform specific institutions perceived to be failing or that did not resemble their counterparts in countries that embodied a successful rule of law. Those programmes did not target directly – and in the best cases only did so indirectly – the core value of the ROL: the idea that governments and citizens should operate within the framework of the law. Probably for this reason, programmes and reforms had poor outcomes and even more mediocre effectiveness in generating the free and healthy market that was at the heart of the Washington Consensus. Nevertheless, more than 20 years after those ROL programmes ended, neither the theory nor the pragmatic approaches have taken into account that the main feature of the ROL what have failed categorically.

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SAGGI
(ESSAYS)

La molteplice identità delle costituzioni

*Riccardo Guastini**

Sommario

Secondo un diffuso modo di vedere, che si può far risalire alla teoria costituzionale di Carl Schmitt, la revisione costituzionale non può alterare l'"identità" della costituzione – e ciò indipendentemente dalla disciplina costituzionale in materia, in virtù solo dei concetti di costituzione e revisione costituzionale che vengono adottati. Tuttavia, l'identità della costituzione non è facile da afferrare. A ben vedere, si possono distinguere almeno quattro diverse "identità" della costituzione: (a) testuale, (b) giuridica, (c) politica e (d) assiologica. I giuristi e i giudici costituzionali (o di legittimità) guardano solo all'identità assiologica della costituzione, cioè a un insieme di principi e/o valori "fondamentali" o "supremi". Tuttavia, non tutte le costituzioni esistenti sono necessariamente dotate di principi e valori. Inoltre, non vi è ragione di privilegiare l'identità assiologica della costituzione, la quale dipende essenzialmente da giudizi di valore arbitrari degli interpreti, trascurando le altre identità (in particolare, quella politica). Dal punto di vista del positivismo giuridico, la revisione costituzionale non ha altri limiti che quelli espressamente stabiliti dalla costituzione stessa.

Parole chiave: Costituzione. Revisione costituzionale. Identità costituzionale (testuale, giuridica, politica, assiologica).

Abstract

According to a widespread view that can be traced back to Carl Schmitt's constitutional theory, constitutional amendments may not alter the "identity" of the constitution – this is so, independently of any positive constitutional provision on the matter, because of the very concepts of constitution and constitu-

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tional amendment. Nonetheless, the identity of the constitution is not easy to grasp. To be sure, at least four different "identities" of the constitution can be distinguished: (a) the textual, (b) the legal, (c) the political, and (d) the axiological one. Legal scholars and constitutional (or supreme) judges look only to the axiological identity of the constitution, that is to a set of "fundamental" or "supreme" principles and/or values. However, not every existing constitution is necessarily provided with principles and values. Moreover, there is no reason to privilege the axiological identity of the constitution, which depends by and large on some arbitrary value-judgements of interpreters, disregarding the others (namely, the political one). From the point of view of legal positivism, constitutional amendments do not have other limits than those expressly stated by the constitution itself.

Keywords: Constitution. Constitutional Amendment. Constitutional Identity (Textual, Legal, Political, Axiological).

1. Caccia all'identità

Secondo Carl Schmitt, «i limiti del potere di revisione [costituzionale] risultano dal concetto […] di revisione» (Schmitt 1928: 145): non, si noti, dalla disciplina positiva della revisione, ma dal concetto stesso di revisione.

Secondo questo modo di vedere, abbiamo dunque una norma giuridica ("È proibita la revisione di un certo tipo") che discende non da un testo normativo, ma da un concetto, tecnicamente da una definizione. Inutile dire che una definizione o un qualunque altro enunciato può implicare una norma se, e solo se, è esso stesso normativo, cioè se include, esplicitamente o nascostamente, espressioni normative o valutative (nel *definiens*, se si tratta di una definizione).

La definizione di revisione, indirettamente formulata da Schmitt, è questa: costituisce genuina revisione un mutamento del testo costituzionale in cui «l'identità e la continuità della costituzione nella sua interezza rimangano garantite». Una sedicente revisione che non presentasse questa proprietà sarebbe, per definizione, non mera o genuina revisione, ma fonte di «una nuova costituzione», la precedente essendo ormai annullata (Schmitt 1928: 145).

Questo modo di vedere – una concezione sostanzialistica della revisione, che suppone a sua volta una concezione egualmente sostanzialistica della costituzione – pare essere la fonte di ispirazione di tutti quei giuristi e giudici costituzionali che oggidì instancabilmente si interrogano sulla identità della costituzione: quando un cambiamento *nella* costituzione si risolve in un cambiamento *della* costituzione?

Si suppone che il potere di revisione sia «implicitamente limitato per natura»

(Roznai 2017: 156)[1]: limitato sotto il profilo sostanziale, s'intende[2]. Si assume che la revisione costituzionale non possa spingersi fino ad alterare l'identità della costituzione, ciò che equivarrebbe a sostituire la costituzione vigente con una costituzione nuova.

Il concetto di identità costituzionale è usato per costruire ben due norme costituzionali (o, forse, meta-costituzionali) inespresse, che si pretendono implicite in costituzione. La prima proibisce ogni legge di revisione che, sia pure nel rispetto delle procedure, pretenda di alterare l'identità della costituzione. La seconda autorizza il giudice costituzionale a dichiarare incostituzionali le leggi in questione. Sottolineo che si tratta di due norme distinte: l'una circoscrive il potere di revisione; l'altra attribuisce una competenza al giudice costituzionale. Questa seconda norma non è implicata dalla prima (ben potrebbe il divieto di revisione non essere assistito da alcuna garanzia giurisdizionale).

Trattasi dunque di quella (cattiva) giurisprudenza dei concetti, che pretende di ricavare norme (inespresse) non dai testi nomativi, ma per l'appunto dai concetti elaborati in sede dogmatica. È insomma uno di quei casi in cui la dottrina non si accontenta di fare scienza giuridica: preferisce fare politica del diritto senza darlo a vedere. In contrasto con la raccomandazione di Kelsen, secondo cui «la scienza giuridica non può né deve – né direttamente, né indirettamente – creare diritto; deve limitarsi a conoscere il diritto creato dai legislatori [in senso materiale], dagli amministratori, e dai giudici. Questa rinuncia, incontestabilmente dolorosa per il giurista […] è un postulato essenziale del positivismo giuridico, che, opponendosi consapevolmente ad ogni dottrina del diritto naturale, esplicita o inconfessata, respinge risolutamente il dogma che la dottrina sia una fonte del diritto» (Kelsen 1928: vii)[3].

Dal punto di vista di un bene inteso positivismo giuridico, l'idea stessa di un limite "concettuale" alla revisione della costituzione – e, del resto, a qualunque altro atto giuridico – è priva di senso. La revisione costituzionale non può essere giuridicamente soggetta che a limiti giuridici, non concettuali. Ma d'altra parte un limite giuridico può solo derivare da una norma di diritto positivo che lo statuisca.

Nondimeno, il problema della identità della costituzione[4] può essere trattato come un problema strettamente teorico, ossia meramente concettuale. Il primo pas-

[1] La questione è discussa da Pfersmann 2012.

[2] I limiti procedimentali non sono in discussione. L'argomento secondo cui il potere di revisione è intrinsecamente limitato perché è un potere delegato (cioè costituito) (Roznai 2017: cap. vii) giustifica i limiti formali, non quelli materiali.

[3] La dottrina è (deve essere, secondo Kelsen) un'impresa puramente conoscitiva, e le norme non possono scaturire logicamente dalla conoscenza: non esistono norme senza atti umani di creazione normativa ("Kein Imperativ ohne Imperator": Kelsen 1965).

[4] Variazioni sul tema, prevalentemente in chiave di filosofia politica, si leggono in Rosenfeld 1994.

so in tal senso è prendere atto che l'identità della costituzione può essere ricostruita in non meno di quattro modi diversi.

2. Identità testuale

In primo luogo, ogni costituzione ha una identità testuale o "formale".

Una costituzione non è che un testo normativo. Un testo normativo a sua volta è un insieme di disposizioni, formulate in un linguaggio naturale. Un insieme qualsivoglia può essere modificato in tre modi diversi (Bulygin 1984: 332 ss.):

(a) aggiungendo un elemento (nella specie, una disposizione),
(b) sopprimendo un elemento,
(c) sostituendo un elemento.

S'intende che la sostituzione è una combinazione di addizione e sottrazione. D'altra parte, l'addizione, la sottrazione, o la sostituzione di una o più parole in una disposizione vale come sostituzione della disposizione stessa.

Orbene, gli insiemi si definiscono estensionalmente, ossia per enumerazione degli elementi componenti[5]. Sicché ogni modificazione di un insieme dà luogo ad un insieme diverso: ecco che l'insieme originario ha perduto diacronicamente la sua identità (Bulygin 1981: 79).

Identificare una costituzione secondo la sua identità testuale (sincronica) è operazione assiologicamente neutra: non richiede giudizi di valore di alcun tipo. E non consente di inferire alcunché circa i limiti della revisione costituzionale. Per quanto possa sembrare paradossale, ogni revisione costituzionale, anche minima, anche marginale, dà luogo diacronicamente ad una "nuova" costituzione: nuova perché testualmente diversa dalla precedente[6].

Da questo punto, di vista, se mai si volessero stabilire dei limiti alla revisione costituzionale – la revisione non può stravolgere l'identità della costituzione – si dovrebbe senz'altro proibire la revisione in quanto tale. E, d'altra parte, sarebbe strano considerare instaurazione di una nuova costituzione qualsivoglia, anche minima, anche marginale, revisione.

[5] È invece intensionale una definizione che determina le condizioni necessarie e sufficienti di appartenenza di un elemento ad un insieme. Non è impossibile una definizione intensionale di un insieme, ma, nondimeno, la sua identità sempre dipenderà dalla sua estensione.

[6] A ben vedere, l'identità testuale di una costituzione, essendo cosa intrinsecamente sincronica, neppure consente di distinguere diacronicamente tra mera revisione della costituzione esistente e instaurazione di una nuova costituzione.

3. Identità politica

In secondo luogo, le costituzioni hanno un'identità "politica" nel senso seguente.

Ogni costituzione, per definizione, non può non contenere un complesso di norme, diciamo, sulla "forma dello stato" (*Staatsform*, *frame of government*)[7], intesa come l'organizzazione – orizzontale e verticale – dei pubblici poteri e, in particolare, sulla produzione normativa (la legislazione in senso "materiale"). Di una sedicente "costituzione" che non contenesse nome siffatte, non diremmo che si tratti di una genuina costituzione[8].

Si tratta delle norme che istituiscono organi, specialmente i supremi organi dello stato (l'organo legislativo, l'organo esecutivo eventualmente l'organo di giustizia costituzionale, etc.), ne stabiliscono (almeno in parte) le modalità di formazione, attribuiscono ad essi competenze, ne disciplinano i reciproci rapporti.

Da questo punto di vista, tuttavia, l'identità della costituzione è alquanto sfuggente: la forma dello stato, intesa nel modo che si è detto, è cosa indefinita, giacché i confini tra un tipo di organizzazione politica e un altro sono labili.

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7 E non necessariamente una dichiarazione dei diritti.

8 Quanto al concetto di forma dello stato, ripeto qui quanto ho scritto altrove: nella letteratura italiana, che usa distinguere tra forme di stato e forme di governo, il concetto di forma di stato risulta opaco sotto almeno quattro profili. (i) In primo luogo, il concetto è comunemente definito con un linguaggio oscuro e privo di qualunque rigore, mediante espressioni del tipo: l'"assetto strutturale" dello stato, il "modo di essere dell'intero assetto della 'corporazione' statale", "il complesso degli elementi che caratterizzano globalmente un ordinamento", etc. (ii) In secondo luogo, non è chiaro perché si stia parlando di "forma" dello stato, dal momento che, almeno nel tracciare alcune distinzioni, si fa riferimento ad aspetti dell'ordinamento costituzionale (o dell'ordinamento giuridico in genere) che nulla hanno di "formale" in alcun senso plausibile di questa parola, ma palesemente attengono piuttosto al contenuto normativo dell'ordinamento. Ad esempio, alcuni distinguono tra forme di stato a seconda che l'ordinamento includa, o no, il principio di eguaglianza e/o certe libertà individuali dei cittadini e/o il principio di legalità dell'amministrazione. Si può convenire che si tratti di caratteristiche strutturali e assiologicamente caratterizzanti di un ordinamento, ma con ogni evidenza attengono al suo contenuto normativo. (iii) In terzo luogo, si usa talora come criterio di distinzione la relazione che si instaura tra governanti e governati (concetto peraltro quanto mai evanescente), talaltra la relazione – del tutto diversa – tra governo e territorio, altre volte ancora il sistema sociale e/o (nuovamente) il contenuto dell'ordinamento normativo e/o l'ideologia politica dominante. Ad esempio: per un verso, conformemente ad una risalente tradizione, si distingue tra monarchia e repubblica; per un altro verso, si distingue tra stato patrimoniale, stato di polizia, e stato di diritto, e poi ancora tra stato liberale, stato democratico, stato sociale, e stato totalitario; per un altro verso ancora si distingue tra stato unitario e stato federale. È ovvio che queste distinzioni poggiano su criteri diversi ed eterogenei – non sempre chiari, peraltro – sicché non possono essere accostate sotto l'unico denominatore della "forma di stato". (iv) In quarto luogo, la classificazione delle forme di stato risulta anche insoddisfacente perché: da un lato, si prendono in considerazione aspetti dell'organizzazione costituzionale, che parrebbero rilevanti piuttosto per la distinzione delle cosiddette "forme di governo" (tipico esempio: la divisione dei poteri); dall'altro, si omette invece di prendere in considerazione certi aspetti dell'organizzazione costituzionale, la cui rilevanza per la forma di stato – in un senso accettabile di questa espressione – a me pare indiscutibile: ad esempio, il controllo giurisdizionale sulla legittimità costituzionale delle leggi.

È facile mostrarlo con qualche semplice esempio. Introdurre, o rispettivamente sopprimere, il controllo di costituzionalità sulle leggi altera o no l'identità politica della costituzione? Introdurre, o rispettivamente sopprimere, il rapporto fiduciario tra governo e parlamento altera o no l'identità politica della costituzione? Introdurre, o rispettivamente sopprimere, il suffragio universale nella designazione del capo dello stato altera o no l'identità politica della costituzione? Introdurre, o rispettivamente sopprimere, la temporaneità del mandato del capo dello stato altera o no l'identità politica della costituzione?

È abbastanza evidente che qualunque risposta a domande di questo tipo suppone una valutazione politica. Ne segue che la difesa dell'identità della costituzione – eventualmente affidata al giudice costituzionale – costituisce di per sé un'impresa non assiologicamente neutra, ma al contrario eminentemente politica.

E resta comunque da domandarsi se sia (politicamente) sensato limitare il potere di revisione fino al punto di inibire ad esso la modificazione dell'organizzazione politica, il che equivale, più o meno, ad azzerarlo.

4. Identità giuridica

In terzo luogo, secondo una nota dottrina, alcune costituzioni hanno altresì una identità che chiamerò "giuridica".

La costituzione è la fonte suprema dell'ordinamento (nella gerarchia materiale delle fonti). Tuttavia, la norma che stabilisce il procedimento di revisione costituzionale, poiché si riferisce proprio al testo costituzionale, è ad un livello *logicamente* più alto della costituzione stessa: dunque, essa è la norma logicamente suprema dell'ordinamento. Ebbene, l'identità giuridica della costituzione giace precisamente in questa norma.

Così è, poiché la norma in questione (si suppone) non si applica a sé medesima, sicché non vi è alcun procedimento legale per mutarla: il procedimento di revisione costituzionale può essere cambiato solo "extra ordinem", ossia mediante un atto illegale, o comunque non-legale, con la conseguente alterazione dell'identità giuridica della costituzione (Ross 1958: 78 ss.; Ross 1969: 205 ss.)[9].

Questa tesi, tuttavia, poggia su fragili basi. Tralasciando la (dubbia) tesi logica secondo cui una norma non può sensatamente riferirsi a sé stessa (la norma sulla revisione non può prevedere la revisione di sé medesima)[10], il punto è il seguente: la

[9] Si osservi che stiamo parlando di *alcune* costituzioni, non tutte, giacché non tutte le costituzioni includono necessariamente una disposizione sulla revisione costituzionale. Non la includono le costituzioni flessibili, e non saprei dire in che mai possa consistere l'identità giuridica (in questo senso) delle costituzioni flessibili.

[10] Sul punto vi è molta letteratura. Vedi la bibliografia menzionata in Guastini 2011: 370 ss.

nuova norma sulla revisione, sostitutiva di quella originaria, contraddice la norma (quella originaria, appunto) da cui trae il proprio fondamento dinamico di validità, il che non sarebbe ammissibile.

Senonché la contraddizione tra le due norme, a ben vedere, non sussiste se non in senso diacronico. Prendiamo il caso di una costituzione flessibile. La costituzione contiene, in ipotesi, una norma, NC, sul procedimento legislativo, la quale dispone "Il procedimento di approvazione della legge è X". Ma, poiché la costituzione è flessibile, la norma NC può essere legittimamente sostituita da una norma di legge NL – purché approvata appunto secondo il procedimento X – la quale disponga: "Il procedimento di approvazione della legge è (d'ora in avanti) Y". E ciò malgrado il fatto che NL tragga validità proprio da NC.

Si vuol dire, insomma, che, la contraddizione tra due norme è inammissibile solo quando una delle due sia "rigida" – ossia materialmente sovraordinata – rispetto all'altra[11]. Ma la costituzione, ivi inclusa la norma sulla revisione, non è sovraordinata alle leggi di revisione costituzionale (se non dal punto di vista solo formale): diversamente, queste non potrebbero modificarla. In assenza di relazioni di gerarchia materiale, una norma che ne contraddica un'altra abroga quest'ultima, o ne è abrogata, secondo il principio "lex posterior", che regola la successione nel tempo di norme materialmente pari-ordinate nel sistema delle fonti. Per conseguenza, le norme NC e NL non sono vigenti nello stesso momento. NC è norma vigente prima della revisione. NL è norma vigente a revisione avvenuta. Nello stesso momento in cui NL entra in vigore, NC perde vigore, essendo tacitamente abrogata (da NL)[12].

C'è poi un problema ulteriore, di cui non si vede la soluzione. Supponiamo che, come accade nella costituzione italiana vigente[13], la norma sulla revisione (art. 138) sia affiancata da una norma che espressamente inibisce un certo tipo di revisione (art. 139: la forma repubblicana dello stato non può essere oggetto di revisione). Quale delle due definisce l'identità giuridica della costituzione? La norma che disciplina la revisione, se si ritiene che essa sia applicabile alla costituzione intera (ivi inclusa dunque la norma che limita la revisione). La norma che circoscrive il potere di revisione, se si ritiene che essa sia a sua volta sottratta ad ogni possibile revisione[14].

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[11] In tema di gerarchie normative, sto usando qui i concetti elaborati in Guastini 2010: 241 ss.: (a) gerarchia formale è quella che intercorre tra le norme sulla produzione giuridica e le norme prodotte conformemente ad esse; (b) gerarchia materiale è quella che intercorre tra due norme una delle quali non può validamente contraddire l'altra; (c) gerarchia assiologica è quella che intercorre tra due norme a una delle quali l'interprete attribuisca un valore superiore rispetto all'altra.

[12] Insomma: NC e NL appartengono, per così dire, a due costituzioni testualmente diverse. Vedi Bulygin 1984: 333; 1981: 76 ss.

[13] O in quella francese.

[14] Ometto qui di discutere la questione se i limiti espressi alla revisione siano, o no, superabili. Vedi al riguardo Guastini 2010: 231 ss.

5. Identità assiologica

In quarto luogo, quasi tutte le costituzioni oggi vigenti – specialmente le costituzioni europee dell'ultimo dopoguerra – hanno altresì una identità materiale o "assiologica", molto cara ai teorici del "moral reading" (Dworkin 1996; Celano 2002) e della "interpretazione per valori" (Baldassarre 1991, 2001; Modugno 2008). Qualcuno la chiama: la dimensione "etico-sostanziale" della costituzione (Luque 2014). Ed è questa che, a quanto pare, ossessiona oggi la dottrina costituzionalistica così come la giurisprudenza costituzionale[15] (Roznai 2017).

Orbene, l'identità assiologica di una costituzione è costituita dall'insieme di principi e/o valori di giustizia da essa proclamati (Zagrebelsky 1992, 2008), o più precisamente dai suoi principi fondamentali, essenziali, costitutivi, caratterizzanti, supremi. La costituzione non è un mero testo normativo, un insieme di disposizioni prescrittive (Häberle 2000: 77), è una unità coesa di principi e valori[16].

Pertanto, si suppone (sulle orme di Schmitt), che la revisione costituzionale non possa spingersi fino a toccare i principi – o almeno i principi "supremi" – consacrati in costituzione senza violare i limiti intrinseci (concettuali) della revisione costituzionale. «Il potere di revisione costituzionale non può essere usato per distruggere la costituzione» o i suoi «principi fondamentali» (Roznai 2017: 141 s.)[17].

Di fatto, la tesi della identità assiologica si accompagna costantemente (sebbene contingentemente) all'idea che i principi costituzionali siano non pari-ordinati, ma assiologicamente gerarchizzati (Roznai 2017: 144 ss.), sicché alcuni di essi rivestono il ruolo di principi supremi e sono sovraordinati ai rimanenti (Barbera 2015).

Non si può non citare al riguardo una notissima sentenza della Corte costituzionale italiana (Corte cost. 1146/1988)[18]: «i principi supremi dell'ordinamento costituzionale» hanno «una valenza superiore rispetto alle altre norme o leggi di rango costituzionale»; «non si può, pertanto, negare che questa Corte sia competente a giudicare sulla conformità delle leggi di revisione costituzionale e delle altre leggi costituzionali anche nei confronti dei principi supremi dell'ordinamento costituzionale. […] Se così non fosse, del resto, si perverrebbe all'assurdo di considerare il

[15] Tra le molte, la giurisprudenza della Corte colombiana, di cui ho avuto occasione di occuparmi analiticamente in altra sede (Guastini 2017: 371 ss.).

[16] E con ciò l'identità testuale della costituzione perde qualunque rilievo.

[17] Una critica impeccabile alla tesi della non-emendabilità di taluni principi costituzionali (o "sovra-costituzionali") si legge in Troper 2018.

[18] La Corte, in una ormai risalente decisione, pur senza argomentare in alcun modo, ritenne «di indubbia fondatezza» la tesi della sussistenza di una gerarchia fra norme e norme della stessa Costituzione: un ordine che conduce a «conferire preminenza» ad alcune norme rispetto ad altre entro uno stesso corpo «di disposizioni coordinate in sistema» (Corte cost. it. 175/1971). Trattasi evidentemente di una gerarchia assiologica: una gerarchia, cioè, attinente ai valori, che intercorre tra due norme allorché non una fonte, ma l'*interprete*, mediante un suo *giudizio di valore comparativo*, ascrive a una di esse un valore superiore rispetto al valore dell'altra.

sistema di garanzie giurisdizionali della Costituzione come difettoso o non effettivo proprio in relazione alle sue norme di più elevato valore»[19].

Occorre sottolineare che, come dicevo, "quasi tutte" le costituzioni oggi vigenti, sì, hanno una identità assiologica nel senso che si è detto, ma non "tutte" le costituzioni: l'identità assiologica di una costituzione è contingente, alcune costituzioni l'hanno, altre no. Ne sono prive le costituzioni che si limitano a disegnare l'organizzazione dello stato, ma non includono dichiarazioni dei diritti né disposizioni di principio[20]. Sicché questo concetto di identità costituzionale non ha carattere teorico-generale: è applicabile non a qualsiasi costituzione presente, passata, e futura, ma solo alle costituzioni, per così dire, "eticamente dense", pervase da norme di principio.

D'altro canto, se l'ascrizione ad una norma del valore di principio è cosa spesso discutibile – il concetto stesso di principio essendo altamente controverso[21] – l'ascrizione ad essa del valore di principio "fondamentale", "supremo", o "caratterizzante" (della identità costituzionale), è cosa totalmente arbitraria[22]. Identificate talune disposizioni costituzionali come disposizioni di principio, perché mai alcune di esse dovrebbero avere valore superiore alle altre? A questa domanda non si può rispondere con argomenti di diritto positivo: si possono solo addurre vaghe intuizioni etico-politiche non ulteriormente fondate.

Accade fra l'altro che attribuire ad una norma il carattere di principio non sempre sia un modo di valorizzarla, ma sia al contrario un modo per differirne l'efficacia giuridica (in attesa della *interpositio legislatoris*)[23] e/o per renderla derogabile, *defeasible*, soggetta al bilanciamento con altri principi che possono prevalere nell'eventuale conflitto. E ciò fa dubitare della intangibilità dei principi, o almeno di alcuni di essi, per quanto fondamentali.

Come che sia, non si vedono ragioni persuasive per anteporre l'identità assiolo-

[19] Non sfuggirà che nessuna delle tesi sostenute dalla Corte (l'esistenza di limiti inespressi alla revisione, l'intangibilità assoluta dell'art. 139, la sovraordinazione assiologica dei principi supremi alle rimanenti norme costituzionali, la competenza della Corte stessa a giudicare della legittimità sostanziale delle leggi di revisione) è convenientemente argomentata. Come che sia, questa giurisprudenza è generalmente guardata con favore nella dottrina italiana: vedi per tutti F. Modugno 2002 e la letteratura ivi citata.

[20] Un solo esempio macroscopico: non aveva alcuna "identità assiologica" la costituzione federale USA fino alla promulgazione del *Bill of Rights*.

[21] Vedi per tutti Alexy 1994: cap. III; Atienza e Ruiz Manero 1996: cap. I.

[22] Secondo Zagrebelsky, peraltro, i principi costituzionali disciplinano non già la condotta, ma gli atteggiamenti assiologici (Zagrebelsky 1992). Così intesi, i principi, si direbbe, sono non già norme giuridiche, ma norme morali, rivolte al "foro interno". Questo modo di vedere ha l'effetto, sorprendente, di rappresentare la costituzione (o il suo nocciolo) non come un documento politico, ma come una sorta di codice morale.

[23] È quanto è accaduto nella storia costituzionale italiana. Come si sa, la Cassazione, tra il 1948 e il 1956, distingueva tra norme direttamente precettive e norme di principio, per negare a queste ultime piena efficacia abrogatrice e/o invalidante della legislazione pre-costituzionale.

gica di una costituzione alla sua identità politica, per quanto labile questa sia (Guastini 2017: 308 s.). Nella teoria costituzionale classica una costituzione è un insieme di regole (regole, non principi) sull'organizzazione dello stato e sulla "produzione giuridica" (in particolare sulla legislazione). I teorici della identità assiologica hanno il torto di raffigurare la costituzione più come una sorta di filosofia morale, un'etica normativa, una tavola di valori, che come l'architettura dell'ordinamento politico.

6. Epilogo

Queste osservazioni vogliono semplicemente suggerire che dal punto di vista del diritto costituzionale scritto – che è cosa diversa dal diritto dottrinale e/o giurisprudenziale – la revisione costituzionale non ha altri limiti che quelli procedurali (a meno che, s'intende, vi siano limiti materiali espressi, come quello dell'art. 139 della costituzione italiana)[24].

Scrive Kelsen: «Lo Stato rimane lo stesso anche se la sua costituzione viene modificata per via giuridico-positiva, vale a dire nelle forme prescritte dalla costituzione stessa. La modificazione può essere incisiva quanto si vuole, però – se avviene in modo conforme a quanto prescritto – non vi è assolutamente alcuna ragione per supporre che con la costituzione modificata sia sorto un nuovo Stato. Soltanto se la modificazione della costituzione ha luogo in forma di rottura della costituzione [...] allora si può parlare di un nuovo Stato» (Kelsen 1925: 563)[25].

E ancora: «Occorre distinguere fondamentalmente due casi. Nel primo caso la costituzione viene modificata alle condizioni da essa stessa sancite [...]; per esempio, una monarchia assoluta viene trasformata, con una legge del monarca, in una monarchia costituzionale. La continuità del diritto è garantita [...]. Il secondo caso, diverso in linea di principio dal primo, è quello di una trasformazione rivoluzionaria della costituzione, cioè attraverso una rottura della costituzione esistente. Il criterio decisivo è questo, indipendentemente dal fatto che la modifica costituzionale sia più o meno profonda» (Kelsen 1920: 347)[26].

Insomma, è potere di revisione costituzionale quello che si esercita in conformità alle norme costituzionali che lo prevedono e lo disciplinano. È potere costituente quello che si esercita *extra ordinem*, ossia in forme illegittime (Pace 1997: 97 ss.). Sicché qualunque mutamento illegittimo della costituzione – per quanto marginale – costituisce esercizio del potere costituente. E, simmetricamente, qua-

[24] A scanso di equivoci: sottolineo che si sta parlando di revisione costituzionale, ossia di modifiche testuali della costituzione. Restano programmaticamente fuori da questo discorso i mutamenti del diritto costituzionale vigente per via interpretativa.

[25] Non si dimentichi che, per Kelsen, uno stato non è altra cosa da un ordinamento giuridico.

[26] Sul punto cfr. Ross 1929: 434 ss.

lunque mutamento legittimo della costituzione – per quanto profondamente incida sulla costituzione esistente (sulla forma dello stato, sui principi, sui modi stessi della revisione) – costituisce comunque esercizio del potere di revisione[27]. L'identità della costituzione – se non forse quella politica – non c'entra un bel niente.

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Three Kinds of Logical Indeterminacy in the Law. Alf Ross's Insights

*Giovanni Battista Ratti**

Abstract

The paper analyzes Ross's theses about three kinds of logical indeterminacy which affect the law understood as a set of norms. First, the logical status of logically derived norms in the light of some undesirable consequences which follow from the application of deductive rules of inference to the normative domain (so-called Ross's paradox). Second, the indeterminacy of negation when applied to normative conditionals. Finally, the paper deals with the puzzle stemming from the application, to the rule on constitutional amendment, of the procedure that the same rule provides.

Keywords: Logical Indeterminacy. Logic of Norms. Ross's Paradox. Negation. Self-reference.

Foreword

In this work, I set myself a modest task: to analyze some theses defended by Alf Ross regarding the logical indeterminacy of law.

By "logical indeterminacy of law" I do not refer to the problems stemming from normative gaps and inconsistencies between norms. These flaws of legal systems are normally examined by means of logical tools. Their *origin*, however, is not logical, but rather empirical: a careful lawgiver may avoid them, to a great extent, by crafting a complete and consistent set of norms.

Instead, by "logical indeterminacy" I refer to flaws which stem from logical features of normative discourse which not even the most careful of the lawgivers could completely escape. They are, so to speak, conceptual, rather than empirical drawbacks.

Not surprisingly, Alf Ross's analysis is, on this score, pioneering. In the early for-

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ties of the past century he discovered a paradox that still bears his name and haunts deontic logic and legal reasoning alike; in the late sixties he deepened our mastery of the notion of a conditional norm and its negation and was so able to dismiss the too hasty analogy which is frequently made between descriptive conditionals and normative conditionals, and in a period spanning more than a decade (1958, 1969) he discovered a foundational self-referential puzzle which jeopardizes the very idea of legal determinacy.

I shall analyze these three issues in this order.

1. Ross's Paradox and the Notion of a Logical Consequence in the Normative Domain

The logical riddle known as "Ross's paradox" is easily explained[1].

If rules of inference of standard propositional logic are applied to the normative domain, we obtain that by applying the following tautological sentence[2]

[1] $$A \rightarrow AvB$$

to the realm of norms, we get

[2] $$OA \rightarrow O(AvB)$$

This is so because the truth of A entails the truth of AvB, since the latter is true whenever at least one of its components is true. So, if A is indeed true, then AvB is unavoidably true as well (because A is true).

Transferred to the normative domain, we oddly obtain that from an obligation to do A (or to create the state of affairs A), we can infer an obligation to do AvB, that is an alternative obligation, according to which we can freely choose to create the state of affairs A and/or the state of affairs B. In Ross's example, the norm "Mail the letter!" entails the norm "Mail the letter or burn it!"

Commonly, this inference is characterized as an uneasy one, since it seems to convey a freedom of choice for the norm-addressee that was not present in the issuance of the categorical norm[3].

Another version of the paradox – propitiated by the equivalence between AvB and ¬A→B – is the following:

[3] $$OA \rightarrow O(\neg A \rightarrow B)$$

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1 For recent discussion, see Guastini 2015.

2 The symbol "¬" represents negation, "&" is for conjunction, "v" for disjunction, and "→" for the material conditional.

3 See von Wright 1991: 281.

This means that OA implies that "If not-A occurs than everything is obligatory" and sounds even more paradoxical than the original formulation. To keep on with Ross's example, from "Mail the letter!" it follows that "If you don't mail the letter, then burn it!".

This paradox is groundbreaking in its simplicity. Indeed, if Ross is right, the logical behavior of norms, and thus also of legal norms, is just an illusion or the product of self-deception. The consequences of the application of logic to law would be so absurd that no one would accept it as rational.

Here I shall analyze three possible arguments used to rebut Ross's paradox[4]. As we shall see, such arguments are unconvincing or not wholly persuasive.

The first argument can be dubbed the *argument from equivalence* and is found in Castañeda (1981: 65) and, more recently, in Woleński (2016: 121). Let us consider the formulation of the point provided by the latter:

> When Alf Ross invented the paradox captured by the formula OA → O(AvB), it was considered to have plagued the logic of normative discourse. [...] because B in Ross's paradox is arbitrary, we can have either OA → O(AvB) or OA → O(Av¬B). Now, given that formula A is equivalent to the conjunction (AvB) & (Av¬B), we have a simple argument that Ross's paradox is apparent.

This argument is not conclusive, I submit, since nobody denies that, from a logical point of view, OA is equivalent to O(AvB)&(Av¬B). An example: that it is categorically obligatory to pay taxes implies that, in both worlds "B" (say, sunny days) and "¬B" (non-sunny days) one ought to pay taxes: what is aptly captured by the formula O(AvB)&(Av¬B). But Ross's paradox does not merely bear on the formulation of categorical norms. It states that, given any categorical norm, such a norm implies another norm whose content is the original one in disjunction with any other content. To avoid such an implication it does not suffice to say that A is equivalent to the conjunction (AvB)&(Av¬B). The fact that it is not logically paradoxical that from OA we can derive both O(AvB) and O(Av¬B) (and thus O(AvB)&(Av¬B)) does not deny that, from a normative stance, it is indeed paradoxical that, from a categorical norm, we can derive an alternative obligation (and, considered that OA → PA is regarded as valid in standard systems of logic of norms, also a disjunctive permission). If the guidance of human conduct is the aim of normative discourses (law included), there is something quite odd in allowing such an inference. This is the gist of Ross's paradox: to apply deductive logic to norms brings about irrational consequences. One cannot use tautologies of deductive logic to show that it is not true, for they only show that Ross's derivations are correct and so the paradox persists.

[4] On several other arguments against Ross's paradox, see Alarcón Cabrera 1990.

The second argument, which is partially similar to the one we have just analyzed, can be dubbed the *argument from satisfaction* and is found in von Wright (1991: 281).

Elaborating on Ross's example, which we previously mentioned, von Wright observes that mailing and burning the letter at the same time is impossible. So that in O(AvB)&O(Av¬B) – which, as we know, is equivalent to OA – the first conjunct is not possible. As a consequence, the only way of satisfying (viz. complying with) both norms OA and O(AvB) is by doing A and ¬B. Von Wright is of course right, but, as he manifestly admits, this only "mitigates" the paradox, but does not solve it. Indeed, the example is just a particular application of the paradox in a situation where both disjuncts are exclusive: the paradox is apparently diminished only by this very fact. Indeed, it is not even a real mitigation: it is just a case where a property of a proposition implies the negation of the other. But it must be clear that in a case where the disjuncts are not exclusive, the paradox is no way mitigated. Let us suppose that from the command "Mail the letter!" we derive "Mail the letter or have a shower!" Clearly, now we have no reason to say that the only way of satisfying the original norm plus the derived one is mailing the letter and not having a shower. The paradox still stands.

The third argument, which can be named the *argument from entailment* is also found in von Wright (1991: 281-2) and, as it were, "got the grain right". Von Wright observes that the paradox has to do with the notion of a logical consequence. That is to say: what does it mean that a certain norm *logically follows* from another norm? Von Wright emphatically denies that "entailment" denotes a *genetic relation*: it is not the case that if a certain norm OA exists (has been given by the lawmaker), then the norm O(AvB) also exists (has been given, at least implicitly, by the lawmaker)[5].

According to von Wright, differently from what occurs in propositional logic, the concept of entailment is conceptually reducible to that of consistency. Indeed, the concept of consistency works here as a primitive one: a norm N1 entails another norm N2 when the norm-negation of N2 (i.e. the norm which makes undoable the simultaneous conjunction of the contents of both norms) is incompatible with N1. A simple example may help: OA entails PA, since the negation-norm of the latter (i.e. O¬A) is incompatible with OA, since A&¬A is not a doable state of affairs.

As a consequence, "That an obligation to mail the letter entails an obligation to mail or burn it "only" means that the first is [...] incompatible with a permission to leave the letter unmailed and do something else" (id., 281). Von Wright's reasoning may be reformulated as follows: indeed, OA and P(¬A&¬B) are inconsistent, since A&¬A&¬B is a contradictory proposition as far as logic is concerned. So, the norm-negation of the latter norm – which is O(AvB)[6] – is entailed by the former (viz. OA).

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[5] On this point, see Kelsen 1973: 228-253.

[6] P(¬A &¬B) is negated by ¬P(¬A &¬B), which in turn is equivalent to O¬(¬A &¬B). This, in turn, is equivalent to O(AvB).

As is easy to see, here we have a complete reduction of entailment to the notion of consistency: indeed, if we do not know what the relations of consistency between norms are, we cannot determine whether a norm entails another norm. But this is very different from propositional logic, where all genuine (viz. non-trivial) entailments presuppose consistency, but not any consistency presupposes an entailment.

Accordingly, von Wright's interesting argument cuts no ice against Ross's paradox, since the gist of such a paradox is exactly that the application of propositional logic to norms brings about undesirable results. However, von Wright's solution (aiming to eliminate such results) is predicated on the *equivalence* of consistency and entailment. But this is not a law of propositional logic, as Quine (1959: 29, 34) clarified. Von Wright is using propositional logic to determine the rationality of a lawgiver (where "rationality" means not issuing conflicting norms), but not to determine which norms follow from other norms. In this sense, von Wright's argument leaves Ross's paradox unchallenged.

2. Normative Conditionals and their Negations

Very few things may be said to be more agreed upon amongst jurists than the thesis that legal norms are, by and large, to be regarded as conditionals connecting some key operative facts to legal consequences. When it comes to applying logic to such an intuition, jurists usually refer to very common schemata of reasoning (such as *modus ponens*) to support the view that legal conditionals, in many ways, have the same logical behavior as material conditionals have in propositional logic.

However, Ross highlighted that, at some junctures, normative conditionals have specific features that characterize them in opposition to descriptive material conditionals. In particular, Ross (1968: 173-4) clarifies that the joint issuance of two conflicting conditional norms can be reconstructed at least in two forms: the first by using external negation: $O(A \rightarrow B) \& \neg O(A \rightarrow B)$; the second using internal negation: $O(A \rightarrow B) \& O(A \rightarrow \neg B)$.

The former, which is the favorite way of reconstructing conflicting conditional obligations among deontic logicians, represents the conflict between the obligation of making true the state of affairs $A \rightarrow B$ and the permission of making true the state of affairs $A \& \neg B$, which is the negation of $A \rightarrow B$. According to Ross (id., 174), the conjunction $O(A \rightarrow B) \& \neg O(A \rightarrow B)$ is *pure nonsense*, for it does not prescribe anything at all.

The latter formula (viz. $O(A \rightarrow B) \& O(A \rightarrow \neg B)$) is intuitively closer to what lawyers regard as a normative conflict, but has an important drawback. Indeed, as Ross correctly observes, from the stance of propositional logic, the sentence providing that $O(A \rightarrow B) \& O(A \rightarrow \neg B)$ is not an inconsistency, since it does not imply any sentence whatsoever. It is far from being pure nonsense. Rather, it logically entails

O¬A[7]. This means that a lawgiver issuing the conjunction under exam is far from being irrational. He can be, as it were, a "malicious" lawgiver, but totally rational (indeed, he is *logically rational*). In issuing such a conjunction of norms, the lawgiver may be regarded as entailing the norm according to which the addressee should not put himself in the scenario that triggers the application of the conflicting consequences (id., 174).

Ross is not clear whether legal conditional norms are to be represented, regarding their negation, as denied conditionals (viz. by using external negation) or conditional denials (viz. by using internal negation).

As we have seen, the simultaneous membership of O(A→B) and ¬O(A→B) within a certain normative system brings about a normative inconsistency, but this does not seem a correct reconstruction of actual antinomies between *conditional norms* which are found in normative documents and the way they are read by jurists. Indeed, the norm-negation of O(A→B) – that is, ¬O(A→B), amounting in turn to P(A&¬B) – is logically well-formed, but seems to lose any feature of conditionality. In fact, it amounts to a categorical norm permitting to bring about simultaneously the states of affairs A and ¬B.

Norms formed by means of internal negation are better in representing what jurists have in mind when dealing with normative conflicts: the same case connected to incompatible normative consequences. In symbols, as we know: O(A→B)&O(A→¬B). However, as we discussed, from a logical point of view, far from bringing to the trivialization of the case A, the conjunction at hand entails the obligation of not-A. This sounds paradoxical regarding many cases. In particular, in all those cases where the common antecedent is not liable to be controlled by the norm-addressee. Consider a norm imposing mandatory military service to young males when turning eighteen and another norm permitting conscientious objections to military service to young males when turning eighteen. Of course, from the conflict of these two norms, nobody would derive the absurd consequence that now there is an obligation for young males not to turn eighteen.

Another candidate for symbolizing a normative conditional could be A→OB, but according to Ross (1968: 167), this is an "impossible hybrid", for it mixes descriptive aspects with prescriptive ones and symbolizes something which is

[7] Analogously with what happens in propositional logic. This is easily seen from the following truth-table:

A→B	&	A→¬B	≡	¬B
1 1 1	*0*	1 0 0	**1**	*0*
1 0 0	*0*	1 1 1	**1**	*0*
0 1 1	*1*	0 1 0	**1**	*1*
0 1 0	*1*	0 1 1	**1**	*1*

neither indicative nor directive[8].

Here we face a huge problem of logical indeterminacy: legal conditionals cannot be easily accommodated into a univocal logical form. This can be seen in particular as regards the negation of conditional norms. Since it is not clear whether the negation found in ordinary prescriptive discourses must be read as internal or external, and whether the simultaneous conflict of a norm and its negation brings about the inconsistency of the normative system or not, it is quite clear that law (as any other system of conditional norms) suffers from this specific kind of indeterminacy. Moreover, sometimes the reconstruction in terms of internal negation brings about paradoxical results. As a consequence, the widespread thesis that legal norms are, generally, conditional norms may be read in different ways, based on the notions of conditional and consistency we apply. However, it must be clear that the law is logically indeterminate in so far as we decide which notions we wish to apply and, in some cases, even after this choice has been made.

3. The Problem of Self-Reference and a Puzzle for Constitutional Revision

In several works, Alf Ross held that problems of self-reference are paramount in legal systems. Particularly, in Ross (1958: 78-84; 1969), one can find a substantial treatment of the question of self-reference in legal provisions bearing on constitutional amendment.

In a nutshell, the problem is the following[9]: may the legal procedure for amending the constitution be used to modify the norm which provides the legal procedure for amending the constitution?

In literature, two main answers to this question are found.

(i) The first, negative, answer is usually maintained by pointing to two remarkable circumstances: (a) the self-referential character which affects the rule on constitutional amendment; (b) the fact that modifying a norm on the basis of what such a norm provides seems to lead to an inevitable contradiction.

Ross (1969: 7-17), holds, on the one hand, that (a) self-referential sentences are always meaningless. Such a contentious view has now been almost entirely rejected, on the basis that some self-referential statements seem to be perfectly sound, and paradoxes usually connected to self-reference may also rise within a set of non-self-referential statements[10].

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[8] Similarly, von Wright 1983: 151 regarding formulas as A→OB states "that if the standard connective in question is a truth-connective, then this 'linguistic hybrid' is a monster with no place in meaningful discourse'.

[9] For the following explanation, I am indebted to Guastini 2010: 229-231; and Bulygin 2015: 178-183. See also Moreso 1991.

[10] See Yablo 1993.

On the other hand, Ross also affirms that (b) there is a contradiction affecting the following reasoning concerning constitutional amendment:

> [1] N': The constitution may be amended by a process in accordance with conditions Q, and only by this process;
> [2] N" (stating that the constitution may be amended by a process, in accordance with conditions R) has been created in accordance with conditions Q;
> [3] Hence, N" is valid, that is, the constitution may be amended by a process in accordance with conditions R and only by this process.

As a matter of course, [1] and [3] appear as *prima facie* contradictory and, if it is really so, the reasoning at hand is not sound: at least one of its premises, in fact, must be false.

(ii) The second, positive, answer refers to the interaction of time and validity. Along these lines, Bulygin (2015: 182-183) holds that both norms – N' and N" – belong to different, so to speak, "momentary constitutions": say, C1 and C2. Therefore, even if a real contradiction existed, it would be between two norms belonging to different sets of norms. However, since "constitution" in N' refers to C1, whereas the same expression in N" refers to C2, there is no real contradiction in the piece of reasoning under examination.

Now, some remarks are in order here. The second answer seems to assume what it has to prove: *i.e.*, that N" is indeed *substituting* N'. This is true only in two cases: (i) if the legal order provides the chronological criterion for solving inconsistencies; (ii) if N" contains an expressed derogatory clause bearing on N'. In Ross's example this is not mentioned, and on this basis one can safely assume that [1] and [3] are indeed contradictory, for both norms seem to belong to a certain momentary constitution C2, which follow to the promulgation of N" at time t2 (whereas C1, which was in force at time t1, was, by hypothesis, formed by N' only). After all, then, Ross seems to be right on this score.

However, apart from this controversial point, neither of these answers seems to be entirely satisfactory. Let me elaborate. As Rodríguez (2006: 247) has pointed out, the criterion of *legality* is better seen as applying to *sets* of legal norms, rather than to single legal norms. As is known, the criterion of legality, traditionally understood, provides that rules produced by a legally competent authority are valid in a certain legal system until they are made invalid in the way determined by the legal system itself. According to Rodríguez, the principle of legality must be reinterpreted as stating the conditions to be met for a legal set (what may be called a "momentary legal system") to belong to a sequence of legal sets (which we can stipulate to call a "legal order"). It does *not* state the conditions that *a single norm* must meet to belong to a certain legal order.

Now, if this is correct, the amendment of the rule on amendment would be tantamount to breaking the continuity of a set of legal sets [*i.e.* a legal order], precisely when the rule on amendment is not regarded as self-referential: it would be a breach of legality, an illegitimate change in the legal order, since there is no rule which allows the amendment of the rule on amendment. This is due to the fact, correctly emphasized by Ross, that the apical normative authority of a certain legal order is that which can amend the constitution. But whereas Ross is wrong in dismissing all kinds of self-reference as nonsense, he is right in suggesting that the only way of making sense of a change of an apical rule of constitutional amendment is by referring to an (hypothetical and extralegal) basic norm, imposing to identify valid law by applying each subsequent norm on the amendment of momentary legal systems. By removing such a fiction, however, one obtains that the legal order (not only momentary legal systems) changes whenever the rule on constitutional amendment is modified.

However, if the rule on constitutional amendment is regarded as self-referential, a different problem arises: such a norm in fact carries out two different delegations to two conceptually different normative authorities (although the same organ or set of organs may be, empirically, vested by both delegations). In the case of the revision of the other norms of the constitution, in fact, it simply empowers some delegated authorities to amend such provisions. Nonetheless, regarding itself, it delegates a certain normative authority to change the criterion of membership of momentary legal systems to the legal order: it changes the legal order.

Accordingly, the determination of the self-referential character of provisions on constitutional amendment seems to lead to a puzzling dilemma regarding law's determinacy: either self-reference is banned but the legal order, as we have just seen, changes whenever an amendment of the rule on amendment is carried out, or self-reference is accepted, but then the apical normative authority of a legal order recognizes that it is not the apical normative authority of such an order, since it empowers another normative authority to modify the constitution and, consequently, the legal order. As a consequence, Ross's puzzle, even if read from a diachronic stance on law, persists.

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