Analisi e diritto
2/2021

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Realizzazione editoriale
Edizioni ETS - Pisa
www.edizioniets.com

Analisi e diritto

2/2021

Edizioni ETS

Registrazione presso il Tribunale di Pisa n. 5/2019

Direttore responsabile
Riccardo Guastini

Periodico semestrale. I contributi pubblicati sono sottoposti, in forma anonima, alla revisione di almeno due lettori anonimi.
Six-monthly journal. Published articles undergo double-blind peer-review.

Analisi e diritto è pubblicata con il contributo dei fondi per la ricerca delle seguenti istituzioni:
Università degli Studi di Genova
Càtedra de Cultura Jurídica de la Universitat de Girona
Dipartimento di Scienze Giuridiche "Cesare Beccaria" dell'Università degli Studi di Milano
Centre de Théorie et Analyse du Droit
(UMR 7074, Université Paris Nanterre, École Normale Supérieure, CNRS)

Abbonamenti, comprese spese di spedizione / *Subscription (incl. shipping charges)*

print, individual:	Italy € 60,00 / Abroad € 70,00
print, institutional:	Italy € 80,00 / Abroad € 90,00
*PDF**:	individual € 50,00 / institutional € 60,00

* Sconti / *Discounts*: Latin America -35%; Africa -50%.

Edizioni ETS
Palazzo Roncioni - Lungarno Mediceo, 16, I-56127 Pisa
info@edizioniets.com
www.edizioniets.com

Distribuzione
Messaggerie Libri SPA
Sede legale: via G. Verdi 8 - 20090 Assago (MI)

Promozione
PDE PROMOZIONE SRL
via Zago 2/2 - 40128 Bologna

ISBN 978-884676338-9
ISSN 1126-5779

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SAGGI
(ESSAYS)

The Methodology of Analytic Jurisprudence

*Pierluigi Chiassoni**[1]

> Striving to cut a new road through the wilds of jurisprudence, I find myself continually distressed, for want of tools that are fit to work with. To frame a complete set of new ones is impossible. All that can be done is, to make here and there a new one in case of absolute necessity, and for the test, to patch up from time to time the imperfections of the old.
>
> Jeremy Bentham[2]

Abstract

The paper purports to provide a tentative introduction to the methodology of analytic jurisprudence. Section 1 puts to the fore ten basic principles of the analytic approach. Section 2 draws the charter of analytic jurisprudence, distinguishing an expository and a normative variety thereof. Section 3 draws up a bird-eye survey of some of the main tools the mastery of which fares as a necessary condition for fruitful analytic enquiries upon the law. Section 4 outlines a variety of analytic conceptual analysis as a response to some recent skepticism. Section 5, finally, strikes a blow in favour of analytic legal philosophy against a variety of (allegedly) truly "philosophical" jurisprudence, by way of a comparative argument concerning their respective dealing with the "concept of law" issue.

Keywords: Jurisprudence. Analytic Jurisprudence. Methodology of Analytic Investigation. Conceptual Analysis. Concept of Law.

0. Foreword

Analytic jurisprudence represents a major achievement in the millenary coping of humans with law. Nonetheless, its identity looks uncertain, and its merits, if any,

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[1] The present paper represents a first, tentative, study towards an introductory chapter to the planned second volume of my "history" of analytic jurisprudence (see Chiassoni 2016a: xv-xvii). That purpose will perhaps excuse its overall naiveté. A modified form of it will appear in a book dedicated to the methodology of jurisprudence and edited by Mathieu Carpentier.

[2] Bentham 1789: 214-215, fn J2.

are currently at stake. Recent meta-philosophies of law entertain a dim view of the analytic enterprise. Roughly since the turn of the century we breathe a new air[3], where legal philosophers are apparently driven by the pursuit of what are presented as less modest, truly "philosophical", more "robust", more "interesting" conceptions of their tasks[4].

My aim, in this paper, is outlining a vindication of analytic jurisprudence (it goes without saying: as I see it) from the standpoint of its meta-philosophy of law and methodology[5].

Section 1 provides a reconstruction of the basic investigation instructions ("principles") that characterize the analytic approach to legal philosophizing.

Section 2, taking stock of the principles in Section 1, offers a tentative account of the disciplinary statute of analytic jurisprudence, distinguishing an expository and a normative variety thereof.

Section 3 draws up a bird-eye survey of some of the main tools the mastery of which fares as a necessary condition for fruitful analytic enquiries upon the law.

Section 4, a follow-up of Section 3, outlines a variety of analytic conceptual analysis as a response to some recent skepticism.

Section 5, finally, strikes a blow in favour of analytic legal philosophy against a variety of (allegedly) truly "philosophical", and hence of (allegedly) more robust and interesting, jurisprudence. That will be done by comparing an instance of essentialist coping with the "concept of law" issue (coming, as we shall see, from Robert Alexy) with the analytic approach, and bringing to the fore why the latter should be considered preferable.

1. The Principles of an Analytic Approach to Jurisprudence

An analytic approach to jurisprudence is a peculiar way of dealing with problems concerning the law-world that are usually regarded as philosophical. These are typically about the law (in general), legal norms, legal systems, legal sources, legal interpretation, legal reasoning, legal science, sovereignty, validity, legal rights, legal duties, the relation(s) between law and morals, law and justice, law and coercion,

[3] The "new air" is in part the effect of the publication of Hart's "Postscript" to *The Concept of Law*, a section thereof is dedicated to a reflection on "legal theory" (Hart 1994: 239-244; Coleman (ed.) 2001).

[4] See, e.g., Dworkin 2006: 140-186; Alexy 2001; Dickson 2001; Dickson 2004: 117-156; Raz 2004: 17-46; Alexy 2006: 281-299; Dickson 2006; Dickson 2011: 477-497; Shapiro 2011, ch. 1; Langlinais, Leiter 2013; Dickson 2015: 207-230; Alexy 2017: 314-341; Plunkett, Shapiro 2017: 37-68; Dickson 2017: 11-40; Luque 2017; Enoch 2019: 65-86.

[5] The word "methodology" is ambiguous. It can stand both for any discipline (or "science") concerned with the method for carrying out certain operations, and for the set of methods used in a particular branch of learning or practical business. Here I will use it in the latter meaning.

law and state, law and logic, law and rhetorics, law and truth, law and social sciences, law and cognitive sciences, etc.

The peculiarity of the analytic approach comes from the adoption of a set of investigation instructions ("principles") that have been theorized or adopted in the course of the two-hundred-and-forty-five years since (what can be viewed as) the founding essay of analytic jurisprudence, Jeremy Bentham's *A Fragment on Government*, was published[6].

A tentative (and by no means exhaustive) reconstruction would present analytic principles as a set encompassing not fewer than ten different items, to wit: (1) the principle of ignorance, (2) the principle of conversion, (3) the principle of refinement, (4) the principle of capture, (5) the principle of empirical support, (6) the principle of contact, (7) the principle of simplicity, (8) the principle of austerity, (9) the principle of separation, and, last but (of course) not the least, (10) the principle of commitment[7].

The *principle of ignorance* requires jurisprudents to be methodically distrustful as regards to what they assume to know about the law: above all when the presumed knowledge sounds familiar, looks like a matter of unquestionable course, is something anybody is used to. Herbert Hart, one of the leading figures of contemporary analytic jurisprudence, makes clear why this principle should be honoured, when, in his inaugural Oxford lecture, he warns that «In law as elsewhere, we can know and yet not understand»[8]. The principle of ignorance works accordingly as a remedy to the received views ("tradition"), biases and false certainties jurisprudents fatally bring to bear in their investigations about law and legal experience. In a Benthamite-styled formulation, the principle of ignorance requests jurisprudence to be turned into «the art of being methodically ignorant of what everybody knows»[9]. Ignoring, notice, *must* be (made into) *an art*: it must become an action the legal philosopher performs by consciously applying a technique of philosophical enquiry[10].

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[6] Bentham 1776.

[7] I have identified some of these principles in various writings over the last ten years: Chiassoni 2019: 9, Chiassoni 2016a: 9-32, 118-131, 308-337, 387-396, Chiassoni 2016b: 384-409, 445-469, Chiassoni 2016c: 61-71, Chiassoni 2013: 247-258, Chiassoni 2011: 331-334. In passing, the principles appear to be quite useful also in coping with issues outside of legal philosophy, like, e.g., issues proper to specific areas of the doctrinal study of law (administrative law, criminal law, constitutional law, the law of evidence, etc.).

[8] Hart 1954: 21; see also Austin 1832: 370.

[9] Chiassoni 2016c: 62-63. I say "in a Benthamite style", since Bentham's definition of jurisprudence as "the art of being methodically ignorant of what everybody knows" can be read, and is usually read as, a sarcastic and derogatory characterization of the study of law as a whole (and perhaps, of the law itself), as it was at the end of the XVIII century.

[10] The principle of ignorance may look like an offspring of the Cartesian principle of methodical doubt (Descartes 1641). This is not the place, however, to cope with such issue.

The *principle of conversion* requires transforming metaphysical (or "ontological") problems into conceptual problems: at least, as a fruitful preliminary step of jurisprudential inquiries. Metaphysically formulated problems (like, e.g., "What is law?", "What is legal validity?", "What is legal interpretation?", "What is a legal duty?", etc.) should be converted into as many conceptual problems ("What does "law" mean in the here and now of extant legal culture?", "What does "legal validity" mean?", "How is "legal interpretation" being used by jurisprudents, jurists and judges?", "What do people mean, if they mean anything at all, when they talk about 'legal duties' or 'legal rights'?", etc.)[11]. Synthetically minded jurisprudents are used to regard the principle of conversion as pushing legal philosophy towards pointless (and boring) lexicography. Analytic jurisprudents, contrariwise, take it as a safe-conduct against abstruseness, as well as a reliable guide to effective and deep mastery of legal reality.

The *principle of refinement* requires jurisprudents to engage in a never-ending (if you like, Sisyphean) fatigue. Any knowledge lawyers may have about the law, as well as their everyday practice as jurists, judges, attorneys, etc., inside of some legal experience, necessarily depend on (is unavoidably mediated by) some terminological-conceptual apparatus (some scheme, framework, or set of terms and corresponding meanings). The principle of refinement invites jurisprudents to be distrustful about the extant terminological-conceptual apparatus their legal culture happens to (have inherited from previous generations and) make use of at any station in its temporal progression. It suggests that there is always room for moving from (fatally) less fine (poorer, obscurer, obsolete) terminological-conceptual apparatuses to (ever) finer (richer, clearer, updated) ones, containing a larger set of more precise concepts tied to a more articulated set of terms. In sum, the principle requires jurisprudents helping their legal culture to enjoy, at any time, of the finest possible terminological-conceptual apparatus that can be worked out. This outcome they should achieve by the constant, relentless, carrying out of two tightly connected and synergetic jobs that are often packed together under the uncertain label of "conceptual analysis": i.e., *conceptual precisification* (clarification, elucidation) and *terminological articulation*.

The *principle of capture* follows in the previous principle's footprints. It sets the regulative ideal any refinement job should be aiming at: to wit, the working out of a terminological and conceptual *net* capable of capturing, by means of an adequately wide set of well defined concepts, all the relevant phenomena in the

[11] G.E. Moore, in his lecture "What Is Analysis?", presents (what I am calling) the principle of conversion as a matter of course for philosophical inquiry: «You see the general question we've got to try to answer is one which it's most natural to put in the form: What *is* Philosophy? But this means the same as: How is the word philosophy in one of its senses used *now*? What is the modern English usage?» (Moore 1966: 153).

relevant field of enquiry (if you like, all the worthwhile fishes in the legal pond)[12].

The *principle of empirical support* requires conceptual frameworks to be both worked out and evaluated in relation to legal reality conceived as a set of empirical events. The problems jurisprudents must cope with should be those that originate from everyday legal practice. The outputs of jurisprudential inquiries must be firmly grounded on experiential data. Jurisprudence must be, in sum, a bottom-up, experience-driven, philosophical investigation. Any belief in conceptual heavens (*conceptualism*), any belief in forms of respectable and fruitful knowledge that would be different from either empirical or formal ones (*anti-naturalism*), and the pursuit of unrealistic utopias so far as normative jurisprudence is concerned (*irrationalism*), must altogether be rejected.

The principles of contact, simplicity and austerity consist in as many complements to the principle of empirical support.

The *principle of contact* requires jurisprudents to avoid conceiving legal philosophy as a bookish enterprise. Books of jurisprudence should not deal solely, or primarily, with other jurisprudential books; they should not be solely, or primarily, "upon other books". On the contrary, jurisprudents should constantly cast their eyes on legal reality, as a (richer) world made of jurists, judges, legislators, administrative officials, and also, of course, people at large with their material and spiritual interests. They should take into account the outputs of the doctrinal study of law and legal sociology. They should be alert to the reality of law in its conspicuous linguistic dimension, taking into account the huge, nuanced, sometimes baffling, discursive stuff that is the main stuff the law is made of. The principle of contact, in sum, stands as a remedy against any dogmatic or (as we may even say) "theological" way of doing jurisprudence. It works as a check against jurisprudents' keenness on turning the discipline into a quotations game, where some (often unfortunate) sentence is raised at the dignity of an eternal statement of some ("necessary") truth about the law and, accordingly, is made the object of interpretations, qualifications, developments or refutations, roughly in the same way as religious dogmas are.

The *principle of simplicity* urges jurisprudents to avoid any magniloquent phrase while pointing to the purpose of their investigations. It sees expressions like "enquiring about the nature", "the fundamental nature", "the essence" or "the charac-

[12] Together, the principle of refinement and the principle of capture suggest an anti-reductionist approach to jurisprudence theory-and-concepts building. They oppose unwarranted theoretical reductionism, to wit, the tendency to underappreciate, overlook, or disregard the complexity of legal systems and legal experience, in order to present them, so far as possible, as structurally simple phenomena. The anti-reductionist jurisprudent, on the contrary, is not on the lookout for «pleasing uniformity of pattern»; she strives instead to retain and display the complexity of legal systems (so far as conceptually warranted by functional and other practical differences, of course) by means of a network of adequately articulated concepts. For a couple of examples of anti-reductionist jurisprudence, see e.g. Hart 1961: 38 ff.; Tarello 1974, part II.

ter" of law, which are supposed to point to as many valuable matters of jurisprudential investigations, as being laden with unnecessary (and possibly obnoxious) ontological suggestions. It requires, therefore, that such forms of words be put down in favour of simpler, ontologically uncompromised, ones (like, e.g., "enquiring about the law"). The principle, in sum, stands up to any non-naturalistic, pre-analytic, "metaphysical" conception of jurisprudence: to any view that still entertains, perhaps unconsciously, the idea of legal philosophy as vested with the role of "the first philosophy" (*philosophia prima*) about the law, as the only enterprise capable of disclosing those "necessary truths" about the law-world, which empirical legal science (and its servant, analytic jurisprudence) cannot even imagine to come close to.

The *principle of austerity* sets a standard of no-exaggeration in the formulation of jurisprudential theses (like, e.g., those concerning the actual role legal rules, interpretation, adjudication, etc., would play in the life of a legal system). If we read this principle together with afore considered principles of empirical support and simplicity, it appears to work as a gap filling instruction, suggesting jurisprudents the proper way of giving word to their discoveries. Such wording, it claims, should not indulge either in metaphors, or, even worse, in forms of expression where the informative content is overwhelmed, disguised or altogether dissipated by the use of combinations of words meant to be shocking for the audience. The principle of austerity admits of no *succès de scandale*. It tolerates no *pour épater les juristes.* Jurisprudence is no literary exercise. It is no words-magic for the amusement of jaded intellectuals and other leisured people. Its claims must be couched in the severe, tightly controlled, language of conceptual precision and empirical reference.

The *principle of separation* requires jurisprudents to avoid any confusion between knowledge and practical action, between description (broadly conceived), on the one hand, and ethical evaluation, prescription and justification, on the other. In the well-known Benthamite terminology, the principle urges legal philosophers to keep expository (descriptive) and censorial (normative) jurisprudence rigorously apart. This, it must be noticed, does not mean arguing *for* descriptive jurisprudence, and *against* the normative variety thereof. The principle of separation does not extoll ethical *Wertfreiheit* as the sole worthwhile posture for a jurisprudent to adopt. As we shall see in a moment, from an analytic standpoint, full-blown jurisprudents should do both. Never, however, in such a way that pieces of normative jurisprudence get smuggled as innocent "discoveries" of the purest descriptive sort[13].

[13] Julie Dickson doubts about the genuinely descriptive character of "descriptive legal theory", arguing for an approach she dubs "indirectly evaluative legal philosophy" (IELP) (see Dickson 2001, Dickson 2006, and, above all, Dickson 2015, where the five "tenets" of IELP are presented). Her preoccupation is sound. It must be noticed, however, that "descriptive", as applied to jurisprudence, may be understood in two different ways. In a narrow sense, "descriptive jurisprudence" is an enterprise strictly devoted to providing (sociological, empirically-grounded) narrations about aspects of the law-world. In a broad sense, "descriptive jurisprudence" is an enterprise devoted to working out general theories of

Finally, there comes the *principle of commitment*. Commitment – one may query – to *what*? The question commands an answer that, at a first blush, may look like an outright violation of the austerity principle. It must be emphasized, however, that the whole history of the analytic approach to legal philosophy suggests the answer I am going to offer. Analytic jurisprudence arises, and thrives down the ages in the works of its supporters, out of the conscious pursuit of an overwhelming, never-to-be completely achieved, goal (a "regulative ideal"); out of the conscious pursuit, if you like, of a realistic utopia. This is the utopia that requires establishing the rule (the dominance) of reason upon positive law and legal thinking. Jurisprudents should bring their own contributions, tentative and passing as they are doomed to be, to that awesome aim. To be sure, a commitment to the rationality of the law-world can be understood in quite different ways, according to the conception of reason, reasonableness, and rationality that is being adopted. The analysts' choice, as we shall see in the next section, goes for a modest but sound variety. They look at reason as "a small light"; but also assume, at the same time, it to be "the only light" that can help turning the law into a better enterprise to human benefit[14].

2. The Statute of Analytic Jurisprudence

A disciplinary statute is a set of sentences that establish the matter, purpose, and tools of the concerned line of enquiry. The several principles reviewed in the previous section play different, sometimes complex, roles in relation to analytic enquiries about the law. In so doing, as we shall see now, they contribute in different ways to defining the disciplinary statute of analytic jurisprudence.

The *principle of commitment*, we have just seen, requires analytic jurisprudents to contribute to the promotion of the rationality of positive law and legal thinking. In so doing, the principle sets up a very broad *purpose* to the enquiries of analytic jurisprudence. From the standpoint of the austere conception of reason I mentioned before (reason as "the small but only light"), that broad purpose needs to be broken down into more precise ones. Five purposes "of detail" come to the mind, which

law, of descriptive and explicatory import, and deprived of any morally justificatory intent. Herbert Hart, for instance, when arguing for the "descriptive" character of legal theory, used that adjectival word in a broad sense. It must also be noticed, in passing, that Dickson's idea of an "indirectly evaluative legal philosophy" looks troublesome. Apparently, by that expression she wants to emphasize that also any genuine theoretical job necessarily involves "evaluations". This is true. These are *epistemic* evaluations, however. Indeed, any serious theoretical job is committed to values like empirical truth, clarity, non-contradiction, explanatory power, intellectual honesty, etc. Commitment to epistemic values can go along with *ethical Wertfreiheit*. Talking of "indirect evaluation" appears, accordingly, un-precise and misleading.

[14] Bobbio 1998: 199.

correspond, respectively, to the *epistemic*, *conceptual*, *methodological*, *instrumental*, and *substantive* dimensions of rationality.

Promoting the *rule of epistemic rationality* requires analytic jurisprudents to further true and reliable knowledge about law and the doctrinal study thereof. Two different tasks must be carried out to that end.

First, jurisprudents should work out realistic general theories of law, of the doctrinal study thereof, and of (assumedly) scientific investigations about it. They should provide true accounts ("descriptions") of the law-world. This task, it must be noticed, has both a *constructive* and a *deconstructive* side. Providing realistic theories requires engaging in a relentless critical assessment of extant theories. In particular, it requires analytic jurisprudents to detect mystifications, whenever they may be afoot, and put them to pieces by means of demystification work.

Secondly, jurisprudents should also take up the role of legal epistemologists. They should enquire about the better ways conceivable of making the law the matter of truly scientific investigations, and put the outcomes of their enquiries into the form of prescriptive legal epistemologies.

Promoting the *rule of methodological rationality* requires jurisprudents to further the accuracy and correctness of legal reasoning, as performed by jurists, judges, officials of the legislative or executive branch, attorneys at law, etc. Accuracy and correctness are to be measured from the standpoint of logic, rhetorics, and sound theories about legal interpretation and legal argumentation, both as to matters of law and as to matters of fact. The rule of methodological rationality over legal reasoning presupposes, accordingly, the working out of realistic theories of adjudication and "legal science" (as doctrinal study of law) in their argumentative dimensions. Its pursuit turns jurisprudents into controllers and reformers of how jurists, judges, and lawyers reason.

Promoting the *rule of conceptual rationality* requires jurisprudents to further the conceptual precision and terminological articulation of legal thinking. In view of this purpose, jurisprudents should perform the tasks identified by the *principles* of *refinement* and *capture* (§ 1 above): extant conceptual-terminological apparatuses must be subject to a relentless work of conceptual precisification (clarification, elucidation) and terminological articulation, aiming at providing legal thinking and legal practice with conceptual structures favouring, at the same time, a better grasp of legal phenomena and a conceptually conscious practice.

Promoting the *rule of instrumental rationality* requires jurisprudents to contribute to making of law an instrumentally rational enterprise. To such an end, jurisprudents should instruct jurists to perform a double task: (a) checking whether extant sets of legal norms (at the national or international level) are instrumentally adequate to the goal(s) they are presumed to serve; and (b) in the negative case, imagining which norms would be instrumentally (more) adequate to such goal(s).

Promoting the *rule of substantive rationality*, finally, requires jurisprudents to promote law's adequacy to a peculiar set of *ethical values*. These are the values that can be argued for as representing the *ideal ethical background*, or the *ideal ethical setting*, of humans as agents endowed with the capacities "reason" stands for: namely, the capacities of calculating causes and effects, means to ends, the consequences necessarily following from given sets of premises, the arguments most apt to persuade or convince an actual or ideal audience, the outputs of adding or subtracting items (be they numbers, physical data, data concerning the human condition and capabilities, data concerning human institutions, etc.). In view of such aim, jurisprudents are required to perform a double task: (a) seeing whether the content of extant laws (at the national or international level) is acceptable to *rational agents*, i.e., from the standpoint of individuals that, due to their being provided with reason, are assumed to be conscious of their dignity as free and equal moral persons; and (b) in the negative case, setting forth reform proposals[15].

After Bentham, we are used to distinguish between expository (descriptive) and censorial (normative) jurisprudence. How do the several tasks of analytic jurisprudence I have just singled out relate to the Benthamite distinction? In very rough terms, the following answer seems to be in order.

(1) The purpose of *epistemic rationality*, insofar as it requires jurisprudents to provide true descriptions of the law-world, and the purpose of *conceptual rationality*, even taking into account that refinement involves a *reconstruction* of extant terminological-conceptual apparatuses (as we shall see in more detail at §§ 3 and 4, below), can be regarded as identifying as many purposes of an *expository*, (broadly) *descriptive*, or *explanatory* variety of analytic jurisprudence.

(2) Contrariwise, the purpose of *epistemic rationality*, insofar as it requires juris-

[15] In his account of the "critical" branch of jurisprudence, Hart, as it is well known, presents the evaluation of law as a two stages process. In the first stage, the only one that is relevant to the present purpose, any positive legal system should be assessed from the standpoint of its being «acceptable to any rational person» individually considered. Acceptability depends in turn, according to Hart, on meeting three conditions. To begin with, the legal system must contain «certain rules concerning the basic conditions of social life»: namely, «rules restricting the use of violence, protecting certain forms of property, and enforcing certain forms of contracts». Furthermore, these rules must satisfy the «procedural requirements» proper of «the rule of law»: i.e., «the principles of legality» (the rules must be general, fairly determinate, publicly promulgated, easily accessible to knowledge, not *ex post facto*), and «the principles of natural justice» (the rules must be applied by impartial judges through fair trials). Finally, the person (the rational agent) who is evaluating the legal system must be among the beneficiaries of the protections and capabilities its rules provide (Hart 1967: 109-116). My other sources for the present conception of what I am calling (the) *substantive* (dimension of) *rationality* are (obviously) Rawls 1971, Rawls 2001, and Alexy 1978. I wish to emphasize that my argument for the rule of substantive rationality over positive law and legal thinking presupposes no claim to ethical objectivity. I take it to belong to a non-objectivist and non-cognitivist metaethical vantage point.

prudents to work out prescriptive legal epistemologies, and the purposes of *methodological rationality*, *instrumental rationality*, and *substantive rationality* can be regarded as identifying as many purposes of a *censorial*, *prescriptive*, or *normative* variety of analytic jurisprudence, though with different, rising degrees of ethical commitment on jurisprudents' part.

The *principles of commitment, refinement, empirical support*, and *contact* conspire to identify the *matter* of analytic enquires, expository or normative alike. These are legal materials and legal thinking. *Legal materials* are what make up "positive law": i.e., municipal legal systems, primitive laws, international law, soft law, etc. They are mostly linguistic materials: constitutional charters, statutes, executive orders, regulations, judicial opinions and decisions, administrative orders, best-practice statements, etc. *Legal thinking* is likewise to be conceived broadly, to include, besides jurisprudential thinking, doctrinal thinking, sociological thinking, views about the law entertained outside of the (inner) legal culture, etc. It is made, again, of linguistic materials in the forms of jurisprudence books, doctrinal essays, sociological, anthropological and historical legal studies, etc.

Up to now, we have seen how several principles of the analytic approach to jurisprudence contribute to defining the *purposes*, the *varieties*, and the *matter* of analytic enquiries upon the law. A few words must be said, to conclude, as to their contribution to designing the *tools* an analytic approach should make use of.

We can look at the *principles* of *ignorance*, *conversion*, *empirical support*, *contact*, *simplicity*, *austerity* and *separation* as representing as many tools of properly carried out analytic enquiries: in particular, of those belonging to the expository variety. They set by what sort of *attitude* (principle of ignorance) and by what sort of *questions* (principles of conversion and simplicity) analytic investigations should start with. They rule upon the *proper direction* of analytic enquiries (principles of empirical support and contact), and the *proper way of formulating* the results thereof (principle of austerity). They warn against any undercover trespassing into the realm of normative jurisprudence: for instance, by working out value-laden pseudo-descriptions of the law-world, or proposing value-laden conceptual reconstructions (principle of separation).

These are not the only tools an (expository) analytic jurisprudent should make use of, however. I have already mentioned that analytic jurisprudents should be able to perform conceptual analysis, as a way of fostering the conceptual rationality of a legal culture, by the twin operations of conceptual precisification and terminological articulation. As anticipated, the two following sections will be devoted to a survey of some tools of analytic jurisprudence (§ 3) and to a more precise account of conceptual analysis (§ 4).

3. Two Sets of Analytic Tools

From the mid-1950s onwards, roughly, after Herbert Hart's appointment to the Oxford chair, (expository) analytic jurisprudence is usually presented as the branch of jurisprudence characterized by resort to "conceptual", "linguistic", or "philosophical analysis"[16].

The identity of conceptual analysis, however, is far from being established even nowadays. Several forms – some richer, some poorer – inhabit the region of philosophical methodology[17], and this fact has fuelled uncertainty also inside of the province of legal philosophy. In such situation, the safer way to proceed seems adopting a bottom-up strategy of enquiry, one that requires identifying and bringing to the fore the tools analytic jurists in fact make use of when they carry out analytic investigations on legal-philosophical issues.

If we cast a glance, even a very shallow one, on the tools actually employed by analytic jurists from Bentham onwards, it seems useful distinguishing two sets of instruments, at least insofar as the expository branch of analytic jurisprudence is concerned. The first set includes tools for the *analysis of legal discourses*. The second set includes tools for the *refinement of extant terminological and conceptual apparatuses*. The two sets of tools, it must be noticed, are not mutually exclusive from a functional standpoint. In fact, some of the tools I put into the bag of those apt for the refinement task can, and do, also work as instruments for the analysis of legal discourses task, and vice versa.

One further precision is in order before proceeding. Whether the tools I am going to review *as a whole*, or, rather, *only a subset of them*, are tools of "conceptual analysis" is an issue to be settled later on: to wit, at the end of the present section and in the next one. It must be noticed since now, however, that whatever solution will come out as preferable, it will be one in tune with the principle of empirical support and the principle of contact.

3.1. Tools for the Analysis of Legal Discourses

Legal discourses are strings of (mostly written) sentences in a natural language, coming from such agents as constitutional assemblies (constitutional charters), parliaments (statutes), officials of the executive branch (executive orders, executive regulations), judges (judicial decisions, judicial opinions), independent administrative agencies (administrative regulations), city councils (local traffic regulations), academic jurists (essays, hornbooks, treatises, commentaries on some legal topic), attorneys at law (writs of summons, "soft law" documents), jurisprudents (general theories of law, theories of justice, natural law theories), etc.

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16 See, e.g, Cohen 1955; Bodenheimer 1956; Cowan 1963; Pannam 1964.

17 See, e.g., Strawson 1962: 320-330.

From the standpoint of the purposes of analytic jurisprudence, the analysis of legal discourses is *a necessary step*: both in view of the refinement of the extant terminological and conceptual apparatus (refining presupposes a fair grasp of what has to be refined), and in view of the performance of its demystification task.

The tools for the analysis of legal discourse analytic jurisprudents put to use in their enquiries compose a quite varied set. It seems worthwhile distinguishing two main subsets. On the one hand, there are tools the identification thereof is the output of (what may be regarded as) a general theory of natural languages[18]. On the other hand, there are tools of (what may be regarded as) hermeneutic investigations.

3.1.1. Tools from the Analytic Theory of Natural Languages

A theory of natural languages is a set of claims purporting to provide true information about their components and the ways those components work as communication tools. The enquiries of analytic jurisprudents typically presuppose a theory of natural languages. From that theory, they draw methodological instructions for the analysis of legal discourses. In what follows, I will provide a very tentative, rough, and rush account of such instructions. In fact, most of them concern distinctions and raise issues so momentous, that they would deserve pages-long treatments.

1. Any fruitful analysis of legal discourses must be equipped with *a theory of words* and *a theory of sentences*, as much developed and sophisticated as possible[19].
2. So far as *words* are concerned, the following notions, distinctions, and related instructions, are to be taken into account by abiding analytic jurisprudents:
   (a) the distinction between *logical terms* (like, e.g., "not", "and", "or", "if … then") and *descriptive terms* (proper names, definite descriptions, ordinary names, adjectives, and verbs);
   (b) the distinction between *concrete* ("real") *terms* (like, e.g., "table", "gold", "elephant") and *abstract* ("fictitious") *terms* (like, e.g., "fortitude", "justice", "legal duty", "legal right", "sovereignty", "legal power", etc.), paying attention to whether abstract terms are being used, inside of the analysed discourse, in ways that present them mistakenly or by guile as concrete ones, and so incurring into an objectivist or substantive fallacy;
   (c) the distinction between *emotively neutral terms* (that do not trigger the passions, emotions or sentiments of hearers/readers, like, e.g., "moved by a monetary interest", "government by universal suffrage and majority rule",

[18] By "natural language" I mean, to the present purpose, any system of communication by means of articulated sounds or the corresponding graphic signs human communities employ, both in their daily linguistic transactions, and as the bedrock on which the specialized languages of scientific and practical disciplines are built up.

[19] A Benthamite mind cast would talk of "terminology" (theory of words) and "sentenciology" (theory of sentences), respectively.

"policemen") and *emotively laden terms* (that trigger the passions, emotions or sentiments of hearers/readers, like, e.g., "greedy", "democracy", "enforcer of law and order"), paying attention to the ways emotively laden terms are used to further mystifications of some aspect of legal reality;

(d) the distinction between *natural kind* ("water", "gold", "tiger"), *functional kind* ("appendectomy", "vulcanization"), and *moral kind* ("marriage", "freedom of expression", "right to the equal protection of laws") *terms*, the meaning thereof would depend on their objective reference, on the one hand, and *conventional terms*, the meaning thereof depends contrariwise on linguistic usages, on the other hand, paying attention to the fact that no term is a self-qualifying entity (no term tells us: "Hey, I am a genuine moral kind term!"), and therefore to the fact that considering a certain term (say, "freedom of expression") as a moral kind term depends not on some hard-and-fast linguistic datum (on "the very nature of things" as somebody may say), but, rather, on a deliberate or unconscious choice by the user and interpreter;

(e) the distinction between *ordinary terms* ("water", "tree", "house", "car") and *technical terms*, proper of specific disciplines, like, e.g., technical legal terms ("trespass", "nuisance", "strict liability"), paying attention to the fact that it can be the case that ordinary terms are being used also to convey specialized meanings, and vice versa;

(f) the distinction between *deontic terms* (like, e.g., "permitted", "obligatory", "forbidden", "authorized", "ought to", "ought not to", etc.) and *other terms that are indexes of a possible prescriptive use of discourse* (like, e.g., "can", "cannot", "sovereign", "penalty", "prison", "fine", "sanction", "punishment", "punished", "republic", "prosecutor", "contract", "wrong", "right", "lawful", etc.), on the one hand, and *non-deontic, prescriptively neutral, terms* (like, e.g., "open", "closed", "tiger", "jogging", "housing", "rocks", "mountain", "seaside", etc.), on the other hand, paying attention to the fact that deontic terms are typically used *both* in sentences expressing legal prescriptions or conceived as legal norm formulations, *and* in sentences *about* legal prescriptions or legal norm formulations.

3. So far as *sentences* are concerned, the following notions, distinctions, and related instructions, are likewise to be taken into account by abiding analytic jurisprudents:

(a) the grammatical-lexical distinction between *ontic sentences* (indicative sentences not containing deontic terms, like, e.g., "Whoever trespasses into another person's property is punished with a 500€ fine")[20], *deontic sentences*

[20] Notice that this sentence does contain many terms that, though not deontic, are nonetheless indexes of a possible prescriptive use of discourse. This fact would suggest to distinguish between *purely* ontic sentences, and *prescriptively biased* ontic sentences.

(indicative sentences containing deontic terms, like, e.g.: "Trespassing into another person's property is forbidden", "Whoever trespasses into another person's property ought to be punished with a 500 € fine"), and *imperative sentences* ("Punish whoever trespasses into another person's property with a 500 € fine"), paying attention to the fact legal norm formulations and legal prescriptions are not necessarily put in the form of deontic or imperative sentences;

(b) the functional distinction between *descriptive sentences*, conveying true or false pieces of information about the world (like, e.g., "The Civil Code contains 2367 articles"), *prescriptive sentences*, conveying instructions about what can, ought to, ought not to, be done (like, e.g.: "Civil Code provisions ought to be construed liberally"), and *constitutive sentences*, that immediately realize a certain state of affairs (like, e.g.: "The Civil code is hereby derogated"), paying attention to the fact that the descriptive, prescriptive and constitute uses of discourse are just a few ways of using a language, though apparently the most relevant ones to the analysis of legal discourses;

(c) the semantic distinction between *empirical sentences*, which are true or false in relation to how the piece of empirical reality they purport to describe in fact is, and *analytic sentences*, which contrariwise are true or false in relation *either* to the meanings of the words they are made of (like, e.g., "Spinsters are unmarried women"), *or* to their syntactic structure (like, e.g., "Harry likes seafood and does not like seafood"), which suggests analytic jurisprudents to be alert about the fact that the correctness of a sentence does not necessarily depend on its (direct) correspondence to states-of-affairs;

(d) the semantic-syntactic distinction between the *grammatical form* of sentences (the form they happen to have in a given piece of discourse) and the *logical form* of sentences (the form that exactly corresponds to their actual syntactic structure, full meaning, and pragmatic force in a communicative context), paying attention to the fact they do not necessarily coincide; that it may happen contrariwise that, inside of an actual discourse, prescriptive sentences be formulated by means of ontic sentences, and descriptive sentences by means of deontic ones[21];

(e) the semantic distinction between *first-order sentences* (which are immediately about some behaviour or state of affairs, like, e.g.: "Citizens ought to go to the Opera house every Sunday") and *meta-sentences* (which, contrariwise, are about other sentences: "The norm 'Citizens ought to go to the Opera

[21] For instance, the grammatically descriptive sentence 'He is out' may be used, in contexts like a cricket game, not to *describe*, or *state*, that somebody is out, but to *pass a judgment* to that effect. On this issue, see, e.g., Hart 1954: 21 ff., Hart 1955: 258 ff., Hart 1961: ch. I, Hart 1967: 89 ff., Hart 1970: 269-277, Hart 1983b: 1-6, Guastini 2011: 2-7, Jori, Pintore 2014: 4-9.

house every Sunday' is hereby declared void and null"), paying attention to the fact that sentences inside of a legal discourse, far from dwelling all on the same semantic level, can belong to several different levels of discourse[22];

(f) the fact that *descriptive sentences* and *prescriptive sentences* are *heterogeneous* communication items. The former, as we have seen, serve to convey people pieces of information about the world, saying them how the world is, was, or (probably) will be; they are true or false according to whether what they say is, or is not, the case, has, or has not, the declared probability to be the case; they elicit attitudes of theoretical acceptance, reject, or doubt. Contrariwise, the latter serve to make people doing something; they are neither true nor false, but, when legal prescriptions are at stake, possible or impossible to comply with, efficacious or not efficacious, legitimate or illegitimate, just or unjust, etc.; they elicit practical attitudes of acceptance or rejection, consisting in a disposition to comply or not to comply with them;

(g) the fact that, provided descriptive and prescriptive sentences are heterogeneous, no genuinely prescriptive conclusion (like, e.g.: "Freedonian citizens ought to go to the Opera house every Sunday night") can be logically derived by sets of genuinely descriptive (and non-contradictory) premises (like, e.g.: "There is a parliament in Freedonia", "The Freedonian parliament has enacted a law according to which Freedonian citizens ought to go to the Opera house every Sunday night") (so called Hume's Law or Hume's Guillotine);

(h) the fact of *linguistic indeterminacy* of the sentences in a natural language, that is due to syntactic, semantic or pragmatic ambiguity, as well as to the actual or potential vagueness of concepts[23]; though analytic jurisprudents should be aware that the linguistic indeterminacy of the sentences that are norm-formulations (like, e.g., the provisions of a constitutional code) is not the only form of indeterminacy to be considered; that there is always the possibility of legal provisions being indeterminate not linguistically, but rather from the standpoint of powerful material or spiritual interests and conspiring juristic theories and constructions (*juristic indeterminacy*);

(i) the fact that strings of sentences inside of a legal discourse may instantiate different types of reasoning, like, e.g., deductive reasoning, analogical reasoning (in the sense of epistemology), inferences to the best explanation, or rhetorical (*a contrario*, *a simili*, *a fortiori*, etc.) reasoning (*reasoning pluralism*);

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[22] A relevant, law-peculiar, instance of the distinction between sentences and meta-sentences is the distinction between *norms* and *normative propositions*, i.e., between sentences coming from some normative legal authority that, for instance, express prescriptions concerning the behaviour of a person or a class of persons, on the one side, and sentences coming from jurists or legal sociologists that, for instance, inform about the enactment, efficacy, or validity of norms, on the other side.

[23] See, e.g., Hart 1961: chs. I and VII, Hart 1954: 26 ff., Hart 1970: 269-271, 274-275, Nino 1983: 259-268.

(j) the fact that the instances of legal reasoning formulated inside of judicial opinions or doctrinal essays are often *enthymematic* strings of sentences, i.e., logically incomplete sets, which suggests abiding analytic jurisprudents should identify and bring to the fore the missing premises, as a way to make judicial and juristic reasonings amenable to rational criticism.

3.1.2. Tools of Hermeneutic Investigations

Hermeneutic tools work as complements to the tools suggested by the theory of natural languages, in view of making a powerful methodological equipment available to analytic enquiries. They reflect the twin interest of analytic jurisprudents in anthropological philosophy (the use of anthropological tools in philosophical enquiries) and philosophical anthropology (the converse use of philosophical methods to construct and sharpen anthropological tools), fuelled by the spell, and promise, of contemporary developments in the social sciences[24]. It is precisely at this crossroads of perspectives that the distinction between the *internal* and the *external* points of view as to any set of social norms comes out. Following Hart's lead, analytic jurisprudents should reject any purely behaviouristic conception of the external point of view, favouring instead a hermeneutic one. A wise *observer*, as any analytic jurist must be, is not to be content with recording the non-linguistic behaviour of *participants* or *users* to a social, rule-governed, practice. She should also crucially take into account the participants' *use* of normative language and their normative concepts. Furthermore, by means of a process of identification (*Einfühlung*, *immedesimazione*), she should even put herself in the participants' own shoes, as it were, in order so far as possible to understand *their* normative structures as *they* themselves understand them[25].

The observer-participant divide is connected to another key distinction analytic jurisprudents do (should) pay attention to. This is the distinction between *descriptive* sentences *about* a normative set (*external* statements of fact about the rules and rules-oriented behaviours and attitudes of the system's officials and subjects), on the one hand, and *applicative* sentences *grounded on* the (pretended) content of some normative system (*internal* statements, made by *users* of the rules or norms of some given normative system, like, e.g., statements of what duties, rights, liabilities, etc. a person has under that system, statements «assessing» situations «by reference to rules» assumed to be valid legal rules of the system), on the other hand[26].

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[24] See, e.g., Hart 1961: 289, where, besides P. Winch (Winch 1958), he also quotes an essay by R. Piddington on B. Malinoswki's theory of needs, and p. 291, where works by Malinowski, A.S. Diamond, K.N. Llewellyn and W. Hoebel are quoted.

[25] See, e.g., Hart 1961: 88 ff., 239 ff., Hart 1961: 247-249, Hart 1982: 106-161, Hart 1983b: 13 ff. In his *Pragmatische Antropologie*, Immanuel Kant draws a like distinction between 'knowing the world' and 'having use of the world': the former amounts to the 'knowledge of a game which we watch'; the latter amounts instead to 'participating in the game' (Kant 1970: 542).

[26] See Hart 1955: 247 ff., where, at p. 248, we read: «We can contrast the "external" standpoint of

3.2. Tools for the Refinement of Extant Juridical Terminological and Conceptual Apparatuses

Also this subset of tools is, really, a quite mixed bunch. Four main subsets are worthwhile considering, namely: (1) a theory of concepts, (2) a theory of definition, (3) a theory of classification, and, last but not the least, (4) a theory of philosophical imagination.

3.2.1. A Theory of Concepts

Analytic jurisprudents should adopt a theory of concepts characterized by three backbone ideas.

First, concepts are a matter of either convention or stipulation. Outside of the realm of common (ordinary or specialist) uses of words, there are no true concepts. Differently from what had been maintained by the adherents of *Begriffsjurisprudenz*, endorsing *conceptualism* (see § 2 above), concepts are not to be found in some rarefied dimension of «real essences»[27].

Second, stipulated concepts are neither true nor false. Stipulations are to be assessed instead in terms of whether they are pragmatically justified; their value, if any, depends on the goal(s) they are meant to serve, and on whether they prove to be actually useful to such goal(s). Analytic jurisprudents should endorse a pragmatic view of concept (pragmatic conceptualism).

Third, theoretical concepts, like those worked out by expository analytic jurisprudence, should be stipulated concepts informed by an overall explicatory, refinement, goal. They should amount, accordingly, to weak stipulations, meant not to depart altogether from the ways the redefined concepts are ordinarily understood, but to provide improved, puzzle-solving, versions thereof[28].

3.2.2. A Theory of Definition

Analytic jurisprudents should adopt a theory of definition resulting from the combination of classical theory, Bentham's path-breaking account of fictitious terms (like "right", "duty", "power", "responsibility", etc.) and method of paraphrasis (a specific method of definition in use)[29], and the contributions of contemporary linguistic philosophy[30]. It revolves around three ideas.

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the observer of a legal system who is thinking about its rules and their present and future operation with the "internal" standpoint of one who is using the rules of the system either as an official or private person in various ways»; see also Hart 1954: 27, Hart 1961: 56-57, 88-90, 102-105, 109-110, 115-117, 291, Hart 1983b: 13 ff.

[27] See, e.g., Hart 1970: 265-277.

[28] See, e.g., Carnap 1950a: 1-19, Hempel 1952: 2-20, Robinson 1954; Scarpelli 1955: 35-70, Hart 1961: 213-214, Hart 1970: 269-271.

[29] See Bentham 1776: ch. V, para. 6, n. 1, Hart 1970: 272.

[30] Hart 1961: 279-280.

First, there are several different forms of definition. There are, particularly, forms of definition other than definition *per genus et differentiam specificam* (definition by kind and specific difference) – to wit, contextual definition (definition in use) and standard or central-case definition – which are more suitable to define legal terms, since they either do not refer to any definite object in reality (compare, e.g., "duty", "right" and "corporation" with "elephant", "triangle", "table", "gold", etc.), or no clear *genus*, no closed set of common necessary and sufficient properties, is available to characterize their reference (like, e.g., is the case with 'punishment')[31].

Second, good definitions – so far as legal terms are at stake – are *explanatory* or *explicatory definitions*. These provide instruction both about how the term being defined is (or may be) used, and about the things to which the term refers. They are not just «about words»: on the contrary, they are to be meant to «make explicit the latent principle which guides our use of a word» and should possibly «exhibit relationships between the type of phenomena to which we apply the word and other phenomena»[32].

Third, following John Austin, attention must be paid not to fall prey of the "definitional fallacy": i.e., of the methodological blunder of pretending to solve some complex theoretical problem – like the long-standing problem "What is law?" – by way of the sentences that make up the definition of a term (e.g., by providing a strictly conceived, therapeutic-regulatory, definition of "law")[33]. At the heart of every theory, of course, there are definitions of key-terms[34]; but no theory can be superseded by definitions, nor should be «built on the back of it»[35].

3.2.3. A Theory of Classification

Since Bentham, analytic jurisprudents should also master the know-how for properly building up new terminological and conceptual apparatuses. These should

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[31] Hart 1961: 15, Hart 1968: 4-5.

[32] Hart 1961: 13-14, 214-215.

[33] See Austin 1832: 370-371, Hart 1954: 25-26, 26 ff., 47 fn 28, Hart 1961: 16, 213-214, Hart 1963: 2-3. In the latter work, Hart recalls the importance of reflexion upon «the criteria for judging the adequacy of a definition of law», and considers definitions aiming «to provide, by marking off certain social phenomena from others, a classification useful or illuminating for theoretical purposes». The passage, however, must be read against other passages in Hart 1961 (15, 213-214), where Hart insists on the difference between providing a *concept* of law and providing a *definition* of law: «It is because we make no such claim to identify or regulate in this way the use of words like "law" or "legal", that this book is offered as an elucidation of the concept of law, rather than a definition of "law" which might naturally be expected to provide a rule or rules for the use of these expressions» (213).

[34] According to Hart, for instance, adequate descriptive theories of social phenomena like law are made of three basic ingredients: definitions of key terms; empirical statements about *passing features* of the world («ordinary statements of fact»); and empirical statements about *constant features* of human beings and their world (statements «the truth of which is contingent on human beings and the world they live in retaining the salient characteristics they have»). Hart 1961: 199-200.

[35] Hart 1954: 23 ff., Hart 1961: 13 ff., 279-280.

be arranged in such a way as to identify, at every classificatory level, mutually exclusive and jointly exhaustive classes of individuals. Analytic jurisprudents should abide by such a technique, for instance, when drawing general theories of legal norms[36].

3.2.4. Explanatory and Constructive Imagination

The purposes of refinement and demystification analytic jurisprudents should pursue (see § 2 above) makes a combination requiring them to carry out also investigations that are similar to those of so-called descriptive and reformatory metaphysics – really, as we shall see now, two forms of "conceptual", "linguistic", or "philosophical" "analysis"[37].

Descriptive metaphysics purports to bring to the fore (expose) and explain the basic or fundamental *conceptual structure* of our thought and discourse. This structure is (assumed to be) presupposed in our everyday talks (and thoughts), whenever we use, as we currently do, terms having to do with identity, existence, knowledge, space and time, cause, effect and the temporal order of objects, mental states, moral properties, classes of individuals in the animal or vegetable kingdoms, etc. "Descriptive metaphysics", it must be noticed, is a belittling label. Indeed, such inquiry must not only identify and provide an accurate *report* about the several basic concepts we make use of, and their mutual relationships. It should also *explain* why, at any given time, we have the basic conceptual structure we do. In view of these objectives, it must go beyond description in a proper or narrow sense. On the one hand, it must bring to the fore, and cure, the perplexities that may arise in the use of basic terms and concepts, performing a *therapeutic function*. On the other hand, in order to explain *why* we have the basic conceptual structure we in fact do, it must perform thought-experiments of *explanatory counter-factual imagination*. It must imagine what the basic conceptual structure would be like, if (we) humans and the world we live in were different.

Reformatory metaphysics purports to see whether the basic conceptual structure we have could be changed for the better, from the standpoint of the way we (and our world) in fact are, and the interests we in fact have. Reformatory metaphysics is parasitic on descriptive metaphysics. Its investigations start where the latter's end (though, saying it in passing, from a diachronical perspective they are both doomed to be never-ending enterprises). Its basic tool consists, again, in performing thought-experiments. In this case, however, they are experiments of *construc-*

[36] On classification see, e.g. Bentham 1817.

[37] The distinction between "descriptive" and "reformatory" metaphysics is drawn and fleshed out by P. F. Strawson in several essays: see, e.g., Strawson 1959: 9-12, Strawson 1962: 105-118, Strawson 1985: chs. I-III. These essays, together with Strawson 1956, provide the basis for what I am going to say in the text.

tive imagination, which are meant to set forth a different and improved conceptual structure.

Analytic jurisprudents are not philosophers *sans phrase*. Their lot consists, rather, in philosophizing about that specific province of social reality that is the law-world. They are local philosophers, dealing with local conceptual apparatuses, ontologies, and epistemologies. By now, however, it should be clear why some at least of their investigations should be similar to those of descriptive and reformatory metaphysicians. The matter of their enquiries, we have seen (§ 2 above), is the extant terminological-conceptual apparatus legal cultures happen to make use of, together with legal thinking in its mystifying capabilities. The purpose of refinement requires conceptual description together with exercises in explanatory and constructive imagination. The purpose of demystification requires, in turn, conceptual description and therapeutic proposals[38].

3.3. The Tools of Analytic Jurisprudence and Conceptual Analysis

How do the several sets of tools above (§§ 3.1 and 3.2) fare in relation to "conceptual analysis"? Are they amenable to it? Or, contrariwise, do they compose a methodological box of their own, to which such a label would be inappropriate?

There is to be sure no objectively true notion of conceptual analysis that could help us out the riddle. In the next section, I will argue, by way of proposal, that the tools I have considered can reasonably be regarded, as a whole, as the instruments of a useful variety of conceptual (linguistic or philosophical) analysis in the service of profitable legal philosophical inquiries.

4. A Modest and Reconstructive Variety of Conceptual Analysis

In a well-known collection of essays, Brian Leiter makes a pressing call for a "naturalized jurisprudence"; this aims «to describe the reality of legal phenomena»,

[38] Hart, for instance, regards, and uses, philosophical imagination as a main tool of his " descriptive jurisprudence", believing that adequately devised thought-experiments may throw much light on our actual conceptual and institutional structures by comparing them to alternative imaginary situations. The use of thought-experiments is manifest in at least three points in Hart's theory: first, in his reconstruction of the simple model of law as a coercive order; second, in his idealized picture of a primitive, pre-legal, society governed only by a set of unconnected primary rules (a prelude of sorts to Nozick's invisible-hand explanation for how the emergence of state out of a Lockean state of nature: Nozick 1974: part I); third, in his account of the "minimum content of natural law" (the «empirical theory of natural law» which Hart sets against both traditional natural law theory and Kelsenian positivism): see Hart 1961: 18 ff., 91 ff., 193 ff. Cf. also Hart 1970: 270-271, Hart 1983b: 12, 13-14. It is worthwhile noticing that, in his enquiries of reformatory analytic jurisprudence, Hart also makes use of a further principle: the principle of anti-reductionism. This principle conspire with the refinement and capture principles. See § 2 above, footnote 11.

and poses as the heiress to American Legal Realism and Quine's empiricist philosophy of science[39]. In so arguing, Leiter urges the abandonment of the «method of conceptual analysis via appeal to folk intuitions»[40]. He claims that method to be doomed to failure, *if* one is looking for a philosophically valuable explanation of the "nature" or "essence" of law: that is to say, if one wishes to get at "necessary truths" about the law, as many *soi-disants* analytic jurisprudents, in recent times, seem fond to do[41].

At first blush, Leiter's case for a naturalized jurisprudence, and against conceptual analysis, may appear as casting a sinister light on the enterprise of analytic jurisprudence, as I have reconstructed it so far.

Upon reflection, however, that is not the case. Leiter's darts aim at conceptual analysis (based on folks' intuitions) as an instrument of analytic enquiries that look for a philosophically valuable explanation of the "nature" or "essence" of law, and

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[39] See Leiter 2007: 183 ff., Leiter 2012, Langlinais, Leiter 2013. On conceptual analysis in (and) jurisprudence, see also Endicott 2002: § 3.1, Bix 2007: 1-7, Marmor 2012: 1-26.

[40] Leiter 2007: 1-2: «the method of conceptual analysis via appeal to folk intuitions (as manifest, for example, in ordinary language), a method that was itself at risk of becoming an item of antiquarian interest in the context of the naturalistic revolution of late 20th century philosophy»; Leiter 2012: § 2: «The question that plagues conceptual analysis, post-Quine, is what kind of knowledge such a procedure actually yields? Why should ordinary intuitions about the extension of a concept be deemed reliable or informative? Why think the "folk" are right?».

[41] Leiter 2007: 177-178, 196-197, where, discussing Ian P. Farrell's defence of the Hartian search for "the concept of law" as a worthwhile piece of "modest conceptual analysis", retorts: «But on Farrell's (more plausible) rendering of conceptual analysis, we do not illuminate the reality, i.e., the nature of law, we illuminate, rather, the nature of our "talk" about law […] *Modest* conceptual analysis illuminates our concepts – our *talk*, as it were – not the referent we might have intended to understand» (italics in the text, ndr). See also Leiter 2012: § 2. Leiter's criticism is in order, when, by "modest conceptual analysis", necessary truths about aspects of reality are looked for. It does not do, contrariwise, when, following J. L. Austin's suggestion (J. L. Austin 1956-7: 129-130), such an ambitious, and mysterious, task is put down, and a «sharpened awareness of words» is looked for in order to «sharpen our perception of the phenomena», though «*not as the final arbiter of*» (italics added; the passage, without this last, quite relevant, qualification, is quoted by Hart in the opening page of the "Preface" to *The Concept of Law*: Hart 1961: vii). For a defence of "traditional conceptual analysis" in jurisprudence, like the one performed by Hart 1961, against Leiter's naturalistic attack, see Himma 2005: 1-23, Himma 2015: 65-92. Himma's defence, however, looks flawed. It sets forth an apparently inconsistent view of "traditional conceptual analysis": on the one hand, it would be just about "our" concept of law, and hence would be tied, and limited, to a contingent, changeable, local, experience; on the other hand, it would lead, mysteriously, to making metaphysical claims about the nature or essence of law in general, telling us metaphysical, necessary, truths «about not just all *existing* legal systems, but all *conceptually possible* legal systems. Thus conceived, a conceptual analysis of law consists in a set of conceptually (or metaphysically) necessary truths and thus constitutes a piece of metaphysical theorizing – just as an analysis of the concept of free will is a piece of metaphysics» (Himma 2015: § 5). In the same passage, Himma also presents Hart as a torchbearer of such a metaphysical conceptual analysis. This view, nowadays common among jurisprudents, is nonetheless disputable. See, for instance, Marmor 2012, who advocates that the basic thrust of Hart's jurisprudence was not conceptual analysis, but reductionism. I have argued against the "essentialist" reading of Hart's conception of conceptual analysis in Chiassoni 2012: § 2.2, and Chiassoni 2016b: 61-71.

wish to unearth "necessary truths" about the law. It should be clear, then, that such a way of conceiving analytic jurisprudence is not the way I have outlined in the preceding sections. Indeed, its research program flies in the face of the principles of simplicity and austerity (§ 1 above). Nonetheless, Leiter's criticism is welcome, for it elicit a well-needed work of precisification.

Let's start from the fact that distinct forms of conceptual (linguistic, philosophical) analysis are conceivable. Provided that that is the case, two pairs of opposite varieties present as worthwhile considering. Very roughly speaking, we can draw a line between conceptual analysis of a (purely) descriptive *or* of a reconstructive character, on the one hand, and conceptual analysis of grand *or* of modest ambition, on the other.

Descriptive conceptual analysis inquires on current conceptual and terminological apparatuses with the aim of clarifying and precisifying their scope in the light of the "intuitions" of those who make daily use of them ("the (mythical) folks"), whatever such intuitions may be[42]. Folks' intuitions (their methodologically unaccountable "sense" about objects and concepts) are paramount: they both delimitate the ground, and determine the output, of the inquiry[43].

Reconstructive conceptual analysis, by contrast, investigates current conceptual and terminological apparatuses with the aim of eventually and ultimately replacing them with "better" ones, from the standpoint of the rational values of simplicity, clarity, precision, empirical adequacy, consistency, coherence, comprehensiveness, explicatory force, and adequacy to the (presumed) purposes of the "game(s)" they are played in. Reconstructive conceptual analysis, to be sure, also takes into account "folks' intuitions" (if we like to call in that way people's ordinary ways of thinking), as they are fatally embodied in, and mirrored by, linguistic practices. In doing so, however, it assumes those intuitions may back a conceptual and terminological apparatus in need of rational repair (rational reconstruction, rational revision).

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[42] See Leiter 2007: 1-2, 183-199; the basic source for intuitionist conceptual analysis is Jackson (1998), especially chap. 2.

[43] According to Jackson, (intuitionist) «conceptual analysis» is needed, if we want to «have much of an audience», and do not want turning «interesting philosophical debates into easy exercises in deduction from stipulative definitions together with accepted facts». If, for instance, our problem is about free action and determinism, the only fruitful way to proceed is by asking «whether free action *according to our ordinary conception*, or something suitably close to our ordinary conception, exists and is compatible with determinism» (Jackson 1998: 30-31, italics in the text). The ascertainment of our (or folk's) conception of free action, in turn, requires appealing to ordinary, shared, intuitions, which reveal «our shared theory» (Jackson 1998: 31-32, 46 ff.). This can be carried out by means of introspection and, above all, socio-psychological inquiries. It is worthwhile stressing that, according to Jackson, «in practice», «the role» he is «recommending for conceptual analysis will often be *very* like the role Quine gives to the [Benthamite] notion of paraphrase» (Jackson 1998: 46). In the light of such remark, the case against "conceptual analysis" *à la* Jackson from Quinean perspectives seems, at least partly, the fruit of an uncharitable exaggeration.

Grand conceptual analysis is the Platonist-flavoured enterprise that, by way of linguistic-conceptual enquiries, presumes to be capable to «reveal» the «a priori», «necessary», «conceptual truths» about «the way things are and the way the mind works»[44].

Modest conceptual analysis, by contrast, characterizes for endorsing the following views:

(a) it conceives of linguistic-conceptual enquiries mainly as a way to know the ways of thinking, and the sets of beliefs and attitudes, that are embodied in on-going conceptual and terminological apparatuses;
(b) it grants to on-going apparatuses only a presumptive epistemic value, since it assumes that the intuitions (beliefs, attitudes) they mirror may be inchoate, confused, contradictory, idle, superstition-laden, wrong as a matter of fact, or otherwise flawed, so that such apparatuses may provide a misleading way to look at the natural or social phenomena they concern;
(c) it adopts a conventionalist and pragmatist conception of conceptual sets[45];
(d) it does not look for "necessary", "a priori", "conceptual truths" about reality, but is content to look for the (relatively) constant features thereof as they are mirrored in on-going sets of concepts[46].

Nonetheless, modest conceptual analysis is more than a "glorification" of lexicography, though it may walk some way along with it. It does not aim at «teaching the use of sentences»; it does not wish making its readers «profit by the sentences» that they «see or hear», or helping them «react to» sentences «in expected ways» and «emit sentences usefully»[47]. Rather, it aims at providing its readers with improved, better, ways of thinking at some natural phenomenon or human undertaking, as observers or acting subjects ("participants") alike.

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[44] These words, by which I characterize what I call "grand conceptual analysis", are from Smith Churchland 2013: xi-xii.

[45] Such a conception of «linguistic frameworks» is defended, for instance, by Rudolf Carnap. In his view, many questions which are presented as «*theoretical* questions» (like, e.g., the question «"are there natural numbers?"»), should be interpreted as «*practical* questions, i.e., as questions about the *decision* whether or not *to accept a language* containing expressions for the particular kind of entities» at stake (italics added, ndr). In his view, «whether or not» a «linguistic framework» should be introduced depends on the purposes one is aiming at, and «is a practical question of language engineering, to be decided on the basis of convenience, fruitfulness, simplicity, and the like» (Carnap 1963: 66. See also Carnap 1950b: 205-221).

[46] Smith Churchland 2013: xi-xiv. «So what is a philosopher to do, if not troll his mind for conceptual truths? The Quinean answer is this: *many* things, including synthesizing across various subfields and theorizing while immersed in and constrained by available facts. Despite much hand-wringing by overwrought philosophers, Quine did not aim to put an end to philosophy, but to remind us of what the older philosophical tradition had always been: broad, encompassing, knowledgeable of everything relevant, and imaginative» (xiv, italics in the text). For a condensed account by Quine himself, see e.g. Quine 1960: 275-276.

[47] Quine 1992: 56-57.

By combination, four complex forms of conceptual analysis result, namely: *grand and descriptive* conceptual analysis; *grand and reconstructive* conceptual analysis (ascribing to reconstruction the mysterious virtue of being capable to get at "conceptual truth about reality"); *modest and descriptive* conceptual analysis (which amounts to something very close to lexicography); and, finally, *modest and reconstructive* conceptual analysis [48].

The statute of analytic jurisprudence, as I roughly outlined it in § 2, and the tools such enterprise should employ (§ 3 above), suggest its commitment to something very close to the modest and reconstructive variety of conceptual analysis. This variety can be presented as proceeding by means of enquiries articulated in the three stages of *conceptual detection*, *conceptual reconstruction*, and *conceptual therapy*.

First, there comes the stage of *conceptual detection*, or conceptual analysis in a narrow sense – what J.L. Austin proposes to call "linguistic phenomenology"[49]. Here, the on-going terminological and conceptual apparatus that is the matter of the enquiry is identified, analysed, and its rational virtues and flaws dispassionately brought to the fore. Here, the several tools for the analysis of legal discourses (§ 3.2 above) are to be put to work. Conceptual detection paves the way for the two following steps.

Second, there comes the stage of *conceptual reconstruction*. Here, the on-going terminological and conceptual apparatus is modified into a new one, that is capable of replacing it, but does, and should do, roughly the same job of the on-going one, though in a better, more rational way – for instance, due to its finer articulation in a larger, more comprehensive, set of terminologically distinct and semantically clearer and more exact concepts. Here, the several tools for conceptual and terminological refinement (§ 3.3 above) are to be put to work. Conceptual reconstruction aims at the refinement and capture purposes of analytic enquiries.

Third, and finally, there comes the stage of *conceptual therapy*. Here, the use of the reconstructed and replacing conceptual and terminological apparatus set forth in the second stage is recommended, and carried out, as a way-out from the (supposed) rational flaws of the on-going one[50]. Conceptual therapy satisfies the demystification purpose of analytic enquiries.

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[48] Ian P. Farrell (Farrell 2006) apparently advocates the third variety. Leiter criticizes both forms of (what I call) descriptive conceptual analysis, i.e., the grand and the modest one, while recognizing, following Larry Laudan, the usefulness of something like the modest and reconstructive variety I stand for here (see Leiter 2007: 183 footnote 3, and 133 footnote 45, 168 ff., 179-181, where, in line with a central, though apparently overlooked, tenet of Logical Positivism, he regards philosophy as «the abstract branch of successful scientific theory […] the abstract and reflective part of empirical science»; Leiter 2008).

[49] J.L. Austin 1956-57: 130.

[50] My view of conceptual analysis may look a piece of eclecticism, where suggestions from Bentham, Russell, Carnap, Quine and Strawson, among others, are put together in a sort of mental patchwork. It is indeed. In fact, I do not care for strict philosophical allegiance. I care for (hopefully) smoothly working tools for (hopefully) fruitful jurisprudential investigations.

5. Analytic Approach v. Essentialist Jurisprudence

The virtues of the analytic approach appear in full light as soon as we cast a glance upon ways of doing legal philosophy that fly in the face of it, in the name of (assumedly) more "philosophical", more "robust", more "interesting" investigations.

In view of supporting this claim of mine, in this final section I will compare the analytic approach with an instance of essentialist approach to an issue jurisprudents usually regard as paramount: to wit, "the concept of law" issue[51].

When jurisprudents set to the task of inquiring about "the concept of law", it happens quite frequently that they understand such an investigation differently. Four different ways of inquiring upon the concept of law are worthwhile considering[52].

To begin with, an investigation upon "the concept of law" can be conceived as a lexicographic research upon the actual meaning(s) (or communicative content(s)) of the word "law" and the corresponding expressions in other modern languages, like, e.g., *derecho*, *direito*, *diritto*, *droit*, *prawo*, *Recht*, etc.[53]

Secondly, an investigation upon "the concept of law" can be conceived as an enquiry aimed at the precisification (clarification, elucidation, rational reconstruction) of the meaning(s) associated to the word "law" in a certain legal culture, in such a way as to furthering jurists' and people-at-large' understanding about it and the phenomena it refers to[54].

Thirdly, an investigation upon "the concept of law" can be conceived as an en-

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[51] In the words of Uberto Scarpelli (Scarpelli 1955: 35): «the definition of law, and the analysis of the relationships between the concept of law and the concepts of justice, morality, economics, politics, etc., are the matter of an ancient and always renewed dispute». Likewise, according to Robert Alexy 2008: 281: «The debate over the concept and the nature of law is both venerable and lively. Reaching back more than two millennia, it has acquired in our day a degree of sophistication hitherto unknown».

[52] Throughout this section, I will deal with the concept or concepts of law conceiving them as linguistic entities: as the meaning(s) or communicative content(s) associated to the word "law" and corresponding expressions in other natural languages. In so doing, I do not wish to enter into the ontological dispute about the nature of concepts (whether, in particular, they are psychological entities or something else) – which, by the way, is often loaded with obscurity, baffling definitions, metaphors, and mental cramps. I will assume that, whatever conception we take, concepts always have a linguistic side: whatever they are, they are, and work as, the meaning(s) or communicative content(s) of "descriptive", "predicative", "categorical", or "class" terms. On the ontologies of concepts, see e.g. Carnap 1932: 60-81, Margolis and Laurence 2011: para 1, Lalumera 2009: 29-95, Moreso 2017: 63-99, drawing on Margolis and Laurence 2011, and referring to the conceptual pluralism about the law advocated by Carlos Santiago Nino (Nino 1985, Nino 1994) and Ronald Dworkin (Dworkin 2006, Dworkin 2011). In passing, Gottlob Frege appears to dismiss the ontological issue in the turn of a few, crystal-clear, lines: «The word "concept" is used in various ways; its sense is sometimes psychological, sometimes logical, and sometimes perhaps a confused mixture of both. Since license exists, it is natural to restrict it by requiring that when once a usage is adopted it shall be maintained» (Frege 1892: 42).

[53] See e.g. Tarello 1993a: 5-10, Guastini 2011: 15-18.

[54] See e.g. Hart 1954: 21-26, Hart 1961: vi-vii, 213-237, Scarpelli 1955: 36-38, 67-119, Tarello 1993a: 10-12, Tarello 1993b: 109-119, Guastini 2011: 15-18, Jori, Pintore 2014: 41-56.

quiry meant to providing a proper (adequate, accurate, useful) definition of one or more meanings of the word "law": i.e., one in tune to what the legal philosopher considers as needed in view of certain explicatory, reconstructive, demystifying, or normative purposes at hand[55].

Fourthly, and finally, an investigation upon "the concept of law" can be conceived as an enquiry aimed at identifying the concept of law (the meaning of "law") that is (truly) adequate to the very nature or essence of law[56].

The four lines of investigations understand "the concept of law" differently.

From the standpoint of *lexicographic enquires*, "the concept of law" is tantamount to the meaning(s) corresponding to the actual uses of the word "law" or homologous words in other natural languages. The correctness of the concept of law, here, is a matter of empirical truth. A lexicographic concept of law is true, if, and only if, the word "law" is being used in fact, inside of the relevant communities, as the lexicographic jurisprudent says it is[57]. Though they may appear idle, lexicographic enquiries are the bedrock of analytic legal philosophy. Usually, they provide the empirical data making up the starting point for conceptual investigations of the second (precisification) or third (stipulative) kind[58].

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[55] See e.g. Williams 1945: 134-156, Kantorowicz 1958: 37-49, Hart 1961: 209-212, Nino 1994: 17-42; Jori, Pintore 2014: 45-46, where they deal with the stipulative approach as "idiosyncratic conceptual manipulation", leading to "idiosyncratic concepts of law", as opposed to the "minimal", "common sense" concept that can be identified by means of lexicographic enquiry. A stipulative approach, based on sound empirical knowledge about legal experience, is apparently endorsed also by Frederick Schauer in his crusade for considering coercion «not strictly necessary but so ubiquitous that a full understanding of the phenomenon [of law, ndr] requires that we consider it» (Schauer 2015: 40; see also Schauer 2018: para 1: «humans can remake or modify the very concept of law that exists within some community»).

[56] See e.g. Alexy 2008: 281-299, Alexy 2001, Alexy 2006: 73-98, Alexy 2017: 314-341.

[57] In perhaps more precise terms, a lexicographic concept of law is true of the word "law" when the corresponding lexicographic sentence is true: namely, when a sentence of the form "According to the linguistic uses of 'law' in time t_i and place p_j, 'law' means l_i" is empirically true.

[58] Acting as legal lexicographer, and using the (Benthamite) technique of contextual definition or definition in use, Tarello (1993a: 5-10) identifies four different meanings of "*diritto*" in contemporary Italian legal experience. When it occurs in sentences like "Il diritto è dalla mia" ("The law is on my side"), "diritto" ("law") refers to law in an objective sense: i.e., it refers to a set of social norms having a certain typical social function. When it occurs in sentences like "Ho diritto di fare *f*" ("I have the legal right to do *f*"), "diritto" refers, contrariwise, to a subjective, favourable, legal position. When it occurs in sentences like "Il diritto di proprietà è riconosciuto in Freedonia" ("The law of property is recognized in Freedonia"), "diritto" refers to a legal institute, i.e., to a certain sub-set of positive legal norms. Finally, when it occurs in sentences like "In caso di morte del Presidente il Vicepresidente subentra di diritto" ("In the event of the President's death, the Vice-President steps in by law"), "diritto" ("law") refers to some legal automatism. It must be emphasized that, according to Tarello, the identification of lexicographic concepts of law is to be considered as the first, sound step in a virtuous analytical enquiry. The second step, which already belongs to conceptual analysis in a reconstructive function, consists in bringing to the fore the conceptual connexions between the four actual meanings of "law" previously identified. These connexions allow for regarding the concept of law as a set of social norms (the law in an objective sense) as the basic concept, which the other three concepts presuppose. A legal right ("diritto

From the standpoint of *precisification enquiries*, "the concept of law" is the result, in terms of the analytic theory of definition, of an explicatory definition, or re-definition, or, in logical positivism's terminology, rational reconstruction. As we have seen (§ 3.2.2 above), this is a definition of the concept(s) of law that aims at bringing to the fore the (complex) meaning of "law" on the basis of the ideas usually associated to the actual uses of the word. The correctness of an explicatory concept of law is not a matter of empirical truth. To be sure, it must get adequate empirical support from the relevant legal experience; it must be tightly fastened, so to speak, to a certain set of sound empirical linguistic and cultural data. Nonetheless, its theoretical correctness depends on such theoretical virtues as simplicity and explicatory power. Simplicity rules out any unnecessarily complex concept of law. Explicatory power requires the concept of law to consist in a concise discourse bringing to the fore (what are regarded and presented as) the theoretically paramount properties of the law. To be sure, from the standpoint of precisification enquiries, which properties, in a complex social phenomenon like "the law", are to be regarded as theoretically paramount is not, and cannot be, a matter for objective cognitive judgments (meaning by that judgements not depending on the jurisprudent's own beliefs, attitudes, and purposes). It is, rather, a matter for judgements by means of which the legal philosopher sets forth what, in her or his view, should be regarded as the theoretically paramount properties of law, taking into account legal experience and public jurisprudential opinion[59]. Explicatory concepts of law are, accordingly,

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in senso soggettivo") is a right conferred by some norm of objective law. A legal institute, like property or contract, is nothing else but a sub-set of norms of an objective law. A legal automatism is necessarily established, again, by some set of norms of objective law. The third and last step of Tarello's conceptual investigation belongs to a clarification or elucidation approach to the concept of law. Here, by way of clarification of the concept of law in use in actual Western legal culture, he sets forth a functional definition of "law" in the objective sense of the word. In his own terms: "the object or phenomenon to which the word law (and the corresponding words in other modern languages) refers" consists of "the set of rules that, in any society whatever, regulate a) *the repression of the behaviours considered as socially dangerous* […]; b) *the allocation of goods and services to individuals and communities*; c) *the institution and ascription of public powers*" (italics in the text, ndr). Tarello also adopts the same approach, binding lexicographic to clarification enquiry, in relation to the notion of "positive law" in the Italian legal culture of the 1950s and 1960s (see Tarello 1993b: 109-119).

[59] One of the prominent torchbearers of the clarification approach to the concept of law has been, to be sure, Herbert Hart. As it is well known, Hart insists that the purpose of clarifying or elucidating the concept of law ("our" concept of law) should not be meant as requiring to provide a definition of law: i.e., a set of rigid rules about the correct use of "law", to be adopted for regulating people's linguistic behaviours. He thinks, indeed, that people do already know how to use "law" (and related legal words), but also that, as it often occurs, they do not (fully) understand the phenomenon it refers to ("In law as elsewhere, we can know and yet not understand": Hart 1954: 21). That is the reason why, in *The Concept of Law*, he sets to «further the understanding of law, coercion, and morality as different but related social phenomena» (Hart 1961, p. vi). That is the reason why, always in *The Concept of Law*, while dealing with international law, he rejects the definitional approach and stands for an analysis that purports to bring to the fore (make "explicit") «the principles that have in fact guided the existing usage» of "law" and

something legal philosophers propose to fellow legal philosophers, and to the legal community at large, hoping for approval. Sometimes the proposal succeeds[60]. It may also fail, though. The "Jurisprudence" bookshelves of university libraries are replete with ambitious, but forever forgotten, explicatory concepts of law.

From the standpoint of *stipulative enquiries*, "the concept of law" is conceived as a pragmatic entity. It is a notion the value thereof depends on its adequacy to the specific theoretical or practical goals the legal philosopher happens to pursue. As I said, it may even be not just one concept, but a set of several concepts, according to the several different needs the jurisprudent pursues at once. The need may be strictly theoretical. In such a case, the concept(s) of law will serve some explicatory goal. It may also be of a practical character, though. In such a case, the concept will serve some ideological purpose. For instance, the goal may be that of providing the conceptual ground for a certain doctrine about the moral duty of obedience to positive laws. In any case, the correctness of stipulative concepts of law is a matter of instrumental rationality: they are correct, if, and insofar as, they serve the purpose(s) they are meant to serve in a satisfactory way[61].

«inspect» their «credentials» (Hart 1961: 214-215). These ideas of Hart, as it is well known, have been developed in a direction conceiving of legal philosophy as an enquiry not (solely) on the concept of law, but rather on the nature or essential or necessary properties of law. See e.g. Raz 2009b: 17-46, 91-106, Shapiro 2011: 9-32. The position of Raz, however, looks close to the idea of a rational reconstruction of the structure of legal thought as advocated by Hart. For instance, he insists that an enquiry upon the nature of law consists in «inquiring into the typology of social institutions, not into the semantics of terms. We build a typology of social institutions by reference to *properties we regard*, *or come to regard*, *as essential* to the type of institution in question» (Raz 2009b: 29, italics added, ndr). Furthermore, he makes clear that an enquiry upon the nature of law is an enquiry about «the nature of our self-understanding […] It is part of the self-consciousness of our society to see certain institutions as legal, that consciousness being part of what we study when we inquiry into the nature of law» (Raz 2009b: 31). Raz leaves «the question of the *kind of necessity involved* unexplored» (Raz 2009b: 91, italics added, ndr). Apparently, however, the "necessary truths" about the law that, in his view, legal theory should be looking for are the truths about the law that *appear to be so* upon an inquiry on societies' legal self-consciousness (Raz 2009b: 98: «legal theory attempts to capture the essential features of law, as encapsulated in the self-understanding of a culture»). On the same footing, in view of getting to law's "necessary and interesting properties", Shapiro adopts a conceptual analysis approach, the starting point of which is provided by a set of legal "truisms" (Shapiro 2011: 13-22).

[60] For instance, Hart's proposal of conceiving the law of municipal legal systems as the union of primary rules of conduct and secondary rules of change, adjudication, and recognition (Hart 1961: chs. V and VI), can be counted among jurisprudential successes, at least so far as contemporary common law legal culture is considered.

[61] In his posthumous work *The Definition of Law* (Kantorowicz 1958: 37-49), Hermann U. Kantorowicz advocates "conceptual pragmatism", "conceptual relativism", or Carnap's "tolerance principle", against "verbal realism." The latter he sees as a mysterious quest for the essence of the things the concept of which is to be defined: «Nobody […] has [ever] been able to explain what the metaphysical term "*Wesen*" or "essence" means, and nobody has [ever] been able to point to a method for teaching the intuition necessary to grasp it» (Kantorowicz 1958: 41). Conceptual pragmatism (see § 3, above), contrariwise, is to be regarded as the only approach compatible with truly rational enquiries. Following

Finally, from the standpoint of *essentialist enquiries*, "the concept of law" is conceived as liable to objective, truth-like, correctness. It is correct, as I anticipated, if, and only if, it is adequate to the very essence or nature of law: that is to say, when it captures the set of properties the presence of which makes some social phenomenon to be (really) *law*, and *not something else*[62].

Of the four different ways of investigating the concept of law, the former may appear totally un-philosophical. Indeed, one may say, it is just a dull exercise in legal lexicography. A couple of arrows can be shot in its favor, though. To begin with, it is worthwhile emphasizing its salutary, demystifying import. The lexicographic approach to the concept of law is in fact the tip of that powerful philosophical iceberg that is the analytic way of philosophizing. Now, such a way considers the *principle of conversion* as paramount (see § 1 above). The principle of conversion, as we have seen, requires converting (obscure, overwhelming, puzzling, paralyzing) metaphysical issues ("What is law?") into (manageable) conceptual issues ("What do we (they) mean by "law"?"). To be sure, as I said, the lexicographic approach does not usually exhaust analytic enquiries on the concept of law. Usually, it is the first step in a process of investigation that is geared either to the precisification and refinement of the on-going concept of law in a given legal culture, or to the stipulation of some theoretical or practical concept, to some corresponding theoretical or practical purpose.

The second and the third ways of investigating about the concept of law belong, too, to the analytic way of philosophizing. In fact, the precisification approach can be regarded as nothing else but a specific variety of the stipulative approach, where the aim the re-defined, rationally reconstructed, elucidated concept of law must serve consists in providing a notion, at the same time, as much simple as possible, and as much ripe with explicatory (understanding-furthering) power, as to the corresponding social phenomenon of law.

The fourth way of investigating about the concept of law, the essentialist approach, is to be sure the more ambitious – and, on its face, the more promising.

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it, Kantorowicz comes to stipulating a concept of law suitable to identify the matter of "legal science", from classical antiquity to modern times, from China and India to Europe (Kantorowicz 1958: 64-66, 106-157). Hart considers a stipulative, pragmatic, approach to the concept of law as the only sensible approach, when he comes to analysing Gustav Radbruch's critique to the positivist concept of law (see Hart 1961, pp. 209-212). Another instance of pragmatic conceptualism about the concept of law can be found in Carlos Santiago Nino's *Derecho, moral y política. Una revisión de la teoría general del derecho*, where he advocates conceptual pluralism as the sole adequate answer to the variety of problems besetting legal theory (see Nino 1994: 17-42).

[62] Alexy 2008: 281-299, Alexy 2001, Alexy 2006: 73-98, Alexy 2017: 314-341. In perhaps more precise terms, an essentialist concept of law is true of the word "law" when the corresponding *essentialist sentence* is true: i.e., when a sentence of the form "According to the very nature or essence of law, the word 'law' means l_i," is true, whatever we take the conditions of the essentialist truth of a concept to be.

It rejects any dwelling in dull lexicography[63]. It likewise turns down the rational reconstructions or stipulations about the concept(s) of law that characterize the second and third approach, as fatally subjective, and therefore philosophically inadequate[64]. It claims, as we have seen, to be able of getting to the very, true, essence of law, and capturing it in its concept.

It must be emphasized however that, from the standpoint of the analytic way of philosophizing I am advocating here, any (purportedly) essentialist concept of law whatsoever looks like fool's gold.

I have already recalled the analytic way of thinking about concepts, which is characterized by pragmatic conceptualism (see § 3.2.1 above). Pragmatic conceptualism sounds sensible from the vantage point of experience. Material objects, beasts, persons, behaviours, events, and complex social phenomena have properties, to be sure. They have not, however, intrinsically essential properties. The essential character of any property whatsoever is fatally in the eye of the beholder. Consequently, coming to the matter of the present argument, any *essential* property of law as a complex social phenomenon is, and cannot be but, in the eye of the legal philosopher who looks after it. What such an essence is, depends, necessarily (as a matter of empirical, psychological necessity), on the theoretical or practical purpose(s) the philosopher happens to pursue[65]. Essentialist investigations about the concept (and the nature of) law, therefore, either are preposterous, or, if they have any useful sense at all, are reducible to investigations of the precisification or stipulative sort, though vested in the pre-analytic, or even anti-analytic, pseudo-objective mode of speech dear to "synthetic", "hard", philosophical outlooks[66].

This conclusion of mine – delusive and disappointing as it may appear – is not a

[63] Essentialist legal philosophers reject dwelling in lexicographic enquiries. Nonetheless, they may consider such enquiries as a necessary, preliminary step to capturing the essence of law and formulating its proper concept. Starting from the statement that «Concepts, as always on the path to the nature of those things to which they refer, are in part parochial or conventional and in part universal», i.e., "non-conventional", or endowed with an "ideal dimension", Robert Alexy concedes that «concepts as conventional rules of meaning» play an «indispensable» role in «philosophical analysis», since they make possible the very «identification of the object of analysis. Without a concept of law *qua* conventional rule, we would not know what we are referring to when we undertake an analysis of the nature of law» (Alexy 2008: 291-292).

[64] See e.g. Alexy 2008: 281-284.

[65] Unless, of course, the legal philosopher aims at bringing to the fore the properties of the phenomenon "law" which are in fact *regarded as* essential in a certain legal culture at a certain time. In which case the enquiry is a piece of cultural sociology, usually in view of ideologies' critique and *Weltanschauungen* analysis.

[66] The pseudo-objective, or "material", mode of speech consists in presenting verbal or conceptual issues (i.e., issues about the meaning or communicative content of words) in the form of objective issues (i.e., issues dealing with the properties of non-linguistic objects). The material mode of speech resorts to "pseudo-object-sentences", while genuine objective speech (i.e., speech about non-linguistic objects) is made of "object-sentences" (Carnap 1959: 284-292).

piece of analytically biased wishful thinking. It looks sound, for instance, as soon as we cast a dispassionate analytic glance upon what is perhaps the most powerful and influential essentialist approach to the concept of law in recent times: I mean the one defended by Robert Alexy.

The core of Alexy's essentialist coping with the concept (and the nature) of law issue can be recounted as follows.

1. The debate about the concept (and the nature) of law is endowed not only with a practical relevance ("significance"), one that would turn it «simply» in «one more dispute in law» among jurists. That is so because it is, in fact, also a debate «over necessary truths about law»[67].
2. An enquiry concerning necessary truths about law is not an empirical enquiry. It is, rather, a philosophical enquiry. The debate concerning the concept and the nature of law is, accordingly, a «genuine philosophical debate»[68].
3. Necessary truths about law are truths about the «necessary or essential properties of law»:

> Necessary properties that are specific to the law are essential properties of law […] Essential or necessary properties of law are those properties without which law would not be law. They must be there, quite apart from space and time, wherever and whenever law exists[69].

4. The necessary or essential properties of law are the objective benchmark for telling the adequate concept of law (for there is one, and only one, adequate concept of law), from those concepts that, contrariwise, are inadequate[70]. A concept of law is philosophically adequate, if, and only if, it is adequate to the object to which it refers. And it is adequate to its object, if, and only if, it captures and accounts for the necessary or essential properties of the object[71].
5. The method of a philosophical enquiry on the concept and the nature of law, properly conceived, is not intuition, but rational argumentation. A set of properties we find in legal phenomena is the set of the necessary or essential properties of law, if, and only if, the claim that it is *the set* of the necessary or essential properties of law can be supported by *rational argument*[72].

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67 Alexy 2008: 284.

68 Alexy 2008: 284.

69 Alexy 2008: 290.

70 As it is well known, according to Alexy the necessary or essential properties of law would allow discriminating the sole adequate concept of law – that happens to be his own inclusive non-positivist concept – from four inadequate concepts: namely, the inclusive positivist concept (proposed by inclusive legal positivism), the exclusive positivist concept (proposed by exclusive legal positivism), the exclusive non-positivist concept, and, finally, the super-inclusive non-positivist concept (see e.g. Alexy 2008: 284-290).

71 Alexy 2008: 291-292.

72 Alexy 2008: 290-291.

6. Rational argument supports the following necessary truths about law:

> law necessarily comprises a real or factual and an ideal or critical dimension. This might be termed the dual-nature thesis. A central element of the real dimension of law is coercion or force. A central element of its ideal dimension is a claim to correctness, which includes a claim to moral correctness and which, if violated, implies legal defectiveness in normal cases and legal invalidity in extreme cases[73].

7. The necessary character of *coercion* depends on the fact that coercion is a necessary means – a *sine qua non* condition – to achieve the goals ("the basic formal purposes") of *legal certainty* and *efficiency*[74]. In turn, the necessary character of the goals of legal certainty and efficiency depends on their necessary connection to justice. Justice, in its broader scope, requires the law to be certain and efficient, besides having contents that must keep below the threshold of extreme (substantive) injustice. The necessary character of law's connection to justice depends, in turn, on law's necessary claim to correctness, which is also a claim to moral correctness. The necessary character of law's claim to justice can be argued for, finally, by appealing to the argument from pragmatic contradiction ("performative contradiction"). A constitutional provision claiming, for instance, that "*X* is a sovereign, federal, and unjust republic" would be evidently absurd[75]. Such an evident absurdity is – and cannot be but – the index of a contradiction between what the constitution expressly *says* (namely, to be *unjust*), on the one hand, and what the constitution – indeed, any constitution *qua* constitution – tacitly but necessarily *claims* (namely, to be *just*), on the other hand[76].

So much for Alexy's argument on behalf of the essentialist concept of law he stands for. It should be evident, by now, why the essentialist approach to the concept of law, even one as sophisticated as Alexy's, is pretence from the standpoint of an analytic approach. The necessary or essential properties on which the objective adequacy of the concept of law depends, as Alexy avows, neither are the matter of a purely empirical enquiry (therefore, statements about them are not empirically true or false sentences), nor are the matter of incontrovertible, indisputable, rational arguments. Indeed, as we have seen, the rational arguments Alexy provides boil down, finally, to the argument from pragmatic contradiction. Such an argument,

[73] Alexy 2008: 290, 292: «the single most essential feature of law is its dual nature. The thesis of the dual nature of law presupposes that there exist necessary properties of law belonging to its factual or real dimension, as well necessary properties belonging to its ideal or critical dimension. Coercion is an essential feature found on the factual side, whereas the claim to correctness is constitutive of the ideal dimension».

[74] Alexy 2008: 292-293.

[75] Alexy 2008: 294: «It is scarcely possible to deny that this article is somewhat absurd».

[76] Alexy 2008: 292-297.

however, is too weak to bear the heavy burden of the necessary truths about law Alexy wishes it to carry. Absurdity is fatally in the eye of the beholder[77]. Furthermore, the argument appears to be flawed by a *petitio principii*. It assumes what it is meant to prove: i.e., the implicit necessary claim to justice every constitution would make, *qua* constitution. Indeed, the *sheer fact* of a constitution that includes a clause such as the one Alexy considers ("*X* is a sovereign, federal, and unjust republic"), by itself, can also be read as evidence that *no* claim to moral correctness, *no* claim to justice, is necessarily connected to the making of a constitution. These remarks bring us back to the conclusion I adumbrated before. Though dressing his theory in the language of "essences" and "necessary truths", Alexy is in fact (a) *stipulating* a concept of law in view of certain theoretical and, above all, practical goals, and (b) providing rational (but, as we have seen, disputable) arguments in its favor.

So, to sum up, if we cast a cool, discriminating, glance on Alexy's way of proceeding as a searcher for the (truly) adequate concept of law, it turns out that Alexy is doing nothing else but adopting and recommending a concept of law in tune with the (noble) ideals enshrined in Radbruch's Formula and Radbruch's human dignity and human rights tuned conception of justice[78]. From the standpoint of analytic jurisprudence, his proposal, once duly demystified, fully and clearly belongs to the province of normative jurisprudence[79].

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[77] See e.g. Bulygin 1993: 41-51, Bulygin 2000: 85-93, Chiassoni 2011: 127-142.

[78] In a classical statement of the analytical theory of definition, Richard Robinson (Robinson 1954: 149-192) identifies twelve different paths actually followed by philosophers in their search for the "real definition" of something: i.e., for definitions of the essence of the object to which a certain concept refers. Among them, the "betterment of existing concepts" and the "adoption and recommendation of ideals" represent useful activities actually consisting in proposing some stipulative or explanatory definition of some key-term. See also Scarpelli 1955: 62-67, and, so far as the concept of law is concerned, 71-86.

[79] For a similar recent criticism to Alexy's essentialist approach, cf. Barberis 2020: 247-263.

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Fundamental Rights in the Italian Constitution. Three Interpretive Issues

*Riccardo Guastini**

Abstract

Article 2 of the Italian constitution reads: «The Republic recognizes and guarantees the inviolable rights of man […]». This provision raises a number of interpretive problems. The paper focuses on three of them. (1) The question whether the rights in question are "declared" or "created" *ex novo* by the constitution. (2) The problem of identifying such rights, namely the question of the existence of further rights beyond those expressly mentioned in the constitutional text. (3) The question whether the inviolability clause amounts to a prohibition of constitutional amendment. The answers to such questions are evidently conditioned by the legal-philosophical assumptions of interpreters. And this is a forceful argument against the current, naïve, theory of interpretation that circumscribes interpretive issues to problems of predicates' vagueness (such as: are bicycles "vehicles"?).

Keywords: Fundamental Rights. Inviolability. Constitutional Amendment Power. Natural Law. Legal Positivism. Theory of Interpretation.

Foreword

Article 2 of the Italian constitution reads: « The Republic recognizes and guarantees the inviolable rights of man […]». These few words raise a number of interpretive problems (Guastini 2007). In this paper, I shall focus on three of them.

1. Recognizing or Creating Rights?

The use of the verb "to recognize" («The Republic recognizes… the inviolable rights of man») raises a tricky problem. If understood literally, an act of "recogni-

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tion" – as an act of "declaration" – is a cognitive act, whose object is a pre-existing state of affairs, entity, event, or phenomenon. «The idea of recognition presupposes […] the pre-existence of the rights so recognized» (Paladin 1995: 557). Should we take seriously the word used in the constitutional text (Grossi 1991: 95 f.)?

If we take it seriously, we must conclude that the constitution refers to a list – however indeterminate – of pre-existing rights, that is, rights that the constitution does not "create" *ex novo*, but simply "recognizes" or "declare".

If, on the contrary, we do not take it seriously – if we think that it is only an emphatic expression with no definite ideological content – we must conclude that the constitution simply refers to itself, that is, to the list of rights expressly mentioned in its subsequent provisions.

The issue unavoidably involves the legal-philosophical beliefs of interpreters (Mengoni 1998: 3 ff.): Legal positivism or natural law?

(1) The advocates of natural law will hold that there are "in the very nature of things (or men)" rights, as well as obligations, antecedent and independent of any positive regulation: rights, therefore, that the constitution simply recognizes – nor could it do otherwise, in the sense that the constitution could perhaps disclaim, but certainly not "create" them, since they already are out there (Mortati 1969, I: 146; Mazziotti di Celso 1956: 88 ff.)[1].

(2) On the contrary, the advocates of legal positivism will hold that no rights at all exist before and independently of the positive legal order – therefore, the rights at stake are not (literally) recognized, but created (and conferred on citizens) by the constitution. The apparently "descriptive" formulations that one finds in many a constitutional text reveal, at most, the political philosophy of the framers (Mengoni 1998: 4), but of course do not prove that such proclaimed rights did really exist before the constitution (Caretti 2005: 136 f.; Grossi 1991: 95 ff.; see also Esposito 1954: 22 f.).

One could ask: who cares about legal philosophy? However, such different legal-philosophical views have important doctrinal consequences concerning: on the one hand, the identification of the inviolable rights; on the other hand, their legal status, with particular regard to the limits of constitutional amendment power.

[1] From this point of view, one might say, the constitutional text, paradoxically, is not a genuinely prescriptive text (conferring rights, in fact, is prescribing), but a text descriptive of pre-existing rights (Di Giovine 1995: 10).

2. What Rights?

In any case, the problem obviously arises of identifying the rights in question. What rights are declared or ascribed by this provision? Art. 2 does not answer to such a question, since it does not mention any particular right.

(1) A legal scholar or judge with a legal-positivistic mind will reply that – since there are no rights at all, pre-existing to the positive legal order – the rights to which art. 2 refers can only be those expressly enumerated and summarily regulated in other constitutional provisions, such as: personal liberty, freedom of speech, freedom of the press, and so forth. In other words, the clause of art. 2 simply refers to the list of rights mentioned in the subsequent constitutional provisions (Caretti 2005: 137 ff.)[2].

Moreover, from this viewpoint, the list in question is necessarily closed – in the absence of "natural" rights already existing before the constitution, other inviolable rights beyond those expressly enumerated by the constitutional text cannot exist (Barile 1984: 54 ff.)[3]. That list, therefore, does not admit any integration by the legislature or the judiciary. This is so, among other things, for the good reason that any "new" right, added to the list by means of "creative" interpretation, would conflict with one or the other of the textually ascribed rights, and therefore would limit them (Pace 2003: 25 ff.; Paladin 1995: 568)[4].

(2) A legal scholar or judge endorsing the natural law doctrine, on the contrary, will answer that art. 2 refers to all natural (of course inviolable) rights.

From this point of view, the clause of inviolable rights is an "open" clause. It does not refer only to the rights expressly mentioned in the subsequent constitutional provisions. The recognition of natural rights made by the framers is to be taken as not necessarily complete and exhaustive (some natural rights may have been omitted from the list). In particular, those natural lawyers who support the doctrine of

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[2] «Une règle qui tire son origine de l'ordre naturel des choses, ne peut être qualifiée règle de droit, tant qu'elle n'est pas entrée dans l'ordre juridique en vigueur; et inversement, one ne peut la qualifier de règle naturelle, à partir du moment où elle est devenue règle de droit» (Carré de Malberg 1920: I, 239).

[3] However, as a matter of fact, no constitutional lawyer really considers as strictly "closed" the list of constitutional rights – everyone admits the existence of rights that are "consequences" of the textually ascribed ones. In other words, even those who reject the natural law thesis of an open list cannot resist the temptation to consider art. 2 as a "matrix" of an indeterminate set of further rights. See Barile 1984: 56 ff.; Barile 1993: 13 ff.; Caretti 2005: 140; Pace 2003: 25 f.; Lavagna 1984: 739 ff.; Grossi 1972: 169 ff.

[4] Luciani 2007: 47: «If the interpreter, namely the judge, would identify some "new" rights […], he would make one of those choices that […] are reserved for the constituent power. And in such a way he would alter the overall balance of rights and constitutional values: no extension of the list of rights is without costs, not only since every new right expands the positions of disadvantage and subjection that are functional to its satisfaction, but also and above all since that new right alters the relative position of the pre-existing rights, shifting the terms of the balance in case of conflict with other rights or competing values».

"a variable natural law", claim that new natural rights, non-existent so far, can stem in the course of time from the "nature of things", the evolution of social conscience, or the like. No need to say that this view justifies the integration of written constitutional law through the construction, by interpreters (and especially constitutional judges), of further unexpressed "natural" rights[5].

3. "Inviolable": In What Sense?

Once it is established that the rights proclaimed in the constitution are "inviolable", one has to ask in what sense they are so. Is the qualification of certain rights as "inviolable" a mere declamatory formula – characteristic of the rhetorical language commonly used by the framers of constitutional texts – and as such devoid of any precise normative content or, on the contrary, is it provided with legal effects? The solution to this problem, too, is fatally conditioned by the legal-philosophical attitudes of interpreters.

(1) The advocates of the natural law doctrine will hold that the qualification of inviolability expresses a prohibition of constitutional amendment. If the constitutional rights are not created *ex novo*, but simply declared by the framers, then such rights cannot be suppressed in any way, not even by constitutional amendment. Since they are already given in nature – since no human normative authority created them – *a fortiori* no human authority can suppress them. In short: "inviolable" means absolutely "intangible", and therefore not liable to constitutional amendment[6].

(2) The advocates of legal positivism, on the contrary, hold that a distinction is in order. If the inviolability clause is contained in a flexible constitution, then it is a mere declamatory formula, devoid of any legal effects. If it is contained in a rigid constitution, like the Italian constitution in force, on the contrary, it does not add anything to the rigidity of rights-conferring constitutional norms[7].

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[5] Since the Eighties of the last century, the Italian Constitutional court considers the clause of art. 2 as "closed" against any value that cannot be traced back to the constitutional text, but "open" to the new forms that such values assume in changed social contexts. In fact, in the subsequent constitutional case-law jurisprudence the Court recognized as inviolable fundamental rights, among others: sexual freedom, the social right to housing, the right to honour and reputation, the right to education, the right to privacy and to a free and secret communication, the right to leave one's own country, the right to personal identity. None of such rights has a textual basis in the constitution.

[6] Among Italian legal scholars this opinion is almost unquestionable. However, it is rarely argued (as one would expect) with natural law assumptions. A (weak) recurrent argument is instead that the rights in question are "essential" to the democratic form of state established by the constitution. See, e.g., Paladin 1995: 565.

[7] No need to say that the rigidity of the constitution stems not from the inviolability clause, but from the norms that regulate constitutional amendment.

In other words, constitutional rights are certainly inviolable for the (ordinary) legislation, and more generally for public authorities at large, just like any other constitutional norm. But the rights-conferring constitutional norms may very well, like any other legal norm, be repealed, derogated, or replaced – by means of the appropriate procedures (in this case, with the constitutional amendment procedure) – whenever this is not expressly forbidden by any positive norm. Besides, the Italian constitution prohibits only the amendment of the republican form of the state (art. 139), in such a way that the prohibition of amendment may concern, at most, all those rights, if any, that define (or contribute to define) the republican form of the state, that is, rights in the absence of which the form of the state, by definition, would no longer be "republican" (Pace 2003: 45).

4. A Substantive Conception of the Constitution

The Italian Constitutional Court has endorsed the doctrine that equates the inviolability clause to the prohibition of constitutional amendment – without any argument[8].

According to the Court, the constitution includes not only expressed (the republican form of the state clause), but also implicit, unexpressed limits to constitutional amendment. In particular, the unexpressed limits identified by the Court are the "supreme principles" or "supreme values", on which the constitution "is grounded", as well as the "inalienable rights of the human person". The Court also considers that such limits are absolute, in the sense that they may not be removed in any legal way.

This jurisprudential opinion seems to presuppose, *grosso modo*, the following reasoning. (a) The amendment of an existing constitution is to be distinguished from the establishment of a new constitution. (b) By definition, the amendment power may not go as far as to establish a new constitution. (c) Any amendment presupposes that the existing constitution retains its identity. (d) A constitution, however, is not a simple set of norms: it is a coherent whole of principles and values; in short, its identity lies precisely in all such principles and values. (e) As a consequence, an amendment that would affect the supreme principles would not be a genuine "amendment": from a substantive point of view, it would be the disguised

[8] «The supreme principles of the constitutional order» have «a superior value with respect to the other constitutional norms»; therefore, «one cannot deny that this Court is competent to judge the compliance of constitutional amendments and other constitutional acts to the supreme principles of the constitutional order […]. If this were not the case, moreover, there would be an absurdity in considering the system of judicial guarantees of the Constitution as defective or ineffective precisely with regard to its most valuable norms» (Corte costituzionale, decision 1146/1988).

establishment of a new constitution. (f) Therefore, the amendment of the principles and values that characterize the constitution is prohibited[9].

This "substantive" conception of the constitution and constitutional amendment – that can be traced back to Carl Schmitt's constitutional theory[10] – is highly debatable. In fact, one could easily argue that: (i) a constitution is only a set of norms, which can be defined extensionally by simply enumerating its component norms; (ii) the axiological priority of some constitutional norms (the supreme principles, the inalienable rights) to the others is the result of a subjective value-judgment, devoid of any "positive" (textual) justification; (iii) constitutional amendment differs from the establishment of a new constitution only from the formal point of view: constitutional amendment takes place in legal forms, while the establishment of a new constitution takes place in illegal forms, *extra ordinem*; (iv) the existing constitution retains its identity until it is replaced in illegal forms (for example, by revolution or *coup d'état*)[11].

5. Vehicles in the Park?

The nowadays most influential theory of interpretation – propitiated by Hart's ideas on the subject (Hart 1961: ch. 7) – argues that (except perhaps for some marginal case of ambiguity of normative provisions) the main problems of legal interpretation are of the following kind: given, for example, a normative provision stating "No vehicles in the park", one has to wonder whether the norm applies to bicycles, fire engines, police cars, or a truck carrying a statue to be installed in the park itself, and the like.

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[9] This way of looking at the amendment power can be met in the constitutional theory of Mortati 1986.

[10] According to Schmitt, «the boundaries of the authority for constitutional amendments result from the properly understood concept of constitutional change» (Schmitt 1928: 150). Schmitt's definition of constitutional amendment reads as follows: a change in the constitutional text is a mere, genuine, amendment only if «the identity and continuity of the constitution as an entirety is preserved» (Schmitt 1928: 145).

[11] Two quotations from Hans Kelsen are in order. «Two cases must be fundamentally distinguished. In the first case, the constitution is modified in accordance with the conditions that the constitution itself has laid down […]; for example, an absolute monarchy is transformed, by an act of the monarch, into a constitutional monarchy. The continuity of law is guaranteed […]. The second case, different in principle from the first one, is that of a revolutionary transformation of the constitution, that is, through a break in the existing constitution. This is the decisive criterion, and not whether the constitutional modification is more or less profound (Kelsen 1920: 237). «The state remains the same even if its constitution is modified by juridico-positive means, that is, in the forms prescribed by the constitution itself. The modification can be as profound as it could be, but – if it takes place according to what is prescribed – there is absolutely no reason to suppose that a new state has arisen with the modified constitution. One could speak of a new state only if the modification constituted a real break in the constitution» (Kelsen 1925: 249).

In other words, the problems of interpretation would be essentially: (a) problems of reference or extension of predicates (predicates in a logical sense: terms that denote classes of objects); (b) problems dependent on the intrinsic vagueness, open texture, of predicates in general; (c) vagueness, that is not peculiar to legal language, but – following an intuition of Friedrich Waismann (Waissman 1968) – is shared by whatever kind of non-formalized language.

Well, it is sufficient to study closely some serious problem of interpretation, actually discussed by legal scholars and judges, to realize how much this view is naïve. The reference problems of predicates regard the application of norms to particular cases: they are problems of subsumption of concrete cases under previously identified abstract classes of facts. But the primary problems of interpretation are not at all of this kind: rather, they concern not the reference (Gottlob Frege's *Bedeutung*), but the very sense (Frege's *Sinn*) of the normative sentence at hand, that is, the identification of the norm (or norms) that it expresses (and/or entails) (Guastini 2011).

Apparently, the (guilty) ingenuity of the prevailing theory depends on the assimilation – sometimes tacit, but often explicit – of legal language to ordinary language. And this in turn depends, however surprising this may be (since the theory in question is held by competent jurists), on the simple ignorance of legal practice.

Legal communication – the "dialogue" between normative authorities and interpreters – is quite different from ordinary communication, and perhaps from any other type of communication. Interpretation of legal texts is conditioned not only by practical (conflicting) interests, which should be obvious, but – often – by legal-philosophical and/or political-philosophical assumptions and – always – by elaborate dogmatic constructions, which simply do not exist in daily conversation. There is no "dogmatics" of daily conversation. Jurists are able to make ambiguous or equivocal any sentence whose interpretation would be completely unproblematic in non-legal contexts. This is precisely what has happened, for instance, in the interpretation of art. 2 of the Italian constitution by legal scholars and constitutional judges.

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Meaning in Law.
Two Theories of Ordinary Meaning for Statutory Interpretation and Why They Do Not Work

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Abstract

The mainstream view on legal interpretation relies on different theories of ordinary meaning in order to set down what the legal meaning is and how to grasp it. In this essay I distinguish among the current theories of meaning by classifying them into two broad groups, or better, two ideal models: rule-based theories and speaker-based theories. This distinction is not meant to be mutually exclusive nor collectively exhaustive. However, these two models, and the difference between them, are interesting for my purposes in so far as they are usually considered the best candidates to account for legal meaning, i.e. the meaning of legal texts. Against these common views, I will attempt to show that the application of both models to legal interpretation is problematic. Even though for different reasons, both models are not suitable for legal domain. The failure of both models brings out an irreducible difference between ordinary understanding and legal interpretation and produces some unpleasant consequences. In particular, it results in the collapse of the distinction between creation and application of law.

Keywords: Legal Interpretation. Ordinary Understanding. Law Creation. Rule-based Theories. Speaker-based Theories.

1. Statutory Interpretation and Ordinary Meaning

The standard picture of legal interpretation is focused on language and the lin-

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[1] Earlier versions of this essay were delivered at: the workshop *Law, Language, and Social Ontology*, Surrey Centre for Law and Philosophy, University of Surrey (UK), June 2019; the special workshop *From Creation to Application of Law,* IVR World Congress, Luzern (Switzerland), July 2019; a webinar organized by Faculdade de Direito, Universidade de Lisboa (Portugal), March 2021. I thank all the members of the audience for discussion, and in particular Filippo Domaneschi, David Duarte, Paula Gaido, Tomasz Gizbert-Studnicki, Paolo Sandro, and Izabela Skoczén for their precious suggestions and criticisms.

guistic tools to discover the meaning of a statute, and legal interpretation is therefore conceived as a subfield of linguistics (Baude & Sachs 2017). More precisely, the mainstream view relies on different theories that have been developed with respect to our everyday linguistic interaction in order to set down what the legal meaning is and how to grasp it (Poggi 2020a). The basic assumption sounds very reasonable: since legislation mainly employs natural language, and since it should be understandable by its recipients in order to direct their conduct, it seems to follow that legal interpretation does not or should not significantly differ from ordinary understanding. However, there are many competing theories of ordinary understanding and they can be classified according to various criteria and different degrees of abstraction. Thus, for example, we can distinguish between semantic and pragmatic theories, cognitively oriented theories and realistic theories of meaning, contextualism and literalism, or – adopting narrower parameters – inferential theories and reference theories, radical and moderate contextualism, semantic minimalism, relativism, indexicalism, and so on.

Herein, I propose that some current theories of meaning be categorized into two broad groups: speaker-based theories and rule-based theories. I will adopt this classification simply because it is more useful for my purposes, without claiming that it is better than the others. In particular, my proposal is to be understood as a distinction between two ideal models. I believe that the distinction between speaker-based theories and rule-based theories is fruitful from an epistemic point of view, since it enables one to clarify some debatable points. However, such a distinction is neither mutually exclusive nor collectively exhaustive[2]. Not only are there mixed theories, which blend some features of the two models above, but there are also theories that cannot be attributed to either of these two models. Nevertheless, these two models, and the difference between them, are interesting for my purposes in so far as they are usually taken as the best candidates to account for legal meaning, i.e. the meaning of legal texts. In fact, as we will see, there are both good reasons to argue that a theory of legal meaning should be a speaker-based theory as well as good different reasons to maintain that it should be a rule-based theory instead. Contrasting these common views, I will argue that the application of both models to legal interpretation is problematic: these models seem unsuitable for legal domain. In particular, I will consider the problems related to the application of these two models to statutory interpretation, which I assume to be, here and now, a paradigmatic case of legal interpretation.

I will proceed as follows. I will explain the distinction between rule-based theories and speaker-based theories of meaning (§ 2) and I will provide some examples

[2] However, I think the same holds for all the classifications among theories of meaning: in a sense they are all ideal models, which have epistemic usefulness, but that can always clash with recalcitrant data. In fact, whatever classification we adopt we can always find authors that have developed mixed theories.

(§2.1). Then, I will try to show why speaker-based and rule-based theories of meaning, despite their apparent appeal, are not suitable for legal interpretation (§§4-5). Afterword, I will examine the unpleasant consequences that follow from their inadequacy (§6). In fact, the failure of both models brings out a difference between ordinary understanding and legal interpretation and it leads to the collapse of the distinction between creation and application of law.

2. Speaker-based Theories and Rule-based Theories of Meaning

By "speaker-based theories of meaning" I mean theories according to which the meaning of a sentence is the meaning that the speaker intends to communicate by uttering it. According to this view, the speaker's intention is what sets the identity of meaning. Surely, these theories recognize that communication is also a matter of rules, but within this model, rules are simply instruments through which the speaker's intention can be inferred.

In contrast, according to rule-based theories, the meaning of a sentence is the meaning established by the relevant set of rules. The relevant set of rules is what defines the identity of meaning. Surely, this approach recognizes that speaker's intention plays a role in the communicative process, yet the speaker's intention is relevant only if it complies with the rules. In other words, speakers are supposed to express their intention in accordance with the relevant rules, so that the meaning established by the rules and the meaning intended by the speakers coincide. However, if they do not, the rules prevail.

It is worth noting that both approaches assume that context is also important, but they assign different roles to context. According to speaker-based theories, context is an element that, along with rules, makes it possible to infer speaker's intention. According to rule-based theories, context is an element which rules can refer to in order to establish the meaning of some constituents of the sentence[3].

[3] I would like to emphasize that, in my view, the above theories are primarily theories of meaning – theories on how meaning is determined – and, secondarily and consequently, theories on how to grasp meaning. It is true that adherents of both theories often distinguish different levels of meaning, but this is not always the same as adopting different concepts of meaning. In particular, authors advocating the speaker-based model conceive of these levels as successive theoretical articulations to explain a communication process which is unique (see, e.g., Bach 2005) or as levels that reproduce internal inferences made by listeners and/or speakers to determine the intended meaning (see, e.g., Sperber, Wilson 1986). By contrast, the supporters of rule-based theories distinguish between a rule-based, invariant, express and necessary meaning and an optional pragmatic implicit meaning which is built on the former (see, e.g., Cappelen & Lepore 2005). Thus, if for the proponents of speaker-based theories there is only one concept of meaning, for the proponents of rule-based theories there seems to be more than one. However, in their perspective what matters is the priority and autonomy of the rule-based meaning: see below (footnote 4 and § 4.1).

The problem is, then, how to establish which approach is better: fortunately, on this point, there is a broad consensus. In fact, it seems that speaker-based theories are to be preferred if there are cases in which the sentence meaning, as determined by rules, is irremediably indeterminate or under-determined[4]. Unfortunately, whether such cases exist is a highly controversial issue. In order to clarify the point as well as the proposed distinction, in the next section I will provide two examples: both refer to very complicated debates, but I will simplify them as much as possible, in light of my purposes.

2.1. Examples: Pragmatic Completion and Demonstratives

Let's consider the following sentence:

(a) It's raining

According to the speaker-based theories (a) expresses an indeterminate meaning. We cannot know whether (a) is false or true if we do not know where it is raining. And we cannot know where it is raining without referring to the speaker's particular communicative intention, the determination of which is not a matter of rules. So, e.g., according to some authors, (a) includes an unarticulated constituent: a pragmatic constituent that is not triggered by anything in the syntax or semantics of (a) (see Perry 1998; Recanati 2004).

Rule-based theories challenge either that (a)'s meaning is indeterminate or that its completion is not a matter of rules. So, e.g., some authors claim that (a) expresses a complete proposition which amounts to "There is an instance of (unlocated) rainfall"[5]. In contrast, other authors sustain that (a) is in fact incomplete, but they argue that its completion is trigged by a hidden variable in the syntactic or semantic structure of the sentence. Therefore, the identification of the relevant place amounts to the saturation[6] of a (hidden) indexical. Various tests have been devised in order

[4] More precisely, we prefer the model that can explain and predict all the phenomena explained and predicted by the competitor model plus some phenomena that the competitor model is not able to explain and predict. Currently, the dispute focuses on whether speaker-based theories have a stronger explicative and predictive power: most theorists opine that in order to prove that they have it, we must prove that in the some cases the sentence meaning as determined by rules is irremediably indeterminate or under-determined.

[5] This thesis is usually advanced by the supporters of semantic minimalism: see Borg 2004; Cappelen & Lepore 2005. It is worth noting that, as we shall see later (§ 4.1.), these authors do not claim that the meaning of (a) within a conversation is exhausted by "There is an instance of (unlocated) rainfall". They claim that (a) has primarily this meaning, on the basis of which other implicit meanings are subsequently elaborated. Minimalism is an attempt to vindicate the autonomy of semantics showing that communication is a bottom-up process which rests on solid semantic bases.

[6] Saturation is "the contextual provision of a value for a syntactically marked context-sensitive item" (Carston 2012: 671).

to show when a constituent is truly unarticulated or when there is really a hidden indexical: none seems ultimate and all are disputed (see Stanley 2000; Recanati 2004).

If the phenomenon of pragmatic completion is still being debated, a more powerful argument in favour of speaker-based theories seems to be provided by demonstratives. Let's consider the following sentence:

(b) I love that[7]

'I' is a pure indexical: it is linguistic expression whose reference can shift from context to context[8]. However, 'I' has a single invariant linguistic meaning or character (Kaplan 1989), which approximately amounts to "'I' refers to the person who is speaking". It is because of this fixed linguistic meaning that (b) can have a virtually unlimited number of contents in different contexts. In summary, a pure indexical has two kinds of meanings: an invariant linguistic meaning (or character) and a content that is determined by its character plus some contextual elements. It is important to stress that the character precisely determines which contextual elements are relevant in order to fix the content, and moreover, it refers to a very narrow context. So, for example, the only contextual element which is relevant to establish the reference of 'I' is the speaker[9]. But what about 'that' in (b)? Suppose that I utter (b) pointing at an empty bottle of porto wine. In this context of utterance, (b) can mean:

(b1) I love that kind of wine – i.e. I love porto wine
(b2) I love that brand of porto wine
(b3) I love the shape of that bottle
(b4) I love that the bottle is empty

'That' is a true demonstrative: its reference – and, therefore, the meaning of (b) – is not (at least, not entirely and not always) determined by its character (nor by the speaker's pointing gesture). It seems that the reference of true demonstratives depends on the speaker's communicative intention (Bach 1992): an element on which rules have no control. However, a complication arises. Suppose that I mistakenly believe that the bottle I'm pointing at is a bottle of champagne and that, by uttering (b), I intend to communicate that I love champagne. It is very counterintuitive to say that the meaning of my utterance is that I love champagne. Even if some exceptions

7 The example is from Bianchi 2003, 42.

8 Actually, not all theorists accept this characterization of indexicals: see Braun 2017. For the sake of simplicity, I will not address this difficulty here.

9 In Perry's terms 'I' is an automatic and narrow indexical. An indexical is automatic if its reference is determined by its linguistic meaning and some public contextual facts, such as speaker and time. An indexical is narrow if its reference is determined by a narrow context including only speaker, time and location. See Perry 1997; Perry 2001: 58ff.

are possible – e.g. if I'm victim of the practical joke of friends who are making fun of my wine ignorance – no one would say this. Moreover, in this example, the speaker has two conflicting communicative intentions: the intention to mean that she loves the kind of drink that was contained in the bottle she is pointing at and the intention to mean that she loves champagne. Which one prevails (and why)?

Various solutions have been devised in order to avoid the problems above and provide a satisfactory treatment of demonstratives: some of these are closer to the speaker-based models, others are closer to the rule-based models, and still others have mixed elements. Currently none of these solutions is unanimously accepted and all are challenged[10]. Therefore, also the dispute on demonstratives is still open.

The previous examples were meant to show the distinction between speaker-based theories and rule-based theories of meaning: two models that try to explain meaning and understanding with regard to our ordinary communication. Establishing which one is better is beyond the scope of this paper. Instead, in the next sections I will attempt to argue that both models are unsuitable within legal domain.

3. Speaker-based Theories and Statutory Interpretation

There are very good reasons for thinking that speaker-based theories can account for statutory meaning. It seems reasonable to conceive of legislation as an intentional phenomenon. Raz makes this point very clear: «Only acts undertaken with the intention to legislate can be legislative acts» (Raz 2009: 282). Raz claims that «the notion of legislation imports the idea of entrusting power over the law into the hand of a person or an institution, and this involves entrusting voluntary control over the development of the law, or an aspect of it, into the hands of the legislator» (Raz 2009: 282). It follows that legislation cannot be identified without reference to legislative intent: the idea of an unintentional act of legislation is inconsistent. Moreover, Raz argues that the intentional nature of legislation supports the "Authoritative Intention thesis", according to which «To the extent that the law derives from deliberate law-making, its interpretation should reflect the intention of its lawmaker» (Raz 2009, 275)[11].

More recently, Goldsworthy claims that, as a matter of fact, statutory interpretation fits with a speaker-based theory, in some countries at least. According to Goldsworthy «legal meanings of legal texts are determined ultimately if not entirely by the practice of legal offices», and «linguistic grounds (…) are relevant only if they are consistent with, and help to illuminate or clarify, existing legal practices» (Goldsworthy 2019: 175). On this regards, Goldsworthy claims that the legal prac-

[10] See, e.g., Devitt 1981; Wettstein 1984; Perry 2009; King 2012; Braun 2017.

[11] However, as we will see (§4), Raz does not embrace a speaker-based model.

tice of Anglo-American legal systems includes two fundamental constitutional doctrines: Legislative Supremacy and Legislative Intention. The commitment to these doctrines involves the adoption of a speaker-based theory according to which the content of law is the content that the legislators intend to communicate. That is to say, the actual legal practice fulfils and, at the same time, founds a speaker-based model. «[I]t is the practice of legal officials that directly determines the matter [i.e. what statutes mean], their normative commitments helping us to understand why they adopted and continue to adhere to that practice» (Goldsworthy 2019: 181). Therefore, a version of the speaker-based theories «provides the most plausible account (interpretation, if you will) of the orthodox legal understanding of the content of Anglo-American Statutes and written constitutions» (Goldsworthy 2019: 181).

Goldsworthy's idea may well be extended to other legal systems. In many jurisdictions judges and lawyers often invoke legislative intent and one would have to assume that these practices are serious and make sense[12].

Nevertheless, the application of speaker-based theories to statutory interpretation raises well-known problems. Many scholars have claimed that legislative intent is a «transparent and absurd fiction» (Radin 1930: 863)[13] or «a metaphor» (Luzzati 2016: 134ff.). Collective entities such as legislatures do not have a mind and, therefore, they cannot bear mental states. Thus, even if we confine ourselves to the law enacted by legislative assemblies – thus excluding customary law and common law –, it seems hard to identify a legislative intent that is able to play the same role that a speaker's intention plays in ordinary conversation. Legislative intention can obviously be ascribed to individual legislators, i.e. to each member of a legislative body, but individual intentions do not determine the content of legislative texts (Pettit 2001: 250-1). When a legislative body passes a statute, all we know is that the majority intended the statute to be enacted, not that the members of this majority intended to convey the same normative content by enacting it.

In order to clarify this point, it is worth noting that, according to the speaker-based model, the meaning of a sentence is the meaning that the speaker intends to communicate by uttering it. Briefly, the relevant communicative intention of the speaker is the intention to have the recipient understand what the speaker means by making the recipient recognize this intention[14]. This complex and reflexive communicative intention can be broken down into the following levels:

[12] Many authors claim that, when invoking legislative intent, judges and lawyer actually refer to the different things, such as the most reasonable reading of the legal provision, or the subjective purpose of the legislators, or the so called *ratio legis*, i.e. an objective purpose which is intrinsic to the norm, e.g., the value it expresses, and/or the aim it pursues, and/or its inner justification (see Diciotti 1999, 312ff.; Guastini 2004, 150ff.; Guastini 2008, 38ff.; Velluzzi 2013: 74ff.; Luzzati 2016: 145ff.). However, one could object that these readings do not take legal practice seriously, do not put it in the best light.

[13] See also Dworkin 1986: 335ff.

[14] See, e.g., Grice 1989, 86ff.

(i) the intention to utter (write) something;
(ii) the intention to utter (write) a given sentence (*x*) and not something else;
(iii) the intention to mean (communicate) something (equal/other/different)[15] by uttering *x*;
(iv) the intention to mean (communicate) *S* and nothing else by uttering *x*[16].

The first level – i.e. the intention to utter (write) something – is very important: it is what characterizes the communication and activates the interpretive activity as an activity aimed at understanding what the speaker intends to communicate. Consider the following example:

(c) These spots mean measles

Here the verb "to mean" refers to causal connections among spots and measles. It is a matter of regularity between certain facts and other facts of which the former constitutes the symptoms or the indications. There is no intention to communicate anything[17]. Similarly, imagine that the sea has washed up some shells on the beach. I can certainly argue that those shells have taken a shape that means 'cat', but here the verb "to mean" does not refer to someone's intentional communication. The sea has no communicative intention that those shells reveal. It follows that the first level of intention is what defines communication – what makes a certain set of sounds or signs count as, or have value of, communication. This level is also the *conditio sine qua* of any interpretative activity, seen as the activity that aims to understand what a speaker intends to communicate.

The intention to enact a statute amounts to this first level[18]. The Parliament intentionally enacts a statute since this enactment is the result of several intentional actions of its members. The intentional participation in the legislative procedure ensures that the law can be understood as the intentional product of (the intentional actions of) the members of the Parliament, i.e. as a communicative instance. Never-

[15] Speaker-based theories do not deny that sometimes an utterance can mean what it means according to the relevant set of rules. However, according to speaker-based theories, an utterance means what it means according to the relevant set of rules if the speaker intends it. On this point see Strawson 1973; Bach 1997; Rysiew 2007.

[16] See Canale and Poggi 2019; Poggi 2020b; and, on the two last levels, Asgeirsson 2017: 82. Notice that the four levels of intention identified in the text should not be confused with different kinds of intention. They simply identify the internal articulation of a unique communicative intention.

[17] This is Grice's *natural meaning*. See Grice 1989: 213 ff.

[18] As we will see (§4), this is Raz's minimal intention: the intention to participate in the legislative procedure and to enact a given text as law. «A person is legislating (voting for a bill, etc.) by expressing an intention that the text of the Bill on which he is voting will […] be law» (Raz 2009: 284). According to Raz, this minimal intention «does not include any understanding of the content of the legislation» (Raz 2009: 284).

theless, this minimal intention is irrelevant in order to establish the intended meaning of the statute enacted[19]. The other three levels of the speaker's communicative intention must come into play.

As far as the second and the third level are concerned, they are very problematic regarding those who voted in favour of the text without reading it. In fact, «It is uncontroversial that most legislators do not read most of the text of the statutes on which they vote» (Greenberg 2011: 239)[20].

Leaving aside the cases in which MPs vote on texts that they have not read – which might be considered as pathological cases, as deviations from the standard (though they are very frequent) – the last level of the speaker's communicative intention is very problematic also with respect to MPs who have read the text and voted in its favour. Within the speaker-based model, the fact that two speakers utter the same sentence does not ensure that, in doing so, they intend to communicate the same meaning. In fact, according to the speaker-based model, sentence meaning is underdetermined or indeterminate. Therefore, it is always possible that two speakers intend to communicate different meanings through the same sentence: it is the speaker's intention which determines the communicated meaning. An epistemic problem also arises: how do we know whether two speakers have the same communicative intention when they utter the same sentence? Within ordinary conversation, context plays a fundamental role in order to grasp speaker's intention. However, as far as legal interpretation is concerned, context does not help: I will return on this point in sect. 4. For the moment, it is enough to stress that, as far as legislative assemblies are concerned, sometimes it is unquestionable that there is not a single communicative intention. Legislation is a matter of negotiation and compromise. «As a result, the language is often chosen not in order to implement anyone's communicative intention, but because, for example, it is unclear enough

[19] This point is clearly stated by Lifante 1999.

[20] Raz seems to dispute this point. He claims that legislators – who have the minimal intention that the text of the Bill on which they are voting will be law – «know that they are, if they carry the majority, making law, and they know how to find out what law they are making. All they have to do is establish the meaning of the text in front of them» (Raz 2009: 284-5). I think that this passage is very problematic. Considering that, according to Raz, «legislation requires not merely legislating; it requires knowing what one legislates» (Raz 2009: 282), can we say that a member of the majority, who has not read the text of the bill, knows what she is legislating simply because she could find it out? If I do not know German and I intentionally pronounce the sound "Hund", can it be argued that I intend to say "dog", only because I *could* find it out with a dictionary? An affirmative answer would make no sense within a speaker-based model of meaning. Within ordinary conversation, it is untenable to say that a speaker *intends* to communicate *S* by uttering *x*, if all that the speaker actually intends is to make a sound, whose meaning she ignores, with no other communicative intention. In the same way, it is untenable to say that a member of Parliament intends to enact the norm *N* by raising her hand, if she has not read the bill on which she is voting. All that she intends is to pass a bill, not to enact the norm *N*. Briefly, a speaker cannot be said to express a communicative intention if she does not know what she is uttering and does not intend to communicate a given meaning by uttering it.

for a majority to accept» (Greenberg 2011: 253). Therefore, very often, the MPs (or the majority that votes for the text) do not have a unique intention about how to intend an unclear statute[21].

In the next sections I will consider two possible strategies against the previous objections: theories of collective intentionality and the objective communication theory.

3.1. Why not Collective Intentionality?

The first strategy is to appeal to some theories of collective intentionality in order to solve the above problems[22]. I contend that this strategy does not work. The most popular and plausible theories of collective intentionality usually require that collective intentionality must rise (emerge, etc.) from individual intentions with some (at least partially) coincident propositional content. But here the point at stake is precisely whether the parliamentarians' individual intentions are directed to the same meaning. In other words, theories of collective intentionality do not suppose the existence of a collective mind capable of bearing collective intentions that are independent from the individual ones: collective intention is always the result of particular individual intentions related to each other in specific ways[23].

Consider for example Bratman's famous theory. According to Bratman, collective intentionality derives from individual planning agency, so that we do not need any new basic elements in our metaphysics or philosophy of mind in order to account for robust forms of collective agency[24]. It follows that there can be a legislative (collective) intention to mean (communicate) *N* (and nothing else) by enacting a provision *P*, only if each member of Parliament (or of the majority) bears the intention "I intend that we intend to mean (communicate) *N* (and nothing else), by enacting a provision *P*". However, as we have seen, the existence of this intention is precisely the point at stake.

In a nutshell, the collective intention to mean *N*, by enacting the provision *P*, presupposes that each member of Parliament (or of the majority) bears the same

[21] Speaker-based theories are also inconsistent with some legal interpretative practices. Sometimes, for instance, a legal provision is interpreted according to a superior constitutional norm that was enacted later: according to a speaker-based model, it makes no sense to intend an utterance in the light of a context that the speaker could not know. However, the existence of similar interpretative practices does not amount to a critique of the viability of speaker-based models within statutory interpretation: one can simply argue that sometimes judges are wrong, since they do not try to grasp the legislative intention.

[22] E.g. Ekins 2012 follows this strategy.

[23] See Roversi 2016. The types of the relevant individual intentions and the way in which they are interconnected vary from one theory to another.

[24] This is the core of Bratman's *continuity thesis*: «The conceptual, metaphysical, and normative structures central to such modest sociality are […] continuous with structures of individual planning agency» (Bratman 2014, 8).

communicative intention, and therefore it cannot ground the existence of that communicative intention.

A detailed analysis of the theories on collective intention is beyond the scope of this essay, but I claim that the same hold for other theories of collective intentionality[25], such as Tuomela's and Gilbert's[26].

3.2. Why not Objective Intention?

The second strategy in order to overcome the criticisms against the plausibility of a speaker-based model of statutory interpretation consists in appealing to an objective communicative intention.

Especially Goldsworthy (2019) develops this strategy. He supports an objective communication theory [OCT], which makes reference to manifest communicative intentions, i.e. intentions that are accessible through textual and contextual evidence (Goldsworthy 2019: 180). Quoting Scalia, Goldsworthy says that «We look for a kind of "objectified intent" – the intent that a reasonable reader would gather from the text of law, placed alongside the remainder of the *corpus juris*» (Scalia 2018: 31), and «other admissible contextual evidence of intent» (Goldsworthy 2019: 180).

Surely, different reasonable readers can reconstruct the reasonable legislative communicative intention in different ways, especially depending on which admissible contextual evidence they rely on (§ 4). However, Goldsworthy concedes this point. Goldsworthy admits that judges understand and reconstruct the legislative objective intention in different ways, but he claims that this fact does not compromise the existence of such intention. «We can agree that something exists notwithstanding theoretical disagreements about its nature; if not, there would be virtually nothing we could believe exists» (Goldsworthy 2019, 177)[27]. Judicial disagreements

[25] Perhaps this is not true as far as Searle's theory is concerned. According to Searle, group intention is formed in the mind of an individual (there are not collective minds) but it is irreducible to individual intentions: collective intentionality (we-intention) is biologically primitive. As far as cooperative actions, there is a collective intentionality if an individual has the collective intention-in-action of B (for example, I intend that we play a duet) by ways of her individual action A (for example, by ways of my playing the plan) plus the belief that also the other subjects of her collective intention have the same collective intention-in-action of B, by way of the execution of their individual action (Searle 2010: 50ff.). However, Searle admits that an individual can also mistake her situation: e.g. it can be false that you have the collective intention-in-action to play a duet with me. Therefore, a single member of the Parliament can bear the we-intention to enact the norm *N*, by passing the provision *P*, even if she is the only one who intends *N* by voting for *P*. As Ekins observes, «It is more than a little odd to think there may be group intentions without a group» (Ekins 2012: 53).

[26] See Schweikard and Schmid 2013; Roversi 2016. Actually Gilbert (1992) speaks of "plural subject", but with this expression she simply refers to the relationship between individual commitments. See Gilbert 1992: 428ff.; Gilbert 2013: 9-10.

[27] "Eminent philosophers of language disagree among themselves about the nature of the communicative contents of utterances, but that does not show that utterances do not have communicative contents

do not compromise even the existence of the legal practice that, adhering to the doctrines of Legislative Supremacy and Legislative Intent, relies on the legislative objective intention. They simply make the practice more indeterminate (Goldsworthy 2019: 181). Moreover, according to Goldsworthy, nor even the fact that sometimes judges clearly depart from whatever attempt to reconstruct the legislative intention compromises the existence of the practice. In fact, it confirms it. Also judges who tamper with the doctrine of Legislative Intent pretend to engage in the practice of reconstructing the legislative intention. And, according to Goldsworthy, «what judges say they do is much better evidence of the scope of their lawful authority than what they might sometimes actually do» (Goldsworthy 2013: 308; Goldsworthy 2019: 192-193). «It follows that the legal content of a statute is what the orthodox interpretative doctrines authorize judges to identify or construct, regardless of occasional dissembling» (Goldsworthy 2019, 193).

Goldsworthy's view seems impregnable. All what matters is that judges declare that they are committed to the doctrines of Legislative Intent and Legislative Supremacy, regardless how they actually reconstruct the legislative objective intention, and regardless if they are actually reconstructing the legislative objective intention. Still I think that Goldsworthy's thesis is untenable for three reasons at least.

Firstly, it is true that something can exist notwithstanding theoretical disagreements about its nature. If we are speaking about *X*, and you think that *X* is *a*, while I think that *X* is *b*, our disagreement does not prove that *X* does not exist (nor that *X* exists). However, our disagreement implies that we are not speaking about the same thing, except on a very abstract level of description – i.e. we are both speaking about *X*. Thus, if judges reconstruct the objective legislative intention in different ways, they are not engaging exactly in the same practice[28].

Secondly, it seems to me odd that what judges say they do determines a practice much better than what they actually do. This idea sounds reasonable only if the deviations from the practice are marginal, exceptional. What about if the majority of judges pay only a formal homage to the doctrine of Legislative Intent without ever even attempting to follow it? Nor Goldsworthy nor I have empirical data to show whether or not this is the case.

Finally, my main objection is that Goldsworthy's thesis turns the legislative communicative intention into an empty notion, which is very different from the

[…] Moreover there is not good reason to exclude in advance the possibility that philosophers of language will one day prove that some version of OCT is superior to others" (Goldsworthy 2019, 177-178).

[28] A supporter of the direct reference theory could object that, even if judges do not share the same concept of objective legislative intention, they can still refer to the same object and, therefore, speak about the same thing. However, this objection is off-target. The point here is that the judges reconstruct the objective legislative intention behind the same legal provision in different ways: therefore, they actually refer to different things. Of course, this does not exclude that one reconstruction might be correct and the other wrong, but it excludes that the practice is the same.

notion of communicative intention developed by the theories of ordinary meaning. In ordinary conversation one can claim that the meaning of an utterance is the meaning that a reasonable speaker intends to communicate, given a certain context of utterance. Surely, also in ordinary conversation the context is huge, and it is sometimes doubtful which contextual elements the speaker has reasonably assumed as relevant – and therefore which contextual elements are relevant in order to infer the speaker's reasonable communicative intention. Listeners make an (unconscious) evaluation, and they sometimes fail – misunderstandings are always lying in wait. However, in ordinary conversation we have a criterion to know whether and when the recognition of the relevant context, and therefore the communication, has failed. If the speaker's actual communicative intention does not amount to what I think she has reasonably intended, then the communication has failed. The failure may be due to the speaker – who was not reasonable, e.g. because she has assumed as mutually known a context which was not –, it may be due to the listener – who did not recognize the relevant context – it may be due to both or neither. Nothing similar usually happens in statutory interpretation.

In legal domain, as we will see (§ 4) and as Goldsworthy concedes, there are many possible different reconstructions of the relevant co-text. Each one is reasonable. To each one corresponds a different construction of the legislative objective intent. And it lacks a criterion to establish which one is better. In statutory interpretation, the objective notion of communicative intention does not find a counterbalance in any actual intention on the part of the legislators: i.e., a criterion to establish the success of the communication is missing. Precisely because there is no parameter to establish communicative success, and because, in fact, there is no consensus on the relevant context, each interpretative proposal has theoretically the same validity as the others.

4. Rule-based Theories and Legal Interpretation

If one agrees that speaker-based theories are untenable in statutory interpretation, the obvious option is to turn to rule-based theories. In fact, rule-based theories are very popular among legal scholars. Raz himself seems to adhere to a kind of rule-based theory. As we have seen (§3), Raz claims that legislation is an intentional phenomenon. However, according to Raz, the minimal intention that is required in order to conceive of the legislation as an intentional phenomenon is the intention to engage with the legislative procedure and to enact a bill as law. As far as the "Authoritative Intention thesis" – according to which the statutory interpretation «should reflect the intention of its lawmaker» (Raz 2009: 275) – Raz actually dissolves the lawmakers' intention into the linguistic conventions. Raz claims that «In the cycle of convention and intention, convention comes first, […] in the sense that the content of any intention is that which it has when interpreted by reference to

the conventions of interpreting such expressive acts at the time» (Raz 2009: 286). Moreover, he maintains that «given that normally, legislation is institutionalized in a way which virtually removes the risk of a slip of the tongue, loss of physical control, or any other explanation for misfire actions, and given that any conceivable theory of authority puts a high premium on relative clarity in demarcating what counts as an exercise of authority and what does not, the possibility of having to go behind what is said to establish what was meant becomes very rare. For practical purposes it may altogether disappear» (Raz 2009: 287).

From the quotations above, it seems to follow that Raz adheres to a rule-based model. As we have seen, rule-based theories claim that the meaning of an utterance is the meaning established by the relevant set of rules. Speakers are supposed to express their intention in accordance with the relevant rules, so that «the content of any intention is that which it has when interpreted by reference to the conventions» (Raz 2009: 286). In particular, as far as legislation is concerned, Raz's position is sustainable and sound if the meaning of statutory provisions is fully determined by rules and conventions due to the legislation's own features.

In fact, Raz's position is very widespread in legal theory[29]. The general idea is that, no matter what happens in ordinary conversation, in legal interpretation rules and conventions suffice in order to grasp a complete, determinate, legal meaning. In this section I will attempt to overturn this thesis and show that, even if rule-based theories were to be preferred within ordinary discourse, they are not suitable for legal interpretation.

Rule-based theories of meaning claim that the meaning of a sentence is the meaning established by the relevant set of rules and conventions. More exactly, as emerges from the provided examples (§2.1.), some supporters of rule-based theories argue that the meaning of a sentence is determinable – even if not determined – by rules. That is to say, some supporters of rule-based theories admit that the meaning of certain components of the sentence can be determined only by reference to some contextual elements, but they argue that which contextual elements are relevant is fixed by the rule associated to those components. In particular, this position is shared by the so-called invariantist theories. So, for example, according to hidden indexicalism some expressions have a unique meaning, which, however, includes a hidden variable (or indexical) that must be saturated by some contextual elements that are specified by the variable itself. Or, to provide another example, according to relativism, some expressions have an invariant meaning content, but their extension (and therefore the true value of their content) shifts from context to context since it is relativized to non-traditional parameters[30].

[29] See, e.g., Marmor 2008; Asgeirsson 2017.

[30] So, e.g., Lasersohn (2005) argues that the predicates of personal taste, such as "fun", do not vary in content from context to context but do vary in extension with respect to judges and /or standards of taste.

It is important to stress that, for the rule to be saturated, the context must be fixed and determinate. Let's introduce this point with a mental experiment. Imagine that I'm walking in a park with my friend Eugenia and we meet our common friend, Isa, with a big black dog on her leash. Suppose that Isa utters

(d) This dog is Guinness

Here, (d) does not raise any problems for the supporters of rule-base theories. "This" refers to the dog closest to the speaker. In that context there is one and only one dog that satisfies this requirement, i.e. the black dog that Isa brings on her leash. All the parties (Eugenia, me and Isa) are aware that there is one and only one big black dog on Isa's leash, and they mutually know that each one of them is aware of this fact. But now imagine that, when Isa utters (d), she is seeing a big black dog on her leash, while Eugenia sees a white little dog and I see no dog at all. If this strange situation occurred, the meaning of (d) would be problematic: the rule associated to "this" still identifies which element of the context is relevant – i.e. the dog closest to the speaker – but for each party the rule selects a different object.

This mental experiment aims to show that a necessary condition for rule-based theories to individuate a complete determinate meaning is that the context must be fixed: context has to be a factual piece of data, an object of mutual knowledge. In ordinary conversation this often occurs, and often does not.

The failure in determining a precise truth-functional meaning is not a problem for rule-based models. The supporters of these models argue for the primacy of semantics and syntax: they claim that communication is a bottom-up process trigged and driven by rules. They may concede that sometimes rules and context do not suffice to individuate a determinate meaning and, therefore, the sentence has not a determinate meaning and the parties of the conversation do not understand each other, as in fact it occurs[31]. Nevertheless this picture arises a lot of problems as far as statutory interpretation is concerned. In fact the context of legislation is constitutively opaque: it needs to be reconstructed by interpreters and it can be reconstructed in several different ways[32]. That is to say, in statutory interpretation context is almost never fixed, it is almost never an object of mutual knowledge, but it is a matter of reconstruction and dispute. Therefore, the adoption of a rule-based

[31] Let's consider again sentence (a) "It's raining". The supporters of the invariantist theories may concede that the precise truth-functional meaning of (a) is not clear every time the context does not provide clear indications on how to saturate the indexical that is hidden in its syntactic form. What matters in their perspective is that there is such an indexical that must be saturated, and, therefore, that the determination of meaning is always guided by rules – even if sometimes the result of saturation is undetermined. After all, misunderstandings and linguistic inaccuracies are real phenomena that any theory must account for.

[32] See Poggi 2013. On the opacity of legal context see also Marmor 2008; Assgeirson 2017.

theory lead us to conclude that the meaning of legal provisions is very often indeterminate – more often than we would like.

As it is well known, the main context of legislation is represented by other legal materials: a statutory provision is not interpreted alone, but in relation to a system of other legal provisions and principles. Such a "reference-system" includes, but it is not limited to, the other provisions of the same statute. Moreover, it does not usually coincide with the whole legal system. In particular, this subset may include all the provisions or principles regulating the same subject matter (*pari materia*), or other provisions and principles that are not strictly related to the statutory provision but might be regarded as relevant according to certain criteria. It also may embrace the legislative history, the relevant case law, the ends that the statute seeks to realize, the parliamentary reports, international agreements, and so on.

As far as the identification of this context, a twofold problem arises.

Firstly, which elements must be included in the reference-system? In this way, for example, the concept of *pari materia* is vague, indeterminate, and open to dispute. E.g., it can be argued that the criminal provision on the cultivation of marijuana and the provision that defines the legal concept of farmer cover the same subject, as both relate to cultivation, or it can be argued that they do not since one is a criminal provision and the other is a provision of commercial (or fiscal) law[33].

Secondly, even if we agree that a given element must be included in the legal context, its interpretation can be open to dispute. For example, we all agree that in order to interpret a statutory provision, the other parts of the statutory scheme must be taken into account. However, the content conveyed by the other statutory provisions might be disputed as well. Similarly, the ends that statute seeks to realize are not always explicitly stated by the legislature. In most cases, the purpose of a statutory provision is inferred from the same contextual elements considered thus far. It is therefore a result of the interpretive activity and not a common assumption. Furthermore, even when the purpose of the statute is quite clear, it can be specified at different levels of abstraction depending on the case to be decided[34].

The two previous problems are actually two sides of the same coin: in order to decide whether an element is to be taken into account when interpreting a given provision, we must have already interpreted that element, but its interpretation depends in turn on a reference system.

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[33] The example in the text is provided by Poggi 2013.

[34] Surely, the legal culture at stake – Raz's legal conventions – can exclude some elements from the relevant context. So, e.g., in some legal systems, international agreements or parliamentary reports are not considered relevant, while in other legal systems they are. National interpretative conventions can also establish a hierarchical order among the relevant elements. For the reasons explained in the text, these conventions can reduce problems related to the identification of the relevant context, but they do not eliminate them: the elements to be taken into account are howsoever numerous and each of them might be in need of interpretation.

Moreover, in legal interpretation is not clear whether we have to refer to the context at the moment of the enactment or to the context at the moment in which a legal provision has to be applied. It is worth noting that in ordinary conversation this problem rarely arises, either because the parties of the conversation are simultaneously present or because it is otherwise clear to which context they refer. So, e.g., if a voice mail message says "Now I'm not at home", it is clear that "now" refers to the time in which the message is listened to and not to the time in which it was recorded. On the other hand, if I read the sentence "A terrible event happened today" in a newspaper published three days ago, "today" refers to the day in which the newspaper was published and not to the day in which I read it.

It follows that different interpreters of the same legal provision can reconstruct the relevant legal context in different ways, and therefore they can reach different interpretations. Rule-based theories cannot establish which interpretation is correct. Actually, they are all correct with respect to their reference-context and they are all wrong with respect to other reference-contexts. From the perspective of rule-based theories, if some overt or hidden indexical is involved and the context is not clear enough to establish how to saturate it, the sentence truth-functional meaning is and remains indeterminate.

Let's provide an example: the famous case of *Smith v. U.S.*[35].

In this case, the United States Supreme Court had to decide whether someone who exchanges a gun for drugs should to be convicted according to Title 18 U.S. C. § 924(c)(I):

> (e) Whoever, during and in relation to any crime of violence or drug trafficking […] uses […] a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years.

Here, "to use" is a so-called pro-act verb, like "to do": a verb that can mean a number of activities. Using a very simplified rule-based model we can think that the verb "to use" is always associated with a hidden variable, which stands for "to do something". The context must fill that variable. So for example, "To use a chair" always means "To use a chair to do something", and according to different contexts, "To use a chair to sit down" or "To use a chair to lock a door" or, again, "To use a chair to stand up on it". Therefore, the saturation of the variable depends on context. Now, what is the relevant context for the saturation of "To use a firearm/to do something" in (e)?

As the Supreme Court stated, «Language, of course, cannot be interpreted apart from context. The meaning of a word that appears ambiguous if viewed in isolation

[35] *Smith v. United States,* 508 U.S. 223 (1993).

may become clear when the word is analyzed in light of the terms that surround it»[36]. In *Smith* the majority argued that the relevant context was represented by other provisions of the same statute and by the legislative purpose.

As far as other provisions, the Court observed that, according to § 924(d)(1), any «firearm or ammunition intended to be used» in the various offenses listed in § 924(d)(3) is subject to seizure and forfeiture, and that § 924(d)(3) also lists offenses in which the firearm is not used as a weapon but instead as an item of barter or commerce.

As far as the legislative purpose is concerned, the Supreme Court identified it with the «purpose of addressing the heightened risk of violence and death that accompanies the introduction of firearms to drug trafficking offenses»[37].

So, coming from this context, the majority decided that "To use a firearm/to do something" in (e) needs to be filled with reference to the activities listed in § 924(d)(3).

The minority (Justice Scalia, Justice Stevens and Justice Souter) disagreed with this conclusion, as well as with the identification of the context of reference. Also according to the minority opinion, it is a «fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used»[38]. However, the minority included different elements in that context.

Firstly, according to the dissenting opinion, the most important contextual element is the phrase, the provision itself. In this regard, «adding the direct object, "a firearm" to the verb "use" narrows the meaning of that verb (it can no longer mean "partake of")»[39]. It follows that the contextual element represented by § 924(d) is not relevant, because it does not employ the phrase "uses a firearm," but provides for the confiscation of firearms that are "used in" referenced offenses[40].

Secondly, the minority opinion attributed relevance to the United States Sentencing Guidelines, which provide for enhanced sentences when firearms are «discharged, brandished, displayed, or possessed», or «otherwise used». Thus, according to United States Sentencing Commission, Guidelines Manual§ 2B3.1(b)(2) (Nov. 1992), «"otherwise used" with reference to a dangerous weapon (including a firearm) means that the conduct did not amount to the discharge of a firearm but was more than brandishing, displaying, or possessing a firearm or another dangerous weapon»[41].

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36 508 U.S. 223 (1993), 229.

37 508 U.S. 223 (1993), 224.

38 508 U.S. 223 (1993), 241.

39 508 U.S. 223 (1993), 245.

40 More precisely, according to the dissenting opinion, "to use" has different meanings within different provisions: "just as every appearance of the word "use" in the statute need not be given the narrow meaning that word acquires in the phrase "use a firearm," every appearance of the phrase "use a firearm" need not be given the expansive connotation which that phrase acquires in the broader context of "using a firearm in crimes such as the unlawful sale of firearms" (508 U.S. 223 (1993), 245).

41 508 U.S. 223 (1993), 243.

Thirdly, the minority considered the legislative history: in fact, § 924(c)(1) originally dealt with use of a firearm during crimes of violence, while the provision concerning use of a firearm during and in relation to drug trafficking offenses was added later. It is quite obvious that "using a firearm during crimes of violence" means using it as a firearm, using it to commit the crime.

Finally, the minority included the rule of lenity within the relevant context. According to this rule, where there is ambiguity in a criminal statute, doubts are resolved in favour of the defendant.

Arguing from this different context, the minority concluded that "To use a firearm/to do something" in (e) has to be filled as "to do what is distinctively done with it/ i.e. to use as a weapon".

It is worth noting that from the point of view of rule-based theories neither the majority nor the minority are right. If, as a matter of fact, the context is not clear enough for the rule associated to the indexical allows its saturation, then the meaning is and remains indeterminate.

4.1. Why not Semantics Minimalism?

In the previous section I've argued that rule-based theories are troublesome for statutory interpretation, in so far as they admit that context can be an essential element in order to determine the complete meaning expressed by a sentence, and in the legal domain context is structurally opaque. However, not all rule-based theories recognize the necessity of context in order to grasp the truth-functional content of a sentence. In this respect minimal semantics might be tempting. According to Minimal Semantics, every sentence always expresses a minimal, complete propositional content, which does not depend on pragmatic/contextual processes, including variables or indexical saturation. So, for instance, Borg defines this minimal content, which she labels as "Liberal truth conditions", as

> conditions which are liberal since they clearly admit satisfaction by a range of more specific states of affairs. A liberal truth-condition posits 'extra' syntactic material (i.e. material in the sub-syntactic basement) *only when* it is intuitively compelling to do so, or when there is good empirical evidence to support the move. Furthermore, what these truth-conditions take as being delivered by sub-syntactic information is merely the presence of an additional argument place, marked by an existentially quantified argument place in the lexical entry, *and not* the contextually (intentionally) supplied value of this variable[42].

[42] Borg 2004, 230, italics added.

Borg provides a few examples:

(f) If u is an utterance of "Jane can't continue" in a context c, then u is true iff Jane can't continue something in c

(g) If u is an utterance of "Steel isn't strong enough" in a context c, then u is true iff steel isn't strong enough for something in c

Now, one can claim that this minimal content is all we need in order to determine the meaning of legal provisions. It is worth noting that minimalism is mainly an attempt to save the autonomy of semantics as an independent field of study. Supporters of minimal semantics do not claim that the meaning of an utterance in a conversation amounts to its minimal content (Cappelen and Lepore 2005). Borg expressly admits that it is quite rare that speakers and listeners fully recognize or use "liberal truth conditions" while processing linguistic data (Borg 2004; Borg 2012). However, more recently, Borg claims that there are cases of literal communication: cases in which the communicated content of an utterance perfectly matches its minimal content. Literal communication «occurs in contexts where accuracy and precision of meaning matters […] where content is likely to be assessed in a range of different contexts and where access to important features of the context of utterance may be later be limited» (Borg 2019: 522). According to Borg, legal context meets these requirements and, therefore, legal interpretation often rests on minimal semantic content. I contend that this claim is untenable. As it emerges also by the previous sections, the minimal content of the statutory provisions is often very underdetermined[43]. So, for example, the minimal content of the legal provision

(h) In case of danger of hurricane, construction sites must close

amounts to

(h^1) In case of danger of an [unlocated] instance of hurricane, construction sites must close [for a period of time whatsoever, including a second]

I do not think that any judge would ever interpret (h) in the sense of (h^1).

Moreover, in some passages, Borg seems to argue a different and weaker point. Discussing *Smith v. United States* – where the majority interpretation certainly did not rest on the minimal semantic content – Borg writes: «the claim here is not that this judgement was the right or the only one to reach in this case […] but simply that we cannot even make sense of the Supreme Court judgement unless we admit

[43] See Skoczén 2016, who also correctly observes that "there may be propositions, which are true or false in every 'liberal' context" (622).

a propositional content for the statute independent of rich pragmatic adjustment» (Borg 2019: 527). It seems to me that claiming that the provisions have a minimum content is not the same as claiming that the legal meaning coincides with this minimum content. The minimum content can be conceived as a kind of frame, which, however, can be filled in many different ways.

5. Unpleasant Consequences

In the previous sections I have tried to argue that both speaker-based theories and rule-based theories are not suitable for statutory interpretation, though for different reasons.

Speaker-based theories are not viable either because there is no intention to which one can appeal in order to determine the meaning of legal provisions or because there are too many objective intentions and it lacks a criterion to choose the correct one.

In the first case, the meaning of legal provisions remains indeterminate. In other words, since according to the speaker-based model sentence meaning is in most cases undetermined or indefinite and it can be identified only by grasping the speaker's communicative intention, and since in statutory interpretation there is no such an intention that can be grasped, then the meaning of legislative provisions remains indefinite or undetermined. That meaning must be determined otherwise. Judges and legal interpreters have to establish that meaning by appealing to criteria that are different from the speaker's actual communicative intention.

In the second case, the meaning of legal provisions is over-inclusive: there is an open set of meanings – or, better, there are as many meanings as the possible reconstructions of the reasonable legislative intention. Judges and legal interpreters have to choice between such meanings, but it lacks a legally binding or unanimously agreed criterion to guide their choice.

In both cases, some unpleasant consequences follow.

Firstly, legislators do not have full control over the law. More precisely, law is an intentional phenomenon in the sense that the statutes enacted are the products of the intentional actions of the MPs. However, law is not intentional in the sense that the meaning of the statute – and therefore the change that the statute produces into the law – is what is intended by MPs. The intention of the lawmakers is the intention to take part in the legislative procedure and pass the bill, but this intention is not relevant when it comes to interpreting the statute and determining its meaning (Lifante 1999).

Secondly, as a consequence of the previous point, the difference between creation and application of law splits. Judges actually contribute to the creation of law in so far as they specify the indeterminate meaning of legal statutes or they choose

among several reasonable legislative objective intentions. Therefore, law turns out to be the product of both legislators and judges.

Finally, if speaker-based theories are to be preferred within ordinary conversation, and if I have successfully shown that these theories are not suitable in the legal domain, then an irreducible difference between ordinary understanding and legal interpretation emerges[44].

Instead rule-based theories are not in themselves unsuitable for statutory interpretation. However, if we agree that legal context is structurally opaque, their application very often leads to conclude that the meaning of the legal provisions is undetermined. This happens every time legislators employ a context-sensitive expression, that is, very often. Therefore, it is not true that as far as statutes are concerned, «the possibility of having to go behind what is said to establish what was meant becomes very rare» (Raz 2009: 287). Since what is said is indeterminate and judges cannot apply an indeterminate norm, they must go behind – or, better, beyond – what is said: they must reconstruct the relevant context, and they do it in many different ways.

It is important to stress that this is not a problem for rule-based theories: if these theories work within ordinary conversation, then they also work within legal interpretation. Here the difference between common understanding and legal interpretation is merely quantitative: if we adopt these theories, legal meaning is more often indeterminate than common meaning. Nevertheless, this quantitative difference is relevant because, when it occurs, it leads to the collapse of the distinction between creation and application of law. Since the complete meaning of a legal provision has to be determined through the identification of the relevant context and the relevant context is determined by judges, law again appears as the product of both legislators and judges.

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[44] One could challenge that this latter consequence is really unpleasant, but I think it is, if we believe that the law should be clearly understandable by its addressees.

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Sets, Separation, and Frames

*Giovanni Battista Ratti**

Abstract

The paper is devoted to analyzing, by using basic notions of set theory, the problem of the identification of law and the notion of a frame of meanings attributable to legal texts. The main results of the inquiry carried out in the paper are: 1) that only a neutral, non-evaluative, definition of law can do from a legal theoretical viewpoint; 2) that the concept of law should not be seen as referring to a unitary set of norms, but rather as referring to a plurality of sets and of results of operations on sets.

Keywords: Set Theory. Legal Positivism. Legal Interpretation. Frame of Meanings.

1. Introduction

In several works, I have used elementary notions of set theory to try and elucidate some fundamental problems of jurisprudence[1]. What I shall do here is to examine, again by means of a set theory approach, two basic and crucial issues for legal philosophy: the analysis of the relations between law and morality (both regarded as sets of norms), and the notion of an interpretive frame, on the footsteps of the analyses provided by Hans Kelsen and Riccardo Guastini. In so doing, I shall proceed as follows.

First, I will briefly go over some basic notions of set theory.

Second, I will try to demonstrate that, once the relations between law and morality are examined from both an extensional point of view and an intensional one,

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1 Ratti 2013: ch. 12; 2019a; 2019b.

it is possible to conclude that only a strictly positivistic, non-evaluative, definition of law can be justified from a legal theoretical perspective.

Finally, I shall unpack Kelsen's and Guastini's notions of an interpretive frame from a set theory stance, showing that the concept of law is better understood as referring not to a unitary set of norms, but rather to an array of different sets, which must be carefully distinguished.

2. Set Theory Basics

Let me briefly introduce the definitions of the basic set-theory concepts[2].

The term 'set' denotes a collection of objects or individuals of any kind, regarding which it is possible to determine, by means of some definitional criteria, whether a certain object or individual belong to this collection or not. The objects or individuals which belong to a set are called 'elements' of the set. When a set has other sets as its elements, it is usually called a 'set of sets' or a 'family of sets'.

It is crucial for our present purposes to notice that a certain set can be identified extensionally, by enumerating its elements one by one, but it can also be identified intensionally, by pointing to the criteria which the objects must match to belong to it. This second way of identifying sets turns unavoidable when one deals with sets that, for empirical or conceptual reasons, are not susceptible of an extensional identification.

The extensional determination of a certain set is usually represented by the enumeration of all the elements which compose it between braces. For instance, if we want to identify the set α, composed by the members of *The Beatles*, we shall write {John, Paul, George, Ringo}.

By contrast, intensional identification can be expressed by stating that a certain property *F* determines a set, and, more precisely, the set of the objects or individuals which are characterized by the property *F*. Therefore, a certain object or individual *a* can be regarded as a member of a certain set, built up on the basis of property *F*, if, and only if, it, he or she possesses such a property[3]. For instance, "musician that played in a British Band with 28 UK top 10 hits in the sixties" could be one of the properties leading to the intensional identification of the set of *The Beatles*.

Two sets may be considered as identical if, and only if, they have the same elements. But, of course, two identical sets can be liable to two or more different in-

[2] See Berto 2007: 145 ff.; Lemmon 1965: appendix B; Quine 1961, 1963, 1974: 235 ff.; Russell 1918; Suppes 1960. The bases of such a theory are to be found in the works of Cantor, on which see Dauben 1990. See also Russell 2010: 67 ff.

[3] This apparently intuitive and innocuous principle leads to the well-known Russell's paradox, on which see at least Russell 2010: 80-81 and 101 ff.

tensional identifications. The set of the members of *The Beatles* can be intensionally identified by means of the above-mentioned property, but it can also be identified by means of the property "musician that played in the most famous rock band ever".

The extensional identification of a certain set can always be traced back to its intensional identification, but not vice versa. Indeed, the extensional identification of a certain set is often impossible, both for conceptual reasons, whenever the set to be identified is infinite (e.g. the set of natural numbers), and empirical reasons, whenever the set to be identified, though finite, is not liable of being completely known, due to the limited epistemic faculties of human beings (e.g. the set of all the living animals). This leads to two significant consequences.

First, it is possible to know a set which is not liable of being extensionally identified. However, such knowledge can never be extensionally complete, in so far as it will never bear upon all the elements of the set. In such cases, we can only obtain knowledge deriving from the intensional characterization of the set at hand and, if any, from a recursive method of identification of each element[4].

Second, it can be observed that, from an epistemic perspective, two different intensional presentations of co-extensional (viz. identical) sets may be not equivalent. For instance, I may know the extension of the songs written by Bruce Springsteen without knowing that the set of his songs may also be presented as 'the tunes of the Boss'.

A fundamental concept of set theory is 'inclusion'. Inclusion is the relation between two sets α and β, such that every element of α is also an element of β. One should distinguish *improper inclusion*, which admits the possible identity of both sets, from *proper inclusion*, which excludes it.

In other words, a set α *improperly* includes another set β, when the latter is a subset of the former, i.e. all the elements of β belong to α, which may (but need not) contain other elements. By contrast, a set α *properly* includes another set β when the latter is a subset of the former, which, in turn, need contain other elements (since, as has been affirmed, both sets cannot be identical).

It is important not to confuse inclusion with *membership*[5]. The former is a relation between sets (and only between sets); the latter is a relation between a set and its elements. The confusion often stems from two well-known circumstances: (*a*) inclusion is defined in terms of membership of elements to sets, so that, once inclusion is detected, the membership of an element to a certain (included) subset implies its membership to another (including) set; (*b*) it is possible that the elements of a set consist of other sets, so that the latter sets belong to the former set, but are not, despite appearances, included in such a set.

Another frequent confusion is the one between a set having only one member

[4] Russell 2010: 113.

[5] On the historical roots of such a confusion, Russell 2010: 79.

and its single member. On such a topic, Russell states that a set «consisting of one member is not identical with that one member» (id., 67). He gives the example of the expression "Satellite of the Earth" which denotes a set which, by chance, has only one member (i.e., the Moon), but could have many more. The phrase "Satellite of the Earth" – says Russell – is not altered in its meaning if other satellites of the Earth are discovered and is not devoid of meaning for those who do not know that, as a matter of fact, the Earth indeed has a satellite. By contrast, «Statements about the Moon […] are meaningless except to those who are aware of the Moon» (id., 67).

We can carry out several logical operations on sets, the main ones being the following: (1) *union*, (2) *intersection*, (3) *difference*, and (4) *complementation*. Let us briefly analyze them in this order.

(1) Given two sets α e β, their *union* consists in determining the set of all the objects which are members of the set α *or* of the set β. The union of the sets, say, α = {1, 2} and β = {2, 3} is, very simply, {1, 2, 3}.
(2) Given two sets α and β, their *intersection* consists in determining the set of all the objects which are members of both α and β. The intersection of the above mentioned sets is {2}.
(3) Given two sets α and β, we call *difference* the set of all the objects which belong to a set, but not to the other set. Unlike union and intersection, difference is not commutative: the order of the sets changes the outcome. The difference between α and β is the set of elements which belong to α, but not to β – in our example: {1}. By contrast, the difference between β and α is the set of the objects belonging to β, but not to α – in our example: {3}.
(4) Given a certain set α, we can carry out its *complementation*, which consists in determining the complementary class of α, which is composed of all the objects which do not belong to α. This class is usually represented by the notation α'[6].

Union, intersection, and complementation allow one to identify some logical relations among sets which are analogous to De Morgan's laws for propositional calculus[7]: the complementation of the intersection of sets α and β equates to the union of the complements of α and β. Analogously, the complementation of the union of α and β equates to the intersection of the complements of α and β.

[6] Complementation presupposes the previous identification of the *universe of discourse* within which it is carried out. This operation brings about a partition in the universe of discourse. Cf. Suppes 1960: 83 ff. Without this previous operation, complementation would be indeterminate, since the complementary class of a certain class a would be made of all the infinite classes belonging to any universe of discourse.

[7] As is known, for the laws of De Morgan, the negation of the conjunction of two propositions equates to the disjunction with both original propositions denied, and the negation of the disjunction of two propositions equates to the conjunction of both original propositions denied.

Another law of set theory states that, if α set a is included in β, then the complement of β is included in the complement of α. A banal example: if the set of Italians in included in that of the Europeans, then the set of the non-Europeans is included in that of non-Italians.

A notion of great relevance for set theory – and for philosophical analysis in general – is that of an 'empty set'. Such a set is determined on the grounds of criteria which are satisfied by no object and, as a consequence, contains no element. It is usually determined by stating unmatchable conditions, such as predicating an object of lacking identity with itself.

As a matter of course, all the empty classes are identical, since they have the same extension (i.e. no element), though their intensions may be different: take, for instance, the class of unicorns and that of half-gods. A special case of an empty set is given by the set identified by intersecting a certain set and its complement. A surprising property of the empty set is that it is included in any other set[8].

The complement of the empty set is the universal set, i.e. the set to which all the objects belong[9]. It is easy to see that the union of a set with its complement brings about the universal set. It is also easy to understand that the universal set contains any set[10].

With these basic instruments of set theory, we are now equipped to analyze the issues of the separation of law and morals and the notion of an interpretive frame.

3. Unsetting Connections: The Separation Thesis Revisited

The thesis of the separation of law and morals (henceforth, ST) – epitomized by the famous John Austin's maxim "The existence of law is one thing; its merit or demerit is another" – is one of the most controversial theses in legal theory. The interpretations of this thesis are so numerous and so diverging, that it is not always easy to understand which version of such a thesis is referred to, when it is advocated or questioned.

Personally, following a suggestion by Ross (1988: 148-150), I am keen on regarding ST as an eminently epistemic or methodological thesis, which bears on the knowledge of law, and not on law itself[11]. Since I've argued in favor of such a

[8] This is a principle of set theory that corresponds to the principle *ex falso quodlibet* of the propositional calculus.

[9] This set has received several interpretations: some understand it as the class of all the objects that belong to some set; others regard it as the class of all the objects. On the different notions of the universal set, and their philosophical relevance, see Alchourrón 1987. One of the few contemporary defenses of the second reading is found in Quine 1980: ch. 5, especially note 10.

[10] This is a set theory transposition of the propositional principle *verum sequitur a quodlibet*.

[11] Against this reading of ST, Green 2008: 1038 argues: "The separability thesis is not a meth-

reading of ST in other papers[12], I will not elaborate on such a reading here.

In this paper, I rather want to examine a "substantial" or "ontological" version of ST, according to which law is not necessarily connected to morality[13]. Framed in these terms, ST is, obviously, but the negation of the thesis of the necessary connection of law and morals (henceforth, CT)[14]. To fully understand the scope of ST, it is worthwhile to first examine CT[15].

In doing so, I will use as the main starting point for my analysis a well-known work by Leslie Green (2008), who carefully examines the notion of 'connection' between law and morals, and, consequently, surveys different interpretations of ST, understood as a series of "destructive arguments against the necessary connection thesis" (id., 1039).

Green holds that ST is false: according to him, several necessary connections between law and morals actually exist. Green's analysis is clarifying on many scores, but there are other points which can be fruitfully clarified by the set theory approach I have been presenting.

The first necessary connection of law and morals which Green spots is the following (2008: 1047): "Morality has objects, and some of those objects are necessarily law's objects". Some lines after, with a quotation from Kelsen, Green affirms that law and morals bear on the same object: namely, (social) relations between human beings. Some other lines on, Green (2008: 1048) adds that "there is a necessary relation between the scope of law and morality". These three sentences, when approached from a set theory stance, seem to affirm quite different tenets.

The first sentence seems to bear upon propositional contents of (legal and moral) rules, the second sentence bears upon the "regulative function" of law and morality, and the third sentence deals with the "topic" (the universe of discourse, as it were) regulated by such families of normative systems.

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odological claim. It bears only on the object-level domain-that is, on laws and legal system". Green 2008:1039-1040 distinguishes ST from the sources thesis and from the social thesis: according to the *social thesis* «law must be grounded in social facts, and any non-factual criteria for the existence and content of law must likewise be grounded in such facts», whereas the *sources thesis* affirms that "the existence and content of law depends on its sources and not on its merits".

12 Ferrer, Ratti 2012a. See also Ferrer, Ratti 2010; 2012b.

13 According to Green 2008: 1041, ST is "the contention that there are no necessary connections between law and morality". Understood in this way, according to Gardner 2001: 223, ST is absurd: "Apparently legal positivists believe [that] there is no necessary connection between law and morality. This thesis is absurd and no legal philosopher of note has ever endorsed it as it stands. After all, there is a necessary connection between law and morality if law and morality are necessarily *alike* in any way. And of course they are. If nothing else, they are necessarily alike in both necessarily comprising some valid norms".

14 Obviously, CT, in turn, is but the negation of ST: this is so, since both theses are regarded as mutually exclusive and jointly exhaustive of the possible relations of law and morals. However, since ST is historically posterior to CT, and for many positivists, is a great progress towards a more scientific jurisprudence, I shall assume CT as the "primitive" thesis.

15 Cf. Green 2008: 1039.

With the first sentence, the thesis which Green seems to affirm is that law and morality (i.e. all the legal systems and all the moral systems) bear upon the same propositional contents (independently from the normative regulation that such systems assign to them). Of course, on this reading, such a thesis is exaggerated and, above all, false, as one could easily show by surveying legal and moral systems in force. What can be held is that, *usually*, there is an intersection of the set of propositional contents regulated by legal norms and the set of morally regulated contents. Obviously, there is nothing necessary in this connection. One could also hold that the set of the socially relevant propositional contents is determined by the union of the legally and morally legal contents, so that there is a sort of connection of these elements. But also in this case, one cannot see where the *necessary character* of this connection lies. Finally, one could hold that the set of the contents of a system is included in the set of the contents of the other. This is very much debatable, for there are many contents which are eminently legal, and others that are mainly moral, so that the relation would be one of intersection, and not of inclusion. At any rate, even if this were true, there would be no necessity at play either.

With the second sentence, Green refers to a more abstract level of analysis: to wit, to the presumptively common function of law and morals, that is guiding human conduct. This thesis is trivially true, by assuming the current definitions of 'law' and 'morals'. However, it sheds light neither on the regulation of normative contents nor on the identification of these contents. That law and morals have the same function guarantees neither that they regulate the same conducts, nor that the determination of such conducts receives the same intensional characterization[16], nor that the normative qualification of such conducts is the same. And it guarantees even less that the techniques used to guide conducts in the legal and the moral domains are the same: quite the opposite, law and morality are usually distinguished by virtue of the fact that law, unlike morality, provides the institutionalization of the procedures of sanctioning. As a consequence, one cannot see why such aspects allows one to affirm the existence of a necessary connection of law and morality, understood as an ineludible relation of the sets of rules denoted by such expressions.

With the third sentence, Green affirms that law and morals regulate the same ambit, the same "topic", and more precisely "high-stakes matters of social morality" (id., 1048). This thesis too, qua presumptive foundation of CT, is quite dubious. Though it may be envisaged that a legal system regulating the social life of a certain community cannot last for a long time without some sorts of correspondence with the positive morality of that community, it is not impossible to think of a legal system totally unconnected to the moral conception which is socially widespread.

[16] Normally, moral qualifications are mainly extensional, whereas legal qualifications (in particular criminal law ones) are eminently intensional. Indeed, morally forbidden actions are forbidden under any description, whereas legal forbidden actions are forbidden only under a specific characterization.

It must be noted that, in contemporary societies, characterized by a high degree of pluralism, legal systems assume, as it were, a "procedural nature", in that they institutionalize, in particular at the constitutional level, procedures aiming at conciliating, or balancing, different and conflicting social moral systems (or principles which are expressions of these systems). If this is correct, the provinces of law and morals are substantially different, since law would partially be a set of procedures to solve, on a meta-level, first order moral conflicts within a certain society.

The problems affecting this defense of CT are probably due to the overlooking of the fact that ST and CT, in their "substantial" versions, are liable to two different readings (provided by a set theory approach): one extensional and the other intensional. Once examined these readings, the problem of the relations of law and morals is significantly reduced (and, in some cases, even dissolved).

On the extensional reading, the relations of law and morals are, as it were, parasitic on single normative systems: one must see, case by case, what the connections (if any) are between some legal systems (at most, all the legal systems) and some moral systems (at most, all the legal systems). To hold a necessary connection between law and morals one should prove that there are elements that cannot but belong to such systems.

In the first place, one must note – with Bulygin (2007: 180) – that the connection thesis is ambiguous for it can express at least two different propositions: (i) there is only one moral system to which all legal systems are connected, or (ii) for any legal system, there exists a moral system to which it is connected[17].

The second proposition is not problematic at all, since it only affirms that legal systems are expression of a certain system of positive morality. In the terms of set theory, this means that the intersection of positive moralities and legal systems is not empty (viz. it's not an instance of the empty set). However, there is nothing necessary in such a connection: it is well possible that a legal system exists which is not the expression of the positive morality in force within a certain community or which is the expression of no moral system at all. On the set theory approach, this means that there is no necessary non-empty intersection of the set of legal rules and the set of moral rules in force within a certain society, although this intersection – as we have just seen – often is not empty *as a matter of fact*.

The first proposition states, instead, that all the legal systems conform to one ideal morality. But this thesis – beyond the quite controversial question of the very existence of an ideal morality and its cognoscibility[18] – is easily rebutted on the basis of logical analysis: (a) first, it is more than improbable (if not simply false) that all the legal systems, which are or have been in force, have the same *intersection* with ideal

[17] See also Rodríguez 2021: 152.

[18] Against moral objectivism and its criticisms of moral non-cognitivism, I argued extensively in Ratti 2021.

morality, unless one wishes to use the term 'legal system' to denote only those sets of rules which have a specific intersection with ideal morality, but here we are in the ambit of an intensional reading, having the nature of a stipulation (we will address this issue in the following pages); (b) second, one can hold that every legal system has at least one element (a rule whatsoever) contained in a non-empty intersection with ideal morality. Some authors – such as Garzón Valdés (1990: 111 ff.)[19] – maintain that such an element is the rule of recognition, i.e. the rule which provides the criteria of identification of the elements of the legal system, for it is accepted from the internal point of view at least by *officials*, who, by their acceptance, would express a claim of legitimacy of the legal system stemming from this rule. Both theses are ill-founded: the first because there is no conceptual warrant that any legal system must intersect, although minimally, with ideal morality; the second because – as Bulygin (2007: 181 ff.) asserts – one cannot infer the presence of legitimacy from the claim of legitimacy: on the set theory approach, this means that one cannot hold that any rule of recognition whatsoever is also a rule belonging (or logically derivable from a rule belonging) to ideal morality.

This is obvious, if the rule of recognition is regarded as a set of intensional criteria which allows one to identify a certain normative system, which would necessarily be connected to ideal morality if conformity (or some other connection) to it were established by such criteria, *in any empirical manifestation of them*. As a matter of course, this is tantamount to stipulating that there cannot be a rule of recognition (and, consequently, an act of identification of law) which is not somehow connected to morality: but this is question-begging, since it assumes what it should prove.

The most serious attempt to bind, from an *extensional* point of view, law and morals, is due, somewhat paradoxically, to one of the champions of XX century legal positivism: H.L.A. Hart (1994: 193 ff.) with his controversial thesis of the minimum content of natural law. The conjunction of the famous truisms (human vulnerability, approximate equality, limited altruism, limited resources, limited understanding and strength of will) and the assumption of survival as the aim "which men have in associating with each other" (Hart 1994: 193) leads to the view that "law and morals should include a specific content" (*ibid.*). Hart maintains that the connection between natural facts illustrated by the five truisms and the content of legal or moral rules is "distinctively rational". Hence, Hart's thesis may be rephrased (in non-Hartian terms) by saying that there is an anankastic relation between a certain end (survival) and the means to safeguard it (rules)[20]: on this reading, Hart's thesis would match the requirements of legal positivism, despite the misleading heading of "minimum content of natural law".

However, by this thesis, Hart wants to deny the Kelsenian tenet, according

[19] Cf. also Green 2008: 1048-1049.

[20] On the notion of an anankastic relation, see von Wright 1963: ch. 1.

to which law can have any content whatsoever[21]. Denying such a tenet means, of course, that law cannot have any content whatsoever. But this, in Hart's intent, does not mean that law cannot contain some elements; it rather means that the extension of legal systems *cannot but* contain some elements. Let us call these elements rules R1, R2, and R3: this means that any legal system should contain at least the following "hard kernel" in its extension: {R1, R2, R3}. Now, a normative system which does not include this hard kernel cannot be regarded, according to Hart's criteria, as a legal system. At the same time, Hart seems to suggest that moral systems too cannot but have an extensional "hard kernel", somehow analogous to law's kernel. For instance, rules which forbid physical aggressions are common to both kinds of normative systems. Let R1 be the name of the rule which prohibits physical aggressions. Thus, legal and moral systems would have, on this standpoint, a *necessary intersection*, for they *cannot but* contain R1. After all, law and morals would be *necessarily connected* from an extensional point of view.

There are at least two objections which can be raised to this view: (*a*) the first concerns the assumption of the end of survival (the conceptual pivotal point of Hart's argumentation): there's no reason why legal systems must necessarily serve the end of survival. The analysis of contemporary legal regulations about unrestrained consumption, economic development detrimental to environment or the workers' physical and mental integrity, free selling of firearms, seems to suggest otherwise[22]. (*b*) Second, one should note that, at the theoretical level, there is no reason why one should deny the qualification of 'legal' to a normative system which does not contain the rules which constitute the minimum content of natural law. Hart's definition is again begging the question, for it connects the presumed necessary extension of normative systems to the instrumental properties of some norms which compose them.

On the intensional reading, the relations between the two classes of normative systems under examination have to do with the very concepts of 'law' and 'morality'. More precisely, their relations depend on how such concepts *are defined*. As is known, stipulations of concepts are essentially arbitrary, so that it is always possible to forge a notion of 'law' which entails its connection with morality. In this sense, Bobbio's distinction between evaluative and non-evaluative definitions of 'law' keeps on being fundamental[23].

The latter – Bobbio (1996: 137) affirms – define "law understood as a system as a means serving an end: obviously, the end, in accordance to which law is defined,

[21] On this topic, see the seminal Paulson 1975.

[22] On this point see Green (2008: 1048), who correctly stresses that such a thesis is, actually, too strong: "Actually, unless 'survival' is understood in a vacuously broad way, Hart's claim is too bold: There are lots of suicide pacts around these days".

[23] Bobbio 1996: 137-143. Cf. also Hart 1983: 11-12.

varies from one philosopher to another". Immediately after, Bobbio adds: "one of the most traditional philosophical definitions is that which defines law in function of justice (i.e. as a system aiming at attaining justice)". It is clear that such definitions of the concept of law entail a necessary (*viz.* conceptual) connection of law and morals, for three reasons at least: (1) the criterion to determine the legality of the *set* of legal rules requires moral qualities characterizing such a set; and/or (2) the criterion to determine the membership of the rules to a legal system contemplates, from the very beginning, the presence of moral qualities in such rules; and/or (3) both the set and their single elements are to be regarded as legal in so far as they possess certain moral qualities. All this renders the question of the connection of law and morality absolutely trivial, since it is built on a stipulation, and hence becomes analytical.

It is more interesting to observe that some prominent defenders of contemporary positivism – such as Joseph Raz or Scott Shapiro – forge an *evaluative* concept of law, though intending, at the same time, to defend a kind of positivism that regards law as necessarily separate from morality.

As is known, Raz (1994) defends, *inter alia*, the normal justification thesis. Put very roughly, such a thesis affirms that, if law claims to have legitimate authority, those subject to legal rules are better off, as to what the correct and objective balancing of applicable reasons for action requires, by following the normative authority's directives rather than carrying out their personal balancing of reasons. This means that legal rules cannot incorporate moral criteria; otherwise, they could not carry out their guiding function towards the addressees of the rules, regarding what right reason requires.

In turn, Scott Shapiro (2001: 177 ff.) has defended the practical difference thesis as an essential element of exclusive legal positivism. Such a thesis affirms that a legal rule which included moral concepts would make no practical difference in agents' deliberation, since it would not block those axiological considerations which agents would carry out in the absence of such a rule and should avoid precisely in virtue of that rule. Consequently, an "inclusive" law would thwart law's main function of guiding human conduct by providing agents with genuine reasons for action.

In a more recent work, Shapiro (2011: 213 ff.) holds that law, unlike other normative systems, is characterized by the fact that its "mission is to address the moral defects of alternative forms of social ordering" (id., 213).

However, such definitions – supposedly positivistic, and hence non-evaluative – are neither substantially nor structurally different from the above-mentioned stipulations elaborated by natural law doctrine, widely considered as openly evaluative definitions. Indeed, all these definitions of 'law' – which share the feature of connoting the "object" law as a function of a certain value[24], be it justice, right reason, or its ability to furnish genuine reasons for action – lead fatally to a trivially necessary

[24] Bobbio 1996: 139.

connection of law and morality, created by stipulation. In particular, in Raz's and Shapiro's theses, one can find the paradoxical attempt of "demarcating" the elements which compose legal systems from those that compose moral systems on the basis of a strongly axiological reading of the function of legal systems, which ends up connecting them functionally to morality.

Overlooking this intensional feature of the relations between the concepts of law and morality – together with lack of an adequate distinction between sets and their elements – is, in my opinion, one of the biggest defects of the contemporary debate on legal positivism.

Is there any way out from this "impasse of intensionality"?

Once again, a way out is suggested by Bobbio (1996: 141): a non-evaluative definition of 'law' is merely factual, i.e. it connects the membership of rules to a legal system with empirical phenomena (such as, e.g., coercion or effectiveness), and not to their dependence on ends or values.

The subsequent problem is to identify the empirical resources to reach a definition of 'law' which is not completely arbitrary, i.e. which artificially separates or binds law and morals, or, more generally, law and non-law[25].

It suffices here to succinctly mention two of the most recent proposals of rational reconstructing the criteria of determination of the relevant facts to establish the legality of rules, formulated respectively by Brian Leiter (2007) and Mario Jori (2010).

According to Leiter (2007: 135), the ontological guide for the discovery of what "legally exists" must be a legal science elaborated in accordance with Quinean "replacement naturalism": what leads him to propose an "exclusivist" definition of what counts as a legal source, since the "best" legal science (both empirical and predictive of judicial sentences) identifies legal sources only in authority-based documents[26].

According to Jori (2010: 71) the ontological guide is rather common sense, which allows one to determine "which kinds of phenomena are identifiable as law in general and, amongst those phenomena, which one is identifiable as law in force in our society". This leads him towards a broader view than exclusive legal positivism, concerning the resources from which one can extract legal norms. Such a view holds that "legal sources can incorporate external elements of any sort and refer to ethical

[25] In the terms of set theory, ST could may be defined as the "thesis of complementation", in so far as it tries to determine the criteria to distinguish, within the universe of the normative, the complement of the legal (i.e. the non-legal).

[26] I am aware of the fact that Leiter (2011) has denied any possibility of successfully attempting to demarcate law and morals. The repercussion of this new thesis of Leiter on his project of naturalizing jurisprudence seems to me enormous, in the sense that I cannot see how Leiter can keep on holding that a naturalized theory of legal adjudication, presupposes an "exclusivist" thesis as to legal sources, such that it makes it possible to distinguish legal from non-legal sources. This is obviously impossible, once one rejects the possibility of demarcation, and so deprives naturalized jurisprudence of those which, for Leiter, are its conceptual bases. I have articulated this view in Ratti 2017.

and social opinion of any kind" (id., 107), and presupposes the previous "separation determined by a list of sources" (id., 108).

Though different, such definitions share the feature of being *non-evaluative*, by claiming to provide a notion of 'law' which captures, in a correct and empirically provable way, the criteria for the identification of the "object" law, actually used in our society.

In both cases, beyond the differences in the content, there is an induction of such criteria from social practice – legal science in Leiter, the general practice of rules' addressees in Jori. Unlike evaluative definitions, such definitions are not arbitrary: they are generalizations of 'definitions (explicitly or implicitly) in use' amongst legal agents or legal scientists.

One must conclude that the only fruitful definitions of 'law', in that they allow a profitable discussion of the relations of law and morals, are the non-evaluative ones, whereas evaluative definitions limit themselves to stipulating a notion of law that – as has been argued – connects or separates artificially, *in vitro*, both kinds of normative systems.

The difference in the criteria of Leiter and Jori shows how two different reconstructions of some empirical phenomena lead to two different views regarding the criteria of identification of legality: one having an exclusivist character, the other having a *lato sensu* inclusivist one[27]. There can be theoretical reasons to prefer one over the other: anyway, only deriving the intension of 'law' from provable social facts – what legal agents or jurists, in carrying out their activities, take as law – allows one to meaningfully discuss the question whether law and morality are connected or separate.

4. Setting Up the Frames

To identify the law in most regulatory states one must be able to identify not only a set of sources, but also their possible meanings. This, in turn, normally implies that one should be able to recognize a set of texts plus their meanings. From the point of view of set theory, this means, at a first approximation, that one must be able to spot a set of authoritative sentences connected, by interpretative sentences, to other sentences which are deemed synonymous to the original ones. Thus, we have at least three sets which are involved in the process of identification of law through interpretation. The set of authoritative texts, the set of interpretive sentences, and the set of norms, understood as the sentences deemed synonymous to the original authoritative texts. Clearly enough, there is no one-to-one correspondence among such sets. This thesis was famously articulated, though not in terms of sets, by Hans Kelsen (1992: 80-82) who puts forward the idea of legal interpretation as detection of a frame of possible meanings. Kelsen (1992: 80) writes:

[27] Cf. Jori 2010: 107-108.

> If "interpretation" is understood as discovering the meaning of the norm to be applied, its result can only be the discovery of the frame that the norm to be interpreted represents and, within this frame, the cognition of various possibilities for application.

And, elaborating on such a notion, Kelsen (*ibid.*) adds:

> That a judicial decision is based on a statute means in truth simply that the decision stays within the frame the statute represents, means simply that the decision is one of the individual norms possible within the frame of the general norm, not that it is the only individual norm possible.

This idea is clearly rephrased by Riccardo Guastini in terms of sets[28]. Guastini (2011a: 59) writes

> The set of possible meanings of a text – identifiable in the light of the rules of the language, the interpretative methods in use, the dogmatic theses widespread in legal dogmatics, etc. – can be called, after Kelsen: the "frame of meaning of the text".

The theoretical importance of the notion of a frame lies in the fact that it "is needed to classify the operations of the interpreters: in particular, to discriminate between proper interpretation and the creation of new law" (*ibid.*).

In fact, it is possible to discern between cognitive interpretation and adjudicative interpretation (and divide the latter into two variants) precisely on the basis of the notion of frame:

> (a) cognitive interpretation consists in identifying the frame, that is, in listing the possible (plausible) meanings of the text; (b) standard adjudicative interpretation consists in choosing one of the meanings included in the frame; (c) creative interpretation consists in attributing a meaning to the text that does not fit into the frame.

Guastini (*ibid.*) adds:

> the frame has vague, fluid outlines. It may happen, for example, that the norms N1 and N2 certainly fall within the frame, that the norm N4 certainly falls out of it, and that, however, the situation is uncertain as for the norm N3. So, it is undecidable whether N3 is to be ascribed to operations of mere interpretation or instead of normative creation. Nonetheless, at least for what concerns the norms N1, N2, and N4, distinguishing between interpretation and normative creation is possible and, I believe, highly significant.

[28] Guastini 2015 interestingly uses the language of sets to deal with the content of legal orders.

The expression "frame", as used by Guastini, denotes different sets and the product of different operations on sets which must be neatly distinguished.

A first set denoted by such a term consists of the meanings which can be potentially attributed to a certain regulatory text within a certain legal community. At this regard, Guastini (2011a: 61) states:

> by "interpretation" we must understood not any attribution whatsoever of meaning to the interpreted text, but an attribution of meaning that falls within the frame – of variable breadth – of admissible meanings.

He adds (2011a: 337)

> Cognitive interpretation (or "scientific interpretation" in Kelsen's terminology) consists in determining – by applying the different interpretative techniques in use – the different norms expressed, or the "frame" of meanings potentially expressed, by a normative provision.

At other times, the concept of frame has as its object "multiple pre-existing jurisprudential interpretations" (Guastini 2011a: 84). In this other sense, the frame is therefore the set of meanings *actually ascribed* by the courts, in the past, to a certain legal source.

Guastini (2011a: 60) correctly clarifies that

> a creative interpretation, which attributes to the text in question a different and further meaning than those considered possible in the cognitive interpretation (N4, let's say), has the effect of extending the frame of possible meanings. So, from that moment on, cognitive interpretation – a "good" cognitive interpretation – will have to recognize that new meaning (N4) as one of the admissible meanings.

From these considerations, it seems possible to derive at least three different notions of frame in terms of sets.

(1) A first frame is constituted by the set of legally admissible meanings, that is, the meanings considered acceptable in light of the interpretive techniques in use among jurists.
(2) A second frame consists, instead, of the set of meanings actually attributed to a certain text in the decision-making interpretation (especially in the jurisdictional sphere).
(3) Finally, a third frame is made of all those meanings that, although culturally inadmissible at a given moment t1, are conceivable as meanings potentially attributable in the future to a legal source by a competent entity or organ.

The notion of frame, however, can be used (and is sometimes used) to refer to the result of possible operations on the sets just mentioned.

It is possible to maintain that the term "frame" is sometimes understood, in a very broad sense, to be the union of the frames delineated in points (1)-(3), that is, all the (actually or potentially) admissible meanings, plus the meanings actually admitted.

More often, however, "frame" refers to the intersection or the union of the subclasses (1) and (2). In the first case (intersection), to be admissible, a certain meaning must belong both to the set of legally admissible meanings and to the set of meanings in force in the jurisdictional sphere. In the second case (union) it will suffice that it belongs to at least one of the two sets.

When the meanings actually attributed are believed to be, for that very reason, admissible (at least legally), the relevant frame will be determined only by the admissible meanings. This frame, furthermore, will be in a relation of inclusion with the frame of the meanings actually ascribed (which will therefore constitute a subclass of the admissible ones).

However, the opposite may also be the case. If it is accepted that, through creative interpretation, the list of admissible meanings is extended, then the set of meanings practiced will include the set of admissible meanings, improperly (if the two sets overlap) or properly (if the set of admitted meanings is, at least in a diachronic perspective, broader than that of admissible meanings).

Each time a meaning is chosen outside the frame, the complement of the set of admissible meanings is reduced, for it is evidently composed of those meanings considered inadmissible[29]. Indeed, whenever a (previously) inadmissible meaning is chosen by a court, it becomes legally admissible.

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[29] A subclass, proper or improper depending on the case, of which it is constituted by the set of conceivable meanings, indicated above, at point (3).

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¿Cuán paternalista es el republicanismo?

*Anna Richter**

Resumen

En el presente trabajo pretendo argumentar que el acercamiento tradicional al paternalismo y la búsqueda por una justificación especial para actos paternalistas presuponen un punto de vista liberal. Es decir, por qué el paternalismo plantea un problema y en qué casos y de qué manera se lo podría justificar o no presupone una división de las acciones humanas basada en la libertad como no interferencia. Si se abandona tal fundamento liberal y se adopta una visión político-teórica diferente, como la del republicanismo, entonces no solo cambian los casos en los que se pueden justificar ciertos actos paternalistas, sino también cambian los argumentos e incluso puede desdibujarse la división tan tajante en el liberalismo entre justificaciones para actos paternalistas y justificaciones para actos que afectan a terceros.

Palabras clave: Republicanismo. Paternalismo. Defensa penal.

Abstract

This paper states that the traditional approach to paternalism and the search for a special justification for paternalistic acts presuppose a liberal viewpoint. That means, that the question why paternalism is a problem and in which cases and in which manner it could be justified or not presupposes a division of human actions based on liberty as non-interference. If this liberal foundation is abandoned and a different political-theoretical vision is adopted, like that of republicanism, then not only the cases in which certain paternalistic acts can be justified change, but also the argumentation changes and even the division between justifications for paternalistic acts and justifications for acts that affect third parties can become blurred.

Keywords: Republicanism. Paternalism. Criminal defence.

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1. Introducción

Generalmente se supone que una de las funciones del derecho consiste en ordenar la convivencia de las personas en una sociedad y en imponer reglas para nuestro comportamiento frente a los demás. Se suele sostener, de manera más o menos clásica, que el denominado "derecho civil" determina obligaciones para con nuestros pares, el "derecho penal" prohíbe ciertas acciones dañinas para otros y el "derecho público" establece los derechos y obligaciones entre el ciudadano y el Estado. Se trata de un conjunto de normas que de alguna manera interviene en la vida de los ciudadanos en su relación con otros.

Junto a tales normas que regulan situaciones entre dos o más personas, en nuestros ordenamientos jurídicos, muchas veces la dogmática y jurisprudencia recurre a argumentos paternalistas para justificar ciertas intervenciones en la vida de los ciudadanos. De esta manera, el derecho no solo es usado para limitar o guiar nuestros comportamientos frente a otros, sino también para asegurar obligaciones que supuestamente tendríamos con nosotros mismos.

Aunque las reglas específicas sean sometidas a críticas, la idea general de usar el derecho para regular los actos que afectan a terceros es ampliamente aceptada. No sucede lo mismo con acciones que solo repercuten en el agente mismo. La admisibilidad de tales actos paternalistas es altamente discutida y el punto de vista que se toma frente a esa pregunta depende de la postura político-teórica que se haya elegido.

Es decir, también impactan en la posición frente al paternalismo el rol que se adscribe al gobernante o autoridad, el alcance de la participación de los ciudadanos en la sociedad, sus obligaciones y libertades, así como el diseño de las instituciones estatales que se elija en una determinada teoría política.

En lo que sigue pretendo argumentar que este acercamiento al paternalismo y la búsqueda por una justificación especial para actos paternalistas presuponen un punto de vista liberal. Es decir, por qué el paternalismo plantea un problema y en qué casos y de qué manera se lo podría justificar o no presupone una división de las acciones humanas basada en la libertad como no interferencia. Si se abandona tal fundamento liberal y se adopta una visión político-teórica diferente, como la del republicanismo, entonces no solo cambian los casos en los que se pueden justificar ciertos actos paternalistas, sino también cambian los argumentos. Incluso – como se verá – puede desdibujarse la división tan tajante en el liberalismo entre justificaciones para actos paternalistas y justificaciones para actos que afectan a terceros.

El republicanismo se presta como objeto de observación por el interés reavivado que ha despertado últimamente, especialmente por los trabajos de Philip Pettit y por la larga trayectoria que tiene esta corriente, pues sus orígenes se remontan a pensadores romanos como Cicerón y la idea republicana ha sido retomada múltiples

veces en diferentes momentos de la historia[1]. Esta atención renovada parece una buena razón para analizar las posibles respuestas del republicanismo a las interferencias paternalistas.

Para ello no solo pretendo indagar de manera abstracta en el paternalismo y sus posibles justificaciones, sino también usaré un ejemplo concreto para la argumentación paternalista en el ámbito jurídico: la defensa técnica obligatoria en un ordenamiento jurídico específico. Centrarme en un caso de derecho positivo específico permite ver con mayor claridad los problemas relevantes que aquí se analizan. Es decir, sirve como una buena oportunidad para desplegar los problemas que aquí se indicarán.

2. Paternalismo

Cuando se discute sobre paternalismo, se plantean por lo menos dos preguntas. La primera se refiere a qué se entiende por paternalismo, es decir, qué acciones pueden considerarse paternalistas y cuáles no. La segunda cuestión es la valoración de esos actos paternalistas, a saber, sí y en qué condiciones están justificados o si han de rechazarse siempre.

Para distinguir esos dos significados de paternalismo, en el presente trabajo se usará el término *paternalismo en sentido descriptivo* para el primer sentido, es decir como una definición de un determinado tipo de acciones que pretende ser neutral frente a la pregunta de la justificabilidad de tales actos. De manera alternativa se van a usar *acto paternalista* o *interferencia paternalista* para referirse a ese paternalismo descriptivo.

El término *paternalismo en sentido normativo* o *justificación paternalista* se aplicará a la segunda opción, es decir para referirnos a teorías que pretenden dar una justificación específica para actos paternalistas, una justificación que se basa en alguna particularidad de un acto paternalista, tal como la irracionalidad de la persona que se coloca a sí misma en peligro o la consideración según la cual la interferencia paternalista sería un daño menor que el daño autoinfligido.

2.1. Paternalismo en sentido descriptivo

La primera pregunta que necesita ser respondida cuando se discute sobre paternalismo es qué se entiende por ese término y, consecuentemente, qué comportamientos entran en la discusión y cuáles quedan afuera.

Según Feinberg, se pueden distinguir tres grupos de razones para intervenir en la vida de una persona: para impedir daños u ofensas a terceros, para impedir un daño a la persona misma que está actuando y para para impedir conductas inheren-

[1] Un breve recorrido histórico del pensamiento republicano se encuentra tanto en Rosler 2016: 10 ss. como en Pettit 1997: 5 ss.

temente inmorales. Feinberg circunscribe el primer grupo con los principios del daño y de la ofensa, mientras que denomina al segundo "paternalismo jurídico" y al tercero "moralismo jurídico". Aquí me quiero centrar en el segundo grupo e indagar un poco más en los actos comprendidos por él. Esta tarea no es fácil, porque no existe una definición uniforme de paternalismo. Así, Feinberg distingue entre el paternalismo presumiblemente condenable que se refiere al trato de adultos como si fueran niños, sea por su propio bien (paternalismo benevolente), sea por el bien de terceros (paternalismo no benevolente) y el paternalismo presumiblemente no condenable que consiste en la defensa de adultos relativamente indefensos o vulnerables ante peligros externos. Dworkin, en cambio, propone incluir en el paternalismo solo aquellos actos que interfieren en la libertad o autonomía de una persona sin su consentimiento y con el fin de beneficiar a la persona afectada[2]. Esto incluiría el paternalismo benevolente y el paternalismo presumiblemente no condenable, pero excluiría el paternalismo no benevolente. Otros autores como Sunstein y Thaler consideran incluso ciertas presentaciones de diferentes opciones como paternalistas si tal presentación de las opciones empuja a la persona a tomar una decisión favorable para ella[3]. Para ellos, «una política cuenta como 'paternalista' si pretende influenciar las elecciones de las partes afectadas de tal manera que las personas que toman la decisión estarán en una mejor situación»[4]. Tal definición de paternalismo es mucho más amplia que la de Feinberg o Dworkin, porque no exige ninguna intervención en la vida de las personas afectadas, sino deja la toma de decisiones enteramente en las manos de la persona afectada.

De ello se puede inferir que no hay una definición inequívoca de paternalismo que abarque todos los comportamientos considerados paternalistas. Sin embargo, se puede encontrar un núcleo duro de paternalismo que comprende aquellos actos que son reconocidos ampliamente como paternalistas. A mi parecer, este núcleo duro de paternalismo coincide con la definición de paternalismo de Dworkin[5]. Según esa definición, un acto es paternalista cuando interfiere en la vida de otra persona sin su consentimiento y tal interferencia está motivada por el supuesto bien de la persona afectada. Con ello, la definición del paternalismo descriptivo contiene tres requisitos: la condición de coerción, la de consentimiento y la de benevolencia. Según la primera, se requiere una interferencia en la libertad o autonomía de la persona afectada. Eso excluye actos que de ninguna manera limitan las opciones del afectado, por ejemplo, regalos o el poner a disposición una nueva opción que la persona no tenía anteriormente.

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2 Dworkin 2014: 1.

3 Sunstein, Thaler 2003: 1162.

4 Sunstein, Thaler 2003: 1161 s., la traducción es mía.

5 Dworkin 2014: 1: «Paternalism is the interference of a state or an individual with another person, against their will, and defended or motivated by a claim that the person interfered with will be better off or protected from harm». Así también, Düber 2015: 31.

Según la condición de consentimiento, un acto solo puede considerarse paternalista si falta el consentimiento del afectado, es decir, si se efectúa en contra de la voluntad o por lo menos sin el consentimiento expreso de la persona afectada.

La condición de benevolencia requiere que la acción esté motivada por el beneficio que trae para la persona afectada, en el sentido de que el agente pretende evitar que el afectado se autoinflija un daño. Allí, lo decisivo no es si el acto realmente aumenta el bienestar del interferido y evita el daño temido, sino si el agente está motivado a la acción por el deseo de ayudar al interferido. La presencia de ese requisito se evalúa entonces en el momento de la ejecución de la acción paternalista, es decir *ex ante*, y no se tienen en cuenta sus consecuencias, i.e. se deja de lado el análisis *ex post* y no se analiza si realmente conlleva beneficios para el afectado.

Como se ha visto arriba, se discute si actos que no cumplen con alguno de los tres requisitos pueden considerarse paternalistas. Así, de las diferentes definiciones de paternalismo de Feinberg, el paternalismo presumiblemente no condenable y el paternalismo benevolente presumiblemente condenable contienen las tres características, mientras que el paternalismo no benevolente presumiblemente condenable no cumple con el requisito de la benevolencia. La propuesta de Sunstein y Thaler, según la cual incluso la presentación de diferentes opciones ha de considerarse paternalista si se hace por el bien de la persona que va a elegir, cumple con la condición de benevolencia, pero no contiene ni la condición de coerción ni la de consentimiento, porque la persona afectada no es obligada a nada, no sufre ninguna interferencia y no se actúa en contra o sin su voluntad.

Existen entonces posiciones muy diversas sobre los límites del paternalismo. Sin embargo, no hay duda de que aquellos comportamientos que sí presentan los tres requisitos han de denominarse paternalistas.

La elección de esta definición exigente de paternalismo me permite entonces limitar mi campo de análisis a aquellos casos que son ampliamente reconocidos como paternalistas. De esta manera, la discusión aquí presentada puede ser útil – por lo menos en parte – también para quienes sostienen una definición más amplia de paternalismo.

Por último, aquí se va a usar el término paternalismo en sentido estricto, es decir solo me voy a ocupar de actos paternalistas efectuados por el Estado y no de actos paternalistas entre individuos. Por ende, si en lo siguiente se habla de actos paternalistas o de paternalismo en sentido descriptivo, entonces eso siempre se refiere a una acción efectuada por el Estado que interviene en la vida de un ciudadano sin el consentimiento de éste y motivada por el bienestar del ciudadano.

2.2. Aplicación a la defensa obligatoria

Para poder analizar la discusión sobre actos paternalistas en un caso concreto, recurriré a la justificación paternalista de la defensa técnica obligatoria, es decir,

las razones que se dan para exigir la participación de un abogado defensor como acompañante del imputado en un proceso penal. Si bien la defensa técnica obligatoria y su justificación paternalista existen en muchos ordenamientos jurídicos, entre ellos el alemán, el costarriqueño o el mexicano, aquí me centraré solo en un sistema que en el aspecto analizado sirve como buen ejemplo para todos los demás: el argentino. Según la normativa argentina, por regla general, el imputado tiene que estar acompañado durante el proceso por un abogado defensor, y solo excepcionalmente podrá defenderse sin ayuda de un defensor si esto «no perjudi[ca] la eficacia de la defensa y no obst[a] a la normal sustanciación del proceso»[6]. Tal imposición general de la defensa técnica recibe por parte de la dogmática y jurisprudencia la justificación paternalista de que el «imputado […] es considerado por la ley un incapaz relativo, en el sentido de que puede, normalmente, obrar por sí, pero para completar su personalidad en el procedimiento, necesita del auxilio y participación en él de un defensor»[7].

Existen otros argumentos ulteriores para justificar la imposición de la defensa obligatoria, como por ejemplo la idea de que un Estado de Derecho solo puede tener el derecho de juzgar a alguien si esa persona tiene los mismos derechos y posibilidades de defenderse que los que tiene el Estado en su calidad de acusador. Dado que aquí la defensa obligatoria solo pretende ser un ejemplo de posibles actos paternalistas en nuestros ordenamientos jurídicos occidentales actuales, el trabajo se centrará únicamente en el argumento paternalista y no se analizarán las demás argumentaciones pensables para justificar la defensa obligatoria.

Si se aplica la definición de intervenciones paternalistas al caso de la defensa obligatoria, se puede ver fácilmente que tal imposición de la obligación de contar con un abogado defensor puede ser considerado un acto paternalista.

Cuando el Estado establece la obligación de contar con un abogado defensor en el proceso penal, claramente está interviniendo en la vida del ciudadano. De esta manera, la defensa obligatoria cumple con la condición de coerción.

También cumple con la condición de consentimiento, dado que, por ejemplo, según la Corte Suprema de Justicia de la Nación Argentina (CSJN), el tribunal en cuestión puede imponerle un defensor al imputado incluso en contra de su voluntad explícita[8].

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6 Así el texto del art. 118 del Código Procesal Penal de la Provincia de Córdoba. Formulaciones parecidas se encuentran en todos los demás Códigos Procesales Penales provinciales y también en el Código Procesal Penal de la Nación. La autodefensa es aceptada para aquellos casos en los que el imputado mismo tiene formación jurídica, así Binder 2016: 155; Cafferata Nores, Tarditti 2003: 356; Vázquez Rossi 2011: 217.

7 Maier 1996: 551; Maier 2004: 265-266; Cordón Moreno 1999: 151 ss.; Vélez Mariconde 1981: 394.

8 Caso LOPEZ: CSJN-Fallos 310:1797; caso ARNAIZ: CSJN-Fallos 237:158; caso CENTENO: CSJN-Fallos 255:91; Carrió, Garay 2006: 577.

Por último, se satisface la condición de benevolencia. Como ya se ha mencionado, una parte de la dogmática argumenta que la intención detrás de la defensa obligatoria sería el beneficio del imputado. Se supone que el imputado lego, es decir, el imputado sin formación jurídica, no puede elaborar y llevar a cabo una defensa adecuada, y por ende se lo obliga a contar con un defensor para evitar que se autogenere un daño mediante una defensa inapropiada o inútil. En la obligación de contar con un abogado defensor se encuentra entonces la intención de evitar que el imputado se dañe a sí mismo.

Por ende, la defensa obligatoria puede considerarse una intervención paternalista según la definición aquí implementada.

3. Liberalismo y paternalismo

Aunque este trabajo se ocupa principalmente del tratamiento que da el republicanismo al paternalismo, resulta apropiado empezar con una breve presentación de la posición que toma el liberalismo frente a este tipo de intervenciones, porque la discusión general sobre paternalismo y la posibilidad de justificar tales actos está fuertemente marcada por el pensamiento liberal. Para ello, primero indicaré el concepto clave de liberalismo, la libertad como no interferencia, para luego ocuparme de la posibilidad de justificar interferencias paternalistas en una teoría liberal.

3.1. Definición de la libertad

Como es sabido, una manera muy extendida de distinguir las teorías liberales de las demás teorías políticas consiste en considerar todas aquellas teorías como liberales que definen la libertad como no interferencia y la convierten en su concepto clave. En ese sentido, tengo libertad cuando nadie interfiere con mis acciones. A la inversa, carezco de libertad solo cuando otra persona me impide la realización de algún fin, pero no, cuando las razones por las que no puedo alcanzar mis objetivos tienen que ver con circunstancias naturales o mis propias limitaciones físicas, mentales o económicas. Cuanto mayor es esa esfera de no interferencia, mayor es la libertad de la persona[9]. Tal espacio libre de intervenciones ajenas es considerado necesario para que cada persona pueda perseguir sus propios planes de vida y vivir según los propios valores y objetivos. Con ello, la libertad como no interferencia sirve para marcar el espacio en el que la persona *prima facie* debe estar libre de intervenciones ajenas. Este espacio comprende todas aquellas acciones que solo afectan a quien actúa. De esta manera, las acciones humanas se pueden dividir en dos grupos: aquellas que se extienden a las esferas de libertad de otras personas y afectan las

[9] Berlin 2002: 170.

vidas de terceros y aquellas que están dentro de la propia esfera de libertad y solo afectan al agente mismo.

3.2. Justificación del actuar estatal

Esta división de las acciones dentro y fuera de la propia esfera de libertad también repercute en las limitaciones que los terceros o el Estado pueden imponerles. Si se considera que la libertad requiere un espacio libre de intervenciones ajenas, entonces por lo menos a primera vista debe estar justificado impedir o limitar todos aquellos actos ajenos que interfieren en esta esfera de libertad de una persona.

Si se quiere, se podría expresar esta idea con los conceptos de derechos y deberes[10]. El agente tiene el derecho de que nadie interfiera en su espacio de libertad y todas las demás personas tienen el deber de no intervenir en él. Este primer derecho a un espacio no intervenido conlleva – o viene reforzado por – el derecho de limitar o impedir todas las intervenciones ajenas no deseadas y, como contracara, implica el deber de las y los demás de aceptar esas limitaciones.

Obviamente no cualquier interferencia mínima en la vida de otras personas justifica cualquier respuesta. Así, por ejemplo, generalmente se exige una interferencia de un tipo y gravedad específicos para justificar la aplicación del derecho penal, lo que según Feinberg se expresa en la idea de los principios del daño y de la ofensa[11]. Aquí no me detendré en las finezas de las justificaciones para limitar las acciones que afectan a terceros. Más bien, me interesa indagar en aquellos actos que solo afectan al agente mismo y en las justificaciones que se dan para impedirle tales acciones.

Frente a estas últimas acciones, es decir, aquellas cuyos efectos quedan dentro de la esfera de libertad del agente, la libertad como no interferencia no brinda ninguna justificación de intervención. Está claro que aquí no hay afectación de la libertad de terceros que justifique una limitación. Pues, dado que la acción en cuestión no interfiere con otras personas, la justificación para su limitación no puede provenir de la protección de la libertad como no interferencia de terceros. La libertad del agente mismo tampoco parece dar una justificación para la limitación de sus acciones, porque esa libertad consiste justamente en la protección de un espacio libre de intervenciones y limitaciones.

En resumen, se puede decir que, en el liberalismo, la libertad como no interferencia tiene dos efectos. Por un lado, sirve para dividir las acciones humanas en dos grupos: aquellas que se extienden a las esferas de libertad de otras personas y aquellas que están dentro de la propia esfera de libertad y solo afectan al agente mismo.

[10] Hohfeld 1913: 32 denomina ese tipo de derechos «claims», lo que se podría traducir con demandas o exigencias.

[11] Feinberg 1986: X.

Por el otro lado, da una justificación para intervenir en las primeras y no intervenir en las segundas.

Por ello, si se pretenden justificar las intervenciones en actos que solo afectan al agente mismo, es decir, si se busca una justificación para actos paternalistas, ha de recurrirse a otro principio que no sea la libertad como no interferencia. Para tales actos paternalistas se necesita entonces una justificación especial, basada en las particularidades de los actos paternalistas. Este tipo de justificaciones específicas serán llamadas "justificaciones paternalistas", a diferencia de otras justificaciones que no se refieren solamente a los requisitos paternalistas antes mencionados. Así, muchas justificaciones paternalistas se refieren a la condición de benevolencia y afirman que el daño efectuado a la autonomía del ciudadano mediante el acto paternalista sería menos grave que el daño que se podría generar el ciudadano mismo mediante la acción impedida. Otra argumentación se refiere a la condición de consentimiento y expresa la opinión de que el consentimiento y la voluntad expresa del ciudadano no deberían ser tenidos en cuenta porque el ciudadano tiene algún déficit – por ejemplo, de conocimiento o de capacidad de comprensión – que le impide prever las consecuencias de sus acciones, por lo que tiene que ser protegido ante actos imprudentes.

También existen argumentaciones que rechazan la justificabilidad de cualquier acto paternalista, por ejemplo, porque el daño efectuado mediante la intervención siempre sería más grave que el daño autoimpuesto[12].

Que se acepte alguna justificación paternalista o que se rechace cualquier intento de interferir en actos que solo afectan al agente mismo depende de la corriente liberal específica bajo análisis. Así, en el liberalismo igualitario de Rawls parece haber un cierto margen para justificaciones paternalistas, mientras que el liberalismo libertario de Nozick no permite actos paternalistas[13]. En este trabajo no indagaré en la compatibilidad de las justificaciones paternalistas con las corrientes liberales, solo me interesa resaltar la posición básica del liberalismo frente a los actos paternalistas, a saber, que esos actos no pueden ser justificados recurriendo a la libertad como no interferencia y que por ende, *prima facie*, los actos paternalistas no son justificables o, en su defecto, requieren de una justificación especial basada en las particularidades de tales actos.

Después de esta breve reconstrucción de la relación entre el liberalismo y las justificaciones paternalistas pretendo demostrar en lo que sigue que en el republicanismo la posibilidad de justificar actos paternalistas es notablemente diferente.

[12] Nozick 1974: ix.

[13] Rawls 1971: 249; Nozick 1974: ix.

4. Republicanismo y paternalismo

Al igual que en el liberalismo, en el republicanismo, la libertad es considerada el valor último de las personas y consecuentemente de una sociedad.

4.1. Definición de la libertad

Sin embargo, esta libertad no es entendida como no interferencia. Más bien, se la concibe como no dominación, es decir, como la ausencia del poder de intervenir sobre bases arbitrarias. Esto significa, por un lado, que no sólo una interferencia efectiva, sino ya el poder de terceros de interferir en la vida de un ciudadano limita la libertad de este último. Por otro lado, no cualquier interferencia o poder de interferencia afecta la libertad. Solamente las interferencias arbitrarias causan una situación de dominación y por ende afectan la libertad. Así, una interferencia efectiva que no es arbitraria no es considerada por el republicanismo como una limitación ilegítima de la libertad.

Para determinar cuándo existe una situación de dominación que compromete la libertad de alguien hay que definir entonces qué es una interferencia arbitraria. Aquí se va a aplicar la definición de interferencia arbitraria de Philip Pettit, aunque también existen otras definiciones de arbitrariedad que en última instancia llevarían a otras consecuencias para los temas aquí abordados.

Según Pettit, un acto es arbitrario cuando solamente está sujeto a la decisión o el juicio del agente y cuando éste puede elegir efectuar el acto o no efectuarlo según su placer o parecer. En estos casos, el agente puede interferir en la vida de otros basándose en intereses u opiniones no compartidos por el afectado, sin pedir permiso o tener que temer sanciones[14].

En cambio, un acto no es arbitrario cuando al tomar la decisión se tiene en cuenta el bienestar, la visión del mundo, los intereses u opiniones del afectado[15]. Esta definición de la no arbitrariedad requiere de algunas precisiones. Por un lado, los valores a tener en cuenta pueden contradecirse, como pasa a menudo con los intereses y el bienestar de una persona. En ese caso se plantea la pregunta de cuál de todos los valores mencionados por Pettit habría que tener en cuenta y cuáles no.

Una manera de evitar ese riesgo sería limitarse al término más frecuentemente empleado por Pettit, a saber, el interés del afectado. Sin embargo, ese interés también puede interpretarse de diferentes maneras. Así, puede ser concebido como un interés objetivo, i.e. como un interés razonable que tendría una persona racional, independientemente de los intereses específicos basados en las experiencias per-

[14] Pettit 1997: 22.
[15] Pettit 1997: 55.

sonales que tiene la persona en cuestión[16]. Dentro del republicanismo, ese interés objetivo y razonable también puede entenderse como un interés basado en el bien común de la sociedad[17]. Por otro lado, las explicaciones de Pettit acerca del interés del afectado también podrían interpretarse como un interés "democrático", según el cual los intereses de las personas dentro de una sociedad republicana se definen mediante debates públicos y deliberativos[18]. La tercera interpretación posible consiste en concebir los intereses del afectado como intereses subjetivos, i.e. como los intereses reales de un individuo, que éste percibe como tales y que guían sus decisiones[19]. Aquí, la determinación del interés no depende cuestiones objetivas o relativas a algún bien común, sino de las expresiones de voluntad de las personas afectadas, es decir, de su consentimiento. Sin embargo, parece que Pettit no está pensando en el interés en ese sentido subjetivo porque para él, el consentimiento no puede excluir la dominación[20]. Desde el punto de vista de Pettit, existen situaciones en las que una persona consiente algún contrato u otro tipo de interferencia y de esa manera se somete voluntariamente a la dominación de otra persona. Un ejemplo es el contrato de esclavitud, pero también ciertos contratos laborales o decisiones mayoritarias que conllevan una dominación ejercida sobre grupos minoritarios. Por ello, Pettit afirma que «el consentimiento en la interferencia no es un control suficiente para prevenir la arbitrariedad y la dominación»[21]. Además, considera que el consentimiento no solo es insuficiente, sino que ni siquiera es necesario para excluir la arbitrariedad. Según él, «lo que se requiere para que no haya arbitrariedad en el ejercicio de un determinado poder no es el consentimiento real a ese poder»[22]. Dado que para Pettit el consentimiento no es ni necesario ni suficiente para excluir dominaciones, el interés a tener en cuenta en la toma de decisiones no puede ser un interés subjetivo. Más bien, debe ser un interés en sentido objetivo o democrático.

El segundo requisito para que una intervención no sea arbitraria se podría llamar la «posibilidad de control» o «disputabilidad». Según Pettit, el ciudadano debe tener la posibilidad de contestar a las autoridades y de esa manera desafiar la suposición de que un acto estatal resulta en su interés[23]. Generalmente, este requisito se considera satisfecho cuando el ciudadano tiene la posibilidad de recurrir contra una decisión estatal ante algún tribunal o cuando se encuentran abiertas otras formas de hacerse escuchar, como audiencias públicas o instituciones públicas de control

16 Bader 1991: 139.
17 Lovett 2016: 2.2.
18 Lovett 2016: 2.2.
19 Bader 1991: 139.
20 Pettit 1997: 62 ss.
21 Pettit 1999: 91.
22 Pettit 1999: 91.
23 Pettit 1999: 92.

y defensa de usuarios o consumidores. Esto se podría denominar un derecho a ser oído posteriormente, o, en las palabras de Pettit, «lo que es importante no es que el gobierno haga lo que el pueblo le dice, sino que, so pena de arbitrariedad, las personas siempre puedan impugnar cualquier acto del gobierno»[24].

En resumen, se podría decir que una interferencia es no arbitraria y por ende no afecta la libertad de las personas cuando en la decisión de interferir se han tenido en cuenta los intereses objetivos de los afectados o la interferencia es el resultado de un debate deliberativo y cuando el afectado tiene la posibilidad de disputar y objetar tal interferencia.

Si se contraponen estas dos concepciones de libertad, la liberal de la no interferencia y la republicana de la no dominación, salta a la vista que ambas teorías políticas están preocupadas por la libertad de los ciudadanos, pero la determinación de esta libertad difiere en puntos centrales. Para asegurar la libertad de los ciudadanos, el liberalismo distingue entre una esfera «interna», en la que caen todas aquellas acciones que solo afectan al agente mismo y por ende debe quedar libre de interferencias ajenas, y una esfera «externa», que comprende todas las acciones que afectan a terceros y por ende pueden ser limitadas o interferidas. Ambas esferas son necesarias para la convivencia en una sociedad y cada una está determinada por las acciones que comprende y las posibles respuestas que pueden darse a esas acciones.

El republicanismo en cambio no divide la vida de los ciudadanos en una esfera libre de intervenciones ajenas y una esfera en la que sí se puede intervenir. Más bien, busca asegurar un único espacio libre de dominación que, en última instancia, debería comprender todos los aspectos de vida de los ciudadanos. En ese espacio libre de dominación, las interferencias en sí no son contrarias a la libertad y, a la inversa, un espacio libre de interferencias no necesariamente asegura libertad. Por ello, no es relevante si una acción solo afecta al agente mismo o si también interfiere en la vida de las y los demás. La pregunta central es si una acción o una situación expresa dominación o no.

4.2. Justificación del actuar estatal

Esta diferencia en la concepción de la libertad repercute de manera directa en las justificaciones para los actos ajenos y especialmente para la intervención estatal.

Como ya se ha visto, la concepción liberal de la libertad como no interferencia le da al Estado la justificación de intervenir en una acción cuando ésta limita la libertad de terceros, pero no puede justificar la intervención en acciones que no afectan a terceros, porque en esos casos la libertad no requiere de protección.

En el republicanismo en cambio, la justificación para la intervención estatal es notablemente diferente. Por un lado, no todas las intervenciones son consideradas

[24] Pettit 1997: ix.

una limitación de la libertad. Y por el otro, no parece ser relevante si la intervención estatal es la respuesta a una acción que solo afecta al agente mismo o si es la respuesta a una acción que afecta a terceros. Es posible que esta falta de relevancia haya llevado a Pettit a no distinguir entre actos que afectan a terceros y aquellos que solo afectan al agente mismo y que por ello tampoco indaga en el tratamiento que recibirían estos últimos actos.

Aun así, existe un párrafo en el Republicanismo de Pettit que puede echar luz sobre su percepción de la justificación de intervenciones paternalistas. Aunque no recurre al término paternalismo o a la distinción entre actos que afectan al agente y aquellos que afectan a terceros, presenta un caso típicamente ubicado dentro del ámbito paternalista, a saber, el diferente trato que reciben menores de edad en comparación con los mayores de edad. Según su opinión, los niños no están dominados, aunque sus padres y maestros tienen amplios poderes sobre ellos y las tareas de educación y crianza limitan notablemente sus ámbitos de elección, siempre y cuando esas autoridades no tengan el derecho de interferir arbitrariamente en la vida de ellos[25]. Según Pettit, "se permitiría a padres y maestros un grado considerable de interferencia en las vidas de los niños, pero la interferencia estaría concebida para atender a los intereses de los niños, de acuerdo con interpretaciones estándar, y no constituiría una forma de dominación"[26]. De ello se puede inferir que para Pettit solo tiene importancia si un acto es arbitrario, pero no si ese acto puede ser definido como paternalista o no.

Ahora solo queda por aclarar si los actos paternalistas frente a adultos – especialmente la defensa obligatoria – también son justificables como intervenciones no arbitrarias o si representan casos de dominación.

Como se ha visto, según Pettit, para no ser dominadoras, las intervenciones estatales deben basarse por un lado en los intereses de las personas afectadas y por el otro lado, tales personas afectadas deben tener la posibilidad de disputar las acciones estatales. Para que un acto paternalista pueda considerarse una intervención no dominadora, se debe entonces evaluar si tal acto se basa en los intereses de los afectados y no meramente en los intereses del agente. Este requisito de tener en cuenta los intereses de los afectados también se refleja en la definición de acto paternalista aquí empleada, pues según ésta, los actos paternalistas requieren una condición de benevolencia, es decir, deben ser motivados por el deseo de evitar que la persona afectada se efectúe un daño a sí misma. A primera vista, se podría asumir que esta condición de benevolencia siempre es compatible con la exigencia republicana de tener en cuenta los intereses del afectado, dado que es de suponer que cualquier persona razonable tiene el interés objetivo de evitar daños autoinfligidos y que también la determinación de un interés común obtenido mediante un debate deliberativo llevaría al deseo de evitar tales daños. Entonces, independientemente de cómo

[25] Pettit 1997: 161.
[26] Pettit 1997: 161.

se entiende el término "interés" en la teoría de Pettit, el evitar un daño autoinfligido sería en el interés del afectado.

En esa determinación del interés del afectado tampoco juega un rol negativo el hecho de que los actos paternalistas se efectúan sin o en contra de la voluntad del afectado. Pues, según Pettit, es irrelevante si la persona consintió a la interferencia o no, dado que la falta de consentimiento no puede convertir una interferencia en dominadora.

Sin embargo, la coincidencia entre la condición de benevolencia y el interés objetivo no parece ser absoluta. En efecto, la benevolencia se refiere a la motivación del agente, mientras que el interés se refiere a los efectos de la acción. Con ello, puede darse el caso que el agente actúa motivado por el deseo de evitar daños, pero la acción realizada no es idónea para evitar tal daño o incluso lo empeora. En esos casos bien se puede afirmar la existencia de la condición de benevolencia, pero no podría decirse que tal acción está en el interés del afectado. Para poder afirmar el interés objetivo del afectado en la acción se debería exigir entonces que tal acción sea efectiva en el sentido de idónea y necesaria para evitar los daños autoinfligidos. Entonces, solo aquellos actos realizados con el deseo benevolente de evitar daños autoinfligidos que también muestren eficiencia en alcanzar su fin pueden considerarse abarcados por el interés objetivo del afectado. Esto también significa que, a diferencia de la evaluación de la benevolencia que se realiza *ex ante*, la determinación del interés objetivo parece requerir una evaluación *ex post*.

El segundo elemento requerido por el republicanismo para una interferencia no dominadora es la disputabilidad. La definición aquí empleada de los actos paternalistas no se extiende a ese requisito. Por ello, es posible que haya actos paternalistas contra los que las y los ciudadanos disponen de vías de control y otros actos para los que no están previstos tales posibilidades de contestación. Sin embargo, siempre y cuando la estructura institucional específica prevea una vía de control para un acto paternalista, éste ha de considerarse una interferencia no dominadora y por ende justificada en el republicanismo.

Por ende, una intervención estatal que pretende evitar un daño autoinfligido estaría justificada en el republicanismo de Pettit siempre y cuando la acción es eficiente para impedir el daño y el ciudadano tiene la posibilidad de control, i.e. cuando puede recurrir contra la intervención ante un tribunal u otra institución estatal. Así, no todos, pero muchos actos paternalistas podrían justificarse en un sistema republicano.

Ese resultado también vale para el ejemplo presentado al inicio, la defensa obligatoria. La defensa obligatoria es una intervención cuya implementación cumple con el interés objetivo y comúnmente compartido de obtener una defensa útil y jurídicamente fundada. De esta manera, la interferencia está en el interés del imputado. Además, en el ordinamiento giuridico argentino, el imputado tiene la posibilidad de oponerse ante el tribunal contra la imposición de la defensa obligatoria y puede pedir permiso para autodefenderse. De esta manera, el afectado, en este caso el

imputado, también tiene la posibilidad de recurrir a una instancia de control. Por ende, la imposición paternalista de la defensa obligatoria estaría justificada en un sistema republicano.

4.3. Evaluación de esa justificación

Como se ha visto, un acto paternalista como la defensa obligatoria puede justificarse sin mayores problemas según la teoría republicana de Pettit. En esta justificación se tiene en cuenta si tal acto es arbitrario, es decir si se tuvo en cuenta el interés objetivo o común del afectado y si el afectado tiene la posibilidad de controlar la interferencia, por ejemplo, mediante la apelación frente a algún tribunal. Lo que no importa en esta justificación es si la interferencia es paternalista o no. Eso significa que la justificación no tiene en cuenta las particularidades de los actos paternalistas, especialmente si la intervención se efectúa para evitar un daño al agente mismo o a terceros y tampoco toma en consideración si el afectado dio su consentimiento o no.

De esta manera, el republicanismo no distingue entre una justificación para actos paternalistas y para aquellos que no lo son, sino que la justificación siempre es la misma, independientemente de si se trata de una intervención paternalista o no: lo relevante es la dominación o no dominación que ejerce la intervención y ésta es independiente de la cuestión de si el actuar estatal es una respuesta a un acto que solo afecta al agente o también afecta a terceros.

Sin embargo, esta justificación no es una justificación paternalista en el sentido antes mencionado, i.e. no es paternalista en sentido normativo. Pues, para el republicanismo de Pettit, la distinción entre actos que afectan a terceros y actos que solo afectan al agente mismo es irrelevante y con ello, la discusión conocida de las teorías liberales sobre la justificabilidad o no de los actos paternalistas en contraposición a los que pretenden evitar daños u ofensas a terceros pierde toda relevancia.

5. Conclusiones

En el presente trabajo presenté la posición del republicanismo de Pettit frente a intervenciones paternalistas y la contrapuse con la visión liberal.

Este análisis llevó a dos conclusiones. Por un lado, y retomando la pregunta planteada en el título, se puede decir que el republicanismo efectivamente es paternalista, o por lo menos más paternalista que el liberalismo, porque permite ciertas interferencias paternalistas al no considerarlas contrarias a la libertad como no dominación, mientras que el liberalismo *prima facie* es refractario a las intervenciones paternalistas porque no pueden justificarse con la protección de la libertad como no interferencia.

Por el otro lado, la discusión sobre el paternalismo parece ser ajena al republicanismo porque para esta teoría política, en la evaluación de la justificación de una intervención estatal, la distinción entre actos paternalistas y actos que no son paternalistas es irrelevante. Preguntarse por las diferencias en la justificación de intervenciones paternalistas frente a otros tipos de actos presupone un punto de vista no compartido por el republicanismo, a saber, un punto de vista liberal que parte de la concepción de la libertad como no interferencia. Con ello, se puede decir que la discusión paternalista y la búsqueda por una justificación paternalista es un tanto artificial en una teoría como el republicanismo.

Por ende, se puede plantear la pregunta de si esta indiferencia del republicanismo frente a las particularidades de los actos paternalistas presenta un problema para el republicanismo. Es decir, ¿debería el republicanismo prestar atención a los actos paternalistas y tratarlos de manera diferente que otras intervenciones? Una manera de buscar una respuesta a esta pregunta consiste en aplicar la técnica del equilibrio reflexivo y recurrir a nuestras intuiciones frente a los actos paternalistas. Como es sabido, mediante la técnica del equilibrio reflexivo[27] se evalúa si y de qué manera una teoría política o moral determinada presenta herramientas para fundamentar y justificar una intuición inicial y se pretende lograr una coincidencia entre la teoría y las intuiciones. Si no se logra tal armonía, esa divergencia entre teoría e intuición puede llevarnos en primer plano a cuestionar la corrección de la teoría (o los principios que la definen). Por el contrario, si la teoría nos convence, su incompatibilidad con la intuición también puede ser tomada como un argumento para cuestionar e incluso cambiar la intuición inicial.

Si nuestra intuición es que está justificado proteger a una persona frente a determinados riesgos autoimpuestos, porque plantean un peligro irrazonable que ninguna persona racional correría voluntariamente, entonces la propuesta republicana parece convincente. Esto es así, porque su foco en la libertad como no dominación puede dar una justificación para todos aquellos actos paternalistas para los que se puede constatar un interés objetivo de la persona afectada. Esta solución se integra orgánicamente en el razonamiento republicano y no requiere de un esfuerzo especial, como sí requiere en cambio en el liberalismo, donde los actos paternalistas *prima facie* no son justificables. Además, protege contra interferencias paternalistas para las que no se puede afirmar un interés objetivo de la persona afectada y, de esta manera, limita las intervenciones estatales a aquellos casos en los que el acto paternalista es eficiente en la prevención de peligros autoimpuestos.

Si, en cambio, nuestra intuición nos lleva a rechazar los actos paternalistas y nos parece que son intrínsecamente diferentes de otros tipos de intervenciones, entonces la indiferencia del republicanismo ante las particularidades de los actos paternalistas y su incapacidad de ofrecer una justificación específica para aceptar o rechazar

[27] Rawls 1999: 18.

los actos paternalistas puede ser una razón para rechazar esta teoría política y buscar otra teoría como el liberalismo que distingue donde el republicanismo no lo hace.

En ambos casos, lo relevante parece ser no solo si el republicanismo justifica determinadas intervenciones paternalistas o no, sino también si tal justificación difiere de las justificaciones que ofrece para intervenciones no paternalistas. En el primer supuesto, el hecho de que el republicanismo responde a las intervenciones paternalistas de la misma manera que a cualquier otra interferencia, es una ventaja, en el segundo supuesto es una desventaja.

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Vers une lecture historique de la «Théorie Pure du Droit». Contextes et pratiques de la juridiction constitutionnelle autrichienne

*Péter Techet**

Résumé

Hans Kelsen n'était pas seulement le fondateur de la "Théorie pure du droit" (TPD), mais il a également travaillé comme juge constitutionnel dans la Première République (c'est-à-dire, en Autriche entre les deux guerres). Donc, la question se pose si et comment sa théorie non-cognitiviste de l'interprétation a promu une juridiction "activiste". Si la TPD et l'activité de Kelsen en tant que juge constitutionnel sont relues dans ses contextes historiques, elles s'avèrent être, d'une part, le produit d'un État multiethnique, dans lequel seul le droit fonctionnait comme un élément intégrateur, et, d'autre part, une réflexion/réaction dans une société divisée, dont les débats politiques ont été décidés par la Cour constitutionnelle (très souvent dans l'intérêt de la minorité, c'est-à-dire la Vienne "rouge"). Dans l'article, je soutiens la contextualisation historique de la TPD en analysant si et comment elle pouvait justifier une juridiction constitutionnelle "activiste" (in concreto: progressiste).

Mots clés: Autriche. Cour constitutionnelle. Hans Kelsen. Théorie pure du droit. Théorie réaliste de l'interprétation.

Abstract

Hans Kelsen was not only the founder of "Pure Theory of Law" (PTL), but he also worked as a constitutional judge in the First Republic (i.e., in Austria between the wars). Therefore, the question arises if and how his non-cognitivist theory of interpretation promoted an "activist" jurisdiction. If the PTL and Kelsen's activity as a constitutional judge are re-read in its historical contexts, they turn out to be, on the one hand, as product of a multi-ethnic state, in which only the law functioned as

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an integrating element, and, on the other hand, as reflection/reaction in a polarized society, whose debates were decided by the Constitutional Court (very often in the interest of the minority, so the "red Vienna"). In the article, I support the historical contextualization of the PTL by analyzing whether and how it could justify an "activist" (in concreto: progressive) constitutional jurisdiction.

Keywords: Austria. Hans Kelsen. Constitutional Court. Pure Theory of Law. Realist Theory of Interpretation.

Hans Kelsen est l'un des classiques de la jurisprudence européenne. Ses théories ont fait l'objet de nombreuses recherches. Contrairement à cela, cependant, les circonstances historiques dans lesquelles la "Théorie pure du Droit" (TPD) de Kelsen a émergé sont beaucoup moins prises en compte dans la littérature. Cet écart favorise une lecture trop abstraite, "sans espace et intemporelle" de l'œuvre de Kelsen, dans laquelle son contexte historique et ses motifs restent cachés[1]. Bien que la patrie de Kelsen n'ait été que la science – comme Horst Dreier l'écrit[2] –, il était un enfant de son époque (post-)habsbourgeoise. Cet article soutient l'idée *heuristique* de lire l'œuvre de Kelsen d'un point de vue historique – plutôt que purement théorique.

À cet égard, l'œuvre de Kelsen peut également être analysé comme le reflet d'une époque historique et de ses défis[3] – en particulier dans l'entre-deux-guerres, où il ne développait pas seulement la TPD, mais travaillait également en tant que juge constitutionnel. Comme Gabriele De Angelis écrit: "Les écrits politiques [de Kelsen] reflètent l'atmosphère politique particulière des années 1920"[4]. En ce sens, Thomas Olechowski souligne l'importance de l'intérêt historique pour la TPD:

1 Helwig 2019: 154.

2 Dreier 2019: 5.

3 Hans Kelsen est né à Prague, (alors en Autriche), en 1881, il étudia le droit à Vienne; en 1918/1919, il participa à l'élaboration de la constitution républicaine (B-VG) de la nouvelle Autriche, qui est toujours en vigueur aujourd'hui (bien que plusieurs fois modifiée); de 1920 à 1930, il fut juge constitutionnel à la Cour constitutionnelle (VfGH) de Vienne. Après avoir perdu son poste à la suite d'un amendement constitutionnel, il accepta un appel à l'Université de Cologne en 1930, où il ne put rester que jusqu'en 1933. Entre 1933 et 1940, il vécut en Suisse, enseignant en même temps à Genève, La Haye et Prague. En 1940, il émigra aux États-Unis, où il devint professeur titulaire à Berkeley en 1945 – après des postes temporaires à Harvard. Même après la Seconde Guerre mondiale, il ne retourna pas en Autriche, mais il effectua plusieurs voyages de recherche et de conférences dans l'Europe d'après-guerre. Il est décédé en 1973 – peu de temps après la mort de sa femme – à Orinda, en Californie; pour la biographie voir Olechowski 2020.

4 De Angelis 2009: 524 s.

> [W]hile it may not be possible to use legal history to contradict legal philosophical arguments, legal history is able to explain where legal philosophical arguments come from. (…) Kelsen's theories achieved everlasting importance, but they originated from a very concrete background and can only be understood in this context[5].

Comme Koskenniemi écrit: "[History of Law] brings legal principles down from the conceptual heaven and into a real world where agents make claims and counterclaims, advancing some agendas, opposing others"[6]. La perspective historique du droit ou de la théorie juridique se concentre

> aux situations, dans lesquelles les acteurs historiques conceptualisent juridiquement des intérêts, des problèmes, des conflits, etc., formulent légalement leurs perceptions, poursuivent des voies juridiques […] et contribuent ainsi à travers la communication et l'action à constituer le droit en théorie et en pratique[7].

Dans l'article présent, je ne veux pas analyser la TPD comme une théorie juridique abstraite, j'essaie plutôt de la contextualiser à partir du moment où elle a été créée. Avec un regard historique, on peut montrer heuristiquement[8] si et dans quelle mesure la doctrine juridique de Kelsen s'explique par l'héritage mental d'un état multiethnique (I.); si et dans quelle mesure les débats politiques de la Première République (autrichienne) influençaient la doctrine (II.); si et dans quelle mesure la doctrine favorisait la pratique juridique (de la Cour constitutionnelle autrichienne) motivée par une politique juridique au vu des conflits sociaux de ce temps (III.); et si et comment la pratique juridique de la Cour constitutionnelle autrichienne, dont Kelsen était membre, se contredisait ou bien se correspondait à une théorie – comme la TPD – qui conceptualise le caractère politique et constitutif de l'"application du droit".

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5 Olechowski 2013: 279.

6 Koskenniemi 2014: 123.

7 Eichenberg, J., Lahusen, B., Payk, .M, Priemel, K. Ch. 2019: 228 [traduit par l'auteur].

8 L'essai est basé sur mon propre projet à encore finaliser, dans lequel je m'efforce de contextualiser historiquement la TPD ou la juridiction constitutionnelle autrichienne – en particulier dans son intersection de Hans Kelsen en tant que théoricien du droit et praticien du droit – dans la Première République (c'est-à-dire en Autriche entre les deux guerres). Les questions y soulevées nécessitent certainement d'autres recherches d'archives – l'article suivant ne peut pas anticiper ses résultats, donc ici la tentative est faite de justifier une question historique par une théorie juridique et en même temps de soumettre cette théorie juridique elle-même à une analyse historique.

I. La "Théorie Pure du Droit" comme doctrine juridique d'un État multiethnique et d'une république "sans nation"

Lorsque Kelsen a écrit une courte autobiographie en 1947 – en vue du paysage scientifique américain –, il a placé ses théories dans un contexte historico-culturel en décrivant la TPD "comme une théorie spécifiquement autrichienne"[9]. Il y a expliqué son scepticisme à l'égard de termes substantiels tels que "État" et "peuple" avec son expérience dans un État multiethnique dans lequel seule la loi – étant donnée l'hétérogénéité de la société – pouvait fonctionner comme un élément contraignant:

> Il se peut que je sois arrivé à ce point de vue [à savoir pour assimiler l'État et la loi, ou à la fictionnalité d'un terme matériel du peuple – P.T.] parce que l'État qui était le plus proche de moi et que je connaissais le mieux par expérience personnelle, donc l'État autrichien, n'était apparemment qu'une unité juridique. Compte tenu de l'État autrichien, qui était composé de tant de groupes différents selon la race, la langue, la religion et l`histoire, les théories qui tentaient de fonder l'unité de l'État sur une connexion socio-psychologique ou socio-biologique du peuple, s'avèrent évidemment des fictions[10].

Le contexte habsbourgeois de la vision du monde de Kelsen a déjà été mentionné dans la recherche[11], mais n'a pas été abordé historiquement[12]. Les éléments principaux d'une telle pensée sont la supranationalité et le légalisme de la monarchie des Habsbourg, qui – certes dans une langue abstraite de la théorie juridique – se retrouvent dans l'a-nationalisme et l'antiétatisme de la TPD[13]. Il convient de noter que le positivisme scientifique dans la monarchie des Habsbourg, en tant qu'idée "objective", remplissait une fonction politique[14].

En ce qui concerne la monarchie des Habsbourg, le cliché d'une "prison des peuples" a longtemps prévalu – en tant qu'autolégitimation des États successeurs et de leur politique de mémoire nationale. Une focalisation excessive sur les prétendus "conflits de nationalité" de la monarchie des Habsbourg ne parvient pas à reconnaître qu'ils ne représentaient que les discours d'élite de certains politiciens

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9 Kelsen 2007: 60 [traduit par l'auteur].

10 Kelsen 2007: 60 [traduit par l'auteur].

11 Baldus 1999: 14 ss.

12 Dans la littérature sur Kelsen, son ascendance juive est également mentionnée comme une expérience formatrice, bien qu'il se considérait lui-même et sa théorie plus "autrichiens" que "juifs"; cf. Lieblich 2019: 62.

13 Parce que la TPD ne réduit pas le droit à un État pré-légal et/ou à un peuple homogène existant pré-légal/pré-étatique, elle peut décrire – contrairement à l'opinion dominante de la jurisprudence allemande – l'Union européenne en tant qu'entité juridique (sans État et un peuple homogène); voir entre autres Ehs 2008: 16 ss.

14 Fillafer, Feichtinger 2018: 222.

nationalistes qui ne reflètent pas les vrais conflits et intérêts de la société[15] – à cause de "l'indifférence nationale" répandue dans la population[16].

Non seulement la pensée nationale (ou nationalisante) mais aussi la pensée étatique s'avèrent insuffisantes dans la description de la monarchie des Habsbourg. L'Autriche (c'est-à-dire la part autrichienne de la monarchie des Habsbourg) était un empire atypique[17], qui, même à l'époque des "nations impériales"[18], ne recherchait ni l'hégémonie d'une nation ni une homogénéisation nationalisante[19]. Parce que l'Autriche n'était pas *une* nation[20], le cadre de l'État n'était pas non plus nationalisé[21]. L'Autriche habsbourgeoise n'accordait à aucun peuple une suprématie ancrée par la Constitution[22] parce qu'il n'y avait pas *un* peuple au sens d'une nation politique[23]. L'empire autrichien ne se fondait pas sur l'idée d'homogénéité et d'hégémonie nationale[24]. La part autrichienne de la monarchie du Danube anticipait – dans sa tentative de maintenir un empire au-delà de l'idée d'État-nation ou d'impérialisme national – les débuts d'une ère post-État-nation du politique d'aujourd'hui.

Une importante fonction de légitimation était assignée à la loi[25]. Comme Kelsen l'écrivait dans son autobiographie, l'Autriche s'unissait autour de la loi. L'unité n'était qu'une *unité juridique fonctionnelle*[26]. Le pluriculturalisme social et la structure impériale-supranationale correspondaient à une conception formaliste-légaliste du droit[27], qui mettait en évidence la processualité dynamique et la formalité positiviste du système juridique[28]. L'absence d'un "peuple" unifié – et même l'absence d'une telle idée d'État – favorisait un modèle dans lequel le droit et l'administration (en tant que fonction) se trouvaient au centre de l'activité de l'État[29]. Cela explique

15 Judson, Zahra 2012: 25.

16 Sur le concept d'"indifférence nationale", c'est-à-dire le phénomène que beaucoup dans la monarchie des Habsbourg se positionnaient au-delà des catégories nationales – plus locales, impériales et/ou religieuses –, voir Zahra 2011: 93-119 et Judson 2016: 148-155.

17 Sur le concept impérial typique, selon lequel les empires sont maintenus ensemble à partir d'un centre sans base sociale, simplement en termes de politique d'État et de pouvoir, voir entre autres Motyl 1997: 19-29 et Osterhammel 2010: 610 ss.

18 Berger, Miller 2015: 4.

19 Sur le caractère impérial de l'Autriche (au sens d'un empire supranational et transnational) voir Řezník 2020: 45-66.

20 Feichtinger 2010: 40.

21 von Hirschhausen 2009: 564.

22 Judson 2008: 593.

23 Urbanitsch 2004: 103.

24 Smith, Grassl 2004: 27 ss.

25 Shedel 2001: 118 ss.; sur le développement de la science juridique autrichienne au XVIIIe siècle voir Schennach 2020.

26 Shadel 2001a: 97 s.

27 Dvořak 1997: 196 s.

28 Urbanitsch 2004: 140.

29 Sur les différents aspects du phénomène de l'État dans l'histoire autrichienne, voir Becker 2018: 317-340.

la tradition fortement légaliste de la pensée juridique autrichienne[30], qui continue d'avoir un effet après 1918 (en fait jusqu'à aujourd'hui)[31].

Éric Voegelin avait raison d'écrire que la pensée juridique légaliste héritée des Habsbourg trouvait son expression théorique dans la conception juridique formaliste de la TPD[32]. Kelsen réinterprétait notamment toutes les substances dans des fonctions et des relations formelles. Voegelin entendait cette analyse comme une critique, à savoir qu'il rendait l'État des Habsbourg et la pensée juridique habsbourgeoise responsables de l'absence d'une nation autrichienne[33], et la TPD de l'effet continu de cet héritage mental dans la Première République[34]. Alors que la TPD voulait nettoyer, purifier la pensée et la pratique juridiques de toutes les catégories métajuridiques – telles que l'idée d'un peuple homogène et l'État en tant qu'entité pré-juridique – en déconstruisant ces catégories comme des idéologies et en dissolvant les substances supposées dans les formes et les relations, Voegelin comprenait la nation comme une unité émotionnelle et l'État comme son cadre (donc, plus qu'un seul cadre juridique)[35]. Pour lui, s'il n'y a pas d'unité existentielle et essentialiste, les "moments secondaires" – soit la norme (c'est-à-dire la pensée purement légaliste) soit la volonté politique d'intérêts particuliers (c'est-à-dire la lutte de classe et de culture) – remplacent et démembrent les éléments fondamentaux[36].

Voegelin expliquait les difficultés de la Première République par le fait qu'une nation unifiée ne pouvait s'établir ni dans la monarchie des Habsbourg ni dans le nouvel État. Selon lui, les partis politiques devenaient ce que les nationalités étaient dans la monarchie[37]. En raison de l'absence d'un sentiment national d'unité, les différences politiques de classe dominaient le public et empêchaient l'établissement d'un *demos* – comme une condition préalable supposée à une démocratie (selon Voegelin)[38]. Cette situation bénéficia particulièrement à la social-démocratie car les antagonismes de classe pouvaient se manifester[39].

D'autre part, la théorie de Kelsen montrait que la coexistence régulée et organisée de différentes personnes (différents intérêts et visions du monde) était possible. Une unité "nationale" serait seulement feinte et imposée par le pouvoir des classes

[30] Ewald Wiederin qualifie la pensée juridique autrichienne de "pensée à partir de la loi" (par opposition à la "pensée à partir de l'État" allemande); voir Wiederin 2007: 296 s. La philosophie autrichienne et formaliste du droit autrichienne de la monarchie des Habsbourg différait également de la philosophie allemande plus substantialiste; voir Goller 1997: 168 ss.

[31] Jakab 2007.

[32] Voegelin 1936: 102.

[33] Voegelin 1930: 585.

[34] Voegelin 1930: 128.

[35] Voegelin 1930: 56 ss.

[36] Voegelin 1930: 587 s.

[37] Voegelin 1936: 98.

[38] Sur la relation entre Kelsen et Voegelin cf. Lecoutre 2020.

[39] Voegelin 1936: 100 s.

dirigeants. Seules les règles et les cadres du jeu devraient être fixés, dans lesquels les différents intérêts, même ceux des classes opprimées, pourraient s'exprimer et se compromettre.

Le scepticisme de la TPD envers toutes les substances et essences peut s'expliquer en particulier par le milieu culturel-intellectuel (souvent juif) de la Vienne (post-) habsbourgeoise[40]. Les "écoles autrichiennes" déconstruisaient – façonnées par un relativisme et individualisme fondamental – la pensée traditionnelle et substantielle dans leurs domaines scientifiques respectifs[41]. La TPD de Kelsen peut également être reconnue comme une expression de cette tradition de pensée, à laquelle appartiennent la psychanalyse de Freud[42], la philosophie du langage de Wittgenstein[43] ou l'école autrichienne de l'économie[44]. Kelsen se situait en ce sens: "Puisque la science moderne s`efforce de dissoudre toute substance en fonction, ayant rejeté depuis longtemps le concept d'âme ainsi que celui de force, la psychologie moderne est devenue une théorie de l'âme – sans âme, la physique une théorie des forces – sans force", donc selon Kelsen, sa théorie était aussi "une doctrine de l'État – sans État"[45].

II. La Première République comme contexte historique

Comme le souligne Peter Oestmann, les aspects ou les conséquences sociaux et politiques du droit peuvent se révéler tout particulièrement dans l'histoire du droit en tant qu'histoire de la pratique du droit[46]. L'histoire de la pratique du droit est donc toujours en même temps une histoire sociale[47]. Elle introduit dans l'histoire du droit des questions et des sujets qui sont traités par l'historiographie générale (en particulier en histoire sociale et culturelle).

L'Autriche de l'entre-deux-guerres – la Première République (1918-1934) – était caractérisée par des conflits politiques et culturels qui se déroulaient sur les lignes de front idéologiques et économiques entre les camps "bourgeois" et "rouges" et qui étaient souvent réinterprétés comme des questions constitutionnelles. En tant que juge constitutionnel indépendant (mais très proche de la social-démocratie, soutenant même le parti lors de la campagne électorale de 1927)[48],

40 Cf. Pollak: 1986; Feichtinger 2001: 311 ss.
41 Feichtinger 2006: 301 ss.
42 Gay 1988.
43 Janik, Toulmin 1973.
44 Wasserman 2019.
45 Kelsen 1964: 54 [traduit par l'auteur].
46 Oestmann 2014: 7.
47 Oestmann 2014: 5.
48 Kelsen a signé une manifeste pour le parti social-démocrate avec plusieurs intellectuelles de Vienne; cf. *"Eine Kundgebung des geistlichen Wien"*, «Arbeiter-Zeitung», 20. 04. 1927, 1.

Kelsen a accompagné et façonné plusieurs décisions de la Cour constitutionnelle (VfGH).

Par conséquent, la critique conservatrice contre la VfGH était combinée à des attaques contre la personne de Kelsen en tant que son membre le plus connu. Après 1920, les sociaux-démocrates n'exerçaient le pouvoir politique qu'à Vienne – en introduisant des réformes culturelles, éducatives, ou encore du logement[49]–, par conséquent, la question de savoir si un domaine relevait de la compétence du gouvernement fédéral ou des Länder était de la plus haute importance politique. Plusieurs affaires, dans lesquelles un conflit politique entre le pouvoir central "noir" et la Vienne "rouge" apparaissait[50], furent portées devant la Cour constitutionnelle. Débats autour de l'interdiction du "Reigen" d'Arthur Schnitzler[51], questions de censure du théâtre ou du cinéma[52], problèmes de logement[53], possibilité de la construction d'un crématorium à Vienne[54], affiliation religieuse des directeurs d'école[55], non-confessionnalité des enfants[56], les lois viennoises de la police et du cinéma[57], les questions de liberté d'association et de réunion[58], ou encore les fameux différends sur le droit du mariage[59] représentaient des affaires dans lesquelles la VfGH devenait, bon gré mal gré, partie intégrante des conflits politiques de la société. La VfGH en Autriche contribuait à la *juridification de la politique* ainsi qu'à la *politisation de sa propre fonction*, ce qui, tout en atténuant les débats politiques, intensifiait la critique politique à l'encontre de la VfGH. Comme le souligne Andreas Thier, le droit n'est pas seulement une matière abstraite-logique, il clarifie les conflits contemporains[60], le droit n'est jamais neutre vis-à-vis des dynamiques sociales et des processus politiques[61].

A cet égard, la Première République représente non seulement l'origine et le contexte initial de la TPD, mais Kelsen – comme le remarque Michel Troper – semblait s'intéresser à la politique surtout à cette époque[62]. Comme mentionné pré-

[49] Beniston 2006; McFarland, Spitaler, Zechner (eds.) 2020.

[50] Lisa Silverman pense que des conflits se manifestaient à la fois entre la Vienne "juive" et le pays non-juif, et entre les "mondes" "juifs" et non-juifs à Vienne; Silverman 2012: 22 s., 177.

[51] Sammlung der Erkenntnisse und wichtigsten Beschlüsse des Verfassungsgerichtshofes (VfSlg), 8/1921.

[52] VfSlg 21/1919; VfSlg 8/1921; VfSlg 630/1926.

[53] VfSlg 71/1921; VfSlg 90/1922; VfSlg 184/1922; VfSlg 190/1922; VfSlg 1123/1928.

[54] VfSlg 206/1923.

[55] VfSlg. 449/1925; VfSlg. 958/1928.

[56] VfSlg. 646/1926; VfSlg. 797-802/1927; VfSlg. 875/1927; VfSlg. 948/1928; VfSlg. 1206/1929; VfSlg. 1267/1929.

[57] VfSlg 720/1926; VfSlg 1114/1928.

[58] VfSlg 625/1926; VfSlg 774/1927.

[59] VfSlg 726/1926; VfSlg 878/1927.

[60] Thier 2016: 272.

[61] Thier 2017: 29.

[62] Troper 1991: 397.

cédemment, il ne pouvait, en tant que juriste, influencer la politique que dans la Première République. Tamara Ehs écrit au sujet d'un "Kelsen-VfGH" "libéral de gauche, politiquement actif" des années 1920, qu'il était conscient de son propre pouvoir[63]. Alexandre Viala le voit à cette époque comme "un juriste libéral dont l'œuvre intègre en son sein une dimension politique qui assume les conséquences logiques des présupposés affichés dans le discours théorique"[64].

III. La "Théorie Pure du Droit" comme justification d'une pratique juridique créative ?

Kelsen lui-même admettait que la juridiction constitutionnelle était un pouvoir politique. Dans sa célèbre dispute avec Carl Schmitt sur le "gardien de la constitution", Kelsen ne remettait pas en cause le caractère politique d'un judiciaire[65], il accusait plutôt Schmitt d'adhérer à un concept dépassé d'une juridiction apolitique[66]. Kelsen déclarait qu'il n'existe entre le caractère politique de la législation et celui du pouvoir judiciaire qu'une différence quantitative et non qualitative[67]. Cette compréhension des rôles correspondait non seulement à sa théorie, qui pour cette même raison peut aussi être lue comme le reflet de son activité judiciaire constitutionnelle, mais en même temps à son intention démocratique[68] à protéger la minorité (dans le cas historique concret: les approches de la Vienne "rouge").

Le pouvoir politique de la juridiction (constitutionnelle) s'explique non seulement par les débats politiques quotidiens de la Première République – décidés par la Cour constitutionnelle – mais aussi par la "Stufenbaulehre"[69], selon laquelle la loi n'est pas seulement reconnue (appliquée) à tous les niveaux (sauf pour le premier et le dernier), mais est aussi (partialement) (re)définie. Les éléments suivants entrent en considération comme des pierres angulaires de la TPD (et historiquement de la pratique juridique activiste de la VfGH en faveur des buts progressistes): 1) l'équation de la législation et de l'application du droit ("Stufenbaulehre")[70], 2) le concept du droit non déterminable par le contenu (et de la jurisprudence apolitique qui lui correspond), et 3) l'absence d'une méthode d'interprétation conçue comme connaissance objective[71].

63 Ehs 2015: 19 [traduit par l'auteur].
64 Viala 2019: 216.
65 Kelsen 2008: 67.
66 Kelsen 2008: 69 s.
67 Kelsen 2008: 67.
68 Kelsen 2006: 193 s.
69 Olechoswki 2020: 430 s.
70 Kelsen 1922: 205 ss., 252; Kelsen 2019: 14, 59.
71 Kelsen 2008a: 101 ss.

(1) Avec l'équation de la législation et de l'application de la loi, le moment politique peut être reconnu à chaque étape de la concrétisation juridique, parce que la loi n'est pas nécessairement reconnue à partir d'une norme plus élevée, mais est partiellement redéfinie par le juriste qui l'applique[72]. Ce n'est pas le contenu mais la validité de la loi qui découle d'une norme supérieure, celui-ci ne peut pas complètement déterminer les étapes ultérieures de la création du droit à l'avance. (2) Le fait que la TPD puisse être accusée d'une orientation antipolitique est lié à l'erreur qui est de l'interpréter comme la théorie du *droit pur*[73]. Mais la TPD n'est en aucun cas une théorie d'un droit pur[74], Kelsen était très conscient des aspects politiques du droit[75] – à cause de sa théorie, qui ne peut et ne veut pas déterminer le contenu de la création du droit. En tant que juriste, cependant, il considérait qu'il n'était pas scientifique de vouloir prédéterminer le processus politique de l'émergence du droit. C'est la pureté de la jurisprudence qui permet un droit "impur" (c'est-à-dire déterminé socialement, politiquement etc.). (3) Par conséquent, il ne développait pas une méthode d'interprétation qui restreindrait l'efficacité de la pratique juridique[76]. L'idée que la loi puisse être reconnue (déterminée) de façon purement scientifique représente une position basée sur la loi naturelle et rationnelle, ce que Kelsen déconstruisait dans sa critique de l'idéologie comme dissimulation d'opinions et d'intérêts politiques[77].

La TPD en tant que réflexion/réaction ainsi que la juridiction (constitutionnelle) en tant qu'acteur historico-politique peuvent être reconnues avant tout dans une lecture réaliste de la théorie kelsénienne[78]. L'indétermination de la norme ou la doctrine d'interprétation non-cognitiviste – qui *strictu sensu* n'est pas une doctrine d'interprétation car elle n'offre pas de méthode objective pour la connaissance du droit[79] – constituent les éléments dynamiques de la TPD[80], qui sont radicalement soulignés et approfondis à Nanterre (Michel Troper, Éric Millard) et à Gênes (Riccardo Guastini, Pierluigi Chiassoni).

La lecture réaliste met l'accent sur le caractère non-cognitiviste, anti-idéologique, anti-métaphysique – en ce sens réaliste – de la théorie juridique de Kelsen[81], qui dépasse donc aussi le formalisme et le cognitivisme du positivisme juridique

72 Kelsen 2008a: 105 ss.
73 Comme exemple pour cette idée erronée voir Tammelo 1984: 249.
74 Jestaedt 2008: XXVI.
75 Kelsen 2010: 371.
76 Kelsen 1968: 1366 s.
77 Kelsen 1933: 89 s.
78 La lecture réaliste de la TPD est représentée par les écoles de Nanterre et de Gênes (Michel Troper, Éric Millard, Riccardo Guastini, Pierluigi Chiassoni); pour une critique complète de cette lecture, voir Pfersmann 2002.
79 Paksy 2019: 134 ss., 150.
80 Chiassoni 2012: 246 ss.
81 Chiassoni 2012: 238 ss., 248.

classique[82]. Cette position radicalement non-cognitiviste montre le caractère politique de l'application de la loi[83], à cet égard aussi celui de la juridiction constitutionnelle[84]. Dans cette perspective, le jugement judiciaire est déconstruit comme une dissimulation juridico-argumentative d'un acte de volonté antérieur[85]. Cette théorie réaliste – par rapport à une doctrine classique de l'application du droit: déconstructiviste – place donc le pouvoir et les acteurs de la pratique juridique au premier plan de l'analyse juridique[86]. La pratique juridique est donc – comme l'écrit Éric Millard – "un jeu politique"[87]. Cette lecture révèle également le caractère politique de la juridiction constitutionnelle[88].

La réflexion dynamique de la TPD montre qu'il n'y pas de norme *a priori*, mais elle surgit *a posteriori* après être attribuée à un texte normatif par la pratique juridique[89]; c'est-à-dire, la compétence d'interpréter la Constitution représente toujours un pouvoir politique. Comme l'application de la loi est en même temps la création du droit (selon la logique de la "Stufenbaulehre"), l'application de la Constitution signifie aussi *la création de la Constitution.*

IV. La juridictionnelle constitutionnelle autrichienne: Argumentation formaliste, objets politiques

Alors que l'idée que la norme est toujours indéterminée et qu'elle requiert donc une "application créative du droit" semble justifier un pouvoir judiciaire politique-activiste, la TPD reconnaît aussi la primauté du politique[90], cette primauté du législateur se justifie avant tout en termes de la démocratie: Si le droit est l'expression d'une volonté démocratiquement formée, le pouvoir judiciaire ne peuvent l'interpréter que de manière si étroite que le résultat reste dans le cadre de l'objectif législatif[91]. Aussi le réalisme de Gênes soutient l'idée d'une cadre interprétative[92]; celui de Nanterre rejettes toutes les barrières imposées à la pratique juridique qui s'avère (chez Troper) complètement libres, donc quasi-législative[93].

82 Jouanjan 2000: 68.
83 Guastini 2013: 530.
84 Troper 1995: 180 s.
85 Troper 1978: 294 ss., 301 s.
86 Millard 2006: 95.
87 Millard 2006a: 732.
88 Ehs 2012: 234 s.
89 Troper 1994: 87s, 99 s.
90 Kelsen 1968a: 619.
91 Kelsen 1928: 240 s.
92 Guastini 2004: 28ss; Guastini 2011: 424; Guastini 2019: 14 s.
93 Troper 1981: 524 ss.

Une tension politique entre la primauté du législatif (en tant qu'expression de la volonté démocratique du peuple) et l'"application créative du droit" (en tant qu'expression du "pouvoir judiciaire") est particulièrement évident dans la question comment une Cour constitutionnelle doit *appliquer* la Constitution. Est-ce qu'il s'agit d'un pouvoir constituant (parce que l'application implique nécessairement la création), ou la Cour constitutionnelle pourrait-elle se limiter à une interprétation strictement textualiste en évitant un "gouvernement des juges"?

Alors qu'une juridiction constitutionnelle politique-activiste peut être justifiée par la TPD, une telle juridiction va à l'encontre de l'approche positiviste consistant à accorder la primauté au législateur. La TPD est donc en mesure de sous-tendre non seulement une pratique juridique activiste – notamment à cause de l'impossibilité d'une connaissance juridique objective et unique – mais aussi – au sens de la "judicial self-retraint" – une pratique juridique autolimitée[94]. Alors qu'un pouvoir judiciaire activiste est la conséquence de la "Stufenbaulehre", une pratique juridique autolimitée résulte de la nécessité démocratique à donner le dernier mot au législateur. Cela montre un conflit entre l'idée théorétique de la création du droit par le pouvoir judiciaire, d'un part, et la primauté démocratique de la politique, d'autre part. En ce sens, le juge constitutionnel social-démocrate (donc un collègue de Kelsen à la Cour) Friedrich Austerlitz s'exprimait critique à l'égard de l'idée de trancher des questions politiques non pas par les vois de la politique (c'est-à-dire au parlement), mais juridiquement "voilées" devant un tribunal[95].

C'est pourquoi la pratique judiciaire de la VfGH s'est orientée vers le texte et la volonté législative dans le pouvoir judiciaire de la VfGH – surtout sous la Première, mais aussi pendant longtemps sous la IIe République[96] – comme si le sens du texte était un élément objectivement reconnaissable[97]. Sous la Première République, il était clair que les juges constitutionnels voulaient éviter une interprétation ouvertement politique et activiste de la constitution en s'en tenant à une interprétation textuelle et formaliste – mais cela ne veut pas dire que des objectifs politiques n'étaient pas cachés derrière cette approche.

Même une argumentation purement formaliste peut également servir à des fins politiques, comme le premier acte d'accusation du gouvernement fédéral contre un gouverneur (au sens de l'art. 142 de la Constitution fédérale de l'Autriche [B-VG]) le montre. Il s'agissait de la question à qui l'interdiction du "Reigen" d'Arthur Schnitzler revenait. Après que le gouverneur et maire de Vienne de l'époque, Jakob Reumann, ait refusé en 1921 d'obéir à une instruction ministérielle (sur l'interdiction de la pièce de théâtre) émise conformément à l'article 103 B-VG, le gouverne-

94 Carrino 2019: 43.
95 Austerlitz 1925: 164.
96 Öhlinger 2007: 60 ss.
97 Troper 1995: 179 ss.

ment fédéral le poursuivait devant la VfGH. La VfGH rejetait l'acte d'accusation en raison d'une erreur formelle – c'est-à-dire en raison de l'absence de signature sur l'instruction ministérielle sans aborder les questions principales (par exemple, à qui appartiennent les affaires théâtrales, ou si un gouverneur en tant qu'exécution fédérale indirecte doit appliquer toute les instructions fédérales)[98]. Dans ce cas, cependant, des éléments activiste émergeaient aussi – par exemple lorsque la VfGH appliquait une procédure *par analogiam* parce que les règles des poursuites contre un gouverneur n'avaient pas encore été établies à ce moment-là. Kelsen, en particulier, était d'avis que la VfGH devait prendre une décision sur cette affaire importante (malgré l'absence de la réglementation du processus) – il décrivait la Cour constitutionnelle dans les débats internes comme "la gardienne de la constitution"[99].

Deux ans plus tard, la VfGH jugeait l'affaire du crématorium – il s'agissait aussi du non-respect des instructions ministérielles par le gouverneur viennois – avec une "réticence" similaire: Bien qu'il n'y ait pas eu cette fois d'erreur formelle, le gouverneur viennois était acquitté à nouveaux[100]. Avec une argumentation textuelle et formaliste, les juges constitutionnels pouvaient trancher les affaires en faveur du gouverneur social-démocrate viennois sans avoir à se positionner explicitement en termes d'activisme juridico-politique sur le "Reigen" de Schnitzler ou le crématorium de Vienne. Bien que surtout les sociaux-démocrates aient préconisé un État centralisé lors de l'élaboration de la constitution fédérale de 1918/1919, le maire de Vienne était acquitté malgré la réglementation existante selon laquelle le gouvernement fédéral peut lui donner des instructions (art. 103 B-VG).

La décision de la VfGH sur la loi du logement (Journal officiel fédéral 872/1922) est souvent utilisée comme exemple pour une interprétation non-activiste. Il s'agissait du fait que le gouvernement du Land Vorarlberg considérait la protection du logement, entre autres, une restriction inconstitutionnelle du droit de propriété garanti à l'article 5 du Staatsgrundgesetz (StGG), c'est-à-dire une expropriation qui ne respecte pas les exigences légales (§ 365 ABGB), car ce n'est pas dans l'intérêt du bien commun. Mais la VfGH remarquait à cet égard: "Le bien commun est un terme juridiquement incompréhensible, il appartient exclusivement au législateur de déterminer l'existence de ce préalable"[101]. Cette phrase peut en effet être comprise comme un exemple d'un jugement non-activiste – mais aussi comme

[98] VfSlg. 8/1921.

[99] Procès-verbal de la séance de la Cour constitutionnelle (10 mars 1921), in: Archives de l'État autrichien (ÖStA), Archives de la République (AdR), Autorités suprêmes (Cours suprêmes de la 1ère République), VfGH, Carton 71, E / 21: fol. 113.

[100] VfSlg. 206/1923. (Dans cette affaire, le gouvernement fédéral déposait par la suite deux autres accusations – d'une part pour un conflit de compétences affirmatif, d'autre part pour l'inconstitutionnalité d'un article de la constitution du Land de Vienne – qui étaient ensuite rejetées par le VfGH aussi avec des arguments formalistes-textualistes; VfSlg. 257/1924, VfSlg 258/1924.)

[101] VfSlg. 1123/1928 [traduit par l'auteur].

une confirmation formaliste-textualiste d'une loi qui correspondait aux vues juridico-politiques de la majorité des juges constitutionnels.

Comme le montrent cette exemple, le non-activisme peut représenter la tentative de maintenir l'illusion d'un pouvoir judiciaire apolitique, mais aussi de servir certaines buts juridico-politiques. La juridiction constitutionnelle se servit d'une langage formaliste (judiciaire), mais son résultat est toujours politique[102], car, d'une part, l'interprétation signifie et contient toujours une décision non-cognitiviste (elle ne découle pas d'un savoir cognitif)[103], dans la mesure qu'elle n'apporte pas de solution "correcte" ("seulement" légale)[104]; d'autre part, elle se déroule au centre de diverses conflits[105]. Donc, la distinction entre "activisme judiciaire" et "l'autolimitation judiciaire" est en fait une dissimulation du pouvoir toujours politique et discrétionnaire des juges. L'interprétation textualiste-formaliste est donc elle-même une décision *pour un certain résultat* d'interprétation, alors une "tactique" pour présenter le résultat non pas comme une décision, mais comme une dérivation "nécessaire", seulement "correcte" et "vraie" d'une "application" des lois.

Alors qu'un pouvoir judiciaire ouvertement activiste doit constamment faire face à l'accusation de la juridiction politique, un pouvoir judiciaire restreint peut dissimuler des opinions politiques sous le couvert de la "loi objective" (et de l'interprétation objective). La position non-activiste aide cependant au maintien de la situation existante – qu'il s'agisse de l'autorisation d'une pièce de théâtre ou du crématorium ou de la protection du logement –, c'est à dire, une autolimitation des juges n'est pas moins politique qu'une interprétation ouvertement activiste et créative:

> Un juge self-restrained est celui qui choisit parmi plusieurs options celle qui préserve le plus probablement la situation juridique antérieure. Un juge activiste, quant à lui, essaie d'adapter la loi aux exigences d'un environnement changeant. […] [N]on seulement le juge constitutionnel activiste intervient dans le système juridique, mais aussi le juge constitutionnel passif, plus prudent, fait une déclaration en soutenant l'interprétation antérieure de la norme en question[106].

La question de savoir si et pourquoi la TPD soutient (ou non) une interprétation ouvertement activiste de la Constitution montre l'ambiguïté de l'œuvre de Kelsen: Alors que Kelsen reconnait l'impossibilité d'une dogmatique juridique et d'une méthode d'interprétation objective, il ne la réfléchissait pas jusqu'au bout. Compte tenu de l'imprécision du langage, sa suggestion était simplement de tracer les limites de la connaissance juridique aussi étroitement que possible, comme si la loi pouvait

[102] Bongiovanni 1998: 201.
[103] Guastini 2020: 393.
[104] Guastini 2004: 50.
[105] Guastini 2017: 39.
[106] Ehs 2015: 19 [traduit par l'auteur].

être objectivement reconnue. A cet égard, sa vision théorétique de la pratique juridique restait dans un positivisme juridique naïf[107] – même si dans certains cas il savait interpréter et appliquer la loi de manière très créative.

Alors que les objectifs politiques (dans l'intérêt du maire social-démocrate de Vienne, par exemple) pouvaient initialement être atteints avec une argumentation formaliste et non activiste de la VfGH, dans son travail en tant que juge constitutionnel, Kelsen utilisait plus tard beaucoup plus clairement les conclusions de la TPD, selon laquelle la loi est redéfinie à tous les niveaux, ou selon laquelle la dernière instance peut déterminer le droit pratiquement à sa propre discrétion. Par exemple, dans le débat sur la soi-disant "Dispensehe"[108], où il s'agissait de savoir si les tribunaux étaient liés par les décisions de l'administration, Kelsen prenait une position activiste, qu'il tentait en même temps de justifier par la théorie. Avec la théorie sur l'équivalence qualitative de la juridiction et de l'exécutif[109], il pouvait théoriquement étayer son opinion sur la question du droit matrimonial selon laquelle il existait un conflit de compétences entre l'exécutif et le judiciaire – ce qui équivalait à un soutien politique à des séparations et des nouveaux mariages.

L'un de ses principaux arguments était qu'il y avait un conflit de compétences entre le pouvoir judiciaire et l'exécutif *parce que* la Cour constitutionnelle était seule habilitée à déterminer l'existence d'un tel conflit[110]. Dans ce cas, il devient beaucoup plus clair comment la TPD peut en fait servir une juridiction activiste: En raison de la force légale – qui couvre également les jugements erronés (*Fehlerkalkül*) – la loi n'est rien d'autre que ce que la dernière instance stipule comme la loi. À cet égard, la Cour constitutionnelle peut décider à sa propre discrétion par exemple la question de savoir quand et comment il y a un conflit de compétences entre le pouvoir judiciaire et le pouvoir exécutif. Dans le débat sur le "Dispensehe", des juristes et des politiciens conservateurs accusaient la Cour constitutionnelle d'usurper le rôle de législateur[111].

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[107] Öhlinger 2007: 65 s.

[108] En Autriche, le droit matrimonial relevait de la compétence des Églises respectives, c'est-à-dire qu'une séparation pour les mariages catholiques n'était pas possible (ABGB § 111), à moins qu'une dérogation n'ait été accordée par l'administration locale (ABGB § 83), sur cette base un nouveau mariage pouvait être conclu. Après 1918, l'administration sociale-démocrate de Basse-Autriche (puis de Vienne) émettait presque automatiquement cette dispense, qui permettait ensuite de nouveaux mariages. Cependant, les tribunaux déclaraient nuls ces nouveaux mariages conclus à la suite d'un mariage dissous par dispense, ce qui entraînait une insécurité juridique en matière de droit matrimonial. Bien que les cours ne se soient pas prononcées sur la dispense mais sur les mariages conclus, Kelsen réussissait à réinterpréter les cas à la Cour constitutionnelle comme un conflit de compétences entre l'administration et le pouvoir judiciaire – comme si tous deux avaient tranché sur la même question. Sur cette affaire voir Harmat 1999.

[109] Kelsen 1929.

[110] Kelsen 1928a: 105.

[111] Mayr-Harting 1928: 1.

Les débats sur la relation conflictuelle entre la juridiction constitutionnelle et la démocratie (législation) commençait non seulement en relation avec la pratique activiste (antisocialiste) de la Cour suprême américaine[112], mais aussi dans les années 1920 en Autriche. Contrairement aux juges américains, la Cour constitutionnelle autrichienne n'endiguait pas les objectifs progressifs, mais voulait les promouvoir. Une décision est qualifiée d'activiste par ceux qui ne sont pas d'accord avec le résultat et en auraient souhaité une différente (mais pas moins "politique"). Cette tendance se voit très bien dans l'histoire de la perception de la Cour suprême des États-Unis[113]. Mais alors que la Cour suprême des États-Unis, à ses débuts, pratiquait une juridiction militante en faveur des intérêts (néo)libéraux et conservateurs (et elle était donc accusée d' "activisme" par les forces libérales de gauche)[114], la Cour constitutionnelle autrichienne (VfGH) dans son l'histoire primitive était – vue de ses résultats – militante et "politique" en faveur d'objectifs progressistes et dans l'intérêt de la Vienne "rouge".

Une argumentation ouvertement activiste, comme on peut l'observer aujourd'hui devant les Cours constitutionnelles, aurait été juridiquement impossible ou socialement inacceptable à l'époque. Même si l'application de la loi (l'interprétation) représente un acte créateur, elle devrait se représenter dans un langage socialement et scientifiquement acceptable et avec des arguments acceptés[115]. La Cour constitutionnelle autrichienne elle-même était soumise à ce contrôle social. Théoriquement, un tribunal peut prononcer la loi comme elle le veut, mais en pratique, il y a des limites à tout acte d'application de la loi – même si celles-ci ne résultent pas de la loi, mais de l'environnement social, scientifique et institutionnel dans lequel tout ce qui est théoriquement possible ne serait pas toujours accepté[116].

En tant qu'institution nouvelle, la Cour constitutionnelle autrichienne a dû faire s'établir, d'une part, dans un environnement politique et social plus conservateur que la majorité des juges constitutionnels. De plus, l'Autriche dans l'entre-deux-guerres était politiquement très divisée, à cet égard les interprètes constitutionnels étaient – comme le souligne Ewald Wiederin – bien avisés d'être prudents avec les idéaux activistes[117]. Mais comme l'écrit Matthias Jestaedt: "Il y a trois types de motifs pour une décision, et en plus de l'oral et de l'écrit, il y a aussi les vrais motifs"[118]. En ce sens, la Cour constitutionnelle autrichienne a souvent caché ses "vrais" motifs (juridiques-politiques, téléologiques) derrière l'argumentation textualiste-formaliste afin de ne pas avoir à s'exposer à la critique politique. D'autre part, la Cour consti-

[112] Lambert 1921.
[113] Easterbrook 2002: 1401.
[114] Gerhardt 2002: 588ss, 597ss, 604 ss.
[115] Tarello 1980: 67ss, 341 s.
[116] Champel-Desplats, Troper 2005: 11 ss.
[117] Wiederin 2011: 104.
[118] Jestaedt 2011: 15 [traduit par l'auteur].

tutionnelle autrichienne n'avait pas encore en mesure d'utiliser les modèles d'argumentation qui font désormais partie de la pratique dominante de la juridiction constitutionnelle dans de nombreux pays.

Donc, toutes les questions politiques à la Cour constitutionnelle étaient traduites en questions purement juridiques: Même dans le cas du "Dispensehe", la VfGH soulignaient qu'elle ne jugeait pas la validité des mariages nouveaux, mais "seulement" la question s'il y avait un conflit de compétence entre le pouvoir judiciaire et l'exécutif[119]. Mais comme conséquence politique, la VfGH rendait la séparation et la conclusion de nouveaux mariages possible dans un pays où les mariages catholiques ne pouvaient être rompus que par la mort[120].

Conclusion

La juridiction constitutionnelle autrichienne – contrairement à l'opinion largement répandue jusqu'à présent[121] – n'était alors nullement apolitique, même si les décisions de grande importance politique étaient souvent justifiées de manière formaliste-textualiste.

En plaçant au premier plan le contexte "autrichien" de la TPD, son "agnosticisme joyeux par rapport aux méthodes d'interprétation"[122] ne s'avère pas être un déficit théorique, mais une justification historiquement explicable d'une pratique juridique activiste à une époque concrète avec des objectifs politiques concrets. Il ne s'agit pas seulement d'une idéologie juridique en faveur des juges[123], mais aussi d'un moyen de correction basé sur la théorie démocratique de Kelsen en protégeant la minorité respective (en tant qu'élément fondamental d'une véritable démocratie) contre la majorité respective (en tant qu'élément pratique d'une démocratie fonctionnelle).

L'expérience d'un empire multiethnique se révèle d'une grande importance pour la compréhension historique de la théorie kelsénienne. Comme dans la monarchie des Habsbourg, il n'y avait pas d'unité substantielle dans la Première République. Mais le formalisme et l'a-nationalisme n'entravaient pas la démocratie plurielle, au contraire ils la rendaient possible. À cet égard, les caractères spécifiques de l'État multiethnique des Habsbourg et de la Première République, qui ont longtemps été perçus comme des déficits – à savoir la polarisation selon les contraires nationaux et/ou politiques – s'avèrent être un berceau mental pour une doctrine juridique,

119 Kelsen 1928a: 110.

120 Cette pratique fut fatale pour Kelsen et pour l'ensemble de la Cour constitutionnelle. Avec l'amendement constitutionnel de 1929, Kelsen perdit son poste, le nouveau VfGH prit une autre voie et n'autorisa plus la séparation des mariages catholiques.

121 Öhlinger 453 :2008; Carrino 43 :2019.

122 Bezemek, Somek 2018: 140 [traduit par l'auteur].

123 Hold-Ferneck 1926: 11, 40.

comme celle de Hans Kelsen, qui définit l'État comme un ordre juridique et la démocratie comme une hétérogénéité pluraliste.

Sur la question de savoir si la juridiction constitutionnelle devait respecter la primauté du législateur ou bien plutôt aider les objectifs progressistes à se réaliser, Kelsen, en tant que juge constitutionnel, optait pour une pratique juridique qui était également capable de faire valoir des objectifs politiques avec des arguments formalistes – à cet égard, la juridiction constitutionnelle autrichienne n'était pas démocratique dans le sens qu'elle aurait toujours reconnu la primauté du législateur, mais elle était démocratique dans le sens qu'elle protégeait les minorités (surtout les intérêts de la Vienne "rouge") contre le gouvernement – qui se correspondait à la théorie de la démocratie de Kelsen – à la base de l'idée de l`"application du droit" créative.

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La máquina del derecho y sus engranajes. Karl Olivecrona sobre derecho, autoridad, y normas jurídicas como imperativos independientes

*Julieta A. Rabanos**

Resumen

En este trabajo, propongo concentrar la atención en una versión específica del imperativismo no voluntarista, su correspondiente concepción de la norma jurídica y el entramado en el cual ésta se inserta: aquella sostenida por el realista escandinavo Karl Olivecrona. Para llevar adelante este análisis, primero contextualizaré la posición de Olivecrona y su rechazo al voluntarismo, reconstruyendo brevemente su posición con respecto al derecho y a la autoridad jurídica, e introduciendo el modo en el cual autoridad y normas jurídicas se articulan como engranajes de la máquina del derecho (sección 2). Luego, analizaré en profundidad la concepción de Olivecrona de la norma jurídica como imperativo independiente con carácter sugestivo, centrando la atención en el rechazo a la norma como mandato y en los elementos de este tipo de imperativos jurídicos (sección 3). Por último, me centraré en esta particular concepción de las normas como imperativos independientes y plantearé algunos problemas que presenta, entre ellos el problema de su identificación, la oscuridad de la afirmación de que estos imperativos "guían el comportamiento", y la adecuación o no de la categoría de "carácter sugestivo" (sección 4). Concluiré el análisis con algunas breves reflexiones sobre la posible utilidad de la categoría de los imperativos independientes para al menos dos temas relevantes y actuales de filosofía del derecho (sección 5).

Palabras clave: Karl Olivecrona. Realismo escandinavo. Normas jurídicas. Imperativos independientes. Autoridad. Máquina del derecho.

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Agradezco enormemente los comentarios de la/os dos revisora/es anónima/os, que sirvieron para mejorar sustancialmente el presente trabajo.

Abstract

In this paper, I propose to draw attention to a specific version of non-voluntaristic imperativism, its corresponding conception of legal norm, and the framework in which it is inserted: that advocated by Scandinavian realist Karl Olivecrona. In order to carry out this analysis, I will first contextualise Olivecrona's position and his rejection of voluntarism; briefly reconstruct his position in relation to law and legal authority; and introduce the way in which authority and legal norms are articulated as cogs in the machine of law (section 2). I will then analyse in depth Olivecrona's conception of the legal norm as an independent imperative with a suggestive character, focusing on his rejection of the norm as a mandate and the elements of this type of legal imperative (section 3). Finally, I will focus on this particular conception of norms as independent imperatives and address some problems it raises, including the problem of their identification, the obscurity of the claim that these imperatives "guide behavior", and the appropriateness of the category of 'suggestive character' (section 4). I conclude the analysis with some brief reflections on the possible usefulness of the category of independent imperatives for at least two relevant and current topics in the philosophy of law (section 5).

Keywords: Karl Olivecrona. Scandinavian Realism. Legal norms. Independent imperatives. Authority. Legal machinery.

1. Derecho, norma jurídica e imperativos

La pregunta acerca de qué es el derecho y qué son las normas jurídicas ha sido, y sin duda sigue siendo, objeto del más arduo debate teórico. Una de las posiciones más antiguas y arraigadas a la cultura occidental es el enfoque imperativista del derecho: en pocas palabras, considerar que el derecho es esencialmente un conjunto de órdenes, mandatos o imperativos de algún tipo que ordenan o prohíben comportamientos[1]. Adscribiendo al enfoque imperativista se pueden encontrar tanto autores clásicos de corte iusnaturalista (Santo Tomás de Aquino, Grocio) como autores clásicos de corte positivista (Austin, Bentham, Hobbes) y realista (Hägerström, Olivecrona)[2].

Algunas versiones del enfoque imperativista, en particular aquellas de Bentham y Austin, han sido sometidas a análisis crítico en el siglo XX y consideradas insuficientes o directamente inadecuadas para dar cuenta del fenómeno jurídico. Algunas de esas críticas de insuficiencia o incompletitud se encontraban dirigidas, por ejem-

[1] Chiassoni 2017: 56.
[2] Cfr. Bobbio 1996, Chiassoni 2017.

plo, al hecho de que el derecho fuera considerado un conjunto de órdenes hacia los ciudadanos de actuar lícitamente, y no de normas dirigidas a jueces que establecen un acto coercitivo como consecuencia de un actuar ilícito (Kelsen)[3]. Otras críticas de inadecuación se encontraban dirigidas al reduccionismo o uniformidad tipológico de estas versiones del enfoque imperativista, que por este motivo no podrían dar cuenta adecuada de un subconjunto clave de normas del derecho: las normas que confieren poderes (Hart)[4].

Siguiendo a Bobbio, pueden reconocerse dos fases del enfoque imperativista: una fase de "imperativismo ingenuo", y una de "imperativismo crítico". La primera se caracteriza por concebir al derecho como un conjunto de mandatos dirigidos por el soberano a los ciudadanos, que no analizaría ulteriormente la estructura de estos mandatos o imperativos jurídicos. La segunda, en cambio, se caracteriza por su análisis de estos últimos bajo dos aspectos: la norma jurídica como imperativo hipotético; y como imperativo dirigido a los jueces y no a los ciudadanos[5]. A esta clasificación por fases podría agregársele una paralela: el que podríamos llamar "imperativismo voluntarista", para el cual los imperativos que componen el derecho son producto de la voluntad (real o ficticia) de un sujeto o ente; e "imperativismo no voluntarista", para el cual estos imperativos no son producto de ninguna voluntad del estilo.

En este trabajo, propongo concentrar la atención en una versión específica del imperativismo no voluntarista, su correspondiente concepción de la norma jurídica y el entramado en el cual ésta se inserta: aquella sostenida por el realista escandinavo Karl Olivecrona. Para llevar adelante este análisis, primero contextualizaré la posición de Olivecrona y su rechazo al voluntarismo, reconstruyendo brevemente su posición con respecto al derecho y a la autoridad jurídica, e introduciendo el modo en el cual autoridad y normas jurídicas se articulan como engranajes de la máquina del derecho (sección 2). Luego, analizaré en profundidad la concepción de Olivecrona de la norma jurídica como imperativo independiente con carácter sugestivo, centrando la atención en el rechazo la norma como mandato y en los elementos de este tipo de imperativos jurídicos (sección 3). Por último, me centraré en esta particular concepción de las normas como imperativos independientes y plantearé algunos problemas que presenta, entre ellos el problema de su identificación, la oscuridad de la afirmación de que estos imperativos "guían el comportamiento", y la adecuación o no de la categoría de "carácter sugestivo" (sección 4). Concluiré el análisis con algunas breves reflexiones sobre la posible utilidad de la categoría de los imperativos independientes para al menos dos temas relevantes y actuales de filosofía del derecho (sección 5).

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[3] Cfr. Kelsen 1941: 54-ss.

[4] Cfr. Hart 1961: 33-ss. Sobre este punto, véase la sección 4 del presente, en especial 4.1.4.

[5] Bobbio 1996: 200-201.

2. Olivecrona: derecho, autoridad jurídica y rechazo al voluntarismo

2.1. El derecho desde el rechazo al voluntarismo

Olivecrona propone una teoría realista, no voluntarista con respecto a la naturaleza del derecho[6]. El derecho no es el conjunto de mandatos emitidos por una autoridad suprema o soberano, mandatos que serían expresión o declaración de la voluntad de ésta, como postularían tanto las teorías iusnaturalistas como las teorías positivistas[7]. No sólo porque no puede existir una autoridad previa e independientemente a la existencia de un sistema jurídico, por lo cual es imposible plantear la existencia de una autoridad suprema; sino porque la así llamada voluntad de la autoridad o el soberano no es sino una ficción. Por este motivo, las únicas autoridades existentes son aquellas cuyo poder proviene de una constitución y de un sistema jurídico en funciones; y estos últimos existen no gracias a una voluntad externa que los ha puesto en funciones, sino gracias a un complejo mecanismo psicológico de los miembros de una comunidad que los consideran existentes y con fuerza vinculante[8].

El derecho, entonces, no es el producto de la voluntad de una autoridad suprema que lo crea, otorgándole unidad por provenir de una fuente homogénea y trasmitiéndole, además, fuerza vinculante. No es producto de una única fuente, fuente que es además la fuerza motriz del sistema. Concebirlo de esta forma, señala Olivecrona, es consecuencia de «nuestra inclinación natural a encontrar causas únicas para fenómenos complejos. La idea de una voluntad en el centro del sistema jurídico satisface este deseo»[9].

Siguiendo esta idea, Olivecrona explica que:

> En realidad, no hay una fuente homogénea de las reglas reconocidas como jurídicas. El origen del centro de las reglas antiguas se ha perdido en las nieblas de la historia; y nuevas reglas fluyen a la piscina común a través de diferentes canales. La relativa unidad del sistema jurídico resulta de la estabilidad de ciertas ideas acerca de derechos y deberes, de la existencia durable de las instituciones (legislativa, judicial, y administrativa), y de la aplicación continua de un cuerpo vasto de reglas conectadas con estas instituciones. *No hay una única fuerza motriz del sistema; la aplicación regu-*

6 Olivecrona 1971: 84.

7 Cfr. Olivecrona 1971, por ejemplo pp. 62-64 y 79-85.

8 Olivecrona considera que las ideas y las emociones de los individuos con respecto al fenómeno jurídico no sólo son fundamentales, y por tanto se debe dar cuenta de ellas al momento de realizar un análisis teórico. También considera que las nociones utilizadas en el lenguaje de estos individuos, así como el lenguaje jurídico en sí mismo, son hechos que constituyen el punto de partida para las investigaciones de la filosofía del derecho. Por este motivo, la investigación acerca de cuál es el contenido de estas nociones "internas" ocupa un lugar fundamental en el discurso de Olivecrona. Especialmente, porque es a través de estas nociones que puede comprenderse el contenido de las ideas y emociones que causan el comportamiento de los individuos.

9 Olivecrona 1971: 77.

> *lar de las reglas y su eficacia en gobernar la vida de la sociedad depende de una red de factores psicológicos y materiales* (ideas acerca de derechos y deberes, hábitos, creencia en la autoridad, temor a las sanciones, etc.). La teoría voluntarista substituye, con una voluntad imaginaria, esta infinitamente complicada realidad[10].

Por esta misma razón, Olivecrona rechaza incluso el uso metafórico que se hace de la noción de "voluntad legislativa". Por ejemplo, señala, Ross «defiende [el uso de Radbruch y Kelsen] del término 'voluntad' como forma de "personificar figuradamente la unidad sistemática del sistema jurídico". En su opinión, esto sirve para enfatizar que el orden jurídico es "un orden, una unidad, y no sólo un conglomerado de reglas"»[11], y luego que «Ross continúa diciendo que muchos de los detentores de posiciones oficiales son considerados como órganos de un poder único, "el Estado", que es la expresión del hecho de que están coordinados en una unidad sistemática; él piensa que es natural usar el término 'voluntad' para designar su unidad en una actividad»[12].

Sin embargo, Olivecrona considera que esta actitud es no sólo inútil, sino altamente engañosa. La razón es simple: se estaría adscribiendo una unidad ficticia, a través de lenguaje figurativo, a masas de elementos que en los hechos no la tienen. Esto vale, por una parte, para la masa de precedentes que constituye por ejemplo el *common law* inglés. Por otra parte, también vale para la masa de actividades de cientos o miles de funcionarios públicos, donde adscribir todas estas actividades a una única voluntad «es dar una impresión errada de los hechos»[13].

En conclusión, para Olivecrona y la teoría no voluntarista que defiende:

> (…) no hay derecho "positivo" en el sentido del término como usado por los positivistas jurídicos. Ninguna regla de derecho es la expresión de la voluntad de una autoridad existente antes del derecho en sí mismo. Lo que tenemos frente a nosotros es un cuerpo de reglas que ha ido cambiando y creciendo lentamente a través de los siglos. No tendría utilidad llamar derecho positivo a este cuerpo de reglas. El adjetivo "positivo" es completamente superfluo; puede ser engañoso porque está conectado con la idea de que el derecho es "puesto" ["posited"] en el sentido de ser la expresión de la voluntad de un legislador ["lawgiver"][14].

Olivecrona es consciente de que su definición de derecho puede parecer oscura y vaga. En efecto, señala que una teoría no voluntarista como la que propugna no tiene la ventaja psicológica de las teorías voluntaristas: la ventaja de permitir una

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10 Olivecrona 1971: 77. La traducción al castellano, y las cursivas, son propias. De ahora en más, todas las citas que se encuentren en castellano de Olivecrona 1971 son traducciones propias.

11 Olivecrona 1971: 76.

12 Olivecrona 1971: 77.

13 Olivecrona 1971: 77.

14 Olivecrona 1971: 77-78.

definición aparentemente clara y comprehensible de derecho[15]. Sin embargo, sí tiene la ventaja de ofrecer una desmitificación de aquellas fórmulas reduccionistas, y de permitir una visión menos distorsionada de lo que la realidad del derecho es: una realidad demasiado vasta y complicada para ser recogida adecuadamente en una fórmula breve[16]. Olivecrona llega incluso a afirmar que: «una definición del supuesto concepto de derecho no puede ser dada. Al final de la investigación, sólo podemos indicar algunas realidades dispares pero interconectadas que están abarcadas por el término»[17].

2.2. Derecho, autoridad e imperativos "jurídicos"

Olivecrona sostiene que los individuos conciben a la autoridad como un sujeto o grupo de sujetos que posee un derecho a emitir mandatos que poseen fuerza vinculante y hacia los cuales, por tanto, existe un deber objetivo de obediencia. Para los individuos, el derecho al mandato, el deber de obediencia y la fuerza vinculante existen como realidades objetivas. Todo aquello que provenga directa o indirectamente de la constitución en funciones[18], tanto las autoridades como aquellos imperativos a los cuales las autoridades califican de "jurídicos", participa de ese deber objetivo de obediencia. Como consecuencia, y por derivación, los individuos generalmente guían sus conductas de acuerdo con los imperativos que han sido calificados como jurídicos. La calificación de un imperativo como "jurídico" reconduce causalmente esta idea de deber objetivo de obediencia, presente en las mentes de los individuos, de la constitución hacia el imperativo particular.

De esta forma, el fenómeno jurídico, la autoridad y el derecho se explican para Olivecrona de un modo no voluntarista: el poder (causal) o la eficacia para guiar el comportamiento de los individuos no están dado porque los imperativos hayan

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[15] Al respecto, Olivecrona dice: «[e]l sistema de reglas "jurídicas" no es un sistema cerrado que puede ser identificado por criterios formales. Es un sistema "abierto" sin límites fijos» (Olivecrona 1971: 272). Incluye dentro del sistema jurídico, por ejemplo, no sólo reglas sobre la organización del Estado y sus actividades, sino todas las reglas dictadas de acuerdo con la constitución, reglas basadas en precedentes, y el indefinible cuerpo de principios, usos, y técnicas enunciadas en libros de textos, trasmitidas en tradición oral, y empleadas por aquellos a quien se les ha encargado la aplicación de las reglas (Olivecrona 1971: 272).

[16] Olivecrona 1971: 80. Olivecrona menciona, como ejemplo de otras teorías no voluntaristas dentro de la teoría del derecho, a aquellas de los realistas estadounidenses, como O.W. Holmes; de Leon Petrazycki; de H.L.A. Hart; y de otros realistas escandinavos como A. Hägerström y A. Ross (cfr. Olivecrona 1971).

[17] Olivecrona 1971: 272.

[18] Con "constitución (en función/es)", Olivecrona hace referencia al conjunto de «reglas fundamentales para la organización de la comunidad» (Olivecrona 1939: 60). Entre estas reglas, las más importantes son las reglas sobre la organización del Estado y sus actividades, que incluyen las formalidades requeridas para introducir y eliminar normas del sistema jurídico. Se trata, en general, del conjunto de reglas acerca de quiénes, a través de qué procedimientos, y en qué circunstancias, pueden hacer uso del poder de la organización estatal.

sido dictados por alguien (como un soberano), sino por las ideas acerca del deber objetivo de obediencia que ya poseen los individuos en relación con la constitución en funciones. Las normas jurídicas no son mandatos de una autoridad suprema sino imperativos independientes, no relacionados con la voluntad de nadie, cuya eficacia está dada porque hayan sido calificados como "jurídicos" por parte de las autoridades del sistema.

Así, puede verse cómo para Olivecrona el rol que ocupan estas autoridades del sistema es esencial, aunque no fundacional. Por un lado, llevan adelante procesos pacíficos y eficaces para introducir y quitar normas jurídicas del sistema en funciones (autoridades legislativas). Por el otro, llevan adelante procesos de aplicación de esas normas y de aplicación de sanciones en los casos de incumplimiento (autoridades judiciales). De esta manera, llevan adelante la compleja maquinaria de la institución organizada que actualmente se llama Estado, cuyo poder surge de los estados psicológicos de los individuos y sus actitudes de respeto hacia la constitución y el derecho[19].

Las autoridades del sistema guían eficazmente la conducta de los individuos, por tanto, a través de la fuerza sugestiva de imperativos emitidos de acuerdo con el cumplimiento de formalidades constitucionales, y del uso de un lenguaje regularizado y estable compuesto en gran parte por lo que Olivecrona llama "palabras vacías": 'derechos', 'deber', 'ley', 'autoridad', etc. «El propósito principal del lenguaje jurídico no es reflejar la realidad sino moldear la realidad», señala Olivecrona. «A este fin, se usan palabras que apelan a las emociones, palabras que incitan a la acción o inhiben la acción, y palabras con una función técnica»[20].

Al mismo tiempo, las autoridades del sistema contribuyen a mantener estable en el tiempo a la actitud de respeto a la constitución, a través del uso de la fuerza o la coerción. El más importante de los efectos de este uso no es el directo (esto es, la aplicación efectiva de sanciones o el ejercicio efectivo de coerción), sino el indirecto. Este último efecto funciona de modo escondido, y actúa a nivel psicológico volviendo a los individuos más propensos a aceptar la fuerza sugestiva de las normas jurídicas. Por este motivo, la fuerza o la coerción es un elemento esencial en el discurso de Olivecrona, y uno del cual la filosofía del derecho no puede no dar una cuenta acabada al analizar el fenómeno jurídico[21].

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[19] En este punto, el pensamiento de Olivecrona puede considerarse un refinamiento de las bases propuestas por Hägerström. Para una síntesis de la postura de este último, cfr. por ejemplo Hägerström 1939.

[20] Olivecrona 1962: 190-191.

[21] Reenvío, para un análisis de esta cuestión en Olivecrona y una propuesta de por qué un concepto de autoridad (y, derivado, de derecho) que no incluya como propiedad a la coerción no es adecuado para la teoría del derecho, a Rabanos 2020.

2.3. La máquina del derecho y sus engranajes

El rechazo al voluntarismo, el rol asignado a la autoridad (legislativa) y la particular concepción de las normas jurídicas como imperativos independientes se articulan para dar lugar a una particular concepción del derecho y los sistemas jurídicos: la concepción del derecho como una máquina, de la cual autoridades humanas (y las normas jurídicas) no son sino meros engranajes[22].

Como se ha visto, el rol de la autoridad legislativa es el de tomar la decisión de asignar del rótulo 'ley' a un determinado texto, que generalmente se realiza con un acto de promulgación[23]. Esta promulgación, si es hecha por determinados individuos de acuerdo con determinadas formalidades, funciona como "fulcro": hace que la actitud de obediencia que los individuos ya poseen hacia una constitución en funciones sea direccionada hacia el texto rotulado como 'ley'[24]. En otras palabras: traslada, causalmente, esas ideas generales de fuerza vinculante y obediencia de la constitución hacia las leyes individuales (los imperativos independientes)[25]. Produce, así, un importante efecto a nivel psicológico[26].

Olivecrona utiliza una metáfora para ilustrar el complejo entramado anterior, que muestra el funcionamiento de la máquina del derecho. El mecanismo legislativo, del cual participan las autoridades legislativas como parte esencial y cuyo resultado son normas entendidas como imperativos independientes, puede ser comparado con una central eléctrica:

> The common attitude towards the constitution corresponds to the water in the river. In the power-plant the energy of the current of water is transformed into electricity, which is distributed round the country-side to give light and heat and to set hammers and looms in motion. The power-lines are particular laws, promulgated according to the constitution. The significance of the act of legislating is that a new power-line is attached to the power-plant[27].

Esta metáfora ilustra bien la postura no voluntarista que propugna Olivecrona, donde el poder (o la capacidad de causar efectos) del derecho es preexistente e

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[22] La idea del derecho como una máquina no es invención de Olivecrona sino una propuesta de A. Hägerström, compartida luego por al menos dos de sus discípulos (Olivecrona y Lundstedt), aunque con diferentes exigencias y objetivos de fondo. En este sentido, Hägerström propuso la expresión «*social machine*» para referirse al derecho (cfr. Hägerström 1939); V. Lundstedt, por su parte, propuso la expresión «*legal machinery*» (cfr. Lundstedt 1956).

[23] Olivecrona 1971: 88.

[24] Olivecrona 1971: 130.

[25] Aunque no exista, para Olivecrona en su calidad de no-cognitivista moral, nada en el mundo a lo que 'fuerza vinculante' pueda referir.

[26] Olivecrona 1971: 90.

[27] Olivecrona 1939: 57.

independiente de cualquier autoridad. Lo que hacen las autoridades es simplemente redirigir este poder, siempre que sigan determinados procedimientos formales establecidos por el derecho preexistente e independiente[28]. En este sentido, el procedimiento en general, el rol que desempeña cada uno de esos individuos, y su 'derecho' de tomar parte en esos actos, se encuentra determinado por normas de la constitución en funciones[29].

Además, nada de lo descrito anteriormente depende de, o es expresión de, ninguna de estas autoridades (o de todas ellas en conjunto). La primera razón es que, por los motivos desarrollados en el punto anterior, Olivecrona sostiene que las leyes *qua* normas jurídicas no son expresión o declaración de la voluntad de nadie. Esta voluntad atribuida a una figura, como un soberano, es una ficción: como máximo, es una forma mediadora imaginaria entre los imperativos independientes y las mentes de los individuos. Es aún más ficticia cuando se trata no de un individuo, sino de un grupo colegiado como un parlamento. En este caso, hay cientos de voluntades diferentes, las cuales sólo a través de una ficción podrían ser colapsadas en una sola voluntad, la del "legislador"[30].

La segunda razón es quizás más sencilla: el mecanismo legislativo, en realidad, no requiere de ninguna voluntad. No es necesario que las autoridades legislativas, los sujetos competentes que participan en el mecanismo legislativo, posean ninguna intención o motivación particular. Pueden incluso no estar de acuerdo con lo que votan aprobar y, más aún, pueden no tener ni siquiera idea de qué es lo que están votando. A los efectos de la adscripción del rótulo de 'ley' a un texto, lo único que importa es que participen en el procedimiento legislativo tal como está establecido, y que además participen en la toma de decisión de promulgar el texto. Qué piensen, qué deseen, cuáles sean sus voluntades o estados emocionales, nada eso importa: lo que importa es que realicen oportunamente aquel acto que, de acuerdo con las formalidades establecidas, implica su decisión por la afirmativa o negativa para la transformación del texto en ley[31].

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[28] También, como se señaló al final del punto 2.2, la otra función de las autoridades es aquella de mantener estable a través del tiempo esa la actitud de respeto a la constitución a través del uso de la fuerza o la coerción.

[29] Olivecrona 1971: 88-89.

[30] Cfr. También Hägerström 1939, especialmente p. 356.

[31] En esta línea, Hägerström señala que «[…] the law exists, as an item of the legal order, when certain formal actions connected with a declaration have taken place in due constitutional manner. This is quite independent from the legislator's will […] those voting in the majority do then generally intend that the declaration shall actually come to force […] but this purpose in itself has not the least significance for endowing the law with force» (Hägerström 1939: 354).

3. La norma jurídica como imperativo independiente con carácter sugestivo

3.1. Elementos de las normas jurídicas como imperativos

Una norma o regla jurídica[32] es, para Olivecrona, el resultado de emitir y proclamar un texto como "ley" de acuerdo con la constitución. Es un medio utilizado para ejercer influencia en las mentes de los individuos y por consiguiente en sus comportamientos, con el objetivo de restringir o limitar determinadas actividades y de promover otras. La forma en la cual esta influencia es ejercida, señala Olivecrona, es simple. El texto debe ser capaz de provocar («*call forth*»)[33] ciertas ideas relacionadas con la conducta humana en la mente de un lector o de quien escucha su proferencia. Y no sólo eso: debe provocarlas de modo tal que «impress people with the feeling that the pattern ought to be followed when occasion arises»[34].

Estas dos cuestiones se reflejan en los dos elementos que, para Olivecrona, pueden encontrarse en toda norma jurídica. El primero es un elemento acerca de la representación ideal del patrón de conducta, que hace al contenido de la norma: el elemento ideacional, o *ideatum*. El segundo es un elemento acerca de la forma de expresión, relacionada con el fin que se persigue: el elemento imperativo, o *imperatum*[35].

Olivecrona concibe al *ideatum* como una idea de que debe realizarse una determinada conducta en una determinada situación. Está, a su vez, compuesto por dos elementos ulteriores: el *requisitum* y el *agendum*. El *requisitum* representa los requerimientos que deberían estar presentes cuando la acción debe ser llevada a cabo. El *agendum*, por su parte, es la acción en sí misma.

Ahora bien, ninguno de estos dos elementos puede ser completamente reconstruido si se toma en cuenta un único texto o, incluso, un único sector del derecho:

> There is, indeed, no case where a single legal provision can be regarded in isolation by the judge or by any other person called upon to decide what sort of action confirms to the law in a given situation. Each provision is like a piece in a puzzle (…)

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[32] Usaré en lo que sigue, intercambiablemente, los términos 'regla' y 'norma'. Ésta no es una elección teórica ni una toma de posición, sino una elección simplemente lingüística. En sus escritos en inglés, Olivecrona utiliza las expresiones «legal rule» y «rule», mientras que en castellano generalmente se habla de «norma jurídica» y «norma» (cuando no quiere hacerse una diferencia expresa entre reglas y principios, como diferentes tipos de norma).

[33] Hago aquí esta salvedad pues «*call forth*» puede ser ambiguo en este sentido: puede significar tanto "causar" como "proponer" o "sugerir", e incluso "dar lugar a". Esto, que parece una mera cuestión terminológica, puede tener consecuencias importantes si se toma en cuenta la posición de Olivecrona con respecto al origen de la eficacia de la constitución y, en consecuencia, de las normas jurídicas. Baste aquí señalar que sería posible entender la expresión usada por Olivecrona en varios sentidos no completamente equivalentes.

[34] Olivecrona 1971: 115.

[35] Olivecrona 1971: 115, 118.

> The *requisitum* and the *agendum* of the respective legal provisions are the material out of which the final *requisitum* and *agendum* are built. In many cases the purpose of the pieces is to contribute to determining the *requisitum* or the *agendum* laid down in a number of other rules[36].

Esta circunstancia, así como las diferentes técnicas existentes en diferentes tiempos y lugares, hacen que la composición del *ideatum* de las normas jurídicas sea materia de controversia. Lo más importante para Olivecrona, sin embargo, es señalar que cada norma debe establecer una situación en la cual la acción debe llevarse a cabo. Si no lo hiciera, entonces fallaría como medio para dirigir la conducta humana[37]. Todas las normas jurídicas tienen ese objetivo, incluso aquellas que no parecen en principio destinadas a dirigir la conducta sino a la creación, cambio y eliminación de 'derechos' y 'deberes'[38]. Como veremos más adelante, Olivecrona entiende que nociones vacías como esas tienen tanto una función directiva como informativa, por lo cual su afirmación se sostiene.

En cuanto al *imperatum*, Olivecrona argumenta que la forma de expresión de las normas jurídicas está determinada por el propósito de guiar la conducta. Por su rechazo al voluntarismo, Olivecrona rechaza que esta forma pueda ser la expresión de un deseo por parte de alguna autoridad; y también rechaza que pueda tratarse de consejos, dado que no tienen una forma condicional relacionada con la obtención de algún resultado deseado por el agente. Dada esta incondicionalidad[39], Olivecrona concluye que la forma de expresión de las normas jurídicas es el imperativo[40].

La formulación de una norma puede ser tanto en modo imperativo como en modo indicativo, como de hecho sucede habitualmente[41]. Al respecto, sostiene Olivecrona que:

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[36] Olivecrona 1971: 117. Esta idea de Olivecrona tiene algunos puntos de similitud con la idea de Kelsen acerca de los "fragmentos de norma", destinados a formar parte del antecedente o acto antijurídico de una norma genuina (cfr. Kelsen 1993). La diferencia fundamental radicaría en que Olivecrona no propone una "norma genuina" de la cual otras, que no respondan a su estructura, están llamadas a ser parte como fragmentos.

[37] Olivecrona 1971: 118.

[38] Olivecrona 1971: 118. Incluso normas jurídicas como las del derecho penal, que Olivecrona entiende como dirigidas principal o exclusivamente hacia la conducta de las autoridades encargadas de la aplicación de sanciones, también se dirigen (aunque indirectamente) hacia la conducta de los ciudadanos en general. Nuevamente, no es difícil pensar a la cercanía entre esta idea y las categorías kelsenianas de norma primaria y norma secundaria (cfr. Kelsen 1993).

[39] No debe entenderse aquí "incondicional" en el sentido usual de "norma categórica" o sin presencia de una hipotética situación que deba ser el caso para que la conducta sea requerida. Es incondicional en el sentido de que no se ofrece una ventaja como la razón por la cual se debería actuar de la forma prescrita. Cfr. Olivecrona 1971: 118-119.

[40] Olivecrona 1971: 118.

[41] Olivecrona 1971: 127.

> Lo importante es que el derecho en su conjunto sea presentado en un sentido imperativo. El texto es publicado en una forma conocida por ser efectiva en hacer que la gente se sienta obligada a comportarse en conformidad con los patrones [de conducta] enunciados. Es sólo una cuestión de estilo si los patrones de conducta son expresados en la forma indicativa o como imperativos[42].

3.2. El rechazo a las normas jurídicas como mandatos: el resabio del voluntarismo

Si las normas jurídicas son imperativos, ¿no significaría eso que se trata de mandatos? Si así fuese, entonces se necesitaría una autoridad que los emitiese. De este modo, se llega a la conclusión de que la existencia de una autoridad suprema es necesaria, a la que mínimamente pudieran reconducirse todos los elementos que componen el sistema jurídico, tal como lo afirman las teorías voluntaristas. Esto, según Olivecrona, parecería llevar a un dilema: por un lado, las leyes tienen un carácter claramente imperativo; por el otro, por las razones que ya hemos visto, no puede afirmarse ni la existencia de una autoridad que comanda ni los mandatos pueden emitidos vía legislación.

La clave para salir de este dilema se encuentra, para Olivecrona, en la noción de imperativo. El dilema asume que los únicos imperativos son los mandatos, pero esa es una premisa errónea. Existe al menos otra categoría de imperativos, los imperativos impersonales, cuya consideración disuelve el dilema. De estos imperativos nos ocuparemos en el punto siguiente. Aquí veremos qué entiende Olivecrona por mandato, y cuáles son las razones por las cuales rechaza que las normas jurídicas sean concebidas como tales.

Olivecrona sostiene que una forma tradicional de entender los mandatos, como aquella presente en las teorías de Austin y Bentham, los define como declaraciones de voluntad de quien manda, cuyo contenido es la expresión de un deseo de que el destinatario del mandato actúe de determinada manera. Para Austin, además, la efectividad de un mandato depende de que sea acompañado de una amenaza plausible. Olivecrona, por su parte, considera que ambas cosas son erróneas. En primer lugar, un deseo puede ser un motivo para proferir una frase imperativa, pero no es el único motivo posible. Además, la proferencia de la frase imperativa es generalmente un medio para conseguir la realización del deseo, no una mera expresión del deseo o una aseveración acerca de su existencia. En segundo lugar, si bien se eleva la posibilidad de obediencia con la presencia de una amenaza, es perfectamente posible pensar en situaciones donde la efectividad no dependa de la existencia de una amenaza. Por ejemplo, situaciones donde el emisor tenga una fuerte personalidad[43].

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[42] Olivecrona 1971: 119. La cursiva me pertenece.

[43] Olivecrona 1971: 123. Sin duda, este sería el caso cuando se trata de un líder carismático en términos de Weber (cfr. Weber 2013).

En la forma moderna de entender los mandatos, por su parte, Olivecrona entiende que el requerimiento de poder en el emisor del mandato «aparece en la forma de que se dice que es necesario que tenga un derecho al mandato. El concepto de mandato es presupuesto. Dado que los mandatos pueden ser emitidos sin ninguna pretensión de un derecho a hacerlo, el significado debe ser que un mandato puede no tener efecto a menos que el emisor posea el derecho al mandato»[44]. Olivecrona, sin embargo, también considera que debe rechazarse esta postura por dos razones.

La primera razón es que la existencia de un derecho al mandato sólo puede tener alguna importancia si este «derecho tuviese alguna fuerza mística que compela a la obediencia. Pero esta sería una suposición absurda»[45]. Olivecrona, como no-cognitivista y comprometido con una metodología realista, considera que el único requerimiento que racionalmente puede existir es un requerimiento psicológico relativo a la eficacia del mandato. Y desde un punto de vista psicológico, señala Olivecrona, un derecho al mandato sólo puede tener importancia como idea en la mente del destinatario:

> El derecho en sí como realmente existente (y eso si pudiera decirse que un derecho realmente exista) no puede ejercer influencia en el comportamiento del destinatario excepto a través de la mediación de [la] idea [del destinatario] acerca de su existencia: y si el destinatario tiene esta idea, es irrelevante si el derecho realmente existe[46].

La segunda razón, conectada estrechamente con lo anterior, es que sin duda la idea de un derecho al mandato tiene gran relevancia como parte de aquello que causa que el destinatario obedezca. Sin embargo, la obediencia puede acaecer por otras razones (como el miedo, el hábito, la pura sugestión, el respeto personal por el emisor del mandato, o una combinación de éstas). En este sentido, Olivecrona sostiene que la idea de un derecho al mandato «sólo es un elemento contingente en una situación psicológica complicada»[47]. Su propia concepción acerca de las causas de la obediencia reafirma esta idea.

Tampoco funcionaría reducir los imperativos a indicativos o "proferencias constatativas", sea como enunciados acerca de la mente del hablante o enunciados acerca de ocurrencias futuras que implican que sucederá algo desagradable si el destinatario no actúa de una determinada manera. Habiendo rechazado el primer tipo, Olivecrona también rechaza el segundo pues supone una visión demasiado racionalista del comportamiento humano, que entiende falsa. Un mandato no sólo es no condicional, en el sentido de que no hace referencia a un fin o valor del desti-

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44 Olivecrona 1971: 123-4.
45 Olivecrona 1971: 124.
46 Olivecrona 1971: 124.
47 Olivecrona 1971: 124.

natario (como puede ser su no sufrimiento o su placer), sino que además funciona a través de la sugestión y no del razonamiento. La fuerza imperativa está dirigida a la parte volitiva de la mente del destinatario, no a la parte intelectual[48]. Es una característica esencial de los mandatos que tengan una función sugestiva, característica que Olivecrona encuentra olvidada si se conciben a los mandatos como indicativos o constatativos[49].

Cuando se trata de mandatos, Olivecrona sostiene que hay dos elementos claves para su eficacia. Por un lado, la expresión y el porte del hablante son muy importantes, así como el modo en el cual es proferida la frase en modo imperativo. Por el otro, si se quiere eficacia a gran escala, se debe acostumbrar a los destinatarios a recibir mandatos de ese hablante. Cuanto más acostumbrados se encuentren, menos esfuerzo personal deberá hacer el hablante para lograr a obediencia. Es justamente en este marco donde se ve lo que Olivecrona señalaba, acerca de qué rol tienen las ideas de la existencia de 'autoridad' o 'derecho al mandato' en la mente de los individuos:

> The contention that 'authority' or 'right to command' is needed for a command to be effective stems from the experience that some preparation in the recipient is generally required. *But the legal or moral relationship expressed by words like 'authority' and 'right' is substituted for the actual psychological factors that cause one man's behaviour to be directed through the commands of another*[50].

Se puede apreciar aquí por qué Olivecrona sostiene que un rasgo esencial del mandato, y del imperativo en general, es poseer fuerza sugestiva. El *imperatum* se dirige hacia la parte volitiva de la mente del destinatario, no a la parte intelectual. Se dirige, para Olivecrona, de la siguiente manera: la idea de que el comportamiento debe ser realizado es provocada («*aroused*») por el elemento ideacional o *ideatum* del mandato. Así, es el *ideatum* el que provoca, o hace surgir, determinadas emociones relacionadas con la necesidad o la compulsión de hacer aquello representado por la imagen mental. Dice Olivecrona: «[e]l eco del *imperatum* en la mente del destinatario es "yo debo" o algo parecido. Pero no se evoca otra idea a parte de la imagen mental de las palabras mismas. Nada es significado por el "debo" o sus equivalentes"»[51].

Los *imperatum* pueden ser tanto espontáneos como estandarizados o convencionales. Los espontáneos generalmente son la forma del lenguaje, el modo en el cual se habla, y el porte del hablante. Los estandarizados o convencionales, por su parte, se establecen para hacer que sea cosa natural que personas en determinadas posiciones

48 Olivecrona 1971: 128.
49 Olivecrona 1971: 126.
50 Olivecrona 1971: 127-128. La cursiva me pertenece.
51 Olivecrona 1971: 128.

deban seguir órdenes de personas en otras posiciones. Entre los más importantes, señala Olivecrona, se encuentran las formalidades que se usan para llevar a cabo diferentes pronunciamientos.

Las formas (y formalidades) tienen un papel fundamental para el discurso de Olivecrona, que afirma: «las formas son necesarias en toda sociedad como un medio de señalar qué pronunciamientos tienen que ser tomados como guías de acción y, por sobre todas las cosas, tomados como jurídicamente relevantes»[52]. Aquí, Olivecrona está pensando en las formalidades establecidas para la promulgación de las leyes, que es justamente en el marco de las cuales las autoridades (legislativas) llevan adelante su rol esencial para el fenómeno jurídico.

3.3. Las normas jurídicas como imperativos independientes

Rechazado por las razones anteriores que las normas jurídicas sean mandatos, quedaría por responder la pregunta de qué serían. Para Olivecrona, es claro que se trata de imperativos. Pero son imperativos que no participan del tipo especial de relación que implican los mandatos, un tipo de relación cara-a-cara entre dos individuos. Ésta es una relación personal que claramente uno no encuentra en el caso de las normas jurídicas; y es además un tipo de relación de la cual no participan, necesariamente, todos los imperativos[53]. En este sentido:

> Hábitos del lenguaje nos vuelven propensos a pensar en 'imperativos' como algo idéntico a los mandatos en el sentido estricto de la palabra. Parece incluso haber alguna dificultad psicológica para concebir a los imperativos sin referirlos a un *imperator* dirigiéndose a alguien más. La cuestión es, sin embargo, muy simple. Las frases imperativas pueden ser formuladas de muchas formas y diseminadas a través de muchos canales. No es necesario un *imperator*. El destinatario puede ser una audiencia de millones[54].

No es difícil ver cómo esto se conecta con la postura no voluntarista que Olivecrona propugna. De la misma forma que el derecho no "necesita" (ni siquiera conceptualmente) de una autoridad suprema que le dé fuerza obligatoria o unidad, o que sea una expresión de su voluntad, los imperativos no requieren necesariamente (ni siquiera conceptualmente) de la existencia de un individuo que ocupe el lugar de emisor o ser expresión de la voluntad de alguien. Ambas afirmaciones están relacionadas si se asume que el derecho sea, o esté compuesto de elementos de tipo, imperativo.

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[52] Olivecrona 1971: 128.

[53] Para una lista más extensa de las diferencias entre mandatos e imperativos independientes, véase Castignone 1995.

[54] Olivecrona 1971: 129.

Sobre esta idea se apoya Olivecrona cuando introduce la categoría de imperativo independiente. Estos se definen como imperativos que son independientes de la relación personal que caracteriza a un mandato. Es decir, se trata de imperativos que existen sin una relación personal entre dos individuos, especialmente una de proximidad física (cara a cara). Esto hace que la categoría de imperativos independientes sea muy amplia, comprendiendo desde enunciados éticos hasta actos legislativos. Comparten con los mandatos, sin embargo, una característica básica: aquella de ser un medio para inculcar un cierto comportamiento en una forma categórica[55]. O, en otras palabras: ser un modo de expresión usado en una forma sugestiva para influenciar el comportamiento de las personas[56].

Frente a esta definición, se impone comprender cuándo exactamente existe una relación personal y cuándo no. Aquí, Olivecrona señala que no existe una forma tajante de diferenciar entre mandatos e imperativos independientes justamente porque lo que llama "relación personal" puede ser una de mayor o menor cercanía. Cuanta más separación se produzca entre los individuos, los imperativos que originalmente fueron mandatos pueden asumir el carácter de imperativos independientes[57]. Una persona cualquiera o un dios pueden ser imaginados, señala Olivecrona, como un modo de mediar esta distancia.

Concebidas como imperativos independientes, las normas jurídicas o «*rules of law*»:

> forman un vasto complejo de estas expresiones [las usadas en una forma sugestiva para influenciar el comportamiento de las personas] que contienen patrones de conducta que son más o menos universalmente seguidos al interior de un grupo de personas. Su eficacia depende de un conjunto de actitudes relativamente firmes entre las personas que, a su vez, tienen causas múltiples y profundamente arraigadas[58].

Como puede verse, Olivecrona asocia íntimamente a la norma jurídica con el concepto de eficacia; y la eficacia, entendida como el seguimiento más o menos universal de ésta, se debe a un conjunto complejo de razones que son heterogéneas. Probablemente, estas razones no son las mismas para todos los miembros de ese grupo de personas, pero definitivamente asentadas se encuentran con firmeza en las mentes y las emociones de los individuos[59].

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55 Olivecrona aclara, en nota al pie, que éste es el mismo concepto que Ross llama "directivas" (Olivecrona 1971: 129, n. 12).

56 Olivecrona 1971: 130.

57 Ésta es, de hecho, parte de la explicación que Hägerström ensaya con respecto a la idea de "deber objetivo". Para Hägerstrom, lo que empezó como mandatos fue objetivándose lentamente con la distancia física y personal cada vez mayor entre individuos una vez que las sociedades comenzaron a complejizarse y a crecer exponencialmente de número.

58 Olivecrona 1971: 130.

59 Olivecrona 1971: 130.

Olivecrona señala que el *imperatum* de las «normas de derecho» no es el mismo en todos los casos, dado que no todas las normas que integran el derecho tienen el mismo tipo de origen. En este sentido, Olivecrona reconoce al menos tres tipos de casos: derecho promulgado, derecho consuetudinario antiguo, y derecho judicial. En cada uno de ellos, el *imperatum* de estos imperativos independientes es diferente.

Con respecto al derecho consuetudinario antiguo, Olivecrona considera que nada puede decirse específicamente dado que las condiciones y formas son muy diversas y han cambiado enormemente según los lugares y las épocas[60]. Con respecto al derecho judicial, Olivecrona señala que éste no coincide con los pronunciamientos (en casos concretos) de los tribunales[61]. Son las decisiones de los tribunales y de los juristas con peso en la doctrina los que deciden aceptar que determinadas decisiones han de ser guías para sus propias conductas, lo más cercano a algo parecido a la promulgación de una ley[62].

Con respecto al derecho promulgado, o derecho legislativo, se tratan de imperativos independientes que han pasado a través de una serie de actos formales. Así, el *imperatum* de cada una de las leyes promulgadas es el escenario completo en el cual tiene lugar la promulgación. Este escenario, siguiendo a Olivecrona, surge de una constitución en funciones y de la organización que funciona de acuerdo con sus reglas. Cuando esta constitución en funciones está establecida firmemente, «las personas responden automáticamente aceptando como vinculantes los textos proclamados como leyes a través del acto de promulgación. Gracias a esta actitud entre los destinatarios, el *imperatum* se vuelve eficaz»[63].

[60] Olivecrona explica, por ejemplo, el caso de este tipo de derecho en Suecia, donde finalmente encuentra que se usaban formas que incluían tanto el lenguaje imperativo como diversos otros elementos, que contribuían a crear una sensación de sacralidad de las reglas y de tomarlas como guías incondicionales de conducta (cfr. Olivecrona 1971: 131).

[61] Aunque también dice que «el rol real del tribunal es aquel de ser un legislador [«lawgiver»] para casos particulares. Las reglas jurídicas, ya sea estipuladas a través de actos de legislador o desarrolladas de otra forma, no pueden dar patrones de conducta para cada contingencia (…) Esta tarea es encargada a los tribunales. Ésas suplementan las reglas abstractas de derecho mediante la estipulación de reglas particulares para casos particulares» (Olivecrona 1971: 211). Y aún más: «Los tribunales no son solo espectadores (…) Representan una fuerza dinámica en la sociedad, moldeando las relaciones de las partes como legisladores [«*lawgivers*»] suplementarios y directores de la fuerza ejecutiva del Estado» (Olivecrona 112-211 :1971).

[62] Olivecrona 1971: 132.

[63] Olivecrona 1971: 130.

4. Algunos problemas de la concepción de norma jurídica como imperativo independiente con carácter sugestivo

4.1. El problema de la identificación vía un elemento formal estructural

4.1.1. Reduccionismo y no exclusividad en el derecho

Bobbio considera que la propuesta de Olivecrona es una entre las tantas, en teoría del derecho, que intentan encontrar un rasgo característico de las normas jurídicas en relación con otros tipos de normas, prescindiendo de la consideración de los propósitos o del contenido. Es decir: encontrar un elemento formal que contribuya a esa identificación. Lo que la hace novedosa, en opinión de Bobbio, es que Olivecrona encuentra esa característica formal no en el sujeto pasivo o en la acción objeto de la norma jurídica, sino en su sujeto activo[64].

Hay dos críticas que Bobbio dirige a la propuesta de la norma jurídica como imperativo impersonal, considerada como un intento de encontrar un rasgo característico de las normas jurídicas en un elemento formal. La primera es que se trataría de una teoría reduccionista, pues intentaría reducir todas las normas jurídicas a un solo tipo de imperativos. Una teoría de este tipo, según Bobbio, es «unilateral y está destinada a empobrecer arbitrariamente la riqueza de la experiencia jurídica», dado que «el ordenamiento jurídico es un conjunto complejo de reglas y como tal está compuesto de reglas de diferente tipo»[65]. Bobbio considera, además, que sería muy difícil demostrar que todos los imperativos jurídicos sean impersonales tal como planteados por Olivecrona. Como ejemplo, cita la sentencia de un pretor (imperativo jurídico, aunque referido a una persona determinada), la ordenanza de un funcionario administrativo regional (sujeto activo claramente identificado), y una orden impuesta por un rey absoluto o un déspota (también sujetos activos claramente identificados).

La segunda crítica es que, incluso si se considera que los imperativos impersonales son el tipo o bien exclusivo o prevalente en el derecho, de todas formas es difícil que este tipo de imperativo no se encuentre también en otras esferas normativas que no sean jurídicas. Como ejemplo, Bobbio cita a los diez mandamientos (también citados por Olivecrona) y las «así llamadas normas sociales en las cuales la impersonalidad es todavía más evidente que en las leyes emanadas por un parlamento»[66].

4.1.2. Una respuesta sobre la no exclusividad jurídica

En relación con esta última crítica, Olivecrona podría responder que existe una confusión por parte de Bobbio con respecto a su postura. Bobbio parece asumir que

[64] Bobbio 1993: 86-87.
[65] Bobbio 1993: 87. La traducción del italiano es propia.
[66] Bobbio 1993: 87. La traducción del italiano es propia.

la calificación de "norma jurídica" estaría dada por el hecho de que un imperativo sea un imperativo impersonal. Pero el criterio para determinar si algo es una norma jurídica o no, señalaría Olivecrona, es que haya sido incorporada como tal por parte de una autoridad del sistema siguiendo una serie de formalidades constitucionales[67]. Así, tanto "no matarás" (Diez Mandamientos) como "al que matare a otro se le aplicará pena de prisión de ocho a veinticinco años" (art. 79, Código Penal argentino) serían para Olivecrona imperativos independientes; pero sólo el segundo, por haber sido proclamado 'ley' por la autoridad legislativa constitucional argentina, es una norma jurídica. Teniendo en cuenta lo anterior, puede decirse que no todos los imperativos independientes son normas jurídicas; pero todas las normas jurídicas, según Olivecrona, serían imperativos independientes.

Esto parece sugerir que Bobbio se equivocaría al sostener que Olivecrona pretende encontrar un criterio formal, en el sentido de un elemento estructural de las normas, para su calificación o no como jurídicas. El criterio es efectivamente formal, pero relacionado con su pertenencia a un sistema jurídico determinado: una pertenencia determinada por su incorporación por ciertas autoridades del sistema con arreglo a determinadas formalidades establecidas en la constitución en funciones.

De hecho, la insistencia de Olivecrona en señalar que las normas jurídicas son imperativos independientes tiene que ver no con su estructura sino con su funcionamiento (del cual esta estructura es reflejo). Son imperativos independientes porque funcionan, esto es son eficaces en causar el comportamiento, independientemente de quién sea el sujeto activo. Es decir, no es el sujeto activo quien (por su voluntad o cualquier otra característica) les da "poder" o "fuerza vinculante", como pasaría en el caso de otros imperativos dependientes. Funcionan porque su declaración como 'norma jurídica' o 'ley', bajo determinadas condiciones, logra direccionar el previo "respeto a la constitución" de los individuos hacia el imperativo independiente particular, y así establecer una conexión psicológica entre el patrón de conducta y un sentimiento de constricción hacia la realización de la acción[68]. Lo mismo pasa con cualquier otro imperativo independiente, el cual puede tener idéntico carácter sugestivo; pero su eficacia no podría explicarse de esta manera.

4.1.3. Una respuesta sobre el reduccionismo en sí: imperativos performatorios

Queda en pie, sin embargo, la primera crítica en cuanto a que la teoría sería reduccionista. Esta crítica no sólo es planteada por Bobbio, con relación a elementos

[67] Cfr. también Hägerström 1939, especialmente p. 355.

[68] Recuérdese aquí la metáfora del legislador como central eléctrica o «*power-plant*» de Olivecrona (Olivecrona 1939: 57). Para la misma idea, Hägerström usó una metáfora diferente: el legislador como el conductor de un automóvil (cfr. Hägerström 1939: 355). Agradezco al/la referí anónimo/a que señaló la necesidad de mostrar aquí explícitamente la fuerte similitud, y probablemente dependencia, del pensamiento de Olivecrona al de Hägerström sobre el punto.

estructurales de las normas, sino es también relevada por el mismo Olivecrona, en relación con la calificación misma de imperativos de todas las normas jurídicas[69].

En este sentido, Olivecrona releva la sugerencia de que las normas jurídicas de un sistema no sólo parecen dirigidas a las conductas de los individuos cuando tratan acerca de "preguntas jurídicas" relativas a, por ejemplo, la adquisición, transferencia y pérdida de derechos o calidades jurídicas[70]. En estos casos, «the rules governing these legal questions are not imperatives because they do not say that you shall behave in this or that way»[71]. Por lo cual, concebir a las normas jurídicas como imperativos independientes no sólo sería reduccionista por considerar que todas corresponden a un único tipo de imperativos, sino también por considerar que *todas* son imperativos.

Olivecrona ensaya una respuesta a esta crítica con la introducción, posterior a la primera edición de *Law and Fact*[72], de la idea de los así llamados "performativos jurídicos". Primero, señala que la objeción se basa en una asunción sin fundamentos: que los imperativos son «necessarily imperatives of conduct»[73]. Esta sería una idea preconcebida a la cual ni siquiera se adecúa nuestro lenguaje real, donde se usan formas imperativas muchas veces para actos que no implican una orden. Un ejemplo de esto sería «'This shall be your property'», proferido por un padre a su hijo al mismo tiempo que le entrega su reloj. Aquí parece claro, para Olivecrona, que el imperativo no está dirigido a que el hijo haga nada sino a que el hijo adquiera la propiedad del reloj[74].

Olivecrona sostiene que, aunque este tipo de lenguaje resulte extraño, es un hecho que lo tenemos, lo utilizamos, y que es una parte muy importante del lenguaje jurídico. A este tipo especial de imperativos, tomando la terminología de J.L. Austin, Olivecrona los llama imperativos performatorios («*performatory imperatives*»), y los define de la siguiente manera:

> Their meaning is that something should come to pass: a right should be created or transferred; a person should acquire a legal quality. This effect is held to be brought about through these imperatives[75].

Los imperativos performatorios son especiales dado que no están dirigidos a nadie en particular (carecen de un sujeto pasivo determinado) y tienen la intención

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69 Como señala Olivecrona, ésta es una crítica general que se ha dirigido hacia todas las teorías agrupadas bajo la etiqueta de "imperativistas", que conciben al derecho como un conjunto de imperativos de algún tipo.

70 Olivecrona 1971: 133.

71 Olivecrona 1971: 133.

72 Lo hace por primera vez en Olivecrona 1962, cuando se ocupa el problema de la "unidad monetaria", y la consolida en la segunda edición de *Law as Fact* (Olivecrona 1971).

73 Olivecrona 1971.

74 Olivecrona 1971: 134.

75 Olivecrona 1971: 134.

no de ordenar que alguien haga algo sino de evocar determinados efectos, los cuales se espera que sigan de la proferencia bajo un conjunto correcto de circunstancias[76]. Olivecrona entiende que no es problemático pensar en un imperativo sin sujeto pasivo determinado, pues hay inmensa cantidad de ejemplos de su uso habitual en la legislación[77]. Sí merece particular atención esos "efectos evocados", los así llamados "efectos jurídicos", que Olivecrona considera que no pueden ser otra cosa que efectos psicológicos.

La idea básica de Olivecrona en este punto es la siguiente[78]. Es claro que no existen los llamados "efectos jurídicos" en el mundo espaciotemporal, sino (en todo caso) en una realidad suprasensible: la "esfera del derecho". Sin embargo, los individuos no sólo tienen ideas acerca de la existencia de estos "efectos jurídicos", sino que además tienen ideas sobre los comportamientos correctos que se seguirían de la existencia de estos efectos. En este marco, los imperativos performatorios funcionarían de la siguiente manera. Por un lado, son el nexo entre ambas realidades: perteneciendo al mundo espaciotemporal, se considera que refieren y moldean aquella realidad suprasensible de la "esfera del derecho". Por el otro, pronunciados bajo las condiciones correctas, dan la idea a los individuos de que se producen estos "efectos jurídicos" y, en consecuencia, se vuelven operativas aquellas ideas sobre los comportamientos correctos que se siguen de la existencia de los "efectos jurídicos"[79].

Se ve así cómo, para Olivecrona, las normas jurídicas que conciernen derechos, deberes y calidades jurídicas son también imperativos. Tal como en las otras normas jurídicas, se dirigen a guiar el comportamiento de los individuos. A través de su proferimento en determinadas circunstancias correctas, son considerados por los individuos como evocando efectos no-psicológicos (efectos jurídicos); y esa evocación conecta, a nivel psicológico, el supuesto acaecimiento de estos efectos jurídicos con una serie de comportamientos correctos que deben seguirles.

Como puede apreciarse, éste es un mecanismo de causa y efecto. Una proferen-

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76 Olivecrona 1971: 219.

77 Olivecrona 1971: 221.

78 Olivecrona usa como punto de partida un análisis de algunas figuras jurídicas de la Antigua Roma, explicando que allí los imperativos performatorios eran pronunciados bajo solemnidades rituales asociadas con la magia y la religión. Olivecrona realiza un extenso análisis acerca del posible origen de los imperativos performatorios, que se conecta con sus ideas acerca del origen de la primera constitución (en su búsqueda de analizar la actitud de "respeto por la constitución"). Una de sus conclusiones es que, en tiempos modernos, la eficacia causal de los imperativos performatorios que primero se encontraba en esta idea de la magia o la religión ha pasado a encontrarse en la ficción de la "voluntad" de una autoridad suprema. Cfr. Olivecrona 1971: 226-233, y cap. 9. También sobre este punto, el pensamiento de Olivecrona puede verse como una refinación del pensamiento de Hägerström, el primero de los realistas escandinavos en proponer este enfoque. Cfr., para un resumen, Hägerström 1939.

79 Usando terminología de Hägerström, se activaría así la "disposición moral positiva" (cfr. Hägerström 1939: 352, 355).

cia hecha bajo determinadas circunstancias correctas[80] establece el supuesto acaecimiento de un hecho (creación de determinados efectos jurídicos) y, de allí, se sigue un efecto psicológico causal que vincula un patrón de conducta determinado con un sentimiento de constricción hacia su realización. También en este caso, la eficacia del imperativo performatorio está basada en la previa e independiente existencia de estas ideas en los individuos (ideas acerca de 'derechos', 'deberes', 'calidades jurídicas'; ideas acerca de comportamientos correctos que se siguen de determinados acaecimientos); y funciona como medio para redirigir estas ideas y sentimientos a determinadas acciones y situaciones[81].

4.1.4. El balance de la respuesta: imperativos, normas permisivas y normas de competencia

¿Es esta respuesta de Olivecrona suficiente para hacer frente a las críticas de reduccionismo? Entiendo que depende, por un lado, de cómo se entiendan estos imperativos performatorios y, por el otro, de cuán dispuesto se esté a aceptar las bases ontológicas y metodológicas de Olivecrona.

En cuanto a lo primero, parecería ser que las normas jurídicas que son imperativos performatorios son, a su vez, imperativos independientes. Ello así porque, siendo imperativos, participan de las mismas características de estos últimos: no existe una relación personal entre dos partes, como en los mandatos; no existe un sujeto pasivo determinado; su eficacia no dependería del sujeto activo (quien sólo es relevante en cuanto cumpla las formalidades del caso); y pueden ser convertidos a afirmaciones sin mayores inconvenientes. Si esto es así, entonces la primera crítica de Bobbio parecería continuar en pie.

Ahora bien, incluso si efectivamente Olivecrona redujera todas las normas jurídicas a "imperativos", ¿tendría este reduccionismo las consecuencias que Bobbio

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[80] Las circunstancias correctas refieren al uso de determinadas reglas: «[t]o fulfill its social functions, speech cannot be disorderly. There are certain rules governing its use» (Olivecrona 1971: 249). Aquí creo que podría parangonarse esta afirmación de Olivecrona a las "condiciones de felicidad" de J.L. Austin (Austin 1962). De hecho, Olivecrona toma fuertemente en cuenta a J.L. Austin (cfr. por ejemplo Olivecrona 1971: 233-238).

[81] Las palabras 'derecho subjetivo', 'deber', 'calidad jurídica' son palabras vacías, cuya «function in our language is primarily to serve as guides to action. When used according to rules, or at least when supposed to be used in such a what, they become points of reference for consequential ideas concerning correct and obligatory behaviour. Such consequential ideas are inculcated from an early age, regulated through rules, and impressed by means of sanctions (social and legal). The result is that real positions of power are established, real bonds are created, and certain attitudes in relations to personas and things are formed» (Olivecrona 1971: 252). Olivecrona entiende además que el uso regularizado de estas palabras lleva a que, cuando supuestamente son usadas de modo correcto, se encuentran conectadas con ideas uniformes acerca de comportamiento correcto, actitudes fijas y escalas de valor relativamente comunes; se transforman en un instrumento de control social y permiten el desenvolvimiento de la vida social en sentido amplio. «The mediating idea that the words signify suprasensible entities and qualities covers up the real function of our legal language» (Olivecrona 258 :1971).

le asigna? Esto es, ¿«empobrecería la riqueza de la experiencia jurídica» o, en cualquier caso, empobrecería las herramientas teóricas para dar cuenta de normas jurídicas como las normas permisivas o las normas que confieren potestades?[82] Este último punto sería de particular relevancia, también, para dar cuenta de otro tipo de crítica como la de H.L.A., no directamente dirigida a Olivecrona, sino a otras corrientes consideradas como "imperativistas" como la de J. Austin[83].

En mi opinión, la posición "reduccionista" de Olivecrona no parece participar de esas consecuencias negativas señaladas: podría perfectamente dar cuenta tanto de normas jurídicas permisivas, por un lado, y de normas jurídicas que confieren potestades, por el otro (y, en sentido más general, de normas constitutivas en sentido amplio). La piedra angular de ello puede ser encontrada en el expreso rechazo de Olivecrona a la equiparación de "imperativo" a "imperativo de conducta": esto es, la equiparación de 'imperativo' a 'orden'[84].

Además de la consecuencia ya analizada, esto es que el imperativo independiente como tal no proviene de la voluntad de nadie, este rechazo tiene otra importante consecuencia en relación con las normas jurídicas. Para Olivecrona, un imperativo tiene definitivamente como objeto guiar (producir) causalmente la conducta; sin embargo, esto es más amplio que lo que generalmente se entendería como "guiar la conducta" a través de órdenes (concebidas tradicionalmente como prohibiciones y/o obligaciones[85]). También abarcaría una guía o producción de conducta directa, aunque menos intensa, como a través de permisiones[86]; y una guía o producción indirecta de conducta, a través de la "evocación de efectos jurídicos", como podría ser a través de estos "imperativos performatorios"[87].

Bajo esta mirada, parecería que el enfoque "reduccionista" de Olivecrona de todas formas podría dar cuenta de normas jurídicas como las normas permisivas y como las normas que confieren potestades. En relación con las primeras, independientemente de qué posición se tome con respecto a su carácter[88], para Olivecrona éstas no serían sino un modo más en el cual las normas jurídicas ejercen influencia en las mentes de los individuos y por consiguiente en sus comportamientos.

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[82] Agradezco al/la referí anónimo/a que sugirió la importancia de considerar explícitamente este punto en el marco del presente trabajo.

[83] Cfr. Hart 1961.

[84] Cfr. Olivecrona 1971: 134-ss.

[85] Cfr., por ejemplo, Austin 1998.

[86] Cfr. para una idea muy similar Von Wright 1970, que entiende a las normas permisivas como parte de las prescripciones (también compuestas por normas de obligación y de prohibición).

[87] Como se verá en el punto siguiente, para Olivecrona existe una característica esencial de las normas jurídicas como imperativos pero olvidada por el resto de los autores: su carácter sugestivo.

[88] El estatus, función, relevancia y autonomía de las normas permisivas ha sido objetivo de gran controversia (cfr., por ejemplo, von Wright 1970, Kelsen 1993). Aquí me limitaré a dejar abierta esta posibilidad, dado que no puedo desarrollar el punto en esta sede. Para un análisis crítico y exhaustivo al respecto, cfr. por ejemplo Poggi 2004.

Promoverían así la realización de las actividades entendidas como permitidas y, dependiendo de cómo se conciban los permisos, también limitarían o restringirían la incidencia de comportamientos que impidieran esas actividades.

En relación con las segundas, las normas que confieren poderes (o normas de competencia), ha de recordarse que también existe una ardua controversia acerca de qué tipo de carácter tienen. No puedo entrar en esa controversia en detalle[89]; sin embargo, vale lo siguiente. Si son normas que establecen obligaciones indirectas o normas que conceden permisos a determinados sujetos para realizar "acciones normativas", quedan sin duda abarcadas dentro de la categoría de Olivecrona por las razones anteriores. Por su parte, si son concebidas como normas constitutivas, en al menos una interpretación de las normas constitutivas como algo diferente de las normas regulativas y/o de las normas prescriptivas[90] entiendo que pueden ser consideradas bajo la óptica de los "imperativos performatorios" tal como propuestos por Olivecrona[91]. Incluso si se considera que son definiciones o reglas conceptuales, y por tanto no formuladas de modo imperativo, Olivecrona podría recordar lo siguiente: «Lo importante es que el derecho en su conjunto sea presentado en un sentido imperativo»[92].

Habiendo analizado lo anterior, queda considerar si la introducción de estos "imperativos performatorios" es suficiente para hacer frente a las críticas de reduccionismo, si es que no se comparten las bases ontológicas y metodológicas de Olivecrona. En este caso, por ejemplo, un realista moral no podría aceptar la visión propuesta. Los efectos jurídicos serían considerados reales, sea pertenecientes a este mundo sea pertenecientes a otro mundo (digamos, moral) con el cual puede conectarse. La función primaria de esas normas jurídicas no sería en todo caso guiar la conducta sino efectivamente realizar cambios en este otro mundo u otro nivel de la realidad o, en todo caso, «*trigger*» determinados hechos de ese otro mundo. En todo caso, los efectos serían reales en el sentido de objetivos, independientemente de aquello que subjetivamente consideren los individuos.

Sin embargo, el no compartir estas bases ontológicas y metodológicas (o, al menos, no considerarlas válidas) no presentaría únicamente un problema para la cate-

[89] Del mismo modo que en el caso de las normas permisivas, en esta sede no puedo entrar en la controversia. Me limitaré a dejar abierta la cuestión, y reenviar a Ferrer Beltrán 2000 y Calzetta 2016 para un análisis crítico y pormenorizado de las diferentes posibles concepciones de normas de competencia.

[90] Como en el caso de J. Searle (Searle 1969) y de G.H. von Wright (Von Wright 1970), respectivamente. También acerca de este punto, en esta sede no puedo entrar en la controversia acerca de las normas constitutivas. Me limitaré a dejar abierta la cuestión, y a reenviar por ejemplo al introductorio Guastini 1986.

[91] Esta interpretación sería cercana a la primera posición que A. Ross adoptó en relación con las normas de competencia, entendiéndolas como normas de conducta indirectamente expresadas (Ross 1963). Posteriormente, sin embargo, Ross abandonó esa posición para entenderlas como normas constitutivas, las cuales no considera normas de conducta sino fijan condiciones de validez (Ross 1968).

[92] Olivecrona 1971: 119, 122.

goría de "imperativos performatorios" de Olivecrona: se trataría de una digresión base que afectaría la apreciación de todo su aparato teórico, y probablemente así invalidaría su propuesta, conclusiones, y consecuencias.

4.2. ¿Qué significa que las normas jurídicas "influencian el comportamiento"?

Olivecrona reprocha a otros autores, especialmente aquellos que conciben al derecho como un conjunto de mandatos expresión de voluntad de una autoridad suprema, el pasar por alto la característica esencial de las normas jurídicas como imperativos: su carácter sugestivo. Este carácter sugestivo es aquello que, según Olivecrona, permite que puedan influenciar el comportamiento de los individuos y, producto de esta influencia, puedan causarlo. Se trata del establecimiento de una conexión psicológica entre la idea de una acción y una "expresión imperativa", como prohibido u obligatorio. Y esta conexión, que aparecería a las mentes de los individuos como objetiva y no empírica, se explica a su vez a través de la actitud de respeto por la constitución. Así, la eficacia de las normas jurídicas (entendida como su capacidad de causar el comportamiento) depende de que los individuos respeten la constitución.

Analizar la actitud de respeto por la constitución en profundidad excede el objeto del presente trabajo[93]. Aquí, por hipótesis, asumiré que ésta existe, que su explicación no es circular, y que es una actitud cuyo contenido (para los participantes) puede sintetizarse como sigue: "Es objetivamente obligatorio obedecer a la constitución y a todos aquellos imperativos emitidos de acuerdo con las normas constitucionales"[94]. La primera pregunta que surge entonces es cuál sería exactamente el contenido del carácter sugestivo de las normas jurídicas, tal como lo postula Olivecrona, y cuál sería exactamente el mecanismo psicológico que las volvería motivos de la conducta de los individuos. ¿Qué significa que "influencian las mentes" y que "actúan sobre la voluntad"?

La respuesta de Olivecrona a estos interrogantes es, quizás, un poco genérica. Por un lado, explica esta influencia señalando que las normas jurídicas proveen de una representación mental de una acción y que, por ser "normas jurídicas", logran asociar esa representación con un sentimiento o idea de deber objetivo que ya se encuentra presente en los individuos (el respeto por la constitución). Cómo se produce esa

[93] Me he ocupado en detalle de su análisis en Rabanos 2020.

[94] Con un poco más de detalle, esta actitud de "respeto por la constitución" fundamentalmente consistiría en: la consideración de las normas de la constitución como poseyendo 'fuerza vinculante'; la consideración de que existe un deber objetivo de obediencia hacia esas reglas; y la consideración de que existe un deber objetivo de obediencia hacia cualquier norma calificada como 'ley' o 'norma jurídica' por haber sido incorporada al sistema siguiendo las formalidades establecidas por la constitución. Por su parte, la eficacia de las normas jurídicas deriva justamente de esta incorporación, bajo estas condiciones.

asociación es algo que, más allá de señalar que se trata de una conexión psicológica, Olivecrona no provee y, en principio, considera que no es necesario proveer:

> How the influence works on the individual mind is a question for psychology. For the purpose of this treatise we need only point out the general conditions which make law-giving possible as an effective instrument of governing society, the basic elements in the structure of society which are a prerequisite to the functioning of the law-giving apparatus[95].

Por el otro, explica esta influencia a través de una cadena de eficacia causal que comienza con este elemento básico para el funcionamiento del sistema jurídico: la actitud de respeto por la constitución. Olivecrona explica que los individuos consideran a la constitución como vinculante por un condicionamiento de siglos, originado en la época donde derecho y religión eran un único sistema normativo, y retroalimentado tanto por el uso de la fuerza por parte de las organizaciones políticas como por la educación y el condicionamiento social. Esta consideración como vinculante la hace eficaz: los individuos se motivan con base en ésta, y así causa sus comportamientos.

Las normas jurídicas se insertan en esta cadena causal constitución-comportamiento cuando son declaradas como tales por una autoridad del sistema de acuerdo con formalidades establecidas en la propia constitución. Los individuos consideran, como parte de su actitud de respeto por la constitución, que aquello que es así declarado participa de la fuerza vinculante originaria. Por este motivo, una vez que un imperativo independiente es así nominado "norma jurídica", la cadena causal pasa a ser constitución-norma jurídica-comportamiento. Todo depende, por lo tanto, de que esa actitud de respeto por la constitución exista, tenga efectivamente ese contenido, y se mantenga a través del tiempo.

Ahora bien: ¿qué tipo de tesis es, para Olivecrona, aquella de que las "normas jurídicas influencian el comportamiento de los seres humanos"? Si con esto Olivecrona se refiere al hecho de los individuos (en la mayor parte de los casos) toman a las normas jurídicas pertenecientes al sistema en consideración y actúan en conformidad con éstas, la tesis parecería trivial. El propio discurso de Olivecrona presupondría este hecho: si las normas jurídicas no influenciaran a los individuos, el sistema jurídico no sería efectivo; y si no es efectivo, entonces las normas jurídicas no podrían tener eficacia causal. Para no ser trivial, la tesis debería interpretarse como afirmando algo más fuerte: algo como que el tipo de influencia que ejercen es de un tipo especial, quizás irresistible. Pero si esto es así, debería explicar por qué (y cómo es que) existen actos constantes de violación del derecho.

Ésta es la posición de Spaak, que termina concluyendo que la tesis de Olivecrona sería entonces o bien trivial (si solo quiere sostener lo primero) o bien falsa (si no

[95] Olivecrona 1939: 52.

puede explicar lo segundo). Si bien admite que puede concebir formas para explicar la violación al derecho, en términos de otros factores que pueden contrarrestar la supuesta influencia de las normas jurídicas, Spaak señala que esto atenuaría la tesis y la volvería menos interesante[96].

El punto que releva Spaak cuando señala que la afirmación sería "trivial" es interesante, dado que se conecta directamente con la pregunta sobre el origen de la eficacia del fenómeno jurídico. Este origen Olivecrona lo encuentra en la "actitud de respeto por la constitución". Baste aquí señalar lo siguiente: en el marco de este discurso, puede establecerse una diferencia entre el origen de la eficacia de la constitución y del sistema jurídico, y el origen de la eficacia de las normas jurídicas individuales. La segunda, por su parte, depende de la primera[97].

Si se ve de esta manera, la afirmación podría no ser completamente trivial al menos en un sentido: si Olivecrona considerase que la eficacia de la constitución y del sistema jurídico no se debe a la influencia de las "normas jurídicas" en el comportamiento sino a otros factores. En este caso, la afirmación estaría entonces dirigida únicamente a las normas individuales, y quedaría por ver entonces qué tipo de explicación es dada para la eficacia de la constitución y el sistema.

A mi entender, el interés de lo relevado por Spaak está más bien en señalar que la afirmación de Olivecrona no es sino una presuposición: en otras palabras, una afirmación que da por válida sin ofrecer ninguna prueba a su respecto. En este sentido, Olivecrona *presupone* que la actuación en conformidad con las normas jurídicas (así como la crítica y la justificación de la sanción hacia quien no lo hace) es producto de la eficacia causal de éstas. Presupone, asimismo, que esta eficacia es producto de que han sido consideradas como vinculantes por haber sido declaradas "normas jurídicas" de acuerdo con ciertas formalidades por cierta autoridad del sistema.

Así, Olivecrona nunca examina seriamente la posibilidad de que las acciones de los individuos respondan a otras causas; no ofrece ninguna prueba empírica para apoyar sus afirmaciones; ni tampoco determina con claridad cuál serían los extremos que deberían acreditarse en el mundo espaciotemporal para considerar que una norma jurídica "ha influido en el comportamiento" de un individuo. Estas cuestiones parecen deficiencias de importancia en el marco un discurso comprometido con bases empíricas y científicas, y no sólo abre la puerta a posibles falsaciones empíricas (lo cual derrumbaría el discurso) sino también a críticas como las dirigidas por Spaak y otras, como por ejemplo aquellas relacionadas con la adecuación de la descripción hacia el fenómeno observado (las cuales ponen en duda las conclusiones especulativas).

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[96] Spaak 2014: 134.

[97] Éste es un punto de partida compartido por otros autores, como por ejemplo Kelsen, para quien hablar de la validez de las normas jurídicas individuales presupone la existencia de un sistema jurídico eficaz. Cfr. Kelsen 1993.

Dejaré para otra ocasión la discusión acerca de la posibilidad, e implicaciones, de que la eficacia de la constitución y el sistema (y consecuentemente de las normas jurídicas particulares) provenga de otras situaciones no consideradas por Olivecrona. Me ocuparé aquí de la segunda alternativa que considera Spaak, que es que Olivecrona esté sosteniendo una "tesis fuerte" de la influencia de las normas jurídicas. Si bien creo que Spaak está en lo cierto al poner este punto de relieve, entiendo que Olivecrona podría responder a la crítica Spaak le plantea. Lo que sucedería, sin embargo, es que se abriría otra posible crítica la cual le sería mucho más difícil responder. Veamos esto.

La respuesta de Olivecrona a Spaak podría ser la siguiente. Debe admitirse que si el Estado (como fuerza organizada) ejerce una fuerte influencia en los individuos y causa así sus comportamientos, no siempre es suficiente. La influencia se explica a través de la "sugestión" que genera en la mente de los individuos, asociando patrones de conducta con sentimientos de constricción a la realización de éstos. El que tenga esta influencia depende también de diversos condicionamientos que recibe el individuo a través de la educación, de su contacto social, etc. Esto podría llevar a que el individuo no se represente siquiera otra alternativa que no sea la obediencia, especialmente si sus intereses se encuentran generalmente satisfechos; o bien que se la represente, pero que sea de un peso mínimo en comparación con la obediencia.

De este modo, la violación al derecho puede explicarse en el marco del discurso de Olivecrona o bien como una falla de esos condicionamientos, por lo cual el carácter sugestivo de las normas jurídicas o no es percibido o no es suficiente; o bien por la existencia de otra alternativa que por cualquier motivo sea superior, ya sea en una situación específica o en general (si los intereses del individuo no se encuentran generalmente satisfechos).

4.3. ¿Es el "carácter sugestivo" la mejor forma de describir esta situación?

¿Es la mejor forma de describir esta situación, en todo caso, hablar de "carácter sugestivo" de las normas jurídicas? Autores como Spaak piensan que no, y que Olivecrona habría encontrado una mejor forma de describir este estado de cosas si hubiese simplemente seguido el análisis de Charles Stevenson acerca del así llamado "significado emotivo" de los términos morales. Spaak lo explica así:

> Stevenson, who thinks for moral terms as means by which we may influence the attitudes of other people, explains that the emotive meaning of a word "is a tendency of [the] word, arising through the history of its usage, to produce (result from) *affective* responses in people[98].

[98] Spaak 2014: 129, citando a Stevenson 1937: 23.

En opinión de Spaak, la explicación de Olivecrona postula al carácter sugestivo como una propiedad de los imperativos independientes; es decir, postula que estos imperativos tienen una propiedad como "hacer surgir una intención avalorativa de llevar adelante la acción". Esto no agregaría nada a la explicación de Olivecrona, señala Spaak, sino que además la volvería menos adecuada para dar cuenta del fenómeno. Así:

> Just as Stevenson finds the emotive meaning of moral words *in* the affective responses in people, so that there will be no emotive meaning over and above those responses, Olivecrona might have found the suggestive character of imperatives in the disposition of people to obey imperatives, so that there would be no suggestive character over and above that disposition. In my view, an account along Stevensonian lines would have been more realistic than Olivecrona's account, in that it does not posit entities or properties that play no real role in the purported explanation[99].

El punto de Spaak es interesante dado que le permitiría, a Olivecrona, simplemente explicar la eficacia causal de las normas jurídicas en términos de emociones[100]. Si se leyese en esta clave, lo que estaría postulando Olivecrona sería algo como lo siguiente. Los individuos poseen, por diversas razones, fuertes emociones relacionadas con el término 'norma jurídica' o 'ley'. Cada vez que se usa la palabra 'norma jurídica', se desata una respuesta afectiva relacionada con una disposición a la obediencia de aquello así denominado. La respuesta afectiva está en gran parte determinada por (el presupuesto de) el correcto uso de la palabra 'norma jurídica', que está a su vez determinado por reglas contenidas en la constitución.

Creo que esto es perfectamente compatible con el planteo de Olivecrona, especialmente en lo que refiere de las normas jurídicas creadas y eliminadas en el contexto de un sistema jurídico en funciones. Además, daría buena cuenta de por qué resulta importante el proceso de adscripción del término 'norma jurídica' a un imperativo independiente a los efectos de causar el comportamiento. Se trata en este caso no de la capacidad potencial de motivar a la conducta, que se supone que todos los imperativos independientes poseen, sino de la capacidad *efectiva* de hacerlo: una capacidad asegurada por la respuesta afectiva vinculada al uso del término 'norma jurídica'. Y esto tiene perfecta cabida dentro del interés del discurso de Olivecrona: explicar cómo la creación de derecho «es un instrumento efectivo para el gobierno de la sociedad»[101].

Se mantendrían, sin embargo, las cuestiones señaladas en el punto anterior: la

[99] Spaak 2014: 205.

[100] Esto estaría, además, en consonancia general con su postura no cognitivista en metaética. Para una discusión sobre si esta postura es no cognitivista o, en realidad, alineada con la teoría del error, véase Spaak 2014, especialmente capítulo 6.

[101] Olivecrona 1939: 52.

falta de examen serio de la posibilidad de que las acciones de los individuos respondan a otras causas; la falta de prueba empírica para apoyar estas afirmaciones; y la no determinación con claridad cuál serían los extremos que deberían acreditarse en el mundo espaciotemporal para considerar que una norma jurídica "ha influido en el comportamiento" de un individuo.

Se le agregarían, además, algunas dificultades. La primera es que Olivecrona tendría que dar cuenta de por qué la reacción emocional de los individuos sería siempre la misma, es decir, la que conduciría siempre al mismo resultado; y, si no se trata de la misma emoción pero sí del mismo resultado, bajo qué condiciones esto es posible o cómo se comprobaría. La segunda es que, incluso tomándolo a nivel meramente especulativo, Olivecrona parecería presuponer una homogeneidad muy importante de emociones y personalidades entre los individuos que pertenecen a una misma sociedad. Esto último, al menos teniendo en cuenta los ejemplos empíricos de algunas sociedades modernas, parece difícil de sostener. En todo caso, Olivecrona tendría a su cargo el demostrar en qué sentido (si alguno) se daría esta homogeneidad, algo que no hace, sino que presupone.

5. Algunas breves reflexiones sobre la posible utilidad de la categoría de los imperativos independientes

La categoría de imperativos independientes propuesta Olivecrona parece, sin duda, un intento sofisticado y original de dar cuenta de las características, función y efecto de las normas jurídicas y de los sistemas jurídicos a los cuáles éstas pertenecen. Como hemos visto a lo largo del análisis crítico de la sección 4, esta concepción de las normas jurídicas (así sus presupuestos y sus consecuencias) puede ser pasible de diferentes críticas cuyo éxito es variable. Además de ello, el hecho de que esta forma de concebir las normas jurídicas esté tan estrechamente a una visión fuertemente realista acerca del derecho (y de su estudio) puede hacer no sólo que no sea compartida, sino que ni siquiera sea considerada con la atención necesaria.

Teniendo eso en cuenta, quisiera concluir este trabajo con una reflexión más bien modesta. A mi entender, e incluso si no se comparte el marco teórico metodológico y sustantivo de Olivecrona, la categoría de los imperativos independientes podría ser de interés para dos temas relevantes y actuales de filosofía del derecho: la interpretación jurídica sin intención del legislador, y el debate acerca de las reglas constitutivas.

En relación con lo primero, la categoría de imperativos independientes es resultado directo del rechazo de Olivecrona al voluntarismo y a la idea de que exista una voluntad de un legislador o soberano que dé origen (y que esté detrás de) al derecho. Gran parte de ese rechazo, sin duda, está estrechamente vinculado al rechazo a la idea de que exista una presunta "fuerza vinculante" de las normas jurídicas montada sobre la base de esta presunta voluntad (basado en una postura de rechazo

a la existencia objetiva de hechos morales, siguiendo a Hägerström). Sin embargo, independientemente de ello, uno de los argumentos más fuertes en contra es la idea de que la "voluntad" del legislador o soberano, simplemente, no existe; ésta no sería más que una ilusión, una mera ficción, derivada de resabios de pensamientos mágicos y religiosos que nunca han dejado a las sociedades.

Esto parece estar muy en consonancia con aquellas investigaciones que concluyen que no puede existir una "intención" o "voluntad" de la autoridad legislativa, al menos no del mismo modo que la concebimos de una persona en un contexto de comunicación ordinario, y por tanto intentan explorar caminos alternativos que separan a los textos promulgados por las autoridades legislativas y la "intención" de esos promulgantes[102]. Si bien no es del todo claro cuál sea la postura de Olivecrona acerca de la interpretación jurídica, su concepción de las normas como imperativos independientes y su compleja visión acerca de las condiciones en las cuales estos imperativos estarían "en vigor" (esto es, serían eficaces para causar la conducta) permite repensar la cuestión de la interpretación de las "leyes". Y lo permite de dos maneras: la primera, desplazando la discusión y el foco de la interpretación de las "leyes" del emisor al destinatario (tanto las autoridades aplicadoras como los miembros de la sociedad); la segunda, desplazando explícitamente el foco del análisis hacia el contexto y condiciones en marco de los cuales esas "leyes" son emitidas, y cuál sería el contexto y condiciones en el marco de los cuales la promulgación de una "ley" podrá tener éxito o no (esto es, ser eficaz para causar la conducta).

En relación con lo segundo, acerca de las reglas constitutivas, creo que la categoría de "imperativo performatorio" (como subclase de imperativo independiente) puede ser de utilidad para repensar aquel elemento de "normatividad" que es generalmente considerado como parte indisociable de la idea de "constitutividad" o de "regla" constitutiva. Con la categoría de "imperativo performatorio", en efecto, Olivecrona podría ofrecer tanto una explicación de aquello "constituido" (la evocación de los "efectos jurídicos" y qué son estos) como una explicación del carácter de la "constitutividad" (un carácter imperativo, a pesar de lo que pueda parecer en su forma superficial, no se limita a meramente establecer o "evocar" sino que principalmente guía o provoca conductas).

Asimismo, su explicación de cómo y bajo qué circunstancias un sujeto puede evocar eficazmente esos "efectos jurídicos", aunque al mismo tiempo las consecuencias de esa evocación queden completamente separadas de su figura, puede contribuir a considerar con mayor seriedad la figura del emisor de la regla constitutiva en el marco de las reglas constitutivas. De este modo, podría ayudar en la reflexión de cuánto la "constitutividad" pueda depender de que el emisor posea una determinada cualificación o característica, cuánto pueda depender del contexto, y cuánto de aquellos destinatarios de aquella "regla" y sus creencias, ideas y/o expectativas.

[102] Cfr., por ejemplo, el reciente Poggi 2020.

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A proposito di certezza del diritto

*Riccardo Guastini**

Sommario

Commentando un libro di Humberto Ávila sulla certezza del diritto, l'autore analizza alcuni dei concetti e dei problemi coinvolti, tra i quali il concetto stesso di certezza, la struttura normativa e istituzionale dello stato liberale di diritto, le condizioni della certezza, nonché alcuni ostacoli alla certezza. L'autore analizza altresì i principi costituzionali da cui il principio (per lo più implicito) di certezza giuridica può essere desunto, così come le sue ulteriori implicazioni. Secondo l'autore, il tema della certezza giuridica è una sorta di *Aleph* (nel senso di Borges) dal quale molti problemi centrali della moderna teoria del diritto si intrecciano e si mostrano in tutta la loro evidenza.

Parole chiave: Certezza del diritto. Stato liberale di diritto.

Abstract

Commenting on a book on legal certainty by Humberto Ávila, the author analyzes some of the concepts and problems involved in the issue, including the concept of certainty itself, the rule of law and the normative and institutional structure of a liberal state, the conditions of certainty, as well as several obstacles to certainty. The author also analyzes the constitutional principles from which the (mostly implicit) principle of legal certainty can be derived, as well as its further implications. He argues that the issue of legal certainty is a kind of *Aleph* (in the sense of Borges) where a great deal of central intertwined problems of modern legal theory are evident.

Keywords: Legal Certainty. Rule of Law. Liberal State.

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Premessa

La letteratura in tema di certezza del diritto occupa un'intera biblioteca. In questa vasta biblioteca immaginaria il ponderoso volume di Humberto Ávila, *Teoria della certezza del diritto* (in corso di stampa per i tipi dell'editore Giappichelli, Torino), riveste una importanza speciale.

Sebbene si presenti soprattutto come un lavoro dogmatico sulla costituzione brasiliana e specificamente sul diritto tributario brasiliano (di cui l'autore è un riconosciuto specialista), il libro ha senza dubbio una portata teorico-generale. Ed è probabilmente lo studio più vasto e sistematico in materia condotto con metodo analitico.

Humberto Ávila (HÁ di qui in avanti) decostruisce la certezza del diritto, riducendola ai suoi elementi costitutivi, e mostrandone tutte le sue molteplici dimensioni, sia concettuali sia istituzionali.

1. Il concetto di certezza giuridica

Nella tradizione teorica e dogmatica prevalente – di ascendenza illuministica e giuspositivistica – il diritto è certo se, e solo se, ciascuno può prevedere con ragionevole precisione le conseguenze giuridiche delle proprie azioni, o comunque può conoscere *ex ante* i limiti e i modi dell'esercizio dei poteri coercitivi dello stato. HÁ elabora un concetto di certezza giuridica assai più articolato, entro un contesto teorico moderatamente "realistico" (nel senso del realismo giuridico) in materia di interpretazione.

A suo avviso, il diritto può dirsi "certo" a condizione che sia: (a) conoscibile e intelligibile, (b) affidabile, e (c) calcolabile.

(a) La conoscibilità del diritto solleva due distinti problemi: conoscibilità dei testi normativi e conoscibilità del loro significato, i.e. delle norme, rispettivamente. I testi normativi sono conoscibili quando siano (ovviamente) pubblicati e accessibili. Le norme, a loro volta, sono conoscibili non solo quando i testi normativi siano intelligibili in virtù della loro formulazione, ma quando, inoltre, la loro interpretazione sia guidata da metodi interpretativi e strategie argomentative noti e intersoggettivamente controllabili. A queste condizioni, il diritto può essere (relativamente) conoscibile malgrado la sua (fatale) indeterminatezza, di cui ora diremo.

(b) L'affidabilità del diritto suppone che le norme non abbiano effetti retroattivi, siano rispettose della cosa giudicata, dei diritti acquisiti, e dei rapporti esauriti. Ma affinché il diritto sia affidabile occorre altresì che sia ragionevolmente stabile, che il mutamento giuridico sia non troppo frequente né repentino, e sempre sia accompagnato da opportune norme di diritto intertemporale, che per l'appunto non travolgano i rapporti esauriti e i diritti acquisiti.

(c) Il diritto – inteso (per dirla con Crisafulli) come insieme non di "disposizioni", ma di "norme" propriamente intese, ossia di significati – non è un oggetto previamente "dato" ai giuristi e ai giudici, indipendentemente dalla sua interpretazione e applicazione: al contrario, ne dipende interamente. Così è perché i testi normativi non hanno un unico, univoco, significato (e, si potrebbe aggiungere, spesso presentano lacune, spesso esprimono norme confliggenti). In questo senso il diritto è indeterminato.

Duplicemente indeterminato, direi. Per un verso, è indeterminato l'ordinamento, nel senso che è controverso quali norme appartengano ad esso. Per un altro verso, è indeterminata ogni singola norma, nel senso che è controverso quali fattispecie ricadano nel suo campo di applicazione.

L'indeterminatezza del diritto non consente di prevedere con precisione – con "certezza" – le conseguenze giuridiche delle proprie azioni. Nondimeno, i possibili (plausibili) significati dei testi normativi sono in numero finito, e sono identificabili alla luce dei metodi d'interpretazione e degli stili di argomentazione in uso. Il diritto è calcolabile quando – essendo conoscibile, intelligibile, e affidabile – i cittadini (o almeno i loro avvocati e consulenti), conoscendo la pratica interpretativa e argomentativa esistente nella cultura giuridica data, abbiano una elevata capacità di anticipare le alternative interpretative, così da prevedere, sia pure tentativamente e solo approssimativamente, le possibili decisioni degli organi dell'applicazione e segnatamente dei giudici. Componente essenziale della certezza giuridica è dunque il controllo razionale della discrezionalità interpretativa.

Risulta evidente che conoscibilità, affidabilità, e calcolabilità sono proprietà strettamente intrecciate l'una con l'altra.

D'altra parte, è facile intuire che tutti i concetti in gioco sono concetti quantitativi, non classificatori. Nella teoria di HÁ, insomma, la certezza non è un concetto a due valori (certo/incerto): è piuttosto questione di grado. E comunque la certezza "assoluta" è inattingibile.

2. La struttura normativa dello stato di diritto

Molte costituzioni proclamano solennemente il valore della "sicurezza", intesa come assenza di (o protezione da) minacce alla vita, alla salute, alla libertà, alla proprietà. Il principio di certezza "del diritto", per contro, raramente si trova espressamente costituzionalizzato: la costituzione spagnola (ma, secondo HÁ, anche quella brasiliana) è una eccezione.

Il principio in questione, tuttavia, si affaccia spesso nelle argomentazioni dei tribunali costituzionali, quale criterio di valutazione della "ragionevolezza" delle leggi. Se ne trova un buon esempio in una decisione additiva della Corte costitu-

zionale italiana (Corte cost. 364/1988), che, pur senza fare espresso riferimento alla certezza del diritto, ha ritenuto parzialmente incostituzionale l'art. 5 cod. pen. – il principio "Ignorantia juris non excusat" (o, come anche si dice, "Nemo censetur ignorare jus") – laddove *non* prevede come causa di giustificazione l'impossibilità di conoscere e/o comprendere la legge (penale).

Anche là dove non è espressamente formulato, il principio di certezza giuridica può essere tuttavia "costruito" – ricavato per via argomentativa – da una lunga serie di disposizioni costituzionali, comuni a molti ordinamenti liberal-democratici, detti comunemente "stati di diritto".

Qualunque ordinamento giuridico (occidentale moderno) è costituito da due livelli, o strati, di norme:

(i) le norme di condotta, che si rivolgono ai privati cittadini, qualificando deonticamente (obbligatorio, proibito, permesso, facoltativo) il comportamento; e
(ii) le meta-norme di autorizzazione o competenza, che istituiscono e disciplinano (circoscrivendoli) i pubblici poteri di produzione e applicazione del diritto, mediante modalità non deontiche, ma hohfeldiane: potere (o competenza che dir si voglia), soggezione, incompetenza, immunità.

Ebbene, in uno stato liberale di diritto, ciascuno dei due insiemi di norme ha una sua propria norma di chiusura.

L'insieme delle norme di condotta è chiuso dal principio di libertà, o norma generale "esclusiva" (Donati) o "negativa" (Zitelmann): "Tutto ciò che non è espressamente proibito (ai privati cittadini) è tacitamente permesso". Se ne trova una mirabile formulazione nell'art. 5 della *Déclaration* dell'Ottantanove: «Tout ce qui n'est pas défendu par la Loi ne peut être empêché, et nul ne peut être contraint à faire ce qu'elle n'ordonne pas».

L'insieme delle meta-norme di competenza, a sua volta, è chiuso dal principio di legalità: grosso modo, "Tutto ciò che non è espressamente permesso (agli organi dello stato, ai pubblici poteri) è tacitamente proibito".

Ma entrambi questi principi esigono qualche chiarimento.

(a) Il principio di libertà, così come l'ho formulato, è una banale tautologia, dal momento che le modalità deontiche sono interdefinibili, e "permesso" è logicamente equivalente a "non-proibito". Ma è importante capire che altro è un comportamento permesso (in senso negativo, diciamo) perché non proibito (e dunque suscettibile di proibizione in futuro); altro è un permesso (positivo) statuito da una norma che espressamente conferisce un diritto di libertà.

E, ovviamente, la distinzione tra permesso negativo e permesso positivo riveste una importanza speciale quando il permesso positivo di cui si parla sia un diritto di libertà conferito da una costituzione rigida. Una libertà costituzionale è altra cosa da una libertà "naturale" pre-giuridica, che sussiste (solo) là dove il diritto positivo non si spinge.

Si noti che questo modo di vedere (che risale alla teoria giuridica secentesca: Hobbes, Pufendorf) suppone che la libertà "naturale" sia coestensiva con le lacune del diritto, intese, in modo elementare, pre-teorico, come condotte non deonticamente qualificate, e dunque indifferenti. È l'idea dello "spazio vuoto di diritto" di Bergbohm e Santi Romano (sebbene con questa idea essi pretendessero non già di illustrare il concetto di lacuna, ma di negare l'esistenza di lacune).

(b) La formulazione deontica del principio di legalità, offerta sopra, simmetrica al principio di libertà, è icastica, ma concettualmente imprecisa, giacché qui sono in gioco non propriamente concetti deontici, ma concetti hohfeldiani. Tecnicamente si dovrebbe dire: "Tutto ciò che non è autorizzato è non autorizzato".

Di nuovo, una tautologia, si direbbe. Ma non è così, perché l'espressione "non autorizzato" (almeno in diritto pubblico) ha, diciamo così, un significato instabile. Nella prima occorrenza "non autorizzato" è la proprietà di un potere non conferito da una norma previa. Nella seconda occorrenza, "non-autorizzato" è la proprietà di un atto formalmente invalido.

Così è perché "in natura" esistono sì libertà pre-giuridiche (condotte non disciplinate dal diritto, e dunque giuridicamente indifferenti), ma non poteri o competenze. Il potere (giuridico: altra cosa è il potere di fatto) è una creazione artificiale del diritto positivo. Insomma, il principio di legalità è semplicemente una regola sulla validità degli atti delle pubbliche autorità, ivi inclusa l'autorità legislativa laddove la costituzione sia rigida.

3. Le istituzioni della certezza

HÁ argomenta persuasivamente che il principio di certezza giuridica, anche là dove non è espressamente formulato in costituzione, è strumentale alla realizzazione di altri principi espressi, che intrattengono con esso una connessione evidente, ed è pertanto "implicito" in essi. "Implicito", beninteso, non in senso strettamente logico, ma in senso argomentativo. Del resto, non è infrequente incontrare nella giurisprudenza costituzionale di diversi paesi la costruzione di un qualche principio inespresso con l'argomento che tale principio, pure *inespresso*, è condizione necessaria di efficacia dell'uno o dell'altro principio costituzionale *espresso*. La giurisprudenza della Corte costituzionale italiana ne offre innumerevoli esempi.

I principi espressi da cui può essere ricavato il principio inespresso di certezza sono principalmente i principi di libertà, eguaglianza, e dignità. Quest'ultimo, a onor del vero, è un concetto estremamente elastico e sfuggente; si può anzi dubitare che abbia un contenuto (non meramente emotivo, ma) normativo qualsivoglia. HÁ, molto sensatamente, lo ridefinisce come la capacità di pianificare il proprio futuro, sicché la protezione della dignità esige – e la certezza del diritto è funzionale a – il rispetto dell'autonomia individuale: il principio cardine dell'etica liberale.

D'altro canto, il principio di certezza, anche là dove non è espressamente formulato, offre giustificazione assiologica a – e trova concretizzazione in – una lunga serie di principi e regole espressi, di rango ora costituzionale, ora semplicemente legislativo. Tra questi (sarebbe difficile enumerarli tutti):

(a) le regole in materia di pubblicazione degli atti normativi e di *vacatio legis*;
(b) il principio di legalità della giurisdizione (la soggezione del giudice alla sola legge e l'obbligo di motivazione delle decisioni giurisdizionali);
(c) il principio di legalità dell'amministrazione (e il connesso principio di tipicità degli atti amministrativi);
(d) il principio di stretta legalità e stretta interpretazione (divieto di analogia e, a mio avviso, anche di interpretazione estensiva) in materia penale;
(e) il principio di legalità dei tributi;
(f) il principio di irretroattività della legge (sebbene in alcune costituzioni questo sia circoscritto alla sola legge penale);
(g) la regola di intangibilità della cosa giudicata, nonché dei rapporti esauriti e dei diritti acquisiti;
(h) la stessa rigidità costituzionale, che è funzionale alla certezza giuridica al livello più elevato della gerarchia delle fonti.

Il principio di certezza del diritto, insomma, è strumentale alla realizzazione di altri principi più alti, che lo giustificano, e al tempo stesso è a sua volta matrice – e fondamento assiologico – di altri principi subordinati che lo concretizzano.

4. Gli ostacoli alla certezza

Malgrado quanto sono venuto dicendo, è abbastanza evidente che il principio di certezza giuridica è inattuato, o comunque attuato molto imperfettamente, in tutti gli ordinamenti statali contemporanei. Dal lavoro di HÁ emerge con chiarezza quali e quanti fenomeni rendano il diritto incerto.

Nel seguito, tralasciando le cause dirette di discrezionalità interpretativa (equivocità dei testi normativi, vaghezza o "trama aperta" delle norme, clausole generali, lacune, antinomie, etc.), provo ad enumerare senza un ordine preciso alcuni ostacoli, macroscopici, alla certezza.

(1) Una prima classe di ostacoli deriva dal sistema delle fonti, più precisamente dalla pluralità di fonti eterogenee (leggi centrali e locali, atti governativi con forza di legge, etc.), non sempre chiaramente ordinate secondo un ordine gerarchico.

Ciò è particolarmente vero, naturalmente, nei paesi dell'Unione europea, dove la normativa europea interferisce con le fonti nazionali. Persino con le fonti di rango costituzionale, secondo giurisprudenza consolidata, sebbene assai discutibile

(chi scrive la trova decisamente infondata: come può una norma qualsivoglia, nella specie una norma internazionale convenzionale, prevalere sulla norma, nella specie una norma costituzionale, che le dà fondamento? potrebbe mai un regolamento derogare alla legge che lo autorizza o un decreto delegato derogare alla legge di delegazione?).

(2) Una seconda classe di ostacoli attiene al disordine dei testi normativi. Ad esempio:

(a) la bulimia delle autorità normative, cui segue una sterminata quantità di disposizioni normative sincronicamente vigenti;
(b) la dispersione delle disposizioni vigenti in una molteplicità di documenti normativi distinti (insomma: la insufficiente codificazione);
(c) la instabilità diacronica dei testi normativi, giacché ogni giorno nuove disposizioni sono introdotte nell'ordinamento, mentre disposizioni previgenti sono *tacitamente* derogate, o soppresse e sostituite.

(3) Una terza classe di ostacoli deriva dalla (pessima) tecnica di redazione dei testi normativi. Qualche esempio.

(i) L'inclusione in un testo normativo su una qualsivoglia materia x di disposizioni che vertono su tutt'altra materia y, senza alcuna relazione con la materia x, rende assai difficile l'identificazione del diritto vigente sulla materia y.
(ii) Accade frequentemente (normalmente, in realtà) che un testo normativo non già sostituisca, ma solo modifichi parzialmente un testo previgente, cambiando, ad esempio, non una legge intera, ma solo una disposizione legislativa, sicché la disciplina della materia in questione si trova dispersa in testi legislativi distinti; o anche (e ancor peggio) cambiando solo alcune parole di una disposizione preesistente (o sopprimendole), e non la disposizione nella sua interezza, sicché per identificare la disposizione vigente occorre combinare due (o più) frammenti di enunciati dispersi in testi normativi differenti.
(iii) Accade altresì che un testo normativo A modifichi un precedente testo normativo B che a sua volta aveva modificato un precedente testo normativo C: con il risultato di rendere pressoché inconoscibili le disposizioni vigenti se non per gli specialisti.
(iv) Una disposizione che faccia rinvio ad un'altra disposizione preesistente è priva di significato autonomo e indipendente, sicché non può essere compresa se non in combinazione con una diversa disposizione collocata in tutt'altro testo normativo; e d'altro canto una disposizione che (come pure accade) faccia rinvio ad una disposizione futura, ossia al momento inesistente, è a sua volta priva di qualsivoglia contenuto normativo (almeno quando non sia accompagnata da una norma di diritto intertemporale).

(v) L'abrogazione, totale o parziale, produce effetti univoci solo quando è espressa e inoltre menziona con precisione (con "nome e cognome", per così dire) le disposizioni normative in tutto o in parte abrogate; per contro, quando l'autorità normativa detta una nuova disciplina per una fattispecie qualsivoglia senza abrogare espressamente le disposizioni preesistenti (abrogazione meramente tacita), il risultato è fatalmente dubbio e potenzialmente controverso.
L'abrogazione "innominata" ("Sono abrogate tutte le norme incompatibili con la presente"), dal canto suo, altro non è che una sorta di delega ad abrogare rivolta agli organi dell'applicazione.

Fenomeni, tutti quelli menzionati, che mettono seriamente in discussione la sensatezza del principio tralatizio *jura novit curia*.

(4) Infine, una quarta classe di ostacoli deriva dalla prassi giurisprudenziale. Mi riferisco a fenomeni quali:

(a) l'interpretazione non uniforme, alla quale non sempre sopperisce il giudizio di cassazione;
(b) l'interpretazione non convenientemente argomentata (spesso una motivazione inutilmente prolissa, frequente in tutte le giurisdizioni, maschera la mancanza di seri argomenti);
(c) i *revirements*, specie quando si situano al livello degli organi giurisdizionali di ultima istanza;
(d) l'interpretazione detta "evolutiva" (o "dinamica"), che, nell'inerzia del legislatore, attribuisce ai testi normativi (peraltro non senza ragione a volte) un significato diverso da quello comunemente accolto;
(e) l'applicazione analogica, che – se consente al giudice di colmare le lacune (reali o immaginarie), come è doveroso fare vigendo il divieto di *non liquet* – produce comunque decisioni imprevedibili *ex ante*, perché fondate su norme fino a quel momento inespresse.

Il lavoro di HÁ mostra come il tema della certezza giuridica sia una sorta di *Aleph* (nel senso di Borges) dal quale molti problemi centrali della moderna teoria del diritto si intrecciano e si mostrano in tutta la loro evidenza.

Edizioni ETS
Palazzo Roncioni - Lungarno Mediceo, 16, I-56127 Pisa
info@edizioniets.com - www.edizioniets.com
Finito di stampare nel mese di maggio 2022