# The Legacy of John Gardner. Legal Justification and the Metaphor of "The Balance of Reasons"

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**Abstract**

This article presents a critical commentary on one point of John Gardner's rich legacy. The critique accepts two important commitments assumed in Gardner's contributions to legal theory. First, it assumes a positivist approach to analysing law and, second, the idea that law can be understood as aiming to constitute reasons for action. On this basis, the criticism is directed in particular against Gardner's conception of the so-called 'balance of reason' that the addressees of law, *i.e.* judges in particular, must undertake in the case of conflicts between legal norms. Gardner's conception of this issue is determined by the widely accepted thesis of the unity of practical reason on the premise that there is only one kind of reason that has a 'genuine' capacity to justify decisions. The arguments put forward in this critical analysis are based on Bernard Williams' reflections on practical reasons.

**Keywords:** John Gardner. Balance of Reasons. Unity of Practical Reasons. Prudential Reasons. Bernard Williams.

## 1. Introduction

This short commentary is intended as a small tribute to John Gardner. There is no need to emphasise the importance of Gardner's contribution to contemporary legal theory. Despite his young age, at which he sadly passed away, his work has had a significant impact on the field.

John Gardner wrote a great deal on a subject that is at the centre of legal phi-

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losophy today. A topic that revolves around the practical capacity of law to provide reasons for action and justify decisions. His insightful writings on this subject have shed light on a discussion that is usually intricated. Among other things, Gardner's ability to clearly express some ideas that can sound very obscure or suspect in abstract form and to provide them with examples and concrete applications from various areas of civil and criminal law should be emphasised.

It is well known that the approach that analyses law from a practical perspective – *i.e.* as a reason for action – goes back essentially to Herbert Hart and was developed in a particular way by Joseph Raz[1]. Gardner worked in a Razian lineage, within a positivist tradition, and he did much to clarify and deepen the positivist proposal.

It is not possible in this context to set out all the premises and presuppositions on which this brief commentary is based, let alone the many consequences that I think follow if we accept it. One thing that should be emphasised is that the critique I am about to present is entirely consistent with the premises of the positivist tradition. From this methodological perspective, I will offer some reflections on certain widely accepted theses that, in my view, have a very negative impact on an adequate legal positivist explanation of the practical nature of law and the way in which law justifies judicial decisions in cases of conflicts of reasons.

The main thesis I am trying to support is that there are good reasons to abandon two central ideas, at least in their current, widely accepted version: I refer, first, to the current interpretation of the idea of the unity of practical reason under the requirements of morality and, second, to the standard metaphor that compares practical reasoning to a balance of reasons by which a conflict of reasons must be resolved by judicial authorities[2]. Surely these ideas should be revised, not because they pose problems for a legal positivist explanation of the practical character of law – the way in which law justifies and requires actions –, but because they are very ambiguous, misleading ideas based on a very restrictive conception of both rationality and morality.

These issues are fraught with many problems that would merit a detailed analysis that I cannot undertake here. To facilitate my brief exposition, I think it is useful to say that the criticism I wish to make is based on Bernard Williams' reflections on the subject. Indeed, the main substantive critical proposals on the idea of the unity of practical reasoning can be seen as direct applications of Bernard Williams' analysis of practical rationality[3].

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[1] See, among other works, Hart 1961 and 1982. Also, Raz 1975, 1979, 1984, 1986 and 1989.

[2] The idea of the unity of practical reason is generally assumed but has not been explicitly analysed in recent literature. See e.g., Nino 1985: 125-137, 1993: 32-37 and 1994; also, Redondo 1999: 164-172. On the idea that reasons have a dimension of strength and that in the case of conflict the stronger or weightier reason overrides the weaker one in a kind of "balance", see Raz 1975: 25-33.

[3] I will be considering principally Williams 1972, 1973a, 1981, and 1985.

## 2. On Reasons for Action and the Normativity of Law

It is useful to begin by setting out the main basis for my critical diagnosis of Gardner's approach. On the one hand, it is a general analytical commitment to how the existence of normative properties, facts and objects is to be explained. Accordingly, any kind of normativity should be explained in a way that does not contradict logic and empirical research. This general idea stems from the desideratum of analytic philosophy that any philosophical explanation – in our case, the explanation of norms and reasons for action – should be compatible with scientific explanations. On the other hand, it is a positivist commitment, according to which there is no hope of explaining legal norms if we do not take into account that they are ultimately determined by and depend on subjective human attitudes. In a few words: I accept the thesis of the social sources of legal norms.

According to this view, legal norms are cultural products. Undoubtedly, under certain conditions and to a certain extent, we can have objective knowledge of these norms. However, unlike natural facts, their existence is not an ontologically external, objective fact that is independent of human beliefs and desires. Legal norms are part of a social reality that depends on human attitudes. My aim here is not to explain normativity in general, but to emphasise that there is a current explanation of legal normativity – which John Gardner accepts – that understands it as ultimately based on external, objective moral reasons whose status is independent of any human attitude. This thesis rests on two controversial general ideas: First, that a reason for an agent to do a certain thing is something objective and external to the agent. Second, that legal normativity ultimately has no human, social sources.

A noteworthy point that should be emphasised is that this current explanation is so convincing that, contrary to what one might expect, and especially contrary to what one would expect from any legal positivist theory, it has not only not been rejected, but has led the long tradition of legal positivism to abandon one of its defining theses and reinterpret itself to accommodate it. Today, it is virtually unanimously accepted that objective, external moral reasons are the only ones that can justify behaviour. Law alone cannot provide reasons for action. It can only have a practical relevance if we allow a connection between law and morality. In other words, for legal justification to be successful, we must refer to "genuine" norms that are not based on mere subjective social facts, but on objective, external moral reasons.

The current explanation of legal normativity is determined by other controversial ideas that Gardner accepts. I would like to mention two of them here.

First, Gardner accepts that there are no more than two kinds of practical reasons, which in turn are mutually exclusive. These are prudential and moral reasons[4].

[4] Cf. Gardner 2012: 137. On this thesis Gardner follows Matthew Kramer. See Kramer 1999: 379.

Prudential reasons relate to the interests of the agent and are therefore partial, subjective reasons. Moral reasons, on the other hand, are objective, external facts. This distinction would require many explanations that I cannot give now. The point is that if we accept the proposition that all practical reasons are either prudential or moral reasons, we can easily see why we cannot escape the conclusion that it is necessary to invoke objective moral reasons to justify decisions, especially when it comes to judicial decisions involving a third party. This is also because, as I will argue in the next point, moral reasons are the only ones that apply to everyone and not only to those who accept them.

The second important idea related to the previous distinction is the way in which morality and moral reasons are conceptualised in this view. There are few concepts that are as controversial as the concept of morality. In the long prestigious tradition that supports the exhaustive opposition between moral and prudential reasons, moral reasons by definition take precedence over the other kind of reasons. As we can see, they are defined in part by the specific role they play within practical reasoning. According to Gardner, moral reasons are inescapable[5]. This means that there is no way to rationally justify a decision without engaging with morality. Other authors, such as Nino, formulate the idea differently, but it follows from the dichotomy between moral and prudential reasons that moral reasons are the highest hierarchical types of reasons that take precedence over the other type of reasons in a practical justification process. Consequently, according to Gardner, moral reasons are also the only ones that can justify duties. Duties, as Gardner points out, are a special kind of reasons. They are not merely external and objective. Unlike ordinary reasons which simply advise action, duties are mandatory reasons that require certain behaviour, «with the extra feature that they are also categorical, meaning that they are not hostage to the prevailing personal goals of those who are subject to them»[6]. In other words, duties are by definition a kind of objective moral reason.

Bernard Williams offers a sophisticated, perceptive critique of these and many other ideas associated with this line of thought.

Firstly, it is not useful to reduce practical reasons in general to the opposition between prudential and moral reasons. There are reasons which we would call "moral", and which are an extension of the prudential interests of the agent. At the same time, however, there are also reasons that do not fit into either of these categories[7]. For example, when we do something because we love someone or because they are our mother or our child. In short, the classification "prudential-moral" regarding reasons is reductive, and forces us to label as "moral" reasons that still seem to be

[5] Gardner accepts what he calls «the inescapable morality thesis». See Gardner 2012: 149-153.

[6] Gardner, Macklem 2004: 469.

[7] See Williams 1972: 68-70.

connected to prudential interests or that do not seem to fit into either category.

Second, Williams also highlights some difficulties associated with the general conception of reasons for action that lies behind this current understanding, and with the possibility that moral norms or duties can be analysed as reasons if one adopts such a conception. It is difficult to understand how something can be a reason for an agent's action or omission and at the same time be a completely external, objective fact[8]. That is, a fact which may not be recognised by the agent as a reason for their behaviour. Certainly, there may be valid moral norms or duties, but if we say that they constitute a reason for an agent *A* to do or refrain from doing something, they can hardly be regarded as something external to the agent *A*, who may not even recognise them as a reason for their action.

Third, Williams' proposal shows us that there is no clear basis for assuming that moral reasons are a kind of reasons that necessarily unify practical justificatory reasoning. In other words, there is no basis for the claim that what is justified, all things considered, is always what we ought to do morally. More generally, there is no safe or stable argument for the conclusion that any kind of reason – whether moral, religious, legal, economic, etc. – must necessarily take precedence over all other kinds of reasons and thus play a justificatory, unifying role[9].

An important consequence in this regard is that, if we abandon the equation between what is conclusively justified and what we ought to do morally, we leave room for the possibility that law can, under certain conditions, provide justifying reasons without necessarily invoking moral reasons. Moreover, we allow for the possibility that, under certain conditions, it is conclusively justified to do what the law prescribes, even if it contradicts what is morally required.

## 3. Should We Always Act for an Undefeated Reason?

Finally, always taking Williams' perspective, I would like to address a specific issue related to the way in which the currently accepted approach understands the practical reasoning that resolves a conflict of reasons. More specifically, the idea of a balance by which we measure the force of applicable reasons to determine conclusively what we ought to do. It is true that the analysis I will argue for leads to a critical conclusion about the way Gardner understands practical legal reasoning that resolves a conflict, but it is interesting to see that such an analysis could be accepted by Gardner because it is based on some ideas that were underlined by him.

Gardner has in fact put forward two ideas that are relevant to this topic.

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8 Williams 1981d: 101-113.

9 Williams 1972: 69; 1981b: 119 and 124; 1985: 178.

First, he makes a clear distinction between partial and complete justification[10]. A reason which can be overridden by other reasons provides a partial justification, while a complete justification is the result of a practical reasoning in which we consider all applicable reasons, which may also be conflicting reasons.

Secondly, he repeatedly emphasised that a reason has normative force and justifies an action even if it is overcome by one or more other conflicting considerations. In his opinion: «Every time one does not do what any reason would have one do, be that reason mandatory or otherwise, a trace is left on one's life. This is always in principle a matter of regret, for as we saw reasons do not lose their force as reasons merely because they are defeated»[11]. This point is of great importance and has consequences that are not fully recognised even by Gardner, who defends it. If we take it seriously, we can still accept that a crucial moment of practical reasoning is to weigh up reasons in order to decide what to do. After that, however, it would also be necessary to determine how we should act to satisfy the defeated reasons, which, as Gardner recognises, may still be relevant. In other words: If the defeated reasons still require something, the practical reasoning which determines what we ought to do, all things considered, cannot be conceived of as mere balancing. The balance determines what the best reasons are in certain circumstances, but it is also necessary to determine what the best actions are in order to honour the reasons that apply in those circumstances. And this also involves determining what we should do to honour the reasons that have not prevailed due to the circumstances.

Strictly speaking, a conflict between two reasons, as opposed to a logical contradiction between them, is a case in which we cannot do everything for which we have reasons on the basis of empirical considerations in a given situation. That is, we have a partial justification for doing two things that we cannot do simultaneously because the world is the way it is in such a situation.

Suppose we have the following partial justifications for two different actions: on the one hand, reason 1: the value (A) of individual respect, which requires us to action (a): to provide equal support to each student; and on the other hand, we accept reason 2: the value (B) of equality between university departments, which requires us to action (b): to provide equal financial resources to the different departments of the university.

However, we may not be able to perform both actions due to contingent circumstances. Suppose that on a particular occasion when funds need to be allocated, the Philosophy department has many more students than other departments. In such a case, we cannot give the same amount of money to each department and the same amount of support to each student. Indeed, if we give each department the same amount of money, we cannot guarantee that each student will receive the same

[10] Gardner, 2007: 95.

[11] Gardner, Macklem, 2004: 467. On this point, Gardner and Macklem explicitly say that their proposal is coherent with Bernard Williams' position. See Williams 1973b: 166-186.

amount of support, and if we decide on a distribution that guarantees equal support for each student, we cannot give the same amount of money to each department. Suppose we conclude that, in the context of the decision, value (A): Individual respect (reason 1) is stronger or more relevant than value (B): Equality between departments (reason 2). Consequently, we should not take action b, *i.e.* we should not provide equal resources to each department, but rather provide more resources to the Philosophy department to treat each student equally.

If we regard the decision-maker's reasoning as simply a weighing of reasons, we need not say much more. In the circumstances, it is conclusively justified to act on the first reason, and this implies that it is justified not to act on the second reason (the demand for equal treatment of the various departments). And this is also true for Gardner, who agrees with Joseph Raz: «It is always the case that one ought, all things considered, to act for an undefeated reason»[12].

Contrary to this idea, if we broaden our view and understand practical reasoning not only as a process of weighing reasons, we can see that our practical reasoning can help us to look for other ways or actions to satisfy the value (B), the defeated reason, even if it is impossible to perform the action (b) (since under the given circumstances the balance is in favour of the action (a)). In other words, the impossibility of action (b) does not mean that we cannot find other actions that satisfy both applicable reasons. These actions will, of course, not be the ones we said the applicable reasons originally required. In this case, for example, we could provide more resources to the Philosophy department, as the balance requires, but compensate the other departments with strategies to increase student numbers, or we could decide that each department can only take a limited number of students from now on, to prevent any one department from exhausting the available resources. In this way, we are coherent with the idea that defeated reasons still have a rational force and must be satisfied even if they are defeated.

It is interesting to note that the reasons that come into conflict in the legal domain are usually principled reasons. They are values that, strictly speaking, are reasons for many different kinds of actions, not just for one particular action. If this is so, the fact that reason 1 is more important than reason 2 does not mean that reason 2 is inert or requires nothing. It means that we need to use our imagination to find actions that can fulfil or satisfy reason 2, at least to some degree.

There are certain cases of conflict where, by choosing to satisfy one reason, we destroy any possibility of satisfying the other reason. In this case, however, assuming that the defeated reason is still a reason, we should say that it is also conclusively justified to express regret, ask for an apology, or offer reparation. All this means that practical reasoning is not just a weighing up of reasons.

To summarise, I have first suggested that there are some insightful considerations

[12] See Raz 1975: 40.

that argue against the common position that all conclusive justifications are ultimately based on external, objective (moral) reasons. This thesis implies that law, which is part of a social reality based in part on human attitudes, cannot justify decisions.

On the other hand, I have given an example that shows that even if we were to accept a definition according to which we ought to act conclusively according to the outcome of a balance of reasons, if we were to follow Gardner's thesis that a reason for action always demands something, even if it has been overcome by other considerations, then we would have to admit that in the case of a conflict we are not only justified to do what the balancing of reasons indicates, because we are also justified to do something more to satisfy the overcome reasons (even if this is not "technically" a duty; of course, this depends on how the concept of duty is defined).

If this is so, we should reject or regard with suspicion the principle I have already mentioned and which Gardner, following Joseph Raz, advocates: «It is always the case that one ought, all things considered, to act for an undefeated reason».

This is so because, as we have seen, all things considered, acting for a defeated reason is also justified.

This conclusion follows in part from Gardner's position and also contradicts it in part. It follows from Gardner's proposal because he explicitly endorses the idea that: «[o]utweighed reasons do not lose their rational force in the sense of being any the less reasons for action, or in the sense that there is any less appeal than there would otherwise be to doing as they would have one do»[13].

However, it also contradicts Gardner, for he claims, «[t]he only effect of their being outweighed, like the effect of their being excluded, *is to eliminate the rationality of acting for them*»[14].

If what I have suggested above is correct, this last conclusion is not. For to be coherent with the first idea, we must accept that outweighed reasons also rationalise an action. Otherwise, it would not be true that they are still reasons that do not lose their rational force.

I hope that with these reflections I have succeeded in conveying, at least superficially, how stimulating and interesting the legacy of John Gardner is. It is certainly necessary to reflect further on his important contributions. They have major implications for how the law constitutes justificatory reasons, how judicial reasoning should proceed, and exactly what actions can be said to be justified by the law.

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[13] See Gardner, Macklem 2004: 464.

[14] See Gardner, Macklem 2004: 464 (the italics are mine).

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