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Saggi
(Essays)

THE JURISPRUDENCE OF JOHN GARDNER AND THE FUNDAMENTALS OF LAW

edited by Julieta A. Rabanos

Foreword

*Julieta A. Rabanos**

Abstract

On 14 July, 2023, a tribute seminar was held at the University of Genoa for the late John Gardner (1965-2019). The aim was to honour and celebrate his life by discussing some of the many topics he addressed in his extensive, diverse and influential academic works. This section collects the contributions of six of the ten key speakers at the seminar.

Keywords: John Gardner. Legal Positivism. Jurisprudence. Study of Law. Responsibility. Reasons for Action.

On 14 July 2023, a tribute seminar –"The Jurisprudence of John Gardner and the fundamentals of law"– was held at the University of Genoa for the late John Gardner (1965-2019). The aim was to honour and celebrate his life by discussing some of the many topics he addressed in his extensive, diverse and influential academic works.

Gardner's academic career is well known[1]. He attended the University of Oxford for all his high education, undertaking his DPhil studies under the supervision of Joseph Raz and Tony Honoré. After that, he was a fellow of several colleges at the University of Oxford (All Souls College and Brasenose College) and he also held an array of different teaching and researching positions at the University of Oxford, with a brief break where he held a readership at King's College London. In 2000, at the age of 35, he was appointed as Professor of Jurisprudence at University College

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This specific contribution, the organisation of the seminar that served as the basis of the contents of this section, and the organisation of the subsequent publication of this seminar result from activities related to the Horizon Twinning project "*Advancing cooperation on The Foundations of Law – ALF*" (project no. 101079177). The project is financed by the European Union.

[1] For a more in-depth account of it, and also his personal life, see v.gr. Endicott 2019, Acorn 2019, Lacey 2019, and Shute and Acorn 2019, as well as Edwards 2021.

(Oxford), a role previously occupied by H.L.A. Hart and Ronald Dworkin. He held that role until his appointment in 2016 as a Senior Research Fellow of All Souls College, where he remained until his death.

In the same vein, the width and depth of Gardner's academic work is also well known. He wrote four main books on criminal law, jurisprudence, private law, and torts: *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (2007), *Law as a Leap of Faith: Essays on Law in General* (2012), *From Personal Life to Private Law* (2018), and *Torts and other Wrongs* (2020), the latter finished just before this passing. The range of his interests and expertise went even further: among others, it involved problems of torts and contracts, constitutional law, public law, private law, sexual assault law, the rule of law, discrimination, theories of justice, and much more. He indeed defined himself as a "generalist" within the scope of philosophy of law[2].

This seminar was one among other diverse initiatives aiming at honouring and celebrating John Gardner, some of them being very recent books[3]. It had several characteristics that made it special. On the one hand, the main speakers were from both common law and civil law traditions, a specific point that opened the scope of the discussion. On the other hand, it involved both speakers that had directly known Gardner and speakers that only had known Gardner by description, either through his work or through his influence on others' works. Moreover, the contents of the discussion at the seminar revolved mainly around Gardner's substantive ideas on jurisprudence, in particular his proposal on the definition of legal positivism; however, they also touched upon his ideas on reasons for action, practical reasoning, the study of jurisprudence, and responsibility. Finally, the seminar has held within the framework of the residential courses of the *Master in Global Rule of Law and Constitutional Democracy* (University of Genoa & University of Girona), so a great number of audience participants were international graduate students who were able to establish contact with Gardner's work and participate in deepening their understanding and debate of his ideas.

This section of the first 2024 issue of *Analisi e diritto* collects the interventions of six of the ten main speakers of the seminar. The discussion on the following pages will follow this order. The first part will be dedicated to three contributions that propose to discuss John Gardner's stand regarding legal positivism, as it was presented in Gardner's very influential essay "Legal Positivism: 5½ Myths"[4]. In "John Gardner on the Scope of Legal Positivism", Brian Bix critically analyses

[2] Gardner & Flores 2019.

[3] See v.gr. Madden Dempsey & Tanguay-Renaud 2023 (explicitly dedicated as an homage to Gardd ner's academic life), as well as Psarras & Steel 2023 (dedicated to discussing Gardner's ideas related to the philosophy of private law). Also, a very recent special workshop "In Memory of John Gardner", related to Gardner's Underappreciated Words, was held at the beginning of June 2024 at the University of Oxford.

[4] Gardner 2001 (reprinted in Gardner 2012).

Gardner's argument that legal positivism is to be understood only as a thesis about the validity of individual norms, and the problematic consequences that followed from this approach. On the one hand, for Bix, it has contributed to the discount and marginalization of two important questions about the non-/separation of law and morality: the legal status of immoral legal systems, and the role of moral evaluation in the construction of theories about the nature of law. On the other hand, it has contributed to taking attention away from the theoretical question regarding the extent to which a position of non-/separation on one topic within jurisprudence entails or supports a similar view on other topics.

In "(LP*) Revisited. On John Gardner's reductionism of legal positivism", Alejandro Calzetta takes a different path in his critical analysis of Gardner's legal positivism, by concentrating the attention on Gardner's attempt to reduce legal positivism to just only one proposition (the so-called LP*). Calzetta argues that Gardner's reductive attempt fails to account for several features of what it is usually denominated as legal positivism, and that is mainly due to the fact that Gardner approaches the analysis of "legal positivism" as if it were a concept akin to "legal competence", *i.e.* a legal concept, and thus takes a strict conceptual analytical approach to its analysis. However, Calzetta claims, "legal positivism" is in fact a concept of the history of ideas, that needs for a "historical approach" to be analysed, understood and defined. He shows how this issue affects Gardner's approach, also contrasting it with the common law approach of H.L.A. Hart's and the civil law approaches of Norberto Bobbio and Eugenio Bulygin.

Finally, in "5½ Myths of Legal Non-Positivism", Mattias Klatt departs from Gardner's article about the myths about legal positivism to, in turn, propose a discussion regarding several assumptions about legal non-positivism that many authors – including Gardner – seem to hold and argue for. He identifies six assumptions: that legal non-positivism misconstructs legal positivism; that it destroys law's positivity; that it disempowers the legislator; that it accepts a questionable notion of ideal dimension of law; that it does not settle the conflict between real and ideal elements of law; and that it transformed a descriptive-analytical debate about what the law is into a normative-political debate about what the law ought to be. In the same way as Gardner did in his original paper, Klatt discusses and critically analyses these assumptions, and finally unveils them as myths.

The second part will be dedicated to three contributions that explore other facets of Gardner's work. In "'No making responsible, we might say, without holding responsible'", Sebastián Figueroa Rubio proposes to analyse some theses that Gardner advanced on the relations between different concepts of responsibility and to explore their usefulness for the understanding of relationships between agency, reasons, and responsibility practices. Figueroa offers a reconstruction of Gardner's stand in the relation between basic, consequential, and prospective responsibility, and points out two challenges related to Gardner's understanding of

basic responsibility: how it makes more difficult the understanding of other types of responsibility, and how would be possible to make sense of the role of excuses in responsibility practices. Finally, Figueroa offers an argument about how to deal with those challenges using tools provided by Gardner's last works.

In "The Legacy of John Gardner. Legal Justification and the Metaphor of "the Balance of Reasons", María Cristina Redondo proposes to critically analyse Gardner's conception of the so-called "balance of reason" that the addresses of law must undertake in case of conflicts between legal norms. Redondo accepts Gardner's commitments of a positivism approach to analysing law, and that law can be understood as aiming to constitute reasons for action for its addresses. However, she points out that Gardner's conception of "balance of reason" is determined by the thesis of the unity of practical reasoning, as accepting that there is only one kind of reason that can genuine justify decisions, and she advances the claim that there are good reasons to abandon both the idea of the unity of practical reason under the requirements of morality and the standard metaphor that compares practical reasoning to a balance of reasons by which a conflict of reasons must be resolved by judicial authorities.

Finally, in "Jurisprudence as a Side-Quest? A critical appraisal of John Gardner's account of the reasons to study jurisprudence", Bojan Spaić critically engages with Gardner's claim that philosophy of law has a modest and optional role within legal studies. Spaić argues that Gardner's account of reasons for studying jurisprudence falls short because it is based on a very narrow concept of general jurisprudence, one that leaves out a wide array of kinds of jurisprudence and crucial jurisprudential issues. To show this point, Spaić proposes to discuss two types of knowledge that jurisprudence can transfer, and then the ability of various kinds of jurisprudence to develop these types of knowledge in students of law. His main argument is that jurisprudence is best understood not as a side quest in legal studies, but a crucial – albeit additional – content to the study of law that is well positioned to contribute significantly both to the study of law and legal practice.

The contributions of the four remaining key speakers, which are not reproduced in this issue but are set for future publication, discussed Gardner's ideas on responsibility, constitutional law, the functionality of rules of recognition, the legality of law, and the authority of law and its normativity. Annalise Acorn focused on "Responsibility, Self-respect and the Ethics of Self-pathologization". She analysed John Gardner and Timothy Macklem's position in regard to defences which deny responsibility on grounds of mental illness (who maintain that self-respecting persons accused of a crime should ideally want to be able to give a rational account of their actions), and their debate with critics Mitchell and Mackay. Then, Acorn argued that, while she agrees with Gardner and Macklem's view, she nevertheless thinks that Gardner and Macklem's reply to Mitchell and Mackay lacks an acknowledgement and critique of what I will call the therapeutic

persuasion; a cultural phenomenon that has radically altered popular conceptions of responsibility, mental illness and self-respect. She then developed her view on the sensibility of the therapeutic perspective and a critique of that sensibility and its influence on criminal conceptions of responsibility.

José María Sauca Cano focused on honouring Gardner not by offering critical analysis of his work, but by showing how it greatly benefited Sauca's scientific production – in particular, Gardner's essay "Can There Be a Written Constitution?". Some of the ideas contained in that essay, in particular Gardner's distinction between constitution and constitutional law, and his specification of the functionality of the Rules of Recognition, have had a great impact in the development and ultimate formulation of a novel concept that Sauca calls "Constitutional Clauses of Liquidity (CCL)". These clauses are, *grossomodo*, provisions enabling the production of provisions that *prima facie* would have an unconstitutional content. Gardner's distinction between constitution and constitutional law, leaving room for actions that are unconstitutional but neither illegal nor legally invalid, allowed Sauca to find a conceptual space for written constitutional provisions such as the CCLs, as there would be no systemic impossibilities for their existence. In turn, Gardner's specification of functionality of Rules of Recognition (RsoR) allowed for understanding that the characterisation of CCLs as power-conferring rules does not change the RsoR of the constitution.

Natalia Scavuzzo focused on ch. 7 of *Law as a Leap of Faith* (2012), and Gardner's reflections related to the legality of law. Scavuzzo analysed Gardner's attempts to fix the problem of the "insufficient sensitivity" of philosophy of law to ambiguities, and concluded that they still left unattended some ambiguities that would need to be taken into consideration. She argued that, on the one hand, there are some relationships between "law" and "legal" that Gardner's analysis seems to leave aside and unattended. On the other hand, attention to these ambiguities can provide a different explanation of the expressions that Gardner attempts to explain, such as "illegal law" and "all laws are legal". Scavuzzo showed different relationships between "law" and "legality", considering the different meanings that Gardner recognised that "law" can have, and how Gardner's proposed definition for "illegal law", for example, does not fit all of them.

Finally, in "Law as Three Leaps of Faith", Julieta Rabanos discussed Gardner's famous article "Law as a Leap of Faith", identifying several interesting points such as: (1) The Socratic challenge (puzzle between omnipotence and omniscience of God); (2) The comparison between transcendental authority and earthly authority; (3) The search of some "God-equivalent-argument" in legal theory; and (4) The idea of a "leap of faith" regarding law's normativity (in a wide sense). Rabanos then identified several possible challenges and questions associated with each one of those interesting points: (1) Is the Socratic challenge still on if we consider morality as another social normative system, or if we renounce the idea of the unity

of practical reasoning? (2) Is the comparison between transcendental authority and earthly authority really conducive to Gardner's claim that faith in law is different from faith in God? (3) Is really the *Grundnorm* a "juristic God"?; and, finally, (4) Is there only one leap of faith regarding law, or are there three of them? Regarding the last question, she suggested that, where Gardner only explicitly identified one leap, three leaps should be considered: the explicit leap (from Being X to Doing Z because of being X); an implicit leap in Gardner's analysis (Being X and Z at the same time and deciding for X or Z [Leap to Being X]); and missing leap (from belief/desires to reasons).

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John Gardner on the Scope of Legal Positivism

*Brian H. Bix**

Abstract

In *Legal Positivism: 5½ Myths*, John Gardner argued that legal positivism should be understood *only* as a thesis about the validity of individual norms. This influential view has had the effect of discounting and marginalizing two other important questions about the separation or non-separation of law and morality: regarding the legal status of significantly immoral legal systems, and regarding the role of moral evaluation in the construction of theories about the nature of law. More importantly, there is far less attention now paid than there should be to the interesting theoretical question of the extent to which a position in favor of separation (or non-separation) on one topic entails, or at least strongly supports, a similar view on the other topics.

Keywords: John Gardner. Hart-Fuller Debate. Legal Positivism. Legal Validity. Theory Construction.

Introduction

John Gardner's work has been influential across a wide range of topics, including tort law, anti-discrimination law, theories of justice, and the debates on the nature of law[1]. Already, there are memorial volumes present or forthcoming considering the many facets of Gardner's career[2]. In the context of this workshop honoring Gardner's many contributions, I have the time only to discuss one small but interesting corner, relating to his writings on the nature of law.

One of Gardner's most influential pieces, *Legal Positivism: 5½ Myths*[3], offered

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1 See, *e.g.,* Gardner 2012, 2018, 2019.

2 See, *e.g.*, Dempsey and Tanguay-Renaud 2023.

3 Gardner 2001. (The article was also reprinted in Gardner 2012: 19-53. Citations in the present work will be to the original article.)

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a series of warnings about what he says that legal positivism does *not* advocate. The article is constructed around a distinctive view of the scope of legal positivism, a view that, I will argue, is unhelpfully narrow. This may seem a minor point, but I will argue that its acceptance or rejection is connected with important questions about the relationship between law and morality.

In what follows, Part 1 discusses Gardner's views, Parts 2 and 3 discuss the other aspects of legal positivism that Gardner's perspective ignores or marginalizes, before offering some general observations in Part 4, and concluding.

1. Gardner's View

In *Legal Positivism: 5½ Myths*, Gardner argued that there is «one and only one proposition [that is] the distinctive proposition of "legal positivism"»[4]. That proposition, as modified in the course of the article, states: «In any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits […]»[5]. That is, according to Gardner, what makes a theory "legal positivist": that it rejects a moral test (or any sorts of "merits" test) for legal validity. (Though, as Scott Shapiro would later argue, a non-merits-, source-based test for identifying law leaves open the possibility that legal rules, identified this way, will have moral implications[6]).

Under Gardner's suggested test, no merits criteria will be allowed, either as a sufficient or a necessary condition for legal validity. This would thus exclude certain understandings of the Radbruch Formula (that individual norms that are sufficiently unjust lose their legal validity)[7]. It would also exclude certain (generally conventional) understandings of constitutional judicial review of legislation, understandings that in such cases courts are holding legislation contrary to the constitutional requirements to have been "void ab initio"[8]. Finally, it may also conflict with certain understandings of common law decision-making (in common law countries), in which there is a sense in which what is morally best is already the law, just being "discovered" by common law judges.

Gardner's legal positivism is thus a form of "exclusive legal positivism" (where

4 Gardner 2001: 199.

5 Gardner 2001: 201. The words left out by the ellipses are «(where its merits in the relevant senses, include the merits of its sources)».

6 See Shapiro 2011: 8-12 (distinguishing identity questions from implication questions).

7 See Radbruch 2006.

8 It is important to clarify that those who hold these ("exclusive") legal positivist positions are not arguing that courts do not invalidate legislation contrary to the constitution, or that they should not. The question is only how to characterize such decisions. Exclusive legal positivists argue that such decisions are best understood as powers delegated to judges to invalidate legislation.

moral evaluation can play no role in determining the legal validity of rules) rather than a form of "inclusive legal positivism" (where moral evaluation *is* allowed to play a role, but only if so authorized by social/conventional sources), though I do not want the focus of the present work to be yet another overview or evaluation of that debate[9]. More importantly, from the present perspective, Gardner's view of legal positivism ignores or discounts two other important aspects of the separation of law and morality, ones that have roots in the works of H. L. A. Hart and many other paradigmatic legal positivist authors.

(Beyond the two topics that will be discussed, there is yet another position that is sometimes included as part of, or at least related to, legal positivism: "ethical" or "normative" legal positivism[10]. This approach argues that the exclusion of moral considerations from determining legal validity is not required by the nature of law, as argued for by conventional legal positivist theories, but is rather a contingent matter, but one worth choosing for policy reasons. I will not be discussing that interesting approach in the present work).

2. The Legal Status of Systems

One of the central parts of the well-known Hart-Fuller debate, published in the 1958 *Harvard Law Review*[11], was the disagreement about the legal status – or *non*-legal status– of the rule system present in Nazi Germany.

Lon Fuller offers his own distinctive twist on natural law in his response to Hart. Fuller's objection to the purported *legal* status of what the Nazis had went less to its substantive evil (not that Fuller in any way denied the deep substantive immorality of the Nazi rules), and more to its procedural irregularities (secret laws, highly vague laws, judicial interpretations and applications that deviated sharply from the promulgated texts, etc.).

H. L. A. Hart, in his *Harvard Law Review* piece and, later, in *The Concept of Law*[12], presents the legal positivist position in contrast to the natural law view (as Hart understood it), in asserting that even evil laws, and unjust *systems* of rules, were still "law", and that to claim otherwise was simply to invite confusion[13]. He urges us to view the separation of law and morality at both levels. In his *Harvard Law Review* piece, he examines «not [only] whether every particular rule of law must satisfy a moral minimum in order to be a law, but whether a system of rules

9 I have written about that debate elsewhere. See*, e.g.*, Bix 1999, Bix 2024.
10 See*, e.g.*, Campbell 2016, Schauer 2021.
11 Hart 1958, Fuller 1958.
12 Hart 2012.
13 See*, e.g.*, Hart 2012: 200-203.

which altogether failed to do this could be a legal system»[14].

Of course, Hart famously went on to complicate the inquiry by making a point more sociological than conceptual. His discussion of «the minimum content of natural law» points out that any society which failed (whether in its social norms or its institutional norms) to give minimal protection to life, health and property for at least a chosen elite, would be doomed to failure[15].

Without wanting to re-enter the particulars of the debate about whether the Nazis (or Stalinist Soviet Union or Apartheid South Africa) had law, the question of whether a rule or dispute-resolution system could be too immoral to warrant the label "law" and "legal" remains an important question, about which reasonable citizens and theorists can and do disagree, and which even has been the focus of a much-discussed experimental jurisprudence study[16].

David Plunkett, in his review of Scott Shapiro's book, *Legality*[17], similarly distinguishes between two kinds, or two aspects, of legal positivism: arguing that social facts (alone) ground *the content of law* (e.g., the content of legal norms), and arguing that social facts (alone) ground *the institutions* of law[18].

And there are questions to be asked about the moral prescriptions for officials and for citizens who live in a society which is so immoral or so procedurally wrong as, under some theories, not to warrant the title "law." As others have noted, there may be moral reasons to abide by simple contractual duties even in a world of great injustice. But such inquiries would take us far from our present topic.

3. Value-Free Methodology in Theory Construction

Another question about the separation – or connection– of law and morality that is regularly mentioned, but rarely focused upon, is that relating to methodology. H. L. A. Hart argued that it is not for the theorists to evaluate (morally) the legal systems about which they are theorizing. And even when they (properly) take into account that citizens sometimes accept the legal system as giving them reasons for action, it is not the theorists' role to ascertain whether they are justified in doing so[19].

In response to Hart, John Finnis argues[20] that the theorists of the nature of law need to make moral evaluations: to posit a practically reasonable hypothetical

14 Hart 1958: 601.

15 See Hart 2012: 193-200.

16 See Flanagan and Hannikainen 2022, critiqued by Himma in Himma 2023: 359-363.

17 Shapiro 2011.

18 Plunkett 2013: 570-572, 584.

19 Hart also famously notes that citizens might have non-moral reasons for accepting the law. Hart 2012: 203.

20 Finnis 2011: 3-22.

citizen, and to ask whether such citizens, viewing their own legal system, would conclude that the law in fact gives them (moral) reasons for action. In rejecting what he characterized in Hans Kelsen's work as a «lowest common denominator» view[21], and the general «internal point of view» espoused by both H. L. A. Hart and Joseph Raz[22], Finnis concludes:

> If there is a point of view in which legal obligation is treated as at least presumptively a moral obligation …, a viewpoint in which the establishment and maintenance of legal … order is regarded as a moral ideal …, then such a viewpoint will constitute the central case of the legal viewpoint. For only in such a viewpoint is it a matter of overriding importance that law as distinct from other forms of social order should come into being, and thus become an object of the theorist's description[23].

Stephen Perry raised a different challenge[24]. He pointed out that theories about the nature of law asserted or assumed a primary objective for law, but that theorists did not agree on that objective: for Hart, law was about guiding behavior, while for Dworkin it was about justifying or constraining state coercion. The choice between these alternatives requires moral evaluation.

By contrast, both Julie Dickson[25] and Jules Coleman[26] have written at length about the way in which the construction of legal theory must be selective and evaluative, but that this evaluation can and should be morally neutral, based on principles of theory construction or just based on "importance". Coleman observed that a theory of the concept of law, like all other theories of concepts «are normative both in their construction and ambition. They are responsive to the norms governing theory construction, and aim not merely to report on linguistic behavior, but to discipline use and to structure thought»[27]. Theory-construction in jurisprudence, Coleman argues, needs to take into account «epistemic norms in identifying those features of law the concept must answer to,» and «theoretical norms, such as consilience and unification»[28].

Dickson speaks of «indirectly evaluative» legal theory (as contrasted with the "direct" moral evaluation advocated by John Finnis and others). As Dickson states, indirectly evaluative propositions «state that a given X has evaluative properties but do not entail directly evaluative propositions stating that this same X is good (or bad)»[29]. In particular, a statement that a particular feature is "important" is

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21 Finnis 2011: 5-6, citing Kelsen 1945.
22 Finnis cites to Hart 1958, Hart 2012, and Raz 1990.
23 Finnis 2011: 14-15 (footnotes omitted).
24 Perry 1995, 1998.
25 Dickson 2001, 2022.
26 Coleman 2001.
27 Coleman 2001: 179-180.
28 Coleman 2001: 199.
29 Dickson 2001: 53.

indirectly evaluative, and assumes or asserts no conclusion regarding whether that feature is (morally) good or bad[30]. In a more recent work, Dickson restates that «the task of identifying and analysing those significant and important features of law which make it into what it is» is a process needed prior to «engaging with law's moral evaluation and/or justification»[31].

Jeff Pojanowski, following arguments earlier developed by Stephen Perry, questions whether any theory grounded in a hermeneutic approach – as Dickson's approach is in Hart's hermeneutic approach, with its emphasis on legal subjects' «internal point of view»[32]– can in fact be morally neutral[33]. He writes, in an overview of a larger argument: «If the concept of law is an enduring moral ideal that judges and makes sense of varying, contingent social practices, such a concept picks out and highlights essential properties amid the flux of human affairs»[34].

Also, when we look back at Lon Fuller's challenge to legal positivism, both in his 1958 *Harvard Law Review* exchange with Hart[35], and in his later Yale University Press book[36], Fuller's principles of legality, his «inner [or internal] morality of law» operate at the level of legal systems as a whole, not at the level of individual legal rules.

Fuller argues variously that systems have to satisfy the principles of legality to a certain level to qualify as "legal" (and that the system in Nazi Germany did not so qualify – due to, among other things, secret laws and courts interpreting laws in ways that diverged sharply from how they were written), or that systems could be said to be "legal" to different degrees, according to their level of compliance with the principles.

In his *Legal Positivism: 5½ Myths*, Gardner argues for equating legal positivism with a proposition separating legal validity from (legal) merits by asserting that it is one of the few propositions about law that the main figures associated with legal positivism (he names Thomas Hobbes, Jeremy Bentham, John Austin, Hans Kelsen, and Hart[37]) converge upon. However, as can be seen, claims about what can and cannot be included in the process of theorizing about (the nature of) law similarly bring together, on the one hand, major figures associated with legal positivism, and, on the other hand, significant figures associated with natural law theory or general anti-positivism.

30 Dickson 2001: 53-54.
31 Dickson 2022: 176.
32 Hart 2012: 82-91; see also Dickson 2001: 33-37 (discussing Perry's critique of Hart).
33 Pojanowski 2021: 1476-1486.
34 Pojanowski 2021: 1487.
35 Fuller 1958, Hart 1958.
36 Fuller 1969.
37 Gardner 2001: 200.

4. Why Does It Matter?

Why does this matter? Why should we be concerned with John Gardner's allegedly-too-narrow understanding of legal positivism? Many theorists have expressed their impatience with too great a concern about labels. For example, Joseph Raz wrote: «I believe that the classification of legal theories as legal positivist or non-legal positivist […] is unhelpful and liable to mislead»[38]. And John Finnis repeatedly affirmed his «belief that reflections on law and legal theory are best carried forward without reference to unstable and parasitic academic categories, or labels, such as "positivism"»[39]. A critic might assert that my present paper is just the wrong sort of example: one tied up both with what counts as "legal positivism" and what sorts of inquiries are relevant to that (meta-)question.

I am sympathetic to those concerns. Of course, nothing crucial turns on labels alone. I do not think that it is important whether one calls the particular theories of (say) John Gardner, Scott Shapiro or Hans Kelsen "legal positivism" or not[40], nor is the precise boundaries between (e.g.) "legal positivism," "natural law theory," and what is sometimes offered as a third, or overlapping, category "anti-positivism," of any great significance.

If I am troubled by the narrow boundaries for legal positivism Gardner espoused, it is not because of any fixation regarding which theories get which names. My concerns, rather, are: (1) that Gardner's position implicitly denigrates, marginalizes, or ignores the importance of the other two sets of law/morality (dis)connection, the one at the level of whole legal systems and the other relating to theory construction; and (2) that Gardner's position implicitly discounts the connections among the three categories, and turns our attention away from them.

I am especially intrigued by the sense in which a «legal positivist position» on one of these inquiries *does or does not* entail, or at least strongly support, a legal positivist position on the others. It is parallel to the inquiry in philosophy, regarding whether realism (or anti-realism) about one area of discourse or class of statements entails realism (or anti-realism) about other areas of discourse or classes of statements[41]. Much closer to the present topic, David Plunkett and Daniel Wodak have recently argued that «positivism [might be] true of one part of legal reality (legal institutions), but not another (legal

[38] Raz 2009: 317.

[39] Finnis 2000: 1597.

[40] With Shapiro, one might raise questions of the legal positivist status of his theory based on his argument that law necessarily has a moral aim. See, *e.g.*, Plunkett 2013. For Kelsen, the challenge to his legal positivist credentials tend to come from the role of efficacy and validity in his theory. See*, e.g.*, Bulygin 2015: 235 («Carlos Santiago Nino […] maintain[s] […] that Kelsen employs a normative concept of validity akin to that found in authors of the natural law tradition» (footnote omitted)).

[41] See*, e.g.*, Dummett 1982.

norms)»[42]. The point of their work is that a legal positivist position about one aspect of (what they call) "legal reality" need not entail a similar position regarding other aspects, and that we would be wise to be open to such divergences and disaggregations.

There are actually here two different sets of questions: first, whether one should take a similar position across the three queries: separation[43] of law and morality/merits/evaluation for all three or non-separation for all three. And second, what the logical/philosophical connection is, if any, among the positions one takes: are the ultimate positions consistent because one follows from the others as a matter of persuasive argument, or are consistent positions mostly just a coincidence?

Conclusion

John Gardner's influence was broad, as his writings brought much-needed clarity and insight to a wide range of topics across legal, moral, and political philosophy, as well as a number of policy debates. The article on which this piece focuses, *Legal Positivism: 5½ Myths*, offered helpful warnings about a number ("five and a half") of common misunderstandings regarding legal positivism, while also providing a useful restatement of the legal positivist position regarding the connection (or lack thereof) between legal validity of individual norms and their merits.

However, as discussed, the intended or unintended effects of Gardner's narrow but influential view of legal positivism has been to discount and marginalize two other important questions about the separation or non-separation of law and morality. These other questions, about the legal status of significantly immoral legal *systems*, and the role of moral evaluation *in the construction of theories* about the nature of law, had also once been prominent in debates between legal positivists and their critics. More importantly, there is far less attention now paid to the interesting theoretical question of the extent to which a position in favor of separation (or non-separation) on one topic entails, or at least strongly supports, a similar view on the other topics.

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[42] Plunkett & Wodak 2022: 235.

[43] I am using "separation" here as a shorthand. I realize that on more precise analyses, even for positivists there remain a number of points of connection between law and morality. See*, e.g.*, Green 2008.

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(LP*) Revisited.
On John Gardner's Reduction of Legal Positivism

*Alejandro Daniel Calzetta**

Abstract

The purpose of this work is to analyse and criticise John Gardner's account (or, better still, reductive explanation) of legal positivism originally offered in his famous paper "Legal Positivism: $5^{1/2}$ Myths", which was originally published in 2001 and then republished in 2012's *Law as a Leap of Faith*. It will be argued that Gardner's attempt to reduce legal positivism to just one proposition (called "LP*") fails to account for several characteristics of the phenomenon that we usually call "legal positivism". This is especially clear when one contrasts Gardner's attempt with those done by legal philosophers of the Civil Law tradition like Norberto Bobbio and Eugenio Bulygin. One could say that Gardner's attempt is one rooted in the Common Law approach and tradition of legal philosophy but when one compares it with H.L.A. Hart's account one discovers that it is not the case, that accounts such as those by Hart are similar to a certain extent to those of Bobbio and Bulygin. In the end it will be concluded that Gardner's attempt fails due to one mayor problem in his approach: the lack of a due diligence of the history of legal positivism itself, what we will call "the historical approach".

Keywords: Legal Positivism. Validity. Sources. Positivity. Separation Thesis.

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0. Introduction

The present work pretends to be an homage via criticism of John Gardner, former Chair of Jurisprudence at Oxford University, and then senior research fellow at All Souls at the same university at the time of his death on the 11th of July of 2019.

As one could very well imagine the interests of such and individual were quite broad and he wrote on many of them, especially on legal philosophy, criminal law and tort law. Personally, I've enjoyed his writings on criminal law (his book, *Offences and Defenses* is almost a work of art) and those on legal philosophy, the most – or especially – because I've tended to disagree with them quite a lot.

Notwithstanding the disagreements I've enjoyed quite a lot reading Gardner, something that cannot be said of all of those philosophers which one can happen to disagree with, and, I believe, learnt a thing or two from him.

The best way one can render homage to someone from who one has learnt something is, as Bulygin often said, to criticise them. That's what I propose to do here.

The main aim of this work is to point out where Gardner's attempt to give an account of legal positivism fails. That account is based on a reduction of what means to be a member of the legal positivistic tradition. This is being treated as being equal to the assertion of a proposition that Gardner calls (LP*).

The approach fails because the strategy followed in order to frame such a proposition is the wrong one. The proposition is framed as if "legal positivism" is a concept similar and susceptible of the same kind of conceptual analysis as "legal competence" or "delict", that is similar to a legal concept itself.

It will be argued that "legal positivism" is not a concept of this kind. It is instead a concept of the history of ideas that needs a historical approach. That is, an approach that looks at the history of the evolution of an idea in order to render it intelligible and not just to a sort of conceptual analytic approach, which *may* be used but is not a necessary tool of the historical analysis.

To that aim first a reconstruction of Gardner's attempt will be given (section 1), followed by an analysis of its main problem, a lack of historical approach of the reconstruction of what legal positivism could be understood as being, and a small family of sub-problems which are derived of said main problem (Section 2).

Then a comparison will be offered with H.L.A. Hart's account of legal positivism, as offered in his "Positivism and the Separation of Law and Morals" from 1958 (Section 3) and from that it will be followed with a comparison with to accounts of the Civil Law tradition rooted in the historical approach, those of Norberto Bobbio and Eugenio Bulygin. From those comparisons will emerge that there are some theses common to all approaches to account for legal positivism that Gardner neglects, either partially or fully (Section 4).

This will be followed with an attempt, if possible, to repair Gardner's account (Section 5) and then the present work will end with some conclusions (Section 6).

1. Gardner's Reduction of Legal Positivism to a Single Proposition

John Gardner gives an account of what, to his understanding, legal positivism is in a famous work titled "Legal Positivism: $5^{1/2}$ Myths", originally published in 2001 and then republished in his *Law as a Leap of Faith* from 2012[1].

Gardner's attempt to explain what "legal positivism" is, as it is well known, consists in a reduction. What he means by "reduction" is to give an account consisting of just one proposition. That is, to give an account of "legal positivism" that is not more than a single proposition.

The present work pretends to deal just with that proposition, what it says and what it does not says, what are its problems, if any. It will not deal with any supplementary things or arguments that Gardner may advance that are not reflected in the formulation of the proposition. If all of legal positivism can be reduced to a single proposition, then that same proposition must be able to stand on its own, with supplementary crutches, if it is to work as envisioned.

This attempt at reducing legal positivism to just a single proposition seems, at least to me, to be the same as defining "legal positivism" by way of a single statement, "*legal positivism is…*" and no more than that, and the statement that is the definition could express more than one proposition. Gardner in a way denies this by insisting that he wants to reduce the whole "legal positivist" phenomenon to just «one and only one proposition»[2].

This «one and only one proposition», to work as a (reductive) explanation of what "legal positivism" is, must be «the distinctive proposition of 'legal positivism'». It must allow us «to designate as 'legal positivists' all and only those who advance or endorse this proposition»[3].

Gardner offers two attempts at reduction, the first one named (LP), the second one (LP*).

The first attempt at reduction is at follows:

> (LP) In any legal system, whether a norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not on its merits[4]

This proposition, according to Gardner, is not chosen at random. It is chosen because it has «a tolerable extensional alignment with the use of the label [legal positivism] familiar from the history of ideas»[5]. That is, this proposition is asserted by those regarded as being members of the "legal positivist tradition" such as Hobbes,

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1 Gardner 2012: 19-53.
2 Gardner 2012: 19.
3 Gardner 2012: 20.
4 Gardner 2012: 19.
5 Gardner 2012: 20.

Bentham, Austin, Kelsen, and Hart[6].

The main argument is that, even if authors such as these ones disagree on many things (propositions regarding law), they all converge in asserting (LP), albeit «subject to some differences of interpretation»[7]. It seems that this convergence defines the extensional reach of (LP) and what is meant by "legal positivist tradition" in this respect.

The secondary argument is that contemporary legal philosophers, such as Raz and Coleman, present themselves as subscribing to (LP) – that is, they consider themselves to belong to the «legal positivist tradition»[8], and debate about its correct meaning[9].

Thirdly, (LP) makes sense of the "legal positivist" label in itself. As Gardner says,

> What should a 'legal positivist' believe if not that laws are posited? And this, roughly, is what (LP) says of laws. It says, to be more exact, that in any legal system, a norm is valid as a norm of that system solely in virtue of the fact that at some relevant time and place some relevant agent or agents announced it, practiced it, invoked it, enforced it, endorsed it, or otherwise engaged with it. Conversely, if it was never engaged with by any relevant agents, then it does not count as a law, even though it may be an excellent norm that all relevant agents should have engaged with unreservedly[10]

Gardner then compares this with Austin's famous dictum "the existence of a law is one thing; its merit or demerit is another", as basically meaning the same thing or as a proof that Austin asserts (LP).

(LP) would be satisfactory if not for one important problem that Gardner notices almost immediately after making his case for the adoption of it. This is due to Austin's dictum jointly exhausting the validity criteria of a norm – its source, and its merits[11] –

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6 Gardner 2012: 20.

7 Gardner 2012: 20. Here Gardner says something that seems to be not at all clear. He says that all of these authors affirm the same proposition even if they interpret it differently. This seems to be problematic, and it will be followed in Section 2 below.

8 Gardner 2012: 20. The case of Raz is notoriously difficult, as he tended to disregard labels such as "legal positivist" and derided its use.

9 I must confess that I do not comprehend this argument. From the fact that some important legal positivists, as legal positivists, debate about what (LP) means it does not follow that (LP) is true or that all legal positivists assert it.

10 Gardner 2012: 20. It is interesting that Gardner seems to equate the positivity of a norm or a rule with the fact that some agent announced, practiced, invoked, enforced, endorsed and/or otherwise engaged with the norm. Gardner does not mention the verb "create" which seems to be central to the idea of positing norms. One could say that "announce a norm" could also mean to "create a norm" but it does not seem to be quite clear, as "announce" is a quite vague verb.

11 Gardner 2012: 20-21. He does not offer a definition of "source" and of "merit" so one must reconstruct them from what he is saying in the text. Regarding "source" he says «'Source' is to be read broadly such that any intelligible argument for the validity of a norm count as source-based if it is nor merits-based» (2012: 20), which is by no means a definition of the term but a (very lax) guide to the use of the term. Therefore, we may understand "source" as from whom the norm originated. For instance,

but not counting for their possible non exclusivity. This results on the criteria of norm validity as being[12]

i) source-based (*Norm N was announced or practiced by Rex*)
ii) merits-based (*Norm N contents are morally good*)
iii) merits-based tests of the sources (*Norm N was announced or practiced by Rex and Rex is a noble – i.e. morally good – king*), *and*
iv) source-based tests of their merits (*Norm N is a reasonably good norm and Norm M orders us to apply reasonably good norms*).

According to Gardner, criteria such as *iii)* has always been excluded by the legal positivist tradition. We can also exclude *ii)* to the list of positivist criteria due to the non-acceptance of merit-based criteria being one of the constitutive elements of the legal positivist tradition, as we will see.

Criteria such as *iv)* are a more open question. The division of legal positivists in the Inclusive and Exclusive camps impinge on this. Inclusive Legal Positivists seem to accept norms based on their merits as long as said norms are recognized as legal norms by a source-based norm. Exclusive Legal Positivism deny this.

This leaves us with just two criteria of validity that can or could be accepted by all legal positivists: *i)* and *iv)*.

This fact is taken by Gardner as one demanding a reformulation of (LP), so the second attempt at reduction is at follows:

> (LP*) In any legal system, whether a norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not on its merits (where it's merits, in the relevant sense, include the merits of its sources)[13]

This reformulation, as can be seen, is made with the explicit intent of excluding all merits-based criteria – *ii)* and *iii)* – from the proposition that all legal positivists must assert.

Being a legal positivist, therefore, is the same as asserting (LP*) – at least, according to Gardner.

However, is this true? Could all of the legal positivist tradition be reduced to such a proposition? Also, what is (LP*) really saying?

"Norm N was posited by King Rex". "Merit" may be understood as meaning two possible things: i) the fact that a norm is morally good ("norm N contents are morally good"); ii) the fact that the source of the norm is a morally good source ("norm N was posited by Rex, who is a noble king"). These definitions must be treated as approximative at best, due to them being dependant on one's interpretation of the text and one could be mistaken.

12 Gardner 2012: 21.

13 Gardner 2012: 21.

2. *The Mother Who Borne Them All*: the Lack of Historical Approach and the Picture (LP*) Paints because of It

2.1. Conceptual vs. Historical Approach

There is no denying that Gardner's attempt at defining – because, what is 'reducing' if not 'defining' in this context?– legal positivism in this way is an interesting one. Asserting that all the members of a definite tradition must share some beliefs (or some theses) of said tradition seems to be a sound argument. However, is this concrete attempt at explanation a sound one?

I believe it is not, and it is not by reason of the strategy chosen to pursue it – that is, the conceptual analysis approach.

Regarding Gardner's attempt, it seems to be rooted in a sort of conceptual analysis approach. That is, to identify some common property to all the variants of "legal positivism" or the "legal positivist tradition" and to define, in what Ramsey calls 'philosophical way', what that common property is.

To achieve that aim, what Gardner does is, seemingly, to identify some prominent members of what he calls "the legal positivist tradition", as he does with Hobbes, Bentham, Austin, Kelsen, and Hart. He chooses these authors and their theories because they are, unambiguously, legal positivists or representatives of the legal positivist tradition, either to the trained eye of the member of the internal legal culture and to most of those of the external legal culture alike of almost all current political societies in existence[14]. They are not problematic as Raz is with his rejection or lack of interest of the "legal positivist" label. All of these men are legal positivists simpliciter, unproblematic ones and obvious ones at that.

Gardner is not mistaken in this choice. As he says, this is an extensional way of reconstruction the class "legal positivist tradition", and if our aim were to just effect an extensional reconstruction of the class, the enumeration of Hobbes, Bentham, Austin, Kelsen, and Hart would be indeed enough.

This is not, however, Gardner's aim. His aim is to provide an intensional reconstruction of the class, and he goes his way about it via extensional reconstruction. Once he has an extensional approximation to "legal positivist tradition", he will try to isolate a common point between their different – for there are different and, in some cases, quite different– theories about the law in order to find a common attitude or belief – the assertion of a proposition, in his case– that can count as an intentional criteria of membership to the class of "legal positivist tradition" – "legal positivists" for short. Gardner believes that this common element is source-based validity, which he redefines in the mentioned way as (LP*), and that (LP*) is the intentional criteria of membership to the class, hence, asserting (LP*) is the same as

[14] For the notions of internal and external legal cultures see Tarello 1988: 205-217.

being a member of the class, *i.e.* being a legal positivist.

The problem with such an approach is that "legal positivism" is not a concept such as "legal competence" or "legal personhood". In other words, it is not a "legal" concept susceptible to an analysis of the sort mentioned nor to any other similar to what the expression "conceptual analysis" tends to be used.

"Legal positivism" is a concept of the history of ideas. It is, in a way, a shorthand to denote several different meanings and several different theses and their interpretations – not all of them, being meanings and theses, shared by all legal positivists, not even when it comes to source-based validity. For this reason, in order to given an account of the expression, an approach that is historical is needed – one that tracks how these meanings and these theses associated with the term "legal positivism" came about at certain points of time in different European legal cultures, particularly those of Germany, France, and England[15].

This poses a serious problem to Gardner's reductive approach, in particular because Gardner's approach is an extreme one. He wishes to reduce "legal positivism" to just «one and only one proposition» instead of reducing it to a small set of propositions. And such an approach forces Gardner to eschew the historical approach, even if he knows that "legal positivism" is a concept which belongs to the history of ideas instead of it being something akin a legal concept[16].

This is his main problem, and it is a serious one because it is a pregnant problem. The lack of historical approach brought with it several other problems that otherwise could have been avoided.

2.2. "Validity" as a Convergence Point

One of these problems is the very way in which Gardner frames his intensional criteria of membership to legal positivism. As he is forced to argue that there is one, and just one, common element to all legal positivists approaches to law and that that common element is source-based legal validity, Gardner is forced to deny all different conceptions of such a notion as mere differences of interpretation and to exclude other convergence points – to use Gardner's expression– as relevant elements of the proposition.

To be clear on this point, (LP*) is a criterion of validity, a definition of sorts. And it only deals with validity as source-based validity. It may mention other notions such as "source" but does not use nor defines them.

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[15] See Bobbio 1996: ch. 2 through 4, and Bulygin 2005: 62-70; 2007: 9-19.

[16] This is clearly shown by Gardner when he affirms that his approach involves (at least at the beginning) «a tolerable extensional alignment with the use of the label [legal positivism] familiar from the history of ideas» (2012: 20).

Regarding Hobbes, Bentham, Austin, Kelsen, and Hart, Gardner says that all of them converge on (LP*) "unanimously" albeit with "some differences of interpretation" that each one of them has of (LP*). If that is indeed true, however, how could all of them converge – that is assert, (LP*) in a unanimous way– when all of them interpret (LP*) differently? The fact that every one of them interprets (LP*) in a different way means that each one of these authors asserts a different interpretation of (LP*). This means that they assert different propositions from (LP*) – for an interpretation of (LP*) must be a different proposition from (LP*) because they have differences in content and, therefore, meaning. In other words, what "validity" is for each one of them is clearly a different thing. For example, Hobbes and Bentham do not assert (LP*) but (LP*-Hobbes) and (LP*-Bentham), respectively.

If all of these authors interpret (LP*) in a different way, then all of them assert different propositions from (LP*). It does not matter how similar they could be or how "close" all of them are to (LP*) in its purest form: they are all different propositions, both from each other and from (LP*).

All these reflections are a matter of historical approach, as said approach will show that each one of these authors use "validity" in a different way, meaning that all of them assert different propositions, different beliefs, about what "validity" means.

Some of the mentioned authors assert something closer to (LP*), and others do not. For starters, (LP*) does not serve as a general proposition on validity as used by legal positivists because it itself could be ambiguous.

Remember (LP*): «In any legal system, whether a norm is legally valid, and hence whether it forms part of the law of that system…». This is an ambiguous formulation where validity can have what, following Bulygin, could be understood as descriptive or normative senses[17]. In other words, (LP*) can be understood either as asserting that from validity follows membership to a legal system or that validity is the same as membership to a legal system – descriptive sense of validity–, or as asserting that validity implies duty – normative sense of validity–[18]. (LP*) is not clear on this point and that is a problem, as some legal positivists assert a descriptive notion of validity and others assert a normative one (and the descriptive sense either follows from that or is not theoretically relevant for them). And it does not seem the case that a legal positivist that denies a normative conception of validity and one who affirms it are asserting the same proposition regarding validity – that is, (LP*).

(LP*) really seems to be a general notion of validity, even a pre-theoretical one, that serves as the basis of different – positivistic – theories of validity; but it is not something that serves as a convergence point for authors in the legal positivistic tradition. Maybe this analogy could help clarify the point: (LP*) is akin to the grammatical form of validity, the word "validity" or the sound "validity", but it is not akin to the logical

[17] Bulygin 2021: 229-231.
[18] Bulygin 2021: 229-231.

form of validity, which are the theses – propositions– asserted by the different authors.

This is the consequence of the extreme reductive and ahistorical approach chosen by Gardner. It forces Gardner to ignore distinctions he knows quite well, and, in the particular case of legal validity, it gives an askew picture of the phenomena.

2.3. The Mere Mention of "Source" and Positivity

2.3.1. What is "Source" according to (LP*)

Another problem with the picture the (LP*) gives us is that of the sources of law. As we have seen, (LP*) says:

> In any legal system, whether a norm is legally valid, and hence whether it forms part of the law of that system, *depends on its sources, not on its merits (where it's merits, in the relevant sense, include the merits of its sources)*[19]

Basically, the validity of a law is source-based, and the merits of said law are irrelevant. So far so good. However, what is a source?

(LP*) says nothing about what a "source" is. One may attempt to explain or clarify it, but the point still stands: if we guide ourselves by (LP*) the notion of "source" is undefined, so "source" can be everything that acts as a point of origin of a law. Gardner himself seems to think so when he says that «'[s]ource' is to be read broadly such that any intelligible argument for the validity of a norm count as source-based if it is not merits-based»[20].

An interesting point to make is that the legal positivist tradition tries to assert a narrower view of "source" than that of (LP*). It tries, in several versions of it, to point to a social or empirical notion of source. "Sources" in the legal positivist tradition are "social sources", not just merely "sources" – that is, sources that are part of a social dimension, concrete persons or concrete organs to whom the political community gives recognition as being competent to create legal norms. As such, not any source will do. Legal sources as social sources are few in number, just some particular organs and some particular persons count as legal sources for concrete legal systems.

However, (LP*) does not make the distinction[21]. It just mentions "sources", and even with the exclusion of merits-based approaches, a mere mention of "source" in general does not exclude non-social sources. This circumstance makes (LP*) com-

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19 Emphasis added.

20 See Gardner 2012: 20.

21 Which is not the same that asserting that Gardner also does not. He does, but his formulation of (LP*) is silent on the subject. It is more concerned with mentioning source-based validity than with what a source is.

patible with a non-socially immanent legislator, such as a deity. This would not be a problem if (LP*) was supplemented with another proposition that limits the notion of "source" to social and/or empirical sources of law, but that is not the case on Gardner's approach.

Gardner's approach selected source-based validity as the one and only convergence point of legal positivism, excluding all the rest – even a definition of "source". This is quite the problem from a historical perspective, for as we shall see in the following sections, the legal positivists tradition has several convergence points in Gardner's sense, one of them being a social source notion of "source".

(LP*)'s «*depends on its sources*» is, at the same time, too broad and too insufficient. Too broad in the sense that it does not discriminate between different types of sources. Too insufficient in the sense that it does not reflect adequately what we do know about the legal positivistic notion of source. Even in the most vulgar sense of "legal positivism", one than can be shared by one of the least knowledgeable members of the external legal culture of a community, it is defined by its exclusion of non-social sources of law. Indeed, a notion of "source" as a social source is one of the convergence points of all authors of the tradition. They of course converge in the grammatical sense of the expression, as with "validity", and each of them forms their own theories about it; nevertheless, it is a clear convergence point that is neglected by (LP*)'s formulation.

Again, this is a result of extreme reduction which leaves out of (LP*) a proper definition of "source" which dovetails into another problem: that of the positivity of legal norms.

2.3.2. The Hole in Things regarding Positivity

If the notion of "source" is at least mentioned in the formulation of (LP*), the same cannot be said to be the case regarding "positivity".

One could argue that this is an outstanding thing. The fact that legal norms are positive norms, that they are posited by some agent, seems to be at the core of legal positivism. One could assume that (LP*) would have something to say about that fact, but it does not happen in the formulation of the proposition. There, "norms" are mentioned without any qualification in regard to their positive status.

It could be argued that positivity does not merit a mention. The mere fact that one could mention a norm means that, at least in some level, said norm exists because it can be considered the value of a variable. In that way, one could argue, that norm is a positive one. It is something that can be simply implied or presumed by the utterer of (LP*), and that would be enough.

A reasoning of this kind betrays a lack of historical approach, for it does not take into account that the problem of which norms are positive and which are not is the

starting point of legal positivism itself[22].

The notion of positivity stems from the very first natural lawyers, who needed a distinction between those norms that can be derived from general principles or from regularities in nature (the so-called natural law) and those norms that were created (posited) by individual agents, both human and divine. This last distinction is crucial, because it allows for at least two kinds of positivity: human and non-human/divine. And this is the main point, as we shall see on Section 4, from which the main theses of legal positivism sprang of.

This does not mean that Gardner does not consider positivity in any way, because he does so. He treats positivity as some fact of legal norms that is valued by some legal positivists, like Hobbes and Bentham, as valuable in itself, as something "good" that one can say about the law, calling people who ascribe to this approach as "positivity welcomers". However, in regard to the formulation of (LP*), the fact – not the value– of positivity is not mentioned. In a way, it is assumed by Gardner but not mentioned in the formulation of (LP*). And this is a worrisome absence: a sort of hole in the approach that impinge both on the notions of source-based validity of (LP*) and on the notion of source itself.

Both natural lawyers and legal positivists use the notion of positivity in order to construe their notions of validity and of source[23]. On the one hand, natural lawyers advance the theses that a) that there are two kinds of norms, non-posited and posited norms; b) that there are two kind of sources, what we may call social sources (human agents) and non-social sources (non-human agents such as God or no agent at all, norms that exists because they are derived from nature, reason, general principles, etc.). On the other hand, legal positivists base their whole approach to law on the fact that norms, in the relevant sense, are only human positive norms. For then, this is a fact, not a value judgement. They are not "positivity welcomers" because of this. It is from the factual assumption that legal norms are only human positive norms that they construe a) a source-based validity account of norms as the only one feasible, that is certain and scientific; and b) a social source concept of source as the only one feasible and scientific.

From a historical approach, then, it is possible to see that positivity is the seed from which the most relevant concepts and theses of legal positivism stem from. A proposition taken as defining what is understood as "legal positivism" should take this into account and introduce the notion of positivity into its formulation, because the fact of positivity is central in the separation of natural law and legal positivism – that is, the exclusion of all non-positive sources and norms from the idea of a feasible and scientific account of what law is. This is the way the legal positivists have seen the distinction since its inception.

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22 As we shall see in Section 4.

23 See Bobbio 1996: 3-11.

These three problems are just some of the problems that a lack of historical perspective can bring on an approach such as the one behind (LP*). Although there are more, we will not dwell on them here: the three problems we have analysed here are by themselves sufficient in order to argue that (LP*) is somewhat flawed as a reductive explanation of legal positivism.

Now, we will turn our attention to other possible accounts of what legal positivism is: one from the common law tradition and two from the civil law tradition. These accounts are based on historical approaches, albeit some more than others; they provide a better picture of what legal positivism could be taken to be than (LP*), and they may be useful in order to "repair" the problems of (LP*).

3. One Common Law approach: Hart's

The first alternative approach that will be *briefly* discussed is that of H.L.A. Hart.

Hart's account is an interesting one because it does not deal with legal positivism directly but, mainly, with one of its main theses, and a fuller, albeit schematic, account is given in a quite *meaty* footnote. Here, I am referring to his 1958 Holmes Lecture, "Positivism and the Separation of Law and Morals", republished in 1983 in his *Essays in Jurisprudence and Philosophy*. In this essay, Hart tries to give an account and a defence of the separation thesis that affirm that law and morals are two distinct and independent normative systems, and that there are no necessary connections between them[24]. While doing that – in a footnote, no less! – Hart attempts to define or characterise legal positivism as a grouping of several theses or propositions.

3.1. An Open-Ended Extensional Approach

[24] Recently it has been argued, mainly by philosophers of the common law tradition, that Hart (and no other positivist for that matter) ever affirmed a thesis postulating the lack of a necessary connection between law and morals. I will not deal with this problem here, but I believe that a cursory reading of Hart's essay is more than enough to reject this view at least in Hart's respect. Gardner, in his essays under analysis (2012: 48-51) advances the view that I reject by mistaken Hart's conceptual positivism with some personal valuations that he makes about the existence of law, like an almost positivity welcomer in Gardner's sense, which are purely ideological in Tarello's sense of the expression (Tarello took notice of these ideological tendencies, and some others, in Hart's *The Concept of Law* and took him to task for presenting them in such a confused way. See Tarello 1974: 101-121). This kind of confusions tend to happen not just because one author such as Hart maybe presented his ideas in a confusing way but also for not distinguishing clearly between different senses of "legal positivism". Following Bobbio (1972: 105-114) we can say that Hart description of what the law is consists in an exercise of conceptual legal positivism, that is an attitude (not a method!) regarding the analysis and study of law, and his valuations of how «every law necessarily exhibits a redeeming moral merit, a dash of justice that comes *of the mere fact that a law is a general norm that would have like cases treated alike*» (Gardner 2012: 48; the italics are mine) are an example of his ideological positivism, that is: the value he ascribes to positive law because it exists. These are two different things that authors such as Gardner do ill to confuse.

In order to give a proper account of what Hart says, the footnote bears being quoted in full:

> It may help to identify five (there may be more) meanings of 'positivism' bandied about in contemporary jurisprudence:
> (1) the contention that laws are commands of human beings; see 58-62 infra;
> (2) the contention that there is no necessary connection between law and morals as it is and ought to be; see 50 6 supra;
> (3) the contention that the analysis (or study of the meaning of legal concepts is (a) worth pursuing and (b) to be distinguished from historical inquiries into the causes or origins of law, from sociological inquiries into the relation of law and other social phenomena, and from criticism or appraisal of law whether in terms of morals, social aims, functions or otherwise; see 64 -6 infra;
> (4) the contention that a legal system is a 'closed logical system' in which correct legal decisions can be deduced by logical means from predetermined legal rules without references to social aims, policies, moral standards; see 64 -6 infra, and
> (5) the contention that moral judgements cannot be established or defended, as statements of facts can, by rational argument, evidence or proof ('noncognitivism' in ethics), see 64-6 infra.
>
> Bentham and Austin held the views (1), (2) and (3) but not those of (4) and (5). Opinion (4) is often ascribed to analytical jurists; see 64 – 6 infra, but I know of no 'analyst' who held this view.[25]

This note is important for two reasons. First, here Hart considers legal positivism to be a set of at least five different theses or propositions. These five propositions, however, do not exhaust the set, for there may be more propositions belonging to the set that Hart has not yet identified. Hence, we may consider that – at least, according to Hart– we may have an extensional, not definitive approach, to what legal positivism is.

Second, according to Hart not all legal positivists affirm all the theses or propositions of the set. Some positivists, such as Bentham, may affirm the first three of them; others may affirm other theses or propositions. At least in Hart's example, there is no quorum of propositions that must be asserted or a definitive convergence point in Gardner's sense.

3.2. Advantages and Disadvantages of Hart's Account as Opposed (LP*)

We may add a few things to this, for Hart is quite schematic in his approach. Firstly, the theses or propositions that Hart identifies are taken from the history of the legal positivistic tradition. This appears clearly from the reading of the whole essay, where Hart – notwithstanding the fact that the essays itself deals with the

[25] Hart 1983: 57-58, *in fine*.

separation thesis (proposition (2) in Hart's footnote)– takes great care in individuating each one of these five propositions from the history of the legal positivistic tradition[26]. Secondly, it gives an open answer to what legal positivism is. Hart clearly does not feel conformable with clear and cut definitions such "positivisms is such-and-such" and does not even attempt such an approach. An extensional approximation more than suffices for his purpose of clarifying – at least a bit – what we understand "legal positivism" to be[27].

Thirdly, as was already mentioned, Hart's approach has no clear convergence points in Gardner's sense. A positivist such as Bentham may assert (1), (2) and (3), and other positivist may not assert them and still being legal positivists, for Hart does not mention neither a quorum of propositions that must be asserted in order to be a legal positivist nor singles out a particular proposition of the set as the key proposition of legal positivism. In a way, it seems by the footnote that, for Hart, "legal positivism" is a concept prone to combinatorial vagueness, i.e. a concept composed by a series of properties – in this case, the propositions– that does not have a quorum of properties that one must manage in order to apply it.

It could be argued that, given the whole essay, for Hart the most important thesis – the one he endeavours to clarify and defend – is the separation thesis, his proposition (2). From his attempts at defend it would seem plausible to conclude that, at least to him, the separation thesis is the central thesis of legal positivism. However, this does not follow from the footnote. There, Hart just enumerates several theses, including the separation thesis, as belonging to the legal positivism set. No more, no less. It does not assert that any of them is more important and more central than the others, and it would be unwarranted to put words in Hart's mouth, so to speak, regarding this point.

Hart's conception of legal positivism is, some would say, an incomplete one, for it only given what I call an extensional approximation to the legal positivist set. It provides an enumeration of propositions, but an incomplete one. Even so, it seems to be a more useful criterion than (LP)*[28]. On the one hand, Hart's awareness of the history of the tradition, in particular regarding the separation thesis, allows us to place the five enumerated propositions more clearly within the set of those propositions belonging to the vast legal positivistic tradition. On the other hand, this apparent combinatorically vague approach to the problem of legal positivism allows

[26] At least with as much care that one can feel allowed to ask to a non-historian such as Hart.

[27] Gardner also begins with an extensional approximation, as we have seen, but only as a prolegomenon to an intensional criteria of the set "legal positivism".

[28] It is interesting to note that Bulygin, in the introduction to the Italian edition of his 2005 book *El Positivismo Jurídico,* also seems to endorse something similar to Hart's open ended extensional approach. Instead of five theses he recognises eight of them. He also seems to endorse the property of combinatorial vagueness of "legal positivism" that Hart seems to imply. We shall return to this point in the following section. Cf. Bulygin 2007: 4-5.

us to ascribe membership to the set to a group of quite diverse authors that historically have been considered legal positivists in a surest manner than just ascribing to them an assertion of (LP*), in the way Gardner formulates the proposition, in a way that is historically doubtful[29].

The problem with a reductive approach such as that of (LP*) is that it is extremely narrow. The fact that one has to converge unambiguously with it implies an exact convergence with a particular formulation of the proposition, excluding all its possible variants. A fact that – Gardner knows – is not historically correct in the case of Hobbes, Bentham, Austin, Kelsen, and Hart.

However, there is one point where (LP*) is extremely important: the fact that it is a proposition about the validity of norms, in particular source-based validity. None of the five propositions mentioned by Hart refers to source-based validity, and this is quite the blind spot.

Even if Hart takes an open-ended approach to the enumeration of the propositions that belong to the set of legal positivism, it is quite odd that he does not mention – not even once – a proposition regarding the validity of norms as being source-based. In this, Gardner has a clear advantage, even if his approach is quite narrow. As mentioned before, source-based validity is central to the legal positivistic tradition, as we saw – albeit briefly – how it stems from the notion of positivity.

It could be argued that source-based validity can be construed from two things: the fact of positivity and the separation thesis. The only relevant norms for the study of law are legal norms posited by human agents because they can be considered certain due to the certainty of who are the agents that create them. All the other norms, like those derived from nature and those posited by non-human agents, are uncertain due to the uncertainty of their origins. Both non-human agents and naturalistic-derivability are a matter of opinion, and thus, are not certain facts. That is, of course, if law and morals are conceptually distinct. However, Hart does not draw the inference or anything like it, at least in the footnote.

(LP*), or something akin a repaired (LP*), should be added to Hart's repertoire of propositions included in the set "legal positivism". We may call it "proposition (6)".

[29] Think, for instance, about the case of Kelsen's notion of validity, which is a more normative notion than a descriptive one (at least in some periods of Kelsen). It hardly seems to be a case of clear-cut of (LP*). Kelsen would not assert (LP*) exactly but something different, (LP-Kelsen) for instance, and would not "converge unambiguously" on (LP*), as was stated on section 2.2 of the present work. As asserting (LP*), and just (LP*) is the necessary and sufficient condition of membership to the set of legal positivists, one must conclude that Kelsen is not a legal positivist, which seems odd. In Hart's extensional approximate approach that is not the case. One could argue that Kelsen asserts propositions (2), (3) and (5), and even some more not yet enumerated propositions, and be a legal positivist as Bentham even while not sharing (1). Also, to Hart's advantage, his propositions are generic and not constrained by any particular formulation.

4. Two Civil Law Approaches: Bobbio's and Bulygin's

There are two other attempts of clarify what legal positivism is, and both are part of the civil law tradition. I am referring to Norberto Bobbio's and Eugenio Bulygin's reconstruction of what legal positivism could be considered to mean and the different theses that one of its meanings conveys.

Of both approaches, Bobbio's is the central one. This is so because Bulygin based his reconstruction on Bobbio's and, while they share the belief on what the possible meaning of "legal positivism" are, they have different ideas regarding the theses conveyed by one of the meanings of "legal positivism".

As the discussion of both approaches will be a – very! – brief one, as was in the case of Hart's, both approaches will be treated conjunctly[30].

4.1. From Revolution to Human Posited Laws: the Origins of Legal Positivism

One point on which there is complete methodological agreement between B&B is about the importance of history in order to characterise what "legal positivism" may be taken as meaning[31]. Both authors frame the analysis of the discussion in the XVIIIth century, particularly in Germany and France[32].

B&B identify a focal historical point for the development of what we call "legal positivism": the French Revolution and the subsequent Napoleonic Codification[33]. Both authors single out the fact that the Revolution and posterior codification of the French civil law introduced a radical change on the notion of "judge" that positioned the old idea of positive law in the forefront of legal practice and legal theory.

Traditionally, at least since the Middle Ages, the role of judge was characterized by two general duties[34]:

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[30] From now on, I will refer to Bobbio and Bulygin as "B&B" when I am mentioning something that apply to both authors.

[31] A very recent book on legal evolution contains multiple contributions that, in one way or the other, stress the importance and usefulness of historical approaches for the analysis of legal concepts and legal institutions. See Załuski, Bourgeois-Gironde, Dyrda 2024. Among those contributions, Rabanos' shows the importance of this type of approach when analysing the concept of legal system, and also how a historical and contextual analysis (in that case, the context of social and political evolution) can contribute to the explanation of the changes in both the content and the understanding of the phenomena that what we denominate legal system. See Rabanos 2024. What she argues for related to "legal system" can also be understood as applying to "legal positivism" itself.

[32] See Bobbio 1996: ch. 1 through 3, and Bulygin 2005; 2007: ch. 1. Bulygin frames the scope of his analysis to Continental Europe and goes out of way to make clear that what he has to say may not apply to Britain. Bobbio, on his part, extends his historical analysis to the British Isles, particularly England and the works of Bentham. See Bobbio 1996: ch. 4.

[33] See Bobbio 1996: section 1, ch. 3, especially 66–71; Bulygin 2005: 67-71, 2007: 15-19.

[34] See Bobbio 1996: section 1, ch. 3 and Bulygin 2005, 2007: ch. 1.

i) All judges are obliged to pass sentence on all matters relative to their competence.
ii) All judges must offer a justification of the decisions expressed in said sentences.

The Revolutionaries added a third obligation[35]:

iii) All justifications of the decisions expressed in the sentences of the judges must be based on valid positive law.

B&B rightly point out that this addition changed everything. Up until this point, legal decisions could be justified by any sort or argument that could be presented in syllogistic form; the use of a valid legal norm was not needed in order to construct a valid decision. From the Revolution onwards, that changed. The toolkit of justifications that judges tended to use became considerably reduced to just valid legal norms issued by the competent authorities and nothing else. Until that moment, human posited laws were just one of the many tools at the judge's disposal; now, they became the only legal tools at their disposal.

This change clearly created a great need for the study of human posited laws, to the point of asserting that only human positive law was the law. And this is the origin, as B&B say of what we call positive law.

4.2. The Different Senses of Legal Positivism

The need for the study of human positive laws was not taken up in an orderly fashion. It took three different directions and, as B&B point out, three different meanings of "legal positivism" which were mostly confounded by positivists and non-positivists alike.

During the XIXth century legal positivism could be understood in three different ways:

i) As a theory about what the law is, its structure, its place in the framework of the state, and so on.
ii) As an evaluation of the law as something good or useful based on the fact of its (human) positivity.
iii) As an attitude that scholars undertake while studying what the law is.

Bobbio gave the following names to these meanings:

i) Theoretical legal positivism

[35] See Bobbio 1996: section 1, ch. 3 and Bulygin 2005, 2007: ch. 1.

ii) Ideological legal positivism
iii) Methodological legal positivism[36]

Regarding methodological legal positivism, Bobbio is quite clear that this variant or meaning is not a method in itself but an attitude that the scholar undertakes[37]. Given that, the name "methodological legal positivism" can result a bit confusing. For that reason, I shall refer to this meaning as "conceptual legal positivism"[38] or just "positivistic attitude".

Although an analysis of these three meanings goes beyond the scope of this essay, a few considerations present themselves as necessary. Firstly, all of these meanings stem from the very idea of positivity. Positivity is the central, almost brute, fact that serves as the springboard for all variants of positivism in the legal sphere, and it cannot be ignored by anyone who endeavours to account for what legal positivism is.

Secondly, these meanings are not mutually exclusive. On the contrary, in some cases, they presuppose one another[39]. For example, a positivistic attitude is necessary in order to create theories about what the law is (theoretical legal positivism). This is something that Bentham saw quite clearly when he proposed his distinction between expository and censorial jurisprudence. His expository jurisprudence presupposes the positivistic attitude and the result of said jurisprudence are theories about the law. Examples of this are famous works such as Bentham's *Of Laws in General*, Kelsen's *General Theory of Law and the State* and Hart's *The Concept of Law*.

Thirdly, while the positivistic attitude and the theoretical positivism are, in my view, the province of the legal scholar, ideological positivism is not. Any person, scholar or not, can have valuations about the law, even one based of its positivity. What Gardner calls "positivity welcomers" are persons who indulge in ideological legal positivism. Gardner, regarding the ideological problem, commits one very right thing. (LP*) could be considered as a proposition belonging to the positivistic attitude, and therefore a prolegomenon to a theory of law. Gardner does well in excluding the ideology of the positivistic welcomer from it, at least in theory. He has some problems in separating legal theories of authors from their valuations. The

[36] See Bobbio 1972, 1996, section 2, ch. 1 and 7; and Bulygin 2005 and 2007, ch. 2.

[37] See Bobbio 1972: 105-107 and 121-124. It is curious how the label "methodological legal positivism" came about because Bobbio does not use it. He goes out of his way to show that it does not constitutes a method. Nevertheless, the use of the methodological label stands, as Bulygin's use of it shows.

[38] This is the label used by Carlos S. Nino. See Nino 2003: 37.

[39] In his *La Forma del Derecho*, Fernando Atria considers this fact as a sort of proof of the unfeasibility of Bobbio's distinction when, in reality, this fact was always affirmed by Bobbio since the very day in which he introduced the distinction. This is very well shown by Navarro Gezan (see 2020). In a way, Atria's point is somewhat similar to Scarpelli's, who in his *Cos'e il postivismo giuridico?* (1965) rejects Bobbio's distinction in favour of what he calls «a unitary definition of legal positivism» that takes into account its attitudinal, ideological and theoretical elements in a unified way. The main difference is that Scarpelli is a positivist and Atria (maybe?) is not.

case of his analysis of Hart as a positivistic welcomer is quite clear. Gardner confounds his theories about what the law is with the value that Hart ascribe to some laws qua rules that treats like cases alike as some "good". That value judgement is completely independent from Hart's theory of law for one can make such a value without presupposing a theory such as Hart's or the distinction between primary and secondary rules, etc.[40]

4.3. The Main Theses of the Positivistic Attitude

For both B&B, the main sense of legal positivism – at least from a theoretical standpoint– is the positivistic attitude[41]. When they talk about the main theses of legal positivism, they are referring to the main theses of which constitutes the positivistic attitude[42]. For sake of brevity, here I will do the same.

Regarding this point, both B&B are in agreement about two theses of legal positivism. Let us call them "BB" theses[43]:

i) BB1: A version of the separation thesis or non-necessary connection thesis between law and morality. As Bulygin puts it: «the legal validity of a norm does not necessarily imply its moral validity and the moral validity of a norm does not necessarily imply its legal validity».
ii) BB2: A version of the social sources' thesis. As Bulygin puts it: «the existence and the content of the law in a given society depends on social facts, that is, acts or activities of the members of such a society».

Bobbio adds three more theses to this catalogue ("BO" theses):

i) BO3: a theory of the legal norm as prescriptions (imperatives).
ii) BO4: coercion as a central element of the law.
iii) BO5: the theory of the legal order as a closed and consistent system of laws.

Bulygin explicitly rejects BO5 (which he calls «thesis of the law's complete-

[40] See Gardner 2012: 26- 29, and fn. 24 of the present work.
[41] Which is quite sensible, as the positivistic attitude is the attitude that a positivist must have in order to produce a proper theory of law (in the expository jurisprudential way).
[42] See Bulygin 2005: 73-74, and 2007: 23-24; Bobbio 1996: 129-132. On this point, Bulygin is more straightforward than Bobbio.
[43] The B&B theses will be explained mostly by Bulygin's formulation of them, as his formulation is clearer and more direct than Bobbio's.

ness»)[44] while not mentioning either BO3 or BO4[45]. He instead proposes a further thesis ("BU" thesis)[46]:

i) BU3: the thesis of (interstitial) discretionality.

BU3 is a thesis that claims that, when the legal norms do not regulate in a clear way an individual legal case (due to problems of ambiguity, vagueness, legal gaps and legal antinomies, etc.), the judges may solve those cases by applying their own discretion within the limits and constraints of the valid positive law of the system.

Bulygin considers that not all legal positivists endorse this thesis but argues that since Hart introduced it in *The Concept of Law* it has become part of the «definitional kernel of legal positivism in its methodological variant»[47].

The real interesting thing here are not the disagreements between B&B, but their agreements: the fact that they converge on BB1 and BB2. Notwithstanding the fact that BB gives a proper historical background of all of the mentioned theses, BB1 and BB2 are the only ones that – it could be argued – are asserted in some variant by all the classics of the legal positivistic tradition, both those mentioned by Gardner and others that one can think of.

Particular emphasis here on the "variants" part, as history shows – in B&B's reconstruction – that members of the legal positivistic tradition may agree on general terms with BB1 and BB2 but may not agree on their possible formulations. A mere family resemblance is more than sufficient between different assertions of BB1 and BB2 by different authors in order to consider them legal positivists. The convergence shown by the history of the tradition is not a unanimous convergence, but one based on a general agreement with room for difference of opinion and emphasis regarding the contents of both BB1 and BB2.

(LP*), due to the content and due to the convergence, demands fly in the face of historical knowledge about legal positivism. It is too stringent a proposition for a movement whose requirements for membership seem to be on the lax side.

However, the point of relevant convergence may be not BB1 and BB2, but a by-product of them. After all, BB1 and BB2 are too general: just some considerations about the separateness of law and morals and some general consideration

[44] Bulygin goes out of his way to reject that thesis at length. I could be argued that that was the case because BO5 could be considered and old burden from XIXth century theoretical positivism that modern technics in logic applied to law have shown to be false (see Alchourrón, Bulygin 1971). In fact, one could argue, that both BO3 and BO5 are both classic theses of XIXth century positivism. That is not the case of BO4, as Schauer (2015) has demonstrated.

[45] Given Bulygin's whole approach to law one may conclude that he also rejects them. See the whole of Bulygin 2015 for a primer on Bulygin's thinking about the law.

[46] Bulygin 2005: 74, 2007: 24, respectively.

[47] Bulygin 2005: 74, 2007: 24, respectively.

on sources, without an explicit mention of validity. We may entertain this thought briefly to see where it leads us.

As we have seen, the fact of positivity is central to the formulation of both BB1 and BB2. These two theses, in order, are also the bedrock of a further thesis of source-based validity that follows from them. In fact, BB1 in a way anticipates the notion of legal validity; once it is combined with BB2 – in whichever variant –, a thesis about legal validity that is source-based follows. This thesis could be the central point of convergence, and that thesis could be (LP*). Indeed, then, (LP*) could be the product of pre-theoretical assumptions such as positivity, BB1 and BB2.

This conclusion could be plausible if not for the actual formulation of (LP*) which, as we have seen previously, does not properly define either "validity" and "source". All the while, the combination of BB1 and BB2 gives us a notion of validity that is strongly source-based and firmly rooted in human positivity.

Hence, whatever follows from BB1 and BB2 is a proposition about legal validity – but it is not (LP*).

4.4. A Postscript from Bulygin in Preface Form

As a way of closing this section, I would like to draw the reader's attention to a curious fact regarding Bulygin's Italian edition of his account of what legal positivism is.

In 2005, he gave an account based on the shared theses of the definitional kernel, BB1, BB2 and BU3. He even went out of his way to refute BO5 at considerable length. Two years later, he seemed to have completely changed theories. What he says in 2007 is quite interesting, and bears being quoted in full:

> What are the central theses of legal positivism? I believe this question does not have a clear answer. Bobbio had already pointed out that three very distinct things can be understood by legal positivism: a specific approach to law, which is usually called "methodological positivism"; a certain ideology, "ideological positivism", whose central thesis is that every positive law must be obeyed; and a theory of law, whose characteristics are statalism (all law comes from the state), imperativism (norms are commands) and interpretative formalism. Many of the criticisms directed at positivism, especially in the era immediately following the Second World War, were based on the confusion between methodological positivism and ideological positivism. Returning to the theme of the characterization of legal positivism, I would say that it is possible to draw up a fairly long list of the central theses of positivism, but it must be kept in mind that not all positivist authors share them all.
>
> 1. The distinction between law as it is and law as it ought to be (Bentham).
> 2. The rejection of a necessary connection (a conceptual one) between law and morals (Bentham, Kelsen, and many others).
> 3. The idea that the existence and the content of the law depends on social facts: the

thesis of the "social sources" (Raz).
4. Ethical scepticism (or non-cognitivism in ethics) (Kelsen, Alf Ross).
5. The rejection of natural law: all law is positive law (Kelsen, Alf Ross).
6. The conception of legal theory as a science (Kelsen).
7. The conception of philosophy as conceptual analysis (Hart).
8. The idea that judges have a discretional power when resolving dubious cases (Hart).[48]

All these theses have been supported by some positivists, but probably very few (including me) would subscribe to them all. On the other hand, there are positivist authors who have defended theses that are completely foreign to positivism, and which seem to me to be erroneous. Thus, for example, there are those who maintain that judges apply, and never create, law, while others, like Kelsen, maintain that judges always create and apply law.[49]

This is a quite radical change, and it fully embraces an extensional approach such as Hart's. It is not completely clear if Bulygin's extensional approach is also an open-ended one, but that is neither here nor there[50].

The really interesting thing is that, when one looks at it, an open-ended extensional approach seems to be useful. It is quite difficult, if not impossible, to constrain a complex historical phenomenon of the history of ideas within the tight corset of definition.

Gardner's attempt at doing so, however interesting and noble it may have been, serves as a cautionary tale regarding the risks of doing so; and Hart's and the latter Bulygin's approaches serve to entice us with the glint of opportunity and (possible) success.

It would be possible to mix both approaches, the extensional and the intensional. It might be possible to consider legal positivism as a vague concept or class that is composed by several theses, such as the ones enumerated by Hart and Bulygin, but with two caveats: firstly, that enumeration is not an exhaustive one, and secondly, some of those theses consist in a quorum, a minimum that anyone must assert in order to begin to be a legal positivist – the bare minimum. This bare minimum is some kind of variants of BB1 and BB2.

This criterion has two advantages. On the one hand, it follows the historical trend followed by the tradition of legal positivism, taking as central the two theses that stem from the fact of positivity. On the other hand, it is not an already closed class: it admits more theses than the kernel, and allows for an evolution of the number of theses that can be considered positivist in the future, as long as the tradition

[48] Bulygin does not tag himself in the list but for what we have previously seen we can say that theses 1 and 2 are variants of BB1, thesis 3 is a variant of BB2 (and maybe thesis 5), and 8 is a variant of BU3. Bulygin also defended thesis 4 for a time, but at the end of his life he stopped considering it as part of the kernel of legal positivism.

[49] Bulygin 2007: 4-5.

[50] One could argue it both ways. Bulygin nowhere says, as Hart does, that the list could admit more theses, but the list hardly seems complete and absolute.

keeps being developed upon.

The question remains as to what should be done with (LP*). Can it retain its present form, and can it have a place in the definitional kernel? Let us turn to that.

5. *With a Little Help from My Friends: Trying to Mend the Shed*

At the end of Section 1, we asked ourselves three questions regarding (LP*), and now we can provide some answers to them:

i) *Is (LP*) true?* No, it is not. Mainly because if does not define in a proper way what "validity" and "source" means and also because of the answer to the next question.

ii) *Could all of the legal positivist tradition be reduced to such a proposition?* No, because – as we have seen– they do not converge on it directly.

iii) Also, *what is (LP*) really saying?* It says that validity is central to legal positivism but in a quite fuzzy way, as validity is not clearly defined, the notion of source is too broad, and the fact of positivity seems to be irrelevant to its content.

After all this one may be tempted to ask

iv) *Was all of this useless?*

Absolutely not. In more than one opportunity in this essay, it was explicitly pointed out where Gardner was in the right with his proposal and how something akin to (LP*) must follow from what we called the definitional kernel of legal positivism, BB1 and BB2.

Gardner was in the right when asserting that a proposition about source-based validity must be asserted by the legal positivists, especially because such a proposition follows from BB1 and BB2

His mistake was one of optimism, if any. He thought that a concentration of theories divorced from their history was sufficient to define legal positivism as the assertion of a specific formulation of source-based validity. His most important mistake was the eschewing of history from the account. That gave way to other problems that obscured why something like (LP*) is needed.

As an account of what legal positivism is, (LP*) seems to fail; however, it serves as a stressing point about the relevance of source-based validity to the tradition. Some proposition such as (LP*) is clearly implied by the assertion of BB1 and BB2, and it is time to make it explicit.

So, the definitional kernel of legal positivism – as positivistic attitude – could remain something like this:

i) BB1: legal validity of a human posited norm is one thing, and the moral validity of a human posited norm is another thing.
ii) BB2: the content of a human posited valid legal norm depends on social sources alone.
iii) GA1: the validity of human posited legal norms rests ultimately on its social sources alone, and all considerations of moral validity are irrelevant to its legal validity.

Naturally, it might be this understanding of these theses or whatever variant of them: it is not necessary to marry with a specific formulation of any of these theses, and room needs to be left for the rest of the legal positivists to do their thing. Repairing, so to speak, (LP*) means this:

i) To focus on the general content of the propositions, not on a specific formulation.
ii) To abandon the idea of reducing legal positivism to just one and only on proposition.

It may be argued that legal positivism requires this kernel in order to be legal positivism; however, it must also leave room for other theses to be asserted, and also to help shape the content of different variants of the kernel.

6. An Attempt at a Conclusion

From the preceding sections we may conclude that:

i) To give a proper account of what legal positivism is, one must look at its history, for legal positivism is nor a concept in the same sense as other legal concepts; it is a historical concept and an analysis of such a concept must take into account its history.
ii) One may give an extensional account or an intensional account of what legal positivism is.
iii) An extensional account is an enumeration of several theses asserted by members of the class "legal positivism" through its history. Such an attempt may be open ended (Hart) or not (possibly Bulygin 2007), and such an attempt could be combinatorically vague, as that does not contradict the history of the tradition.
iv) An intensional account proposes a set of theses as a definitional kernel of legal positivism. An intensional account must not reduce the definitional kernel to just one thesis, as that would be unfeasible.
v) Both attempts are not mutually exclusive. The definitional kernel could be considered as the quorum of properties needed to apply the concept to a person,

while other properties may also be presented.

vi) A good candidate for the position of definitional kernel is the conjunction of BB1, BB2 and GA1 [(LP*) repaired], where GA1 is an implied proposition derived from the conjunct assertion of BB1 and BB2 made explicit.

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5½ Myths of Legal Non-Positivism

*Matthias Klatt**

Abstract

Many legal philosophers assume that legal non-positivism misconstructs its counterpart, legal positivism; that it destroys law's positivity by allowing the judges to grab directly into the blue sky of justice; that it disempowers the legislator; that it accepts a bizarre notion of an ideal dimension of the law which is either empty or amounts to ideological particularism; that it cannot settle the eternal conflict between real and ideal elements; that it transforms a descriptive-analytical debate about what the law is into a normative-political debate about what the law ought to be. The present article unmasks these assumptions as myths.

Keywords: Legal Positivism. Legal Non-Positivism. Concept of Law. Law and Morality. Alexy-Raz-Debate.

1. Introduction

This article addresses six prominent beliefs about legal non-positivism. I seek to demonstrate why and to what extent these beliefs are myths – widespread but untrue stories. My analysis takes issue with the debate on law and morality, but I will limit my argument to the specific version of the connection thesis maintained by inclusive non-positivism[1]. All answers to whether law's validity and content depend on morality employ various background premises[2]. Consequently, these answers are more complex than a simple Yes or No could grasp. Given the vast literature on the topic, I will concentrate here mainly on arguments put forward in the exchanges between Robert Alexy, Joseph Raz, Andrei Marmor, Scott Shapiro, and John Gardner, whose seminal article on the myths of legal positivism inspired

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1 On the three forms of legal non-positivism, see Alexy 2012: 4–7, 2017: 327–329.

2 Five distinctions matter most in this respect, see Alexy 2002: 23–27 for details.

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my thoughts[3]. When I arrived in Oxford in 2005, I encountered John as a fascinating discussant and an extraordinarily kind, supportive mentor. I dedicate this article to his memory with gratitude.

2. The Myth of Misconstruction

According to the myth of misconstruction, non-positivism gives a wrong description of legal positivism by assigning the separation thesis to it. Gardner dubs this myth «the jurisprudence student's favourite myth about legal positivism»[4]. It is, however, likewise a myth about legal non-positivism, given that the separation and the connection theses stand in a relation of contrariety to each other[5]. A misconstruction of one thesis automatically results in a misconstruction of its counterpart.

Therefore, Gardner's myth about legal positivism necessarily implies a myth about legal non-positivism. Proving that the separation thesis is a myth about legal positivism would automatically result in an equivalent myth about legal non-positivism. Assigning the connection thesis to legal non-positivism would also be a myth. For this reason, I enlist the problem here as a myth about legal non-positivism.

The criticism based on this myth is that misconstruing its counterpart resulted in a strawman fallacy because non-positivism attacked a position nobody holds. As a result, arguments put forward by non-positivism «find no target»[6]. They are «not relevant» to the task of refuting the separation thesis[7]. Many legal positivists have reported frustration, sometimes anger, about how non-positivists picture their positivist counterparts. Marmor has put his frustration in the following words:

> Any attempt to specify what legal positivism is about, what it really boils down to, sadly proves this claim that it is very difficult to say something that is true about it. Why? Partly because it is not a theory. It is a whole tradition of theories and often with contradictory theses. And partly because the complicated insights and theses of legal positivism are not as reducible to catchy slogans as many commentators assume[8].

Likewise, Raz laments the «failure to define legal positivism in a way which would apply to many of the theories of law commonly known as positivist»[9]. In his

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3 Gardner 2014.

4 Gardner 2014: 48; it makes no difference to the substance of the argument that Gardner uses a different label for the separation thesis («no necessary connection thesis»).

5 See Alexy 2012: 4.

6 Raz 2007: 18.

7 Raz 2007: 22.

8 Alexy & Marmor 2005: 773.

9 Raz 2007: 22.

primary reply to Alexy, he stresses that «what Alexy says is legal positivism is not what is understood as such in the English-speaking world»[10].

2.1. The Positivist Connection Thesis

The separation thesis is the leading example legal positivists invoke to support their claim that non-positivists misconstrued their position. According to Raz, it makes no sense to attribute to legal positivism the separation thesis because legal positivists also agreed that there existed «an indefinite number»[11] of «necessary connections between law and morality»[12]. For the same reason, Gardner submits that the separation thesis was «absurd and no legal philosopher of note has ever endorsed it as it stands»[13].

Indeed, legal positivists have accepted numerous connections between law and morality. Gardner refers to Hart's proposal that some element of justice comes from the mere fact that every law is a general norm that allows us to treat like cases alike[14]. Gardner comments, «[f]or Hart, this built-in *dash of moral merit in every law* clearly forges a necessary connection between law and morality»[15].

Marmor lists law's claim to legitimacy as an example, which «already proves that there is a necessary connection between law and morality»[16]. Since both law and morality had the same function «to govern our lives», legal positivism agreed that «law would have some moral content, that there will be considerable overlap between the content of any legal system and moral prescriptions»[17]. Similarly, Shapiro maintains that legal systems solve «moral problems»[18] and that legal concepts shall «be moral as well»[19]. Shapiro also characterises law as «necessarily having a moral aim»[20] and the legal point of view as purporting «to represent the moral point of view»[21].

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10 Raz 2007: 18.

11 Raz 2007: 21.

12 Raz 2011: 169. See also, from a non-positivist standpoint, Finnis' claim that conveying the debate between positivist and non-positivist theories of law as «a debate about whether there is any necessary connection between law and morality» as a «sheer oddity»: Finnis 2013: 7.

13 Gardner 2014: 48.

14 Hart 2001: 81

15 Gardner 2014: 48-49, emphasis added; see also ibid, text to fn. 12.

16 Alexy & Marmor 2005: 783

17 Alexy & Marmor 2005: 783.

18 Shapiro 2011: 170.

19 Shapiro 2011: 114.

20 Shapiro 2011: 215.

21 Shapiro 2011: 187.

Raz, addressing the issue of «identifying legal positivism»[22], underlines that law's claim to authority is a «moral claim»[23] and that «the concept of legitimate authority is a moral one»[24]. Raz maintains that legal positivists accept the moral merit of law's positivity and the possibility of evaluating the law as good or bad from a moral perspective[25]. As a result, the positivist connection thesis claims that law has «an indefinite number of necessary moral properties»[26]. According to Raz, the separation thesis does not correctly identify legal positivism.

2.2. Discussion

Looking more closely at the positivist connection thesis reveals significant differences vis-à-vis the non-positivist connection thesis. The positivist variant establishes only a relatively weak connection between law and morality. It is weak in two related aspects.

First, some arguments submitted by legal positivists fail to establish a necessary character of the connection between law and morality. When Marmor refers to the «considerable overlap»[27] between the content of the law and morality, he does not acknowledge that, for legal positivists, this overlap can only be a contingent matter. It is left to the decision and will of the lawgiver whether and to what extent to establish such overlap. Marmor does not address the decisive point here, namely that both inclusive and exclusive legal positivism deny the *necessary* character of the connection between law and morality.

The same point of a lack of necessity of the connection between law and morality infects the argument that legal positivism also accepted the moral merits of law's positivity. The inner morality stemming from law's «reliance on general standards»[28], *e.g.*, is a *contingent* property as long as one maintains the sources thesis. If the only thing that makes a norm legally valid is that it is source-based, then generality cannot be a necessary property of the norm. Because «being source-based does not imply being general»[29]. A legal norm lacking generality or other elements enlisted by Fuller to depict the inner morality of positive law will still be valid if validity rests solely on being source-based.

It follows that there is an essential difference between the positivist and the non-positivist variants of the connection thesis, drawing to the necessity or contin-

22 Raz 2007: 18.
23 Raz 2007: 19 with fn. 6.
24 Raz 2007: 20.
25 Raz 2007: 20-21.
26 Raz 2007: 21.
27 Alexy & Marmor 2005: 783.
28 Raz 2007: 21.
29 Alexy 2007: 44.

gency of the connection between law and morality[30]. The contingency of the connections accepted by positivists renders their connection thesis weak.

A second aspect in which the positivist connection thesis is weak is that it does not specifically relate to legal norms' validity. None of the four examples enlisted by Raz for the positivist connection thesis refer to the validity of legal norms[31]. Raz's connections do not make legal validity dependent on moral merits. It is this dependency between moral merit and legal validity, however, that stands at the centre of the debate. The weak positivist connection thesis does not even address this issue. Gardner understood this vital point much more clearly than Raz did, for he underlined that «legal positivism is a thesis only about the conditions of legal validity»[32].

In a nutshell, the positivist connection thesis is weak, establishing only contingent connections that do not relate to legal validity. In contrast, the non-positivist connection thesis is strong, as it establishes a necessary connection between legal validity and moral merits. This difference allows us to clearly see the necessity of formulating the separation thesis more precisely. The phrasing Raz[33] and Gardner[34] attack so fiercely («There is no necessary connection between law and morality») is merely an unprecise shortcut. The debate has suffered in the past from this shortcut leading to misunderstandings. We have two variants of the precise separation thesis, which I label the validity variant (ST_{vv}) and the definitional variant (ST_{dv}):

> ST_{dv}: «[T]he concept of law is to be defined such that no moral elements are included»[35].

From this definitional variant, immediate consequences for the content of the law follow. According to ST_{dv}, morality does not determine the content of the law. Two separate questions are what the law commands and what justice requires, or the law as it is and the law as it ought to be. From answering one, nothing follows for the answer to the other.

> ST_{vv}: There is no necessary connection between legal validity and moral merits.

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30 I should like to acknowledge that Raz has explicitly objected against this distinction, claiming that the contingency thesis «cannot […] be taken as a defining feature of [the legal positivist] tradition». Raz 2007: 21. However, he does not list arguments for this claim except the one referring to the moral merit of law's positivity, which I have already discussed and rejected.

31 Alexy 2007: 43-45.

32 Gardner 2014: 49.

33 Raz 2007: 18 with fn. 3, citing Alexy.

34 Gardner 2014: 48.

35 Alexy 2002: 3; see also 20-21.

Legal positivists have overlooked, I assume, that this second variant exists in non-positivist reconstructions of legal positivism. This oversight may have occurred because Alexy's monograph on the topic presents «the basic positions» with the help of the definitional variant only[36]. Still, the same monograph contains the roots for the validity variant. Two relevant sections are the third chapter on «the validity of law»[37] and the section laying down the «conceptual framework»[38].

In the latter section, Alexy offers an interesting discussion on the relation between the concept of law and the validity of law. This discussion is relevant since we can read it as addressing the relation between the definitional and the validity variants of the separation thesis. The distinction Alexy discusses is between law concepts that omit validity and those that embrace validity[39]. A concept that embraces validity is present in Bergbohm's statement that the expression «valid law» was without doubt a pleonasm[40]. It is also present in Jellinek's claim: «A legal norm that is not valid any more or that shall be valid only in the future is not law in the true sense»[41].

Validity-embracing concepts of law like these have the disadvantage that they do not allow to characterise bygone legal systems as "legal". Kantorowicz has laid down the now classical argument by pointing out that validity-embracing concepts of law exclude the study of classical Roman law from legal science[42]. Even worse, the discipline of legal history would be eliminated from legal scholarship altogether[43]. Kantorowicz concludes that a rule does not have to be valid to be legal[44]. Therefore, a validity-omitting concept of law is preferable for most purposes and contexts. This preference also follows from the general Kantian rule that the existence of an object does not belong to its conceptual properties[45].

Things are different, however, in the context that interests us here[46]. The discussion between legal positivism and non-positivism must operate based on a validity-embracing concept of law. Otherwise, the main problem gets circumvented by

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36 No mention of legal validity is made in the relevant passage, see Alexy 2002: 3–4.

37 Alexy 2002: 83-123.

38 Alexy 2002: 23-24.

39 Alexy 2002: 23-24.

40 Bergbohm 1892: 49.

41 Jellinek 1966: 333.

42 Kantorowicz 1980: 16.

43 Kantorowicz 1980: 17.

44 Kantorowicz uses the term "binding" instead of "valid". For my purposes here, I shall use these terms as synonyms, as does Kantorowicz; see Kantorowicz 1980: 16.

45 See Kantorowicz 1980: 18.

46 The context can influence a definition, and this fact is acknowledged, *e.g.*, by Campbell in his preface to Kantorowicz' work: «[…] we judge our definitions not by their correspondence with an imagined essence of things but by their coherence and their usefulness for the thinking operations on which we are engaged». Kantorowicz 1980: vii.

simply excluding any impact morality may or may not have upon law's validity from the scope of the concept of law altogether[47].

It is vital to note that the opposite does not hold. Adopting a validity-embracing concept of law does not predetermine the decision in the debate between legal positivism and non-positivism. The reason is that including validity does not mean importing specific validity criteria. The concept of law understood as including validity, will still be open to all sorts of validity criteria, including positivist ones. The validity criteria are a separate issue. Accepting a validity-embracing concept of law does not predetermine anything in that regard. Nevertheless, as I have said, the contrary is true: favouring a validity-free concept would predetermine the decision between legal positivism and non-positivism in favour of the former. This consideration is another reason to adopt a validity-embracing concept of law in the present context.

Returning to the main line of my argument, it follows from the necessary employment of a validity-embracing concept of law that we must understand ST_{dv} and ST_{vv} as two variants of the same thesis. In other words, the positivist separation thesis can separate law and morality, but it may not separate concept and validity of the law in an attempt to limit itself to the former and exclude the latter. We can now see that ST_{vv} is not a distinct variant of ST_{dv} but rather a more precise reformulation.

The decisive point of my argument is that to these precise, reformulated versions of the separation thesis, the weak positivist connection thesis is no interesting counterpart. The reason is that the weak positivist connection thesis does not relate moral elements to legal validity. Furthermore, even more critically, ST_{vv} is maintained by most legal positivists. Marmor, *e.g.*, gives the following formulation of the separation thesis:

> [T]he separation thesis maintains that determining what the law is does not necessarily or conceptually depend on moral or other evaluative considerations about what the law ought to be in the relevant circumstances[48].

Marmor stresses that all contemporary legal positivists accept this formulation of the separation thesis[49]. He then goes on to name the core aspect of the dispute and identifies it as «legal validity»[50], and legal validity, according to Marmor, is «one crucial aspect of the separation thesis»[51]. Commenting on Alexy's position that «moral considerations form a necessary condition of legal validity», Marmor stresses that «this is clearly at odds with one of the main insights of legal positivism»[52]. Later in his debate with Alexy, he returns to this point and again stresses

47 Alexy 2002: 24.
48 Alexy & Marmor 2005: 773; Marmor is referring here to his Marmor 2001: 71.
49 Alexy & Marmor 2005: 773.
50 Alexy & Marmor 2005: 774.
51 Alexy & Marmor 2005: 774.
52 Alexy & Marmor 2005: 775.

that the dispute is «really about one crucial aspect […] of legal validity»[53]. For this reason, I submit that we can read Marmor's following sentence as relating to legal validity by adding a word into the following quotation: «Whether something is [scil. valid] law does not necessarily conceptually depend on its moral content, and this is what we claim»[54].

These remarks, taken together, amount to adopting ST_{vv} and labelling it as the common core of all contemporary legal positivists. The fact that Raz, referring to Marmor's formulation cited above, and in open contradiction to his fierce resistance, almost disgust[55], to identify a core of legal positivism, says that Marmor's formulation does get close to «the common core of the positivist tradition»[56], confirms my interpretation. Raz adds that he believes it «to be correct»[57] – so he endorses it himself. Raz then stresses that his sources thesis holds that «the identification of law never requires the use of moral arguments of judgements about its merits»[58]. What could «identification of law» be other than a statement upon the concept of law? Moreover, what could «identification of law» be other than the identification of *valid* law? It seems clear to me that Raz endorses both ST_{dv} and ST_{vv} here. Both variants of the separation thesis accurately describe Raz's sources thesis. There is no trace of a misconstruction.

3. The Myth of the Blue Sky

3.1. Destroying Law's Positivity

This myth departs from the view that legal non-positivism somehow ignored the value of law's positivity by getting too enamoured with the free, blue sky of justice. One way to describe this myth is by juxtaposing it with Gardner's first myth of legal positivism, which he entitled «the value of positivity»[59]. According to Gardner, it is a myth that legal positivism necessarily entailed what he labels «positivity-welcomers». Positivity-welcomers are positions that identify some evaluatively meritorious elements in law's positivity. «They see some built-in redeeming merit in legal norms *qua* posited»[60]. Gardner argues that the evaluative question is a separate issue that

53 Alexy & Marmor 2005: 788.
54 Alexy & Marmor 2005: 788.
55 I am referring here to the tone in Raz 2007: 17–19.
56 Raz 2007: 22.
57 Raz 2007: 22.
58 Raz 2007: 22.
59 Gardner 2014: 26.
60 Gardner 2014: 29.

does not go hand in hand with either positivism or non-positivism[61].

We can mirror this myth for legal non-positivism. The result is a myth saying that non-positivism, rather than overstating the value of law's positivity, as in Gardner's myth, would deny or downplay the value of law's positivity.

A similar way of describing this is by mirroring Gardner's second myth, closely related to the first. Gardner's second myth suggests that «[…] legal positivists insist on the evaluation of laws according to their "form" (e.g. their clarity, certainty, prospectivity, generality, and openness) as opposed to their content»[62]. Gardner summarises these formal criteria as purported «"content-independent" evaluative criteria»[63]. He then goes on to demonstrate that the form/content distinction is not what characterises legal positivism correctly. Instead, Gardner convincingly argues that the distinction that matters is the one between sources-based and merits-based criteria[64].

Still, we can use Gardner's considerations to identify a second formulation of the myth of the blue sky. This second formulation says that legal non-positivism would insist on evaluating laws according to their merits alone, employing only merit-dependent criteria. Since the latter would belong to the blue sky of justice, legal non-positivists downplay, if not ignore, sources-based criteria by focusing on merits. Many critics of legal non-positivism believe this. Their myth is that legal non-positivists would overemphasise the blue sky of justice by ignoring law's positivity (first formulation) and downplaying sources-based criteria (second formulation).

Another way to describe this myth is by arguing that legal non-positivism would necessarily result in an overmoralisation of the law. This myth is present when Shapiro uses the term «natural lawyers» to designate the opponents of legal positivism. Shapiro also characterises them as claiming «that unjust rules are not laws»[65] or as legal philosophers who «deny that the Nazis, the Soviets, the Taliban, and others had law»[66]. Others have argued that *qua* overmoralisation non-positivism poses an unacceptable threat to the «normativity»[67] of the positive law and to «the rationality of decisions»[68].

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61 Gardner 2014: 26, 29.
62 Gardner 2014: 29.
63 Gardner 2014: 29.
64 Gardner 2014: 31.
65 Shapiro 2011: 409.
66 Shapiro 2011: 16.
67 Reese 2013: 15.
68 Reese 2013: 138. Reese makes this claim for the constitution specifically, while I discuss the more general variant of the myth here.

3.2. Blue Sky Adjudication

The general idea of this myth is that by accepting an ideal dimension of the law, non-positivism destroyed law's positivity[69]. A narrower variant of the myth maintains that non-positivism led to blue sky adjudication. The judges would, so to speak, grab directly into the blue sky of justice to pull down a solution to the case before them, ignoring – and, ultimately, destroying – law's positivity.

This myth mirrors two of Gardner's myths of positivism. First, Gardner lists a myth entitled «positivistic adjudication», which holds that judges «decide cases only by applying valid legal norms to them» and that they avoid having «regard to the merits»[70]. The term «merits» is unclear here, but it seems natural to interpret it as referring to moral merits. Gardner's differentiation between an adjudication that sticks solely to «source-based norms»[71] and an adjudication that goes «beyond the mere application of posited […] norms»[72] is very close, if not identical, with adjudication following the real and the ideal dimensions of the law respectively. Consequently, we could rephrase Gardner's myth as claiming that legal positivism thinks judges decide cases only by referring to sourced-based norms and not moral merits. This interpretation allows us to mirror the myth: For legal non-positivism, judges decide cases only by referring to their moral merits and not to source-based norms.

Second, Gardner also enlists a myth referring to interpretation. Gardner's myth says that legal positivists «must favour particular methods of legal interpretation», namely textualism and originalism[73]. It is easy to see how the corresponding myth for non-positivism goes: Legal non-positivism favours modes of interpretation that look «to what would make the norm morally defensible»[74] or more fit for its objective (rather than intended) purpose. It favours, hence, justice-related, free, unbound interpretation.

3.3. Discussion

Some variants of legal non-positivism are indeed vulnerable to the objection from overmoralisation. To the relatively small and uninteresting extent that this is so, the myth bears a kernel of truth. Classical natural law doctrine has, indeed, overmoralised the law by seeing the law as essentially and purely ideal[75]. In more

69 See Alexy 2019a: 20.
70 Gardner 2014: 34.
71 Gardner 2014: 36.
72 Gardner 2014: 35.
73 Gardner 2014: 42.
74 Gardner 2014: 47.
75 Blackstone 2016: 41; see Klatt 2019: 45.

modern terms, this position is identified as «exclusive non-positivism», according to which «every moral defect yields legal invalidity»[76]. Exclusive non-positivists claim that «immoral rules are not legally valid»[77]. This position pays too much attention to law's ideal dimension.

It is easy to see that exclusive non-positivism is indefensible. Endicott has argued convincingly that a complete «rule of justice», that is, a state of affairs in which «the law prohibit[s] all injustices and give[s] recourse against them», would be «tyrannical»[78]. This is why we rarely find such views in the literature.

Shapiro's blanket characterisation of non-positivists as «natural lawyers»[79] rests on a myth. Overmoralisation is a myth because all interesting, modern, defensible variants of legal non-positivism are not vulnerable to the reproach of overidealisation. For all these variants, the real dimension of the law does not simply vanish by accepting an ideal dimension. On the contrary, the real dimension, law's positivity, is also relevant for legal non-positivists. As Alexy has said in his debate with Marmor, «[n]o non-positivist would claim that judges have the […] competence not to apply what is authoritatively issued and socially efficacious simply because they think it is morally wrong»[80]. Law's positivity is not a point on which positivists could claim a monopoly. Murphy has stressed this point:

> All natural law theorists believe that the existence and content of law necessarily depend on non-normative facts - meaning, that the spelling out what it is for a law to exist includes an appeal to some non-normative facts holding[81].

We can see all this best in the leading opposition to legal positivism: inclusive non-positivism. The Radbruch formula can characterise it, the shortest conceivable form of which is «Extreme injustice in not law»[82]. This formula does not require a complete fit between law and morality[83]. Even more importantly, below the threshold of extreme injustice, any conflict between the real and the ideal dimension of law, between legal certainty and justice, is solved in favour of the real, authoritative dimension[84]. Inclusive non-positivism has stressed the necessity of law's real dimension consistently[85]. It does not seem easy to describe this as destroying law's positivity, as the myth does.

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76 Alexy 2008: 287.
77 Beyleveld & Brownsword 2001: 76.
78 Endicott 2022: 1851.
79 Shapiro 2011: 409.
80 Alexy & Marmor 2005: 790.
81 Murphy 2017: 353.
82 Alexy 2008: 282.
83 Alexy 2008: 282.
84 Alexy 2016: 303; for a similar point in the context of constitutional rights, see Alexy 2019a: 20-21.
85 See, *e.g.*, Alexy 2017: 322–323, 2019b: 499.

According to the Radbruch formula, an adequate account of the relation between the real and the ideal dimension requires balancing the material principle of justice and the formal principle of legal certainty. This balancing entails legal reasoning, so the dual nature of law necessarily leads to argumentation. As I have defended elsewhere, discourse is the bridge required to integrate law's ideal and real dimensions. This function is so essential that discourse must be accepted as a third element of the nature of law, lending the latter a triadic rather than dual nature[86]. The vital point of the triadic nature of law is that under the discursive nature of law, the acceptance of an ideal dimension does not lead to an overmoralisation:

> [T]he seal of a totalitarian paralysis, stemming from the purportedly absolute moral principles of law's ideal dimension, is broken once and for all. In the procedural paradigm of law, there are no sacrosanct principles, except for the necessary conditions of rational discourse. The procedural paradigm already accounts for this essential objection against accepting an ideal dimension of law. It is hence mistaken to argue, as many sceptics do, that only a complete renunciation of the ideal dimension of law would allow for tolerance in a democratic society[87].

In order to shed more light on how this balancing works, I would like to refer to a concept I introduced some years ago: the dual nature of legal argumentation[88]. Moreover, with this, I am moving towards addressing the myth of the blue-sky adjudication. I should underline that a theory of the nature of law will inevitably impact the theory of legal reasoning. The two are by no means two separate things[89]. So this myth's starting point, *e.g.*, accepting an ideal dimension of law has consequences for legal reasoning, is unobjectionable.

However, this still does not lead to blue-sky adjudication, as the myth maintains. Given the dual nature of law, legal argumentation also has a dual nature, comprising an ideal and a real dimension. We can identify the dual nature of legal argumentation in all major canons and legal methods[90]. The fundamental idea behind this approach has been aptly condensed by Allan:

> There are good reasons to honour both the decisions of a democratic assembly and any legitimate expectations such decisions have induced; and those reasons will often commend close adherence to the canonical form of an enacted rule, aligning the normative rule with ordinary textual meaning. Against these reasons, however,

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86 Klatt 2020.

87 Klatt 2020: 393; see also Fuller 1946: 394–395.

88 Klatt 2016.

89 See, however, Massimo La Torre's remark in the discussion between Alexy and Marmor, Alexy & Marmor 2005: 787.

90 For details, see Klatt 2016: 31-36; for the connectedness between nature of law and the nature of legal argumentation, see already Klatt 2012: 14-16.

> must be set any contrary considerations of justice – in particular, those considerations of justice embodied in presumptions of legislative intent, which serve to bolster the integrity of the rule of law. The legal effect of an enactment, accordingly, is always a matter of judgment, sensitive to all the applicable moral reasons[91].

As the beginning of this quotation demonstrates, the ideal dimension of legal argumentation[92] does not allow for blue-sky adjudication. The value of law's real dimension, its positivity, and the value of finality[93] in public decision-making continue to exert influence upon adjudication. A balancing between ideal and real elements of legal reasoning is required, and a Dworkinian ideal of integrity must inspire this.

I have summarised these considerations in the "Radbruch formula of legal argumentation", which runs: Arguments from law's real dimension (literal meaning, will of the historical legislator, original intent, etc.) take preference over arguments from law's ideal dimension (justice) unless we can cite rational grounds for granting preference to the latter[94]. This formula captures the balancing between ideal and real elements, which is necessary in every instance of legal reasoning. From accepting an ideal dimension of legal reasoning, «it does not follow that the law cannot diverge from justice»[95]. Even more importantly, the formula does give a default (albeit rebuttable) preference to the real elements of legal reasoning. This default preference is why the reproach of overmoralisation of legal argumentation is a myth.

4. The Myth of Juristocracy

The myth of juristocracy is based upon the myth of the blue sky but gives the reproach of overmoralisation a distinct institutional angle. The criticism is that non-positivism gives the judges too much authority by allowing for an ideal dimension of law and legal argumentation while disempowering the legislator. This disempowerment contradicts the principle of the separation of powers and the principle of democracy. In a nutshell, non-positivism leads to juristocracy. Habermas has raised this concern prominently:

> Once the judge is allowed to move in the unrestrained space of reasons that [...] a "general practical discourse" offers, a "red line" that marks the division of powers between courts and legislation becomes blurred. In view of the application of a particular statute, the legal discourse of the judge should be confined to the set of

91 Allan 2020: 588.
92 See Alexy 2019a: 26.
93 See Endicott 2022: 1866–1870.
94 Klatt 2016: 38.
95 Allan 2020: 588.

> reasons that legislators either in fact put forward or at least could have mobilised for the parliamentary justification of that norm. The judge, and the judiciary in general, would otherwise gain or appropriate a problematic independence from those bodies and procedures that provide the only guarantee for democratic legitimacy[96].

My discussion of this myth can be brief. Because the same reasons that disprove the blue-sky myth also count against the myth of juristocracy. If blue sky adjudication is not a necessary consequence of law's ideal dimension, if legal reasoning is not by necessity overmoralised, then it is wrong to claim a disempowerment of the legislator. As I have stressed above, the Radbruch Formula of legal argumentation includes a prima facie preference for authoritative arguments, stemming from law's real dimension: By default, judges are not empowered to resort to «the unrestrained space of [moral] reasons», as Habermas has put it.

Suffice it to add that this misdiagnosis also rests on an idea that is too narrow regarding the principle of democracy. Democracy also has a dual nature[97]. On the one hand, it is a formal decision procedure based on the simple mechanism of majority will. On the other hand, democracy is intrinsically linked to the idea of public discourse, and discourse strives for material correctness. The concept of deliberative democracy unites both aspects. The myth of juristocracy, however, presupposes a narrow idea of democracy that concentrates exclusively on its formal side, ignoring its dimension of material correctness.

5. The Myth of Mistaken Idealism

This myth maintains that the notion of an ideal dimension of law is of a highly suspicious character in itself. As has been remarked in the discussion following the debate between Alexy and Marmor, «[t]here are some thinkers who believe that the idea of the just, the unjust and the theory of legal argumentation are simply rubbish»[98].

Idealism may be suspicious for two distinct reasons. Either one assumes that the blue sky is empty. There are no moral entities that could inform an ideal dimension of the law. This is the non-existence variant of the myth. It claims that moral entities do not exist. Kelsen objected to non-positivism, which «presupposes an absolute moral order, that is, one that is valid at all times and places»[99]. According to Kelsen, however, such an absolute, «a priori»[100] morality does not exist: «In view of the extraordinary heterogeneity, however, of what men in fact have considered as good

[96] Habermas 1999: 447; see also Reese 2013: 250.
[97] Alexy 2017: 338.
[98] Alexy & Marmor 2005: 791.
[99] Kelsen 1967: 68.
[100] Kelsen 1967: 65.

and evil, just and unjust, at different times and in different places, no element common to the contents of the various moral orders is detectable»[101]. Under this view, idealism is mistaken because it can only be upheld as perverted deontological liberalism. If the blue sky is empty, anything goes. Consequently, the notions of moral justification and knowledge degenerate into subjectivist, relativist, non-cognitivist or emotivist contingencies[102].

According to the second variant of this myth, idealism automatically turns into ideologism. Because the blue sky is empty, idealism gets monopolised by particularistic views that are unjustified from a rational standpoint. In addition to the purported irrationality and paternalism, there are worries that ideological particularism is ill-suited to function in pluralistic societies where a certain leeway and room for a plurality of correctness standards is essential[103]. This is the reproach of invariance: «[T]o ask the pure concept or ideal to work as an a priori element requires an approach to invariancy that indeed is very difficult to attain»[104]. According to this claim, idealism goes hand in hand with a one-right-answer thesis that knows only a single, pure moral truth.

It follows from these considerations that the central and arguably decisive argument[105] in favour of law's ideal dimension – law's claim to correctness – seems either too strong or too weak. The claim to correctness is directed into an empty, contentless airiness or a rigid, inflexible, ideologised stock of moral truths. Both alternatives are likewise unattractive and unconvincing, the myth of mistaken idealism maintains.

Both variants of this myth point to the *content* of law's claim to correctness, and both misunderstand this content, albeit in opposite ways[106]. The misunderstanding lies primarily in overlooking that the correctness is discursive. The content of law's claim to correctness is neither preestablished, set in stone, before any discourse, nor does the discourse necessarily lead into an empty blue sky. Instead, the content is being established and constructed discursively; it is a *discursive* correctness that matters for law's ideal dimension.

This understanding allows us to reject both variants of the myth. Candidates for ideal elements of the law have to justify and defend themselves in rational discourse. There are no sacrosanct, rigid, predetermined, absolute elements. This is a reason against Kelsen's objection to «absolute morality». The misunderstanding of correctness demands too much of that standard and then prematurely discredits the ideal dimension of law for not meeting that excessive standard. A weaker understanding

101 Kelsen 1967: 64.
102 See Alexy 2004: 166.
103 See Bix 2020: 126.
104 Alexy and Marmor 2005: 791.
105 Alexy 2004: 164.
106 On the problem of the content of law's claim, cf. Bix 2020: 125-130.

of correctness suffices for the ideal dimension to exist – an understanding that uses the notion of rational justifiability instead of absolute rationality[107].

An essential and often overlooked consequence of this discursive understanding is that accepting an ideal dimension of the law does not necessarily go hand in hand with adopting a specific, narrow moral theory at the expense of bluntly excluding all other moral theories. Instead, under the discursive understanding of law's ideal dimension, this dimension is open towards a plurality of moral theories that have to defend and prove their respective value in rational discourse, according to the strength of the better argument. For this reason, the reproach of invariance mentioned above is mistaken. I must mention only one element of discourse theory here, namely the three discursive modalities of discursively necessary, impossible, and possible propositions[108]. The latter category leaves ample room for variance.

On the other hand, it is not true that discourse could not justify some aspects as necessary – hence, the blue sky is not empty. The plurality of correctness standards in an open, diverse society does not go so far that differences in rational justifiability among the various normative proposals vanish altogether. I want to acknowledge that the myth of mistaken idealism has a valid starting point. The argument from law's claim to correctness presupposes that some moral objectivity, rationality, or correctness exists. The non-positivist concept of law indeed rests on a moral theory[109]. The myth goes astray, however, when it denies that non-positivism can meet the burden of demonstrating the existence of moral objectivity.

In the case of inclusive non-positivism, the required moral theory is discourse theory. Moral correctness is continuously developed, constructed, challenged, and reconstructed in moral discourse. The outcome of the latter is not mere emptiness, as the first variant of the myth maintains. Human rights, for example, exist because they can be rationally justified in a «game of giving and asking for reasons»[110]. They are discursively necessary elements of justice and, hence, substantive and necessary content of the correctness claimed by the law[111]. The ideal dimension, then, is not empty. Moreover, it is a dimension of law precisely, as opposed to a mere dimension of morality, because the legal principles necessarily incorporated in our legal systems express an ideal or prima facie «ought» that directly ties in with human rights and, more generally, justice[112]. Constitutional rights are positive laws, but they still keep raising a claim to correctness that refers to human rights, thus linking the real dimension with an ideal dimension[113].

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107 Alexy 1989: 220; cf. Bix 2020: 126.
108 See, *e.g.*, Klatt 2012: 6, 25.
109 See also Alexy 2013: 101.
110 Brandom 2000: 189, borrowing a phrase from Sellars.
111 Alexy 2012: 8–13.
112 On this norm-theoretic argument for the dual nature of law, see Alexy 2010: 180.
113 See Alexy 2019a: 18–19.

The claim to correctness is neither too strong nor too weak, as the myth would have it. To be sure, nothing of the above settles the distinct question of how legal practice can meet law's claim to correctness under the conditions of a dual nature of law. The two dimensions can lie in conflict, and the problem arises of determining the relation between the Real and the Ideal. This distinct problem is the issue of the next myth.

6. The Myth of Lacking Integration

The critics of non-positivism argue that if one accepts the dual nature of law, then law dissolves into a fragmented chaos, since the real and the ideal lie in eternal conflict. It was impossible to overcome this conflict by some magic harmonising means. The legal sociologist Ludwig Gumplowicz sneered at Jellinek's attempt to construct a dual nature of the state by comparing it to «eating a Beethoven sonata with spoons»[114]. The modern variant of this critique is the objection from incommensurability[115]. It informs the myth of the lack of integration of the two dimensions[116]. In order to avoid being tossed back and forth between real and ideal elements of the law, one needs to limit the law to one dimension only, the real one, adopting legal positivism.

A variant of this myth criticises the Radbruch Formula. Since the Radbruch formula attempts to arrive at a justified, integrated relationship between the real and the ideal dimension, criticism against the formula directly affects the idea of integrating the two dimensions by balancing legal certainty and justice. Many objections against the Radbruch Formula have been raised. I shall consider only three of them here. Habermas joined in the Alexy-Marmor debate with the following question:

> Why do you need any recourse to the Radbruch formula? Once you confine the dispute to legal systems within the frame of a democracy, then constitutional principles contain all the moral content you need […][117]

Shapiro, on the other hand, objected with an eye to the Nazi regime that «regimes that are morally illegitimate may still have law»[118]. Raz maintained that the Radbruch Formula was compatible with legal positivism since «its existence can only be a matter of social fact»[119], and it led only to a moral[120] obligation to disobey unjust laws.

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114 Gumplowicz 1907: 450.
115 Finnis 2014: 108.
116 Elsewhere, I have labelled this myth the bridge problem, see Klatt 2019: 57; cf. also Klatt 2020: 390.
117 Alexy & Marmor 2005: 785.
118 Shapiro 2011: 16.
119 Raz 2007: 31.
120 Raz 2007: 29 with fn. 28.

The myth of the lack of integration points towards an essential characteristic of legal non-positivism. Once we accept an ideal dimension of the law and, accordingly, allow for some role of moral arguments in legal reasoning, we incorporate the uncertainties and imponderabilia of morality into the law[121]. Moral reasoning sometimes ends with rational disagreement, and the functions of the law then necessitate an authoritative decision[122]. This necessity, however, points towards law's real dimension, and if that is what the ideal dimension is leading us to, the very point of the ideal dimension seems to vanish.

These considerations would count against legal non-positivism unless the latter can demonstrate how morality can be part of the law without destroying its real, authoritative dimension. Legal non-positivism cannot leave unexplicated the relation between ideal and real elements of the law[123]. Legal non-positivism has to deal with two concepts of correctness, each of which relates to one of the two dimensions[124]. It must demonstrate a third overarching correctness since what is correct in the real dimension can conflict with what is correct in the ideal dimension. An explication of this integration and overarching correctness is required, which is not a small burden.

I have already discussed an aspect of this integration problem above, referring to how, in legal reasoning, discourse is the bridge capable of binding together real and ideal arguments[125]. Here, I shall concentrate on the Radbruch formula and the more general field of the concept of law. The Radbruch Formula is an attempt to achieve integration. To be sure, one does not have to accept this formula to be a non-positivist. However, it is the only justifiable position within legal non-positivism. Its fundamental idea is that «the question of how to determine the relation between the ideal and the real dimension of law boils down to how to determine the relation between the principle of justice and the principle of legal certainty»[126]. Its explanatory power lies in the combination of achieving two things simultaneously. On the one hand, the formula can explain the limits of law by demonstrating that we must exclude extreme injustice from the law.

On the other hand, the formula can allow for these limits without destroying the authoritative dimension of the law. Below the threshold of extreme injustice, it gives preference to law's real dimension. In this way, it represents a well-balanced integration of both dimensions. This advantage, in turn, contrasts the alternative positions within the camp of legal non-positivism, which either pay too little atten-

121 See my inheritance thesis developed in Klatt 2014: 899.

122 Alexy 2004: 165.

123 See Alexy & Marmor 2005: 790: «The overarching concept of law requires the judge to resolve the contradiction between the factual and the ideal as a legal problem».

124 Alexy 2017: 323–324.

125 See my discussion of the dual nature of legal reasoning, and the triadic nature of law, point 3.3. above.

126 Alexy 2013: 102.

tion to law's ideal dimension (super-inclusive non-positivism) or too much attention to it (exclusive non-positivism)[127].

The abovementioned objections against the Radbruch formula misunderstand its meaning. Habermas' objection that it was superfluous under the conditions of a constitutional democracy holds only for standard cases in a stable, well-functioning constitutional state[128]. Such a state may have enough internal resources to prevent injustice, and it may then be unlikely that we ever transgress the threshold of extreme injustice. Still, the dormant, quasi-hypothetical scenario of extreme injustice helps us to stay vigilant and realise when the situation deteriorates so much that applying the Radbruch formula is required. It thus allows us to «understand what is only implicit in everyday practice»[129]. The need to nurture our awareness in this regard is acute even in Western democracies, which nowadays face situations of abusive constitutionalism. The potential for abuse is why we cannot follow Habermas's suggestion to dispose of the formula.

Regarding Shapiro's objection that even morally illegitimate regimes may still have law, it overlooks that we cannot use the Radbruch formula to evaluate legal systems as a whole. Instead, it applies only to individual legal norms[130]. It does not deny that a legal system may contain some norms that are legally invalid because they are extremely unjust, as well as some other norms that are legally valid because they do not reach the threshold[131].

Lastly, the validity of the Radbruch formula cannot be a matter of social fact, as Raz maintains. If it were a matter of social fact, its validity would depend on the authoritative decision alone. This, however, would collapse non-positivism into inclusive positivism. Non-positivism addresses the problem of *non-authoritative* reasons for extreme injustice[132]. Another misunderstanding lies in Raz's claim that the Radbruch formula was consistent with legal positivism since the latter also could accept a moral obligation not to obey immoral laws. It is the very point of the formula to make legal validity dependent upon morality, if only in extreme cases. It is not about a «moral» obligation but a legal one. The same misunderstanding seems to inform Allan's statement that the Radbruch threshold was «the point at which our ordinary duties of collaboration cease and moral duties of resistance and rebellion succeed them»[133]. The Radbruch formula is not about ordinary (legal) duties versus moral duties but about a conflict between two types

127 See Alexy 2008: 290; see also Alexy 2013: 107–110.
128 See Alexy & Marmor 2005: 786.
129 Alexy & Marmor 2005: 786.
130 Alexy 2016: 305.
131 In fact, Shapiro's position is not even consistent, since despite his criticism he also adopts a position very similar to the Radbruch formula, cf. Alexy 2016: 305.
132 Alexy 2007: 51.
133 Allan 2020: 589.

of *legal* duties – those binding us to authority and positivity and those binding us to justice.

I conclude that the three objections against the Radbruch formula are not convincing. The integration between the Real and the Ideal, which inclusive non-positivism specifically defends, represents a well-balanced integration of the two dimensions of law. Radbruch also reminds us that we may only determine the preference of one or the other dimension by «responsible decision» of changing eras[134]. This decision, however, must take place in open and public discourse, and it remains subject to further discourse[135]. Our discursively justified decisions about the correct relation between the real and the ideal dimension of the law have «at any one time a preliminary character»[136].

7. The Myth of the Wrong Methodology

This myth accuses non-positivism of pursuing a wrong methodological approach towards the concept or nature of law. It comes in two variants, criticising the analytical and normative approaches. Here, I only address the objection against the normative approach.

This objection argues that non-positivism mixes prescriptive political arguments into a descriptive project. Marmor criticises that non-positivism can only justify the Radbruch Formula by normative argument. Drawing to normativity, however, was a methodologically wrong turn in a conceptual analysis: «I cannot make a normative argument about the nature of anything except normative conclusions, so if I make a normative argument, a moral argument, then the conclusion is a moral conclusion»[137] – rather than an analytical conclusion about the concept of law. Marmor also distinguishes between two approaches to the nature of law. First, the ontological one, which answers the question of "what characteristics does law have?", and which Marmor identifies with legal positivism. Second is the political approach, which, in his words, «aims to put the concept of law […] at the service of what some or many of us desire and therefore qualify as just», which Marmor identifies with non-positivism. Similarly, Shapiro argues that «statements of legal authority, legal rights, and legal obligations are *descriptive*, not normative»[138]. Raz maintains that the nature of law is a matter of theory and not advocacy; he urges us to concern ourselves only with «how things are»[139].

[134] Radbruch 1990: 50.
[135] See also Allan 2020: 583-584.
[136] Klatt 2019: 62.
[137] Alexy & Marmor 2005: 778.
[138] Shapiro 2011: 188.
[139] Raz 1996: 7.

The myth is that non-positivism was a normative-political theory rather than a conceptual, descriptive theory about the nature of law. This reproach is true, so I list this point as a "half" myth. It is still a myth, though, because the normative character of the argument does not weaken non-positivism's position in the debate on the concept of law.

Let me briefly explain these two aspects of my argument. First, it is only a "half" myth because the Radbruch formula is a normative argument. The normative character may have been sometimes overlooked because Alexy's main frame is a conceptual-analytical argument on the concept of law. Nevertheless, he has made explicit the normative character of the argument from injustice: «[…] the debate surrounding Radbruch's formula cannot be decided based on analytical or conceptual arguments alone. What matters is expedient or adequate concept formulation that is justified by normative arguments»[140].

Still, the reproach of wrong methodology is a myth because the normative character of the argument does not weaken non-positivism's standpoint. This is so for two reasons. First, the Radbruch formula is a compelling normative argument. Its core insight is that one transgresses the limits of the law when one violates a core of human rights very severely. It is hardly surprising that we can only justify this proposition with recourse to moral reasons[141]. The real question is not whether it is a normative point but whether these moral reasons are convincing. On the condition that human rights mean anything to us at all, I find it very difficult to argue against the normative claim to exclude such transgressions from the realm of the law[142]. The protection of human rights requires a non-positivistic concept of law[143].

Second, it is vital to see that even though legal positivism is a purely descriptive[144] theory for most contemporary legal positivists, many theorists in the legal positivist tradition also argue normatively[145]. This is no surprise, given that value relativism is the main argument for the separation thesis[146]. Because questions of practical philosophy could never be answered objectively, rationally, and universally, but only in a subjective, irrational, parochial fashion, we had better exclude morality from the law – so the argument goes. For this reason, a normative, prescriptive dimension of legal positivism has been accepted, *e.g.*, by Jeremy Bentham, Bruno Celano, Jeremy Waldron, Liam Murphy, Stephen Perry, and Fred Schauer[147]. In addition, the view

[140] Alexy 2002: 40; see also Alexy 2008: 296; Alexy & Marmor 2005: 772.

[141] See Finnis 2013: 7.

[142] See also Alexy 2002: 62 for further arguments in favour of the argument from injustice.

[143] See Alexy 2002: 58; Alexy and Marmor 2005: 772.

[144] For convincing arguments against this self-description, see Schauer 2021: 69–71, 2005: 495-497.

[145] See the remark by Pasquale Policastro in Alexy and Marmor 2005: 790: «The choice to develop the positivistic approach comes from essentially moral reasons»; cf. Gardner 2014: 26–29.

[146] Alexy 2002: 53–55.

[147] See Schauer 2021: 61–71 for details; Schauer 2005: 498–499 with fn. 21.

that legal position is a prescriptive enterprise was the shared, if unspoken, premise of both Hart and Fuller in their famous debate[148]. For these two reasons, I cannot conclude that the argument from injustice's normative character weakens non-positivism's position in the debate.

Nevertheless, there is still more to say. While embracing the normative necessity of a non-positivist concept of law, Alexy has distanced himself from views that defy any conceptual argument and see all arguments as normatively laden so we could settle the debate on the concept of law only by normative considerations[149]. Admitting that Radbruch's formula is a normative point allows for some role of normative considerations while maintaining that the connection between law and morality is also *conceptually* necessary. The role precisely that inclusive non-positivism envisages for the normative argument is «in part [to] strengthen and in part [to] go beyond the conceptually necessary connection» between law and morality[150].

These remarks allow us to make an intricate connection between the conceptual and normative arguments for inclusive legal non-positivism. The two arguments are not entirely separated from each other. A complete separation between the conceptual and the normative argument would mean an open choice between a purely descriptive and a normative approach. Some scholars indeed frame the debate in this way, as if it was simply a matter of individual methodological preference whether one adopts a normative or a descriptive concept of law. I label this strategy the "Pilatus-move" of descriptive legal positivism, adopted, *e.g.*, by Marmor in his debate with Alexy.

Descriptive methodology, however, is adequate only if one adopts a pure observer perspective, which limits itself to merely describing social facts of legal practice. It is interesting to note that non-positivists agree that legal positivism is correct from an observer's perspective[151].

Things change dramatically, however, if one adopts a participant's perspective. A participant asks, "What is the *correct* legal answer I *ought* to give to a legal problem?". This reference to correctness and ought inevitably leads her into a normative rather than descriptive inquiry. A participant «cannot be disengaged, offering neutral reports of what other people think»[152]. Instead, he must «join the practice he proposes to understand»[153].

Given this difference between the two perspectives, justifying the perspective one adopts is vital. This is the point at which conceptual analysis enters the stage. Because of conceptual necessity, law raises a claim to correctness, and this claim

148 See Schauer 2005: 494–495.
149 Alexy 2002: 22.
150 Alexy 2002: 23.
151 Alexy 2007: 45.
152 Allan 2020: 592 fn. 81.
153 Dworkin 1986: 64.

transforms legal practice into a normative enterprise, lending it a «context-transcending dimension»[154] that the descriptive observer cannot grasp. The observer's view of the law is too restricted to the empirical truth of propositions. It is so detached that «we can only report other people's opinions of the law's requirements rather than our own considered view»[155]. In that way, it inevitably misses that the participant's view includes some considerations of what the law ought to be into what the law is. Allan aptly described this holistic, integrative approach: «What the law requires is always a matter of interpretative judgment, dependent on an evaluation of all the matters relevant to an appropriate integration of fact and value»[156].

The participant's descriptive approach to the concept of law, so to speak, always includes some elements from the realm of moral ought[157]. There is no free choice between normative or descriptive methodology for these conceptual reasons. Instead, the normative participant perspective is conceptually necessary. Otherwise, we risk constructing an incomplete, oversimplified concept of law that is blind to law's ideal dimension[158]. If we follow these considerations, we may discover that the half myth is, in fact, a complete myth because the normative necessity of legal non-positivism is conceptually necessary.

8. Conclusion

In my discussion of the myths of legal non-positivism, I have sought to demonstrate why and to what extent certain beliefs, albeit widely shared, misconstrue legal non-positivism. First, non-positivism correctly states the core of its debate with legal positivism by employing the separation and the connection theses. Second, legal non-positivism does not overemphasise the blue sky of justice, and it neither ignores law's positivity nor downplays sources-based criteria. In legal reasoning and adjudication, non-positivism even allows for a default preference of authoritative elements over ideal elements. Third, legal non-positivism does not violate the principles of the separation of powers and democracy; it does not lead to juristocracy. Judges are not empowered to grab into an unrestrained space of morals reasons – but they cannot ignore the ideal dimension of democracy either.

Fourth, accepting an ideal dimension of the law does not make the law dependent upon subjectivist, relativist contingencies. Law's claim to correctness has a

154 Cooke 2012: 285; Alexy 2016: 302.

155 Allan 2020: 592.

156 Allan 2020: 592.

157 See Alexy 2008: 297; Klatt 2012: 13–14.

158 Klatt 2020: 381; Alexy and Marmor 2005: 780; Alexy 2007: 52; most interestingly Gardner acknowledges that «legal positivism naturally supplies only part of the answer» in the very last paragraph of his article, see Gardner 2014: 53.

discursive character; consequently, ideal elements of the law must justify and defend themselves in rational discourse. Non-positivism is hence open for a plurality of correctness standards in our diverse societies, while this openness does not go so far that differences in rational justifiability among the various normative proposals vanish altogether. Fifth, discourse theory disproves the myth that integrating the ideal and the real was impossible. Lastly, regarding the objection that non-positivism mixes prescriptive political arguments into a descriptive project, I have argued that this is true but does not weaken the justification of non-positivism. Furthermore, if we acknowledge the link between analytical and normative arguments established by law's claim to correctness, this half-myth turns even into a complete myth.

I conclude that legal non-positivism is an adequate theory of the nature of law, while legal positivism limits itself to an observer perspective that can only see law's real dimension. Half-blind legal positivism does not give us the whole story of law's nature. We should not settle for less than the complete picture.

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No Making Responsible, We Might Say, Without Holding Responsible

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Abstract

This article analyses some theses developed by John Gardner that deal with the relations between different concepts of responsibility and how these are useful for understanding the relationships between agency, reasons and responsibility practises. In the first two sections, the text introduces the Aristotelian view developed by John Gardner, focussing on how he understood the relationships between the concepts of basic responsibility, consequential responsibility and prospective responsibility. Sections III. and IV. then review two challenges that arise from the author's treatment of the concept of basic responsibility. The first is the difficulty of understanding some types of responsibility and the second is how we can make sense of the role of excuses in our responsibility practises. Finally, some philosophical tools that Gardner developed in his last works are presented in order to deal with those challenges.

Keywords: Responsibility. John Gardner. Excuses. Agency. Reasons.

I. Few people in recent decades have thought as deeply about the concept of responsibility and its relationship to our moral and legal agency as John Gardner. In his elegant and insightful work, he has not only clarified much of the debate in our tradition, but has also developed an interesting way of understanding how we see ourselves in legal and non-legal practises. In this text, I will review some of the theses that the author developed on these topics over the course of two decades. In particular, I will focus on how he understood what he called basic responsibility. The concept of basic responsibility plays an important role in three of his books (viz. *Offences and Defences* (2007), *From Personal Life to Private Law* (2018) and *Torts*

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and Other Wrongs (2019)) and in a series of essays on agency and responsibility that he wrote as part of his development of a broader Aristotelian philosophical conception. I will begin this text by outlining some basic elements of this conception (Section I) and then set out his views on responsibility (Section II). I will then analyse two challenges arising from Gardner's treatment of the concept of basic responsibility, namely the difficulty of making sense of some kinds of responsibility such as vicarious responsibility and role-based responsibility (Section III), and the way in which we can make sense of the role of excuses as non-relational reasons in our responsibility practises (Section IV). To conclude, I will explore some philosophical tools that Gardner developed in his last works that might help us to overcome those challenges (Section V). From these tools I have taken the title of this article, which is a direct quotation from Gardner, as we shall see.

In the works already mentioned, John Gardner defends an Aristotelian view of responsibility, which he defines in contrast to a Hobbesian one that would prevail in the modern age[1]. According to the Hobbesian story, «the only natural aim of rational beings is to stop nasty consequences, including nasty moral and legal consequences, from descending upon their own heads»[2]. In this framework, the central element of responsibility is the imposition or avoidance of punishment for wrongdoing. Lay people respond to what the authorities say as far as a serious imposition of punishment is in play and the practises of responsibility play an important role in determining who has acted wrongly and therefore deserves to be punished. Excuses in this context would be explained, for example, by the fact that they serve to deny the existence of responsibility and thus prevent the possibility of imposing a punishment. In this way, the practise in question would be relational in the sense that people aim to convince the decision-maker to achieve a good outcome (which means to avoid punishment).

The Aristotelian view, on the other hand, is based on a different way of seeing our rational agency, in which the propension to be understood by others and to give an account of oneself takes centre stage. In a co-authored text with Timothy Macklem on reasons, the author expresses:

> In differentiating human beings from other animals Aristotle emphasizes human excellence in the closely connected faculties of speech and reason. We may think of these faculties, in their most developed form, as the distinctively human ways of relating to the world. One, the faculty of speech, provides us with a distinctive way of imposing ourselves on the world. The other, the faculty of reason, is the distinctive channel through which the world, in return, imposes itself on us[3].

[1] This contrast begins clearly in his 2003 essay "The Mark of Responsibility" (see Gardner 2007: ch. 9; 2008: 139-140). Before that, he referred to some elements of the Hobbesian conception as a residual view (see Gardner 2007: ch. 4).

[2] Gardner 2007: 179.

[3] Gardner, Macklem 2002: 440. See Gardner 2007: 185.

According to this view, our human abilities produce a particular way of being in the world, in which language and rationality are central. A good life therefore presupposes that we develop these abilities in society. On the one hand, we use the faculty of speech in order to make sense of what we do and what we are, and to shape our social environment. On the other hand, we use the faculty of reason in order to respond appropriately to the facts surrounding us and do justice to them. The mixture of both is what makes responsibility so important, because it is in the practise of responsibility that our human abilities are revealed in all their splendour. Being a responsible agent therefore means «being able and willing to explain one's action as a manifestation of one's rational competence»[4].

An Aristotelian view thus focuses on the way in which our rational powers and the value we attach to them permeate practise and our understanding of it. Rather than focusing on the avoidance of punishment, this view explains responsibility in terms of our interest in understanding and justifying what we do. In this context, offering an excuse is a way of providing reasons that explain our behaviour. Consequently, Gardner points out that «[a]s rational beings, we might want our wrongs and mistakes to be justified, or failing that excused. It is what we could call the Aristotelian story. As rational beings we cannot but aim at excellence in rationality»[5].

II. Gardner's Aristotelian view is supported by an analysis of the relationships between the different concepts of responsibility. In the writings of the 2000s, Gardner focussed in particular on the difference between "basic responsibility" and "consequential responsibility", a distinction he adopted from Ronald Dworkin[6]. As for consequential responsibility:

> Those who are responsible are those who are singled out to bear the adverse normative consequences of wrongful (or otherwise deficient) actions. The consequences in question are normative in two ways. First, they are changes in someone's moral or legal (or otherwise normative) position. Second, they are effected by someone's violation of a norm (moral, legal, or otherwise). In other respects they are very varied[7].

This concept of responsibility is usually referred to in the literature as 'liability' and refers to how we react to a person (e.g. blaming, punishing, imposing the obligation to repair) after we have attributed a wrong (e.g. legal, moral or political) to her. The notion of liability is present in the sense that the ascription of the wrong implies that someone is held liable to be the object of a reaction, which changes the normative status of the person responsible. These normative issues can be repre-

4 Gardner 2007: 84.
5 Gardner 2007: 177-178.
6 See Dworkin 2000.
7 Gardner 2008: 132.

sented as the imposition of a burden. Thus, according to the author: «[t]o say that D is liable is to say that another has a normative power to burden her, for example by imposing extra duties on her or taking away some of her rights»[8]. This, in turn, implies that «I am consequentially responsible if some or all of the unwelcome moral or legal consequences of some wrong or mistake (whether mine or someone else's) are mine to bear»[9]. Subsequently, we have a way of saying that a person responds for what has happened in the sense that others might impose a burden on her. As we can see, this concept of responsibility is directly related to the possible consequences of our acts that others can impose on us. This fits very well with the Hobbesian view of responsibility, in which the threat of punishment plays a central role.

For Gardner, on the other hand, basic responsibility is «a kind of ability to respond. More precisely it is the ability to explain oneself, to give an intelligible account of oneself, to answer for oneself as a rational being»[10]. In this context, when we say that someone is responsible, we mean that she is capable to respond in the sense of answering some questions related to her actions. For Gardner, this means that we are talking about the abilities of human beings. More precisely, for Gardner this concept of responsibility «is a compound […] of our ability to use reasons in acting, thinking, choosing, wanting, etc. and our ability to use those reasons again in giving an account of whatever it was we did, thought, chose, wanted, etc., and in that sense, as rational beings, giving an account of ourselves»[11].

There is a third concept of responsibility that is important for a more comprehensive picture of responsibility practises: prospective responsibility. This third concept was introduced by the author in his last writings as part of what he called assignable responsibility. In this sense, when we talk about responsibility, we are talking about the responsibilities that people have and we are referring to the reasons that apply to people and that show what they ought to do. According to Gardner, this "ought" should not be confused with the idea of duty, in his words: «duties are individuated according to the actions that they are duties to perform. A duty to perform a different action is a different duty. Responsibilities, however, are individuated otherwise. Alongside rights, they belong to the apparatus for explaining why I have whatever duties I have. They are individuated at the level of the reasons for my duties. I have a responsibility inasmuch as a certain reason or set of reasons is mine to conform to»[12]. In this context, someone is responsible in the sense that there are reasons that apply to her as guiding reasons[13].

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8 Gardner 2019: 173.

9 Gardner 2007: 177.

10 Gardner, 2008: 123.

11 Gardner 2007: 185. See. Gardner 2011: 87-88; 2018: 75.

12 Gardner 2019: 200.

13 Gardner says that «[o]ne's actions can be regulated by norms only if one is the kind of being who can be guided by norms. Guidance by norms requires guidance by reasons. It requires that one have the

In terms of the relationship between these concepts, Gardner sees basic responsibility as primary. The practises associated with consequential responsibility are meaningful insofar as they open up the space for people to give their reasons and explain themselves to others. Our prospective responsibilities, in turn, depend on our rational capacities. Without our capacity to respond to them, they would make no sense at all. The interplay between these different concepts of responsibility is more complex. In what follows, I will consider some of them in the context of John Gardner's work.

III. The first point I would like to address concerns the existence of a kind of conceptual connection that he identified between the concepts of consequential responsibility and basic responsibility. He called it 'the rudimentary link' and it consists in the idea that: «one must be basically responsible, or at least assumed to be basically responsible, for the question of one's consequential responsibility to arise in the first place»[14]. For Gardner, the presence of basic responsibility is therefore a precondition for consequential responsibility[15].

The proposal immediately raises the question of whether such a connection is accurate for describing the various ways in which consequential responsibility is deployed. It can be argued that in many cases of vicarious responsibility, as well as responsibility for the exercise of a role, it is irrelevant whether the person who has to bear the normative consequences has exercised basic responsibility for the wrong for which she is responsible. This is the case, for example, when the employer must bear the consequences of a wrong done by her employee or when a mother has to bear the normative consequences of her daughter's actions, even though her actions played no role at the time of the wrong. An example of the latter is when a person occupying a new position has to take responsibility for the decisions of her predecessors in that position. In this latter case, it is the exercise of the role that justifies that the person responds, not that her did something wrong. It may even be that the person being held responsible did not know that the wrong had been committed.

For Gardner, an answer to this possible problem can be sought by reflecting on the ambiguity of the expression "holding responsible". He says that: «[w]e hold people responsible in two senses of 'hold'. […] Sometimes we hold a person responsible in the ('constative') sense of coming to the conclusion that she is responsible. Sometimes we hold a person responsible in the rival ('performative') sense of making her responsible: we confer responsibility on her by an exercise of our

ability to justify or excuse one's actions» (2008: 128). See Gardner 2007: ch. 5; 2018: 23-31; 2019: ch. 6.

[14] Gardner 2008: 137.

[15] See Gardner 2011: 88. Consequently, for Gardner, whenever a person is held responsible by attributing consequential responsibility to her, basic responsibility is also attributed to her. In his words: «[o]ne asserts H's basic responsibility, in other words, by imposing consequential responsibility on H» (2008: 139).

normative powers»[16]. This distinction can be applied to the three aforementioned concepts of responsibility in different ways. For example, prospective responsibility, insofar as it is assignable, can be conferred when a new institution is created and new responsibilities arise for those who fulfil roles in that institution.

What is interesting for our purposes is the fact that, as it stands in contrast to consequential responsibility: «Basic responsibility […] cannot be conferred. One cannot assume it, impose it, be relieved of it, be exempted from it, or otherwise subject it to the exercise of a normative power»[17]. Since basic responsibility refers to some abilities that are part of our human life form, «we cannot intelligibly complain, for example, that basic responsibility is unfairly distributed, such that I keep finding myself basically responsible for actions that I did not know I was performing. Nobody distributes it and so the question of the fairness of its distribution does not arise»[18]. Basic responsibility lies outside the scope of our normative powers.

Nevertheless, Gardner says that «[t]here may be legal norms that instruct others (e.g. officials) to treat some people who are not basically responsible as if they were basically responsible. But these norms do not make those people basically responsible. Instead, they create a legal fiction of basic responsibility»[19]. If we introduce this idea, the cases described as problematic can be explained: We treat the employer, the mother, and the person performing the role as if they were basically responsible at the time of the wrong, and we treat them as someone who can justify or excuse their link to the wrong[20]. In those cases, it would therefore suffice to point out that we are dealing with a fictitious product of this instruction issued by a normative authority.

While one can agree with Gardner that legal authorities can make such attributions through the enactment of legal norms, I suspect that if we accept without further ado that we must assume in every difficult case that basic responsibility is fictitiously attributed, the interpretation becomes unsatisfactory. This is because it seems that something else is needed to explain such a fiction. We can come up with various reasons that might justify this technique (e.g. to prevent certain behaviour or to ensure compensation for victims), but I suspect that those justifications might take us far away from the Aristotelian story. Furthermore, without such an explanation or justification, the argument might be impossible to refute, since basic responsibility is either affirmed or created in each case, and no counterexamples can be given. Regarding this last idea, I suspect that the argument supporting the rudimentary link is in danger of losing its force, as it is no longer available to place limits on

16 Gardner 2008: 129.
17 Gardner 2008: 129.
18 Gardner 2019: 219.
19 Gardner 2008: 129.
20 See Gardner 2007: 60, n.3.

what people can be held responsible for, and each case (whether easy or difficult) can be interpreted as a fictitious attribution of basic responsibility.

IV. I would now like to turn to the second problematic question, which is related to how Gardner understands the relations between the different concepts of responsibility. This challenge has to do with the concept of excuse and arises from two ideas that Gardner puts forward. The first idea is based on the Aristotelian view that responding to others is to explain something about our agency and the reasons that apply to us. The second is that, according to Gardner: «basic responsibility, unlike some other kinds of responsibility, in non-relational. one is not responsible to anyone in particular»[21].

The sum of the two ideas seems to contradict two very common theses about what excuses are. The first thesis is that excuses are a way of denying responsibility. It is common to distinguish between justifications and excuses, where justifications are thought to deny the existence of wrongdoing, while excuses go in a different direction. As David Brink points out: «[e]xcuses concede wrongdoing but deny that the agent is blameworthy for her misconduct by denying the agent's responsibility or culpability for the wrongdoing»[22]. The second common thesis is that we present excuses in responsibility process in order to avoid a negative verdict[23]. This later thesis has two consequences. The first is that it recalls the Hobbesian idea that responsibility is related to the possibility of imposing a punishment or some other reaction and leads to an exchange in which people have the possibility of defending themselves in order to avoid this.The second is that, practises of responsibility are presented as practises in which agents respond to others who have the authority to impose such reactions, and to whom we should therefore respond within the scope of their authority. The reasons we should give to avoid punishment are thus relational in the sense that in order to identify the relevant reasons, we need to see what kind of relationship is at play. It is not the same to deny my responsibility for a wrong as a friend and to deny it as a citizen or employee[24].

With regard to the first point, Gardner suggests that while it is true that those who present excuses are trying to avoid undesirable normative consequences: «they didn't want to do so by denying, or casting doubt on, their responsibility in the basic sense, at least not if they could avoid it. On the contrary, they wanted to assert their responsibility in this basic sense. they wanted to assert that, in spite of all they had been through, they were fully responsible adults. And they asserted this precisely

21 Gardner 2007: 276.
22 Brink 2021: 52.
23 See Hart 1968: ch. II; Edwards 2023.
24 See Duff 2007: 19-30; 2018: 91-101; Gardner 2011.

by arguing that, although unjustified, their actions were excused»[25]. In this respect, according to Gardner's interpretation, the public and sometimes dialogical nature of the practises of attributing responsibility allows us to affirm ourselves as responsible agents. To offer an excuse when we have no justification for our actions is not to denying our responsibility, but to express it. To offer an excuse is to affirm our responsibility in a basic sense, and as we have seen, according to Gardner, basic responsibility is a precondition for consequential responsibility[26].

As for the second theses, Gardner's emphasis on the idea that one expresses oneself in this context leads him to reject relational theories that assume that these reasons are offered to someone and that the kind of relationship we have with that person partly determines which reason is correct. In his words:

> Remember that, by hypothesis, I am no longer interested in whether my account of myself makes my interlocutors sympathetic, rebuilds my friendship with them, persuades them to let me off punishment, or anything like that. those are just more of the same Hobbesian factors […] What I care about, under the Aristotelian heading, is giving, so far as I am able, a good account of myself. If it really is a good account and other people can't see how good it is then, relative to the Aristotelian story of basic responsibility, that's their problem[27].

On this basis, Gardner argues that the reasons relevant in this context are not held and offered in relation to a particular audience or person (e.g. a group of friends, a court), but regardless of to whom they are offered. The same applies when we ask for the reasons of others. Any rational agent is capable of recognising them and therefore, strictly speaking, nothing is ever «none of my business»[28]. At this point, then, he defends a Kantian conception of reasons, in which every reason is the concern of every rational agent. In this sense, reasons come first and relations second. Our relationships can help us understand how important a reason is in respect of attention, but they do not enclose the realm of reasons[29].

I do not find this idea entirely convincing. It is not necessary to reject an Aristotelian view in order to consider that the relevant reasons we can give to others are relational. To give an account of who we are is something we do not only for ourselves, but also for others and in conjunction with others. If we understand that the interre-

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25 Gardner 2007: 182.

26 Gardner points out that: «On the view I sketched, unlike the residual view, offering an excuse is not a way of denying, but rather a way of asserting, one's responsibility. For having an excuse, like having a justification, is by its nature an affirmation of one's rational competence. Both justifications and excuses are rational explanations for wrongdoing. They explain why the agent acted as she did by pointing to reasons that she had at the time of her action» (2007: 86).

27 Gardner 2007: 187.

28 See. Gardner 2011; 2019: 208-209.

29 See. Gardner 2007: ch 3; 2011.

lation between rationality and speech is part of our social nature, we can say that our reasons, as well as the way we state them, depend in some cases on the relationship that produces them, and that they can be meaningfully expressed within that relation[30]. We form our practical identity in the various kinds of relationships and exchanges we enter into with others in the course of our lives, and it is within these relationships that we justify ourselves. Often the only way to account for the wrongs we commit is to address the elements of the circumstances, and the particular relationship between the parties involved can be one of them. This is true not only at the level of our intimate relationships, but also at the broader societal and institutional level. In this sense, while Gardner may be right to see the defence in a trial as an expression of responsible agency, I believe that relational theories still have something important to say.

V. The two challenges to which I have drawn attention in Sections III and IV are addressed directly or indirectly by the author in his later works.

As for the latter issue, I personally tend to think that Gardner developed a more relational view of reasons over time[31]. A first methodological note I would like to draw attention to is the reason why, in *From Personal life to Private Law*, he rejects the use of thought experiments in favour of using literary examples, as he says:

> For the most part, they deliberately eliminate any hint of background story. They treat problems about what some generic agent is to do now as touched on only occasionally, and in strictly demarcated ways, by the way in which the agent came to be facing those problems, the role she is occupying, and the place that her actions have in the wider story of her life[32].

For Gardner, these abstractions are problematic. I agree with him. But even if it is true that this can be said without considering relationships and interactions with others as part of the background against which we act, such a notion shows a poor view of our practical lives. Even if we can accept that not every aspect of our practical lives is relational, to deny the constitutive importance of our relations for some of the reasons we have is not the best way to express it. In fact, I think Gardner himself would agree. This is reflected in his recognition of strictly relational duties, which he defines as those «one has for the reason that one stands in some special relationship with the person to whom the duty is owed»[33].

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[30] See. Scanlon 2008; Duff 2007.

[31] One possible manifestation of this is his continuity thesis, according to which the reasons that support a duty continue to concern us even when we violate those duties and justify some relational-dependent actions such as reparation and apology. I cannot discuss this thesis in detail in this text. (see Gardner 2018: ch. 3; Oberdiek 2023; Sinel 2023).

[32] Gardner 2018: 10-11. For a similar methodological issue see Gardner 2007: 58-59.

[33] Gardner 2018: 23.

This leads us to the notion of prospective responsibility to which I have referred and which Gardner introduced in his later writings. As we have seen, this idea is linked to the concept of duty in terms of reasons. In his later books, Gardner presents this idea based on the understanding of duties as categorical and mandatory reasons and the understanding of responsibilities as sources of duties[34]. In this sense, in Gardner's words: «when we have responsibilities we have reasons to concentrate on some reasons for action at the expense of others in connection with our own actions»[35]. This in turn is consistent with the fact that «[r]esponsibilities [...] belong to the apparatus for explaining why I have whatever duties I have. They are individuated at the level of the reasons for my duties»[36]. Since many of the duties we have are shaped in our relationships with others, one can imagine a much stronger connection between reasons and relationships in his approach.

As might be expected, these special relationships shape not only the duties we have, but also the ways in which we account for their violation in a process of attribution of responsibility. In this sense, I find an approach that takes this relational aspect into account when we talk about the reasons that are present in our practises more satisfying.

Regarding how to explain the aforementioned cases of vicarious or role-based responsibility, in his essay "The Negligence Standard: Political Not Metaphysical"[37], he introduces a new notion of responsibility, which he calls 'assignable responsibility'. As the name suggests, these are responsibilities that can be voluntarily assigned to the individual, as opposed to basic responsibility, which, as we have seen, cannot be conferred. More precisely, assignable responsibility has a double face, as he says:

> When we talk of assigning responsibilities (plural), we are generally thinking of things that are, at the time when the responsibility arises, yet to be done. We are asking who will be the one to do those things, or at least see to it that they are done. When we talk of assigning responsibility (singular), by contrast, we are often thinking of things that were already done, or will already have been done, by the time the responsibility arises. We are asking who will be the one to face the music or pick up the pieces when the things that were supposed already to have been done were not done[38].

In this vein, what the law and our practises do is precisely to assign responsibilities to us, in the sense that they generate new duties towards us, on the one hand,

[34] See Gardner 2019: 68, 199-200.

[35] Gardner 2019: 197.

[36] Gardner 2019: 200.

[37] The article was originally published in 2017 and reprinted as ch. 7 of *Tort and Other Wrongs*. In this text I quote this latest version.

[38] Gardner 2019: 198.

and the obligation to face up to the things that happen and, if necessary, to bear the consequences, on the other hand. The two cases in question can therefore be understood within this framework. In the case of vicarious responsibility, we assign responsibility to someone for what someone else has done, even if it is not within their basic responsibility to prevent what has happened. For Gardner, in the case of role responsibility, in addition to this, the responsibilities of the predecessor are attributed retro*actively*[39].

The question that now arises is how to account for basic responsibility in this reasoning. Gardner does not speak here of a conceptual connection between the two meanings of responsibility, but says that basic responsibility is normally a condition for assignable responsibility. He explicitly uses the word "normally" in relation to the cases: «in which assignable responsibility for something is assigned to someone who lacks basic responsibility for that thing»[40].

In these cases, Gardner is inclined to say that we sometimes assign responsibility to those who have not basic responsibility and at the same time he claims that in such cases we treat them as if they were basically responsible. On this point, the argument is symmetrical to the one discussed above, and he pointed out that:

> Assignable responsibility is sometimes assigned, rightly or wrongly, to people who are not basically responsible for whatever they are being assigned assignable responsibility for. However, it is assigned to nobody without at least the fiction of their basic responsibility for whatever they are being assigned the assignable responsibility for. No making responsible, we might say, without holding responsible[41].

It seems to me that the introduction of the concept of assignable responsibility is very valuable and helps to account for how our practises lead to duties that are ultimately political rather than metaphysical. We often have good reasons to assign responsibility to people for what others do and even for events beyond their control. However, I suspect that in doing so we move away from the notion of basic responsibility as Gardner understands it. It is not easy to see how this ability can be genuinely exercised in these cases. In cases of vicarious responsibility, one wonders what kind of reasons can be given by someone who was not the one who acted. How will she present her perspective on the wrong if there is no such perspective? We should have in mind that basic responsibility shows precisely the connection between the two moments.

The problem becomes even more serious when we think of the case of role responsibility. In this case, we are also assigned the prospective responsibilities of

[39] See Gardner 2019: 199.
[40] Gardner 2019: 209.
[41] Gardner 2019: 211.

which the person was not aware. Here it does not seem possible to offer excuses to express our practical perspective. In this way, basic responsibility seems to be absent in a more radical way. At this point, it is not clear what role basic responsibility plays beyond a faint reminder that our rational powers are behind our practises, which leads us to question the extent to which it can be treated as a fiction.

I do not wish to draw any strong conclusions from what has been said, but rather to leave open these questions that arise from the profound and rich ideas that John Gardner has developed about the concepts of responsibility. While the notion of basic responsibility seems to explain some important elements of our practical lives and Gardner's reflections on it allow us to make sense of many important issues, it also seems to have limitations when it comes to addressing the complexity of responsibility practises and the exercise of our practical identity in them.

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

*Maria Cristina Redondo**

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

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Jurisprudence as a Side-Quest? A Critical Appraisal of John Gardner's Account of the Reasons to Study Jurisprudence

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Abstract

In a short paper entitled "Why Study Jurisprudence?" John Gardner claims that philosophy of law has a modest and optional role within legal studies. To his mind, the reasons for studying it are that it gives jurists a broader outlook on law and develops excellence in argument. This paper argues that, on closer scrutiny, Gardner's account of reasons for studying jurisprudence falls short because he considers a narrow concept of general jurisprudence that leaves out many kinds of jurisprudence and crucial jurisprudential issues. By discussing the two types of knowledge jurisprudence can transfer, namely knowledge that and knowledge how, I focus on the ability of various kinds of jurisprudence (general/particular/special, analytical/hermeneutical, conceptual/descriptive/normative/critical, philosophers' jurisprudence/jurists' jurisprudence) to develop propositional and performative knowledge in students of law. I conclude that jurisprudence is not best understood as a side quest in legal studies. Instead, by using the same game analogy, it is better understood as crucial but additional content (DLC, so to say) to the study of law that is well positioned to contribute significantly both to the study of law and legal practice.

Keywords. Jurisprudence. Kinds of Jurisprudence. Propositional Knowledge. Performative Knowledge. Study of Law.

1. Introduction

Debating issues in jurisprudence requires a significant amount of shared background understanding. The challenges that often lead to discussions and debates

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stem from the fact that the very word is used to describe various areas of interest. It sometimes refers to philosophy of law or the most general science of law, known as legal theory. Some take it to be a tradition, a mode of theorising about law, and even an ideology[1]. Other times, it is contrasted with theory of law as a distinctly philosophical enterprise[2]. At times (and places, most commonly in France), following more closely the word's etymological roots, it doesn't even denote the theoretical study of law but the corpus of judicial decisions of a court or a judicial system.

Consequently, when we face claims about jurisprudence as a discipline, we are hardly ever sure what these claims relate to. A recent jurisprudential debate may best exemplify the trouble. In an influential essay, David Enoch argued that general jurisprudence is not interesting. General jurisprudence is mainly exemplified in the debates between legal positivism and legal non-positivism and between exclusive and inclusive legal positivism[3]. Following a similar line of thought, Scott Hershovitz claimed that contemporary jurisprudence is dominated by a single debate that has brought the entire field to an end, lacking relevance in any area of law[4]. According to these authors, jurisprudence has rendered itself inconsequential and futile. Julie Dickson disagrees, but not by arguing that jurisprudence is relevant. Instead, she claims that the criticism might be valid, but only if one holds a narrow understanding of general jurisprudence. The criticisms would subside if the relevant philosophical issues in the jurisprudential debates go beyond «the nature of law and its various relations with morality, and explore law's potential and actual value, function, and place amongst those other social and normative phenomena which shape our lives»[5]. It seems that the relevance of jurisprudence depends on our understanding of jurisprudence and that we are nowhere close to a joint understanding of the enterprise that would make it exciting or worthy of study.

With all the confusion regarding the very term jurisprudence, the relatively frequent discussions about the contribution of jurisprudence to legal studies and the need to spell out the exact reasons for including jurisprudence in the study of law is not surprising. In the paper entitled "Why Study Jurisprudence?"[6], John Gardner gives an attempt to reflect on the academic study of jurisprudence and by dwelling on the import of jurisprudential teaching on the rest of legal scholarship and legal practice. To expand on Gardner's discussion, the paper will (1) summarise John Gardner's view on the reasons for studying jurisprudence. Then, it will (2) present alternative accounts of jurisprudence, arguing that Gardner's reasons are closely

1 Twinning 2009: 8.
2 Robertson 2017.
3 Enoch 2019.
4 Hershovitz 2015.
5 Dickson 2017: 16.
6 The only place in which the piece was published is, as far as I know, a yearbook of a professional association of barristers and judges called The Inner Temple.

tied to a specific kind of jurisprudence. Finally, it will (3) contend that most types of jurisprudence can equip aspiring lawyers and legal practitioners with propositional and practical knowledge that is far more relevant for the study of law and the legal profession than what is envisaged by Gardner. As indicated in the title, it will use the metaphor of role-playing games to illustrate and discuss these issues[7].

2. Gardner's Account of Jurisprudence as a Side Quest

Gardner begins his short paper "Why Study Jurisprudence?" by defining the jurisprudence he is interested in discussing. He makes three initial points: 1) Firstly, jurisprudence is wisdom about the law imparted to students throughout their legal education. 2) Theory of law, the most general of the legal disciplines (or sciences), also purports to make true propositions about law based on generalisations from existing legal systems. 3) Finally, he claims that jurisprudence is oftentimes equated with philosophy of law. Surprisingly, according to Gardner, none of these points is decisive in his discussion of reasons to study jurisprudence. The reason for this is that, according to him, in many jurisdictions, law students are required to study the «articulation, defence, and criticism of propositions about law and legal life that are supposed to hold generally»[8]. The common name for the discipline that engages students in these topics is "Philosophy of Law". Gardner confines himself to discuss the use that law students might have in studying one specific brand of philosophy of law. The brand is identified in another other paper, "Law and Philosophy", in which he places himself firmly in the analytical jurisprudential cycle, defined by the fact that its members «like to analyse, breaking every big question down into small, sometimes apparently disconnected, sub-questions»[9].

In confronting universal questions tackled by this specific kind of philosophy of law after some years of legal training, students of law are, Gardner reports, quite

[7] For the uninitiated, RPGs are role-playing games in which the player assumes the role of a character in a setting. The players' roles are played in a narrative emphasising structured decision-making in various situations. To do this, the player must understand two crucial interconnected game mechanics: a) character development and b) progression by quests. By undertaking and successfully solving quests, the player gains experience points to invest in certain character traits. The upgraded character stats are then used to increase the likelihood of completing other quests. The progression in the story is determined by the success of the so-called main quests. However, it is often necessary to complete side quests to achieve the character traits needed to successfully progress with the main quest. Often, side quests are insubstantial for the narrative, wholly or partially disconnected. Their only purpose is to allow the "levelling up" of the character, which in turn allows or facilitates the completion of the main quests. However, they are a more substantial way of levelling up than eliminating enemies by collecting items repetitively, often called "grinding".

[8] Gardner 2006: 1.

[9] Gardner 2012: 14.

often dumbfounded. Training in legal practicality and conclusiveness makes it so that (1) philosophical writing is frequently treated dogmatically[10]. Students tend to treat philosophers like legal authorities without exploring autonomously the issues that philosophers discuss. Law students adapt quickly to the lawyerly fashion of arguing from authority, to which both lawyers and academic lawyers are oriented. Conversely, Gardner claims philosophers put arguments of authority high on the list of fallacies[11]. In this way, (2) the default understanding of philosophical writing is like an endless debate about opposing camps, with elaborate views on legal issues tied together in an all-or-nothing fashion. (3) They tend to adjudicate between the competing positions based on how realistic they are instead of inquiring into whether the propositions are true. (4) Finally, students approach philosophy of law with a reforming ambition, and the philosophy of law should be able to tell legal practitioners how to do their job better.

These are indeed high expectations that are difficult to fulfil in any academic course. At the same time, these aspirations are to be expected from law students. Namely, unlike philosophers, lawyers are oriented on putting their thinking to use, not just to think[12]. From Gardner's perspective, these students' expectations are mistakes that result from the conflation of legal and philosophical knowledge[13]. However, answering a philosophical or jurisprudential question yields no practical advice. At best, it simply provides students with true or at least plausible insights into the necessary properties of law, rights, obligation, interpretation, etc.

Ronald Dworkin argued that the philosophy of law offers practical advice by claiming that the philosophical study of law is connected with the practical problems lawyers face. According to him, the philosophy of law shares with legal practice the method of constructive interpretation. This specific kind of interpretation boils down to the fact that lawyers and philosophers of law interpret legal materials in their best light to connect those materials in a coherent whole. Gardner argues that Dworkin's view conflates lawyers and philosophers by turning philosophers of law into ambitious lawyers and lawyers into workday philosophers of law. The position became popular among lawyers because it «appeals to their vanity»[14]. An obvious counterpoint to Dworkin's position, Gardner argues, is the practice of inquiry in most other philosophical disciplines. Epistemologists might know more about the nature and justification of knowledge, but they certainly do not know more about stuff than the rest. Ethicists might know more about morality, but there is scarce evidence that they give better moral advice or are even more moral[15]. Likewise, no

[10] Gardner 2006: 2.
[11] Gardner 2012: 14.
[12] Gardner 2012: 14.
[13] Gardner 2012: 17.
[14] Gardner 2006: 4.
[15] Schwitzgebel, Rust 2009, 2014.

amount of study of aesthetics can reasonably be expected to teach one to create beautiful art. At best, philosophers of law are experts in legal concepts and justification of law, so there is no point in coming to them for legal advice. Likewise, legal practitioners often make lousy philosophers. What is different, according to Gardner, are the attitudes and temperaments – a philosopher's job is to understand and explain the nature and form of something, while a judge's job is to resolve the issue:

One could sum this up by saying that philosophers can go only as far as reason will take them, whereas judges can and must make progress beyond the limits of reason by acts of will or decision[16].

In other words, in "Why Study Jurisprudence?", Gardner endorses a strict separation between philosophy of law and legal practice based on the diverging aims of philosophical and legal inquiries. The discussion leads him to claim that there are two main contributions of philosophy of law to legal education: (1) The widening of lawyers' horizons and their development as human beings. Garner advances the study of jurisprudence because there is a need to study something more than parochial legal doctrine, a mere reminder that «there is more to life than legal practice»[17]; (2) Developing excellence in argument. Philosophers of the analytic kind tend to break arguments into smaller pieces and evaluate those pieces. Moreover, jurisprudence doesn't deal with specific arguments but with arguments as such. In this sense, argumentation about any subject matter is a transferable skill in analytic philosophy and law[18].

Overall, it seems that general jurisprudence allows one to go beyond the legal looks of the problem and understand the ramifications of the legal decision. In conclusion, Gardner argues that there is indeed value in the philosophy of law:

> A philosophical education encourages us to look beyond this immediate issue. It encourages us to look for timeless problems underlying topical problems. You may say that for a lawyer with clients, this could be a distraction. No doubt it could. But a lawyer who is astute to both perspectives has two levels of argument to think about. Whereas her opponent – lacking any philosophical education – can maybe muster only one[19].

3. Why Study Anything? Levelling Up in Legal Knowledge

The reason for studying anything is to gain knowledge on the thing. In epistemology, it is common to differentiate between three types of knowledge. The first kind

16 Gardner 2006: 5.
17 Gardner 2006: 2.
18 Gardner 2012: 12.
19 Gardner 2006: 8.

of knowledge is called *knowledge of* or *knowledge by acquaintance*[20]. This knowledge involves direct awareness or familiarity with something, a direct, first-person relationship or experience with an object, person, or event. For example, knowing Paris because you've been there, knowing your best friend because you've spent time with them, or knowing what it feels like to be happy because you've experienced happiness. Knowledge by acquaintance is considered more fundamental and immediate than propositional knowledge because it doesn't rely on any inference or interpretation. Bertrand Russel, for example, claims that «all our knowledge […] rests upon acquaintance as its foundation»[21]. It's often described as the kind of knowledge that can't be adequately expressed in words or communicated to others who don't have the same direct experience or acquaintance.

Propositional knowledge, also known as "declarative knowledge" or "knowledge that", involves knowing something is the case. It refers to knowledge of facts or truths, things external to our mind[22]. It can be expressed in propositional sentences, usually in the form "S knows that P", where "S"" refers to the subject who has the knowledge and "P" refers to the proposition that is known. For example, if you know that Paris is the capital of France, this is propositional knowledge. You know a fact or proposition about the world. Propositional knowledge is typically contrasted with other kinds of knowledge, such as procedural knowledge (knowing how to do something, like riding a bike) and acquaintance knowledge (knowing of something or someone, like being familiar with a city or person). In epistemology, the study of propositional knowledge often involves addressing the conditions that must be met for a person to know a proposition. Traditionally, these conditions include a belief in the proposition, the proposition being true, and the person having justification for their belief in it. This is often called the "justified true belief" theory of knowledge, although this theory has been subject to significant debate and criticism.

Finally, Gilbert Ryle argued that there is a third specific kind of knowledge distinct from knowledge of and knowledge that. "Knowledge how" refers to *performative* or skill-based *knowledge*[23]. It is the knowledge of how to perform a task or activity. This type of knowledge is often contrasted with "knowledge that", or propositional knowledge, which involves knowing something is the case. Knowing how to ride a bike, play a musical instrument, swim, or speak a foreign language are all examples of "knowledge how". It is typically gained through practice and experience and is often tacit, meaning it's difficult to articulate. Ryle's arguments

[20] Russell 1998: 25.

[21] Russell 1998: 26.

[22] Russell 1998: 28-29.

[23] Ryle 2009: 14-48. For this paper, following Ryle, I won't differentiate between skill and knowledge-how. There are, however, good reasons to treat knowledge of how as separate from skill, especially if we have in mind that even knowledge of how is at times split into theoretical understanding of how, which would be propositional, and practical knowledge of how that would be closer to skill (Cath 2015)..

were influential in epistemology because they show that knowledge isn't just about accumulating facts and developing skills and abilities and cannot, therefore, be reduced to other kinds of knowledge. However, his instance on the differentiation between knowledge and knowledge how has led him to adopt an anti-intellectualist standpoint that led many to conclude that the differentiation also means the complete disconnect between the two[24].

However, Ryle's anti-intellectualism regarding performative knowledge is convincing as long as we understand it as a claim that performative knowledge is not exhausted in propositional knowledge. Claiming that the two kinds of knowledge are not connected, in the sense that propositional knowledge can, in fact, lead to the development of performative knowledge, seems a step too far. Be this as it may, we can reframe Gardner's discussion of reasons to study jurisprudence regarding the distinctions between different kinds of knowledge. His position regarding jurisprudence might be summarised as follows: by starting with knowledge from acquaintances, law students expect jurisprudence to provide propositional knowledge about law or performative knowledge that is valuable for the legal profession.

4. The Problems of Gardner's Account: Side Quests vs Grinding

Gardner's descriptions of students' expectations, the knowledge of legal philosophers about practical matters, and the knowledge of judges and legal practitioners generally do a good job mapping experiences with students and practitioners. They do not, however, map them perfectly. His interpretation of a typical student question, which he uses to kick off his discussion, is a glaring example of the mismatch. Namely, students often ask whether a conception is realistic when confronted with jurisprudential writing about law. Gardner considers the question indicative of a tacit equating of realistic and accurate claims. He argues that law students, by default, consider a philosophical argument valid because it's realistic.

In my experience, even if equipped with a practical mindset, students usually do not use the criterion of realism to access the truth of philosophical propositions. Instead, they either use it as a statement of their knowledge by acquaintance with the issue at hand or as a grounding of their intellectual effort in the discipline and practice they are being educated in. (1) In the first sense, the claim is commonly a sign that they recognise the problem that is being discussed by the professor because it is a problem that they either encountered during their legal studies as a result of personal inquiries and dilemmas or, like with many philosophical problems, in virtue of them being humans prone to examine their lives. Moreover, the claim about the "realism" of a jurisprudential position is rarely a categorical statement that judges

[24] Pavese 2022.

the truth or falsity of the claim. This statement of acquaintance with the problem of claim commonly signals that the student is open to competing explanations or instructions. In other words, and the authors' teaching experience, students use the attribute of realism as a shorthand for "it strikes me as plausible". The crucial difference is that this use of the adjective "realistic" for students of the philosophy of law marks a beginning rather than an end of philosophical inquiry. It signals the understanding of a position or point recounted to them and a willingness to accept counterarguments. (2) The second use relates similarly to Gardner's arguments but is still significantly different from his conclusions. An overly partial, technical claim detached from the main line of studies tends not to map well on our understanding of what an explanation of a thing is or should be. In this sense, when we argue about philosophical positions without considering the lived experience of legal professionals within a legal system, we might encounter a clash between our claims about the discrete issue at hand and the state of the problem in legal practice. This is the result of working within a legal order that is in some ways dysfunctional but can also arise as a consequence of overly technical explanations riddled with state-of-the-art terms that, at least on a first encounter, are more confusing than elucidating. This is especially the case if they were developed in response to a long-standing debate within a discipline (like the debate between inclusive and exclusive legal positivism). The expectation of "realism" calls for a better, clearer, down-to-earth explanation of the issue, which often entails stepping outside the boundaries of general jurisprudence and into social science and philosophy. It also entails giving up, either temporarily or permanently, on the technical terms and/or explaining the entire history of a debate.

In other words, the students' default assessment of a jurisprudential claim as realistic is not detrimental to jurisprudential discussions. It is often the opposite, as it invites us to provide students with substantial propositional and performative knowledge from the domain. At the same time, this constitutes a problem for Gardner's understanding of reasons to study jurisprudence. I have argued that according to Gardner, jurisprudence imparts a specific kind of performative knowledge. This performative knowledge consists in the development of an attitude of openness and a mode of argumentation that should be better than the default modes of argumentation done by jurists. If so, knowledge imparted by jurisprudence might as well be valuable, but it is neither necessary for legal practice nor imparted exclusively by jurisprudence. It would seem that the philosophy of law directs lawyers to other disciplines outside of law and philosophy and that excellence in argumentation is actually excellence in a kind of argumentation quite different from the default legal argumentation.

In other words, not only is jurisprudence a side quest in the study of law, but its study is completely dispensable from the perspective of legal practice. Arguably, instead of embarking on the side quest of jurisprudence, law students would do better in achieving performative knowledge and procedural knowledge by "grinding" –

studying disciplines outside of the law and practising legal argumentation in debate clubs and public speaking competitions. It is no surprise, then, that the discipline might be considered as (1) superfluous since it is in no way unique in terms of widening lawyers' horizons. Sociology, psychology, history, and even Roman law might broaden students' horizons while providing important propositional knowledge about phenomena closely related to law. Looking beyond the legal problem most often leads to political science, sociology, or, eventually, psychology in the form of social psychology, not necessarily to the philosophy of law. Even more, students could be right in considering it (2) redundant since excellence in legal arguments is perhaps better achieved by practising and studying legal argumentation and not philosophical argumentation.

5. Varieties of Jurisprudence: A Walkthrough

Gardner's answer that jurisprudence ultimately widens one's perspective and develops excellence in the argument is extraordinarily deflationary compared to the usual answers to these questions in most parts of continental Europe. I remarked in the introduction that the term jurisprudence doesn't have a settled meaning. The wildly different and sometimes diverging uses of the word make it sensible to introduce some much-needed distinctions. (1) The first set of distinctions concerns the proper subject matter of jurisprudence. In this sense, it is quite usual to distinguish between general, special and particular jurisprudence[25]. (2) Another sensible division cuts across general jurisprudence by answering the question of how we go about doing jurisprudence. In this sense, we can distinguish between analytical and hermeneutical jurisprudence. (3) Yet another important point of contestation is based on the difference between the authors who undertake jurisprudential inquiries. Based on this criterion, we can claim that there is a difference between lawyers' jurisprudence, philosophers' jurisprudence, and philosophers of law's jurisprudence. (4) Finally, one can differentiate jurisprudential inquiries based on their aim and claim that there are at least four kinds of jurisprudence: conceptual, descriptive, normative, and critical.

Arguably, each and every one of these kinds of jurisprudence aims to provide students with the knowledge that is in the mind of their proponents and is important for aspiring lawyers and philosophers of law. In the next part of the paper, I will explain these distinctions and illustrate the propositional knowledge and practical knowledge that might be imparted to students based on the choice of jurisprudence.

[25] The contrast between various kinds of jurisprudence is established in the *Lectures on Jurisprudence* by John Austin.

5.1. What?

Our first distinction concerns the question of the proper domain of jurisprudence. Gardner confined his jurisprudential teaching to his jurisprudential interests, which, by his admission, included issues of a specific kind of jurisprudence, often called general jurisprudence. *General jurisprudence* concerns issues not limited to any jurisdiction, legal system, or domain of law, focusing on the nature of law and legal systems[26]. The first element of a general jurisprudence is an account of the nature of law and «whatever else it does […] has at its core an account of the nature of law»[27]. Herbert Hart argued that there is this is complimented by a set of persistent jurisprudential issues that form the core of jurisprudential inquiries, including the question of the coerciveness of law, the relation between law and morality, and the role of rules in law[28].

Even if dominant, general jurisprudence is not the only game in town. It is often argued that at least a special jurisprudence and a particular jurisprudence complement general jurisprudence[29]. *Particular jurisprudence* focuses on studying the types of legal systems or specific legal systems. We would, therefore, say that the study of Roman, Serbian or Italian law is one kind of particular jurisprudence[30]. Developing the argument further, some authors forcefully argue that jurisprudence proper is always particular or parochial in that it should relate to one determinate legal system[31]. Others argue for general jurisprudence but protest against the «narrow range of concepts and issues» that positivist general jurisprudence focuses on[32].

Finally, *special jurisprudence* is the theoretical inquiry into an area of law, like torts, criminal law, family law and so on. Some recent contributions to special jurisprudence include theories of areas of law, like labour, discrimination, tort law or criminal law[33]. However, one might also say that theories of judicial or prosecutorial interpretation of law, legal factfinding, collective rights, and theories of various legal institutes fall under the same category.

All of the possible kinds of jurisprudence aim to provide propositional knowledge. General jurisprudence emphasises conceptual or descriptive claims about the perennial topics of debate in the philosophy of law, particular jurisprudence identifies common traits and distinguishing features of a legal system or a type of law, special

26 Khaitan & Steel 2023: 76-77.
27 Green 2005: 567.
28 Green 2005: 567.
29 Green 2005; Waldron 2008; Khaitan & Steel 2023.
30 Waldron 2008: 5.
31 Dworkin 1986: 102-103.
32 Twining 1997: 178.
33 Khaitan, Steel 2023: 77.

jurisprudence philosophically tackles problems that are confined to one area of law or a legal institute. A tacit claim of the less general jurisprudential accounts is the provision of the tools for classifying and interpreting the discrete objects of inquiry striving to advance law students' skills in using legal rules to solve actual and hypothetical cases. In some traditions of teaching law, this is done within discrete disciplines like criminal law, civil law, and constitutional law. Often, though, jurisprudence provides these disciplines with both theoretical grounding and critical reflection.

In other words, it would seem that Gardner's account of the study of jurisprudence relies primarily on specific limited issues of general jurisprudence, disregarding, along the way, many an issue in unique and particular jurisprudence. Issues of legal reasoning, legal argumentation, and legal interpretation have long been the focal point of interest in legal theory, and this interest shows no signs of waning. Similarly, questions on norms, their logic and language, and issues related to conditions of defeat of norms continue to captivate the field. Relations between different normative systems have been thoroughly examined in legal pluralism, a movement with a sociological inclination, and in the philosophy of law proper, which delves into the enduring traits of the relations between various normative orders in society. These problems might not count as perennial questions that Herbert Hart identified in *The Concept of Law*[34]. Still, they often are an indispensable part of studying jurisprudence[35].

5.2. How?

The second way to distinguish jurisprudential efforts is by describing and, in part, ascribing certain methodological attitudes to researchers interested in general, particular or special jurisprudence issues. A common way of doing this in certain jurisprudential circles (in Italian and, to a degree, in Serbian legal philosophy) is by distinguishing between *analytical* and *hermeneutical* jurisprudence[36].

Despite the domination of the analytical philosophy of law and the debates surrounding the analytical approach[37], even in Anglo-American jurisprudence, there

[34] Hart 1994: 7-8.

[35] For the most part, questions on special and particular jurisprudence on the European continent have been left to various legal disciplines. Instead of discussing legal and natural obligation issues in civil law, freedom of will and legal responsibility. This is most often the result of the fact that there are many more researchers in discrete legal fields than in the philosophy of law. However, in most cases, the authors in these disciplines rely heavily on jurisprudential and, sometimes, even philosophical writing to explain an issue in special or particular jurisprudence.

[36] Zaccaria 1984; Nicolaci 1989; Basta 1990, 1994; Jori 1994; Spaić 2014a, 2019. For a concise account of the many debates surrounding the proper methodology of jurisprudence see Green 2005: 576-578. I focus here on a methodological distinction based on different philosophical traditions that, it seems to me, do a better job in classifying the approaches on a global level for my present purposes.

[37] Green 2005: 576-578.

have been significant attempts at introducing alternative ways of doing jurisprudence. Dworkin's critical orientation towards conceptual analysis, which, for quite some time, served as a staple of contemporary legal positivism, was interpreted by many as an alternative hermeneutical theory of law[38]. The discussions on the possibility of a hermeneutical theory of law have continued alongside the domination of analytical jurisprudence[39].

On the most basic level, *analytical jurisprudence* draws on the approaches of modern analytical philosophy to understand the nature of law. Its method and subject matter were established by John Austin's negative and positive determination of the province of jurisprudence. From a negative perspective, Austin excluded most jurisprudential issues previously discussed in Anglo-American jurisprudence from the domain of proper jurisprudence to focus the field on a narrow set of problems[40]. However, for the characterisation, it is far more important how Austin envisaged the method for dealing with these narrowly formulated issues. The concepts designated as the proper province of jurisprudence are to be analysed in their ordinary use, identifying the core elements that lawyers supposedly have in mind and then using them[41]. In the work of Herbert Hart, the anti-philosophical strains of analytical jurisprudence are connected again to philosophy, or more specifically, ordinary language philosophy, dominating Oxford in the 50s and 60s, owing to the work of J. L. Austin. Since its inception, analytical philosophy has been connected with the philosophy of natural science and with a specific way of doing philosophy that emphasises arguments, distinctions and clarity in its effort to identify the necessary and sufficient properties of things[42].

However, a different strain of philosophy doesn't emphasise conceptual or ordinary language analysis. Instead, it focuses on making sense of law using the approaches developed in the philosophical writing on the European continent. Neokantianism was the staple of the work of Hans Kelsen and Gustav Radbruch[43], argumentation and discourse theory was the basis of the jurisprudential writing of Robert Alexy and Jurgen Habermas[44], classical and revisionist Marxist philosophies inspired and still inspire generations of legal thinkers[45]. I will place these various strains of thought under the umbrella term *hermeneutical jurisprudence* to exchange a loose geographical designation with a loose thematic designation. Some arguably some common traits that many authors in the continental tradition share. 1) Instead of analysing concepts, the

38 Valauri 2011; Glanert & Girard 2017; Poscher 2019.
39 Spaić 2014b; Hage 2019.
40 Austin 1954; Postema 2011: 31-32.
41 Postema 2011: 32.
42 Williams 2011: 285; Dummett 2014: 4.
43 Carrino, 2016b.
44 Hofmann 2016: 310-315.
45 Carrino 2016b.

hermeneutical tradition focuses on making sense of the whole of the analysed practice, often by giving up on the idea of specialisation. 2) The character of the continental tradition is not scientistic, nor is the tradition overly concerned with developments in the natural sciences. Instead, it is more focused on discussing the contingent social world without focusing on the necessary properties of social entities. 3) It shares the idea that the history of an event of an entity is constitutive of that entity and that, as a consequence, the problems regarding social entities cannot be discussed without considering their history. 4) Finally, the hermeneutical approach is focused on understanding the thing in its temporal and social context[46].

I argued in previous work that even though these two approaches have undergone profound transformations as a result of the work of authors who draw from both traditions. Still, in discreet philosophy enterprises, like in the philosophy of law, the differentiation is present. The adherence to an approach is, by and large, inclusive in emphasising specific research methods without dismissing others. This is commonly well reflected in the manner of teaching jurisprudence. Focusing on analytic jurisprudence gives rise to teaching materials that discuss crucial legal concepts analytically[47]. An emphasis on hermeneutical methods often gives rise to a) the study of the history of the philosophy of law and often to b) the philosophical study of some of the issues in law that give rise to philosophical debates (like issues in bioethics, technology, etc.)[48].

The focus of Gardner's jurisprudence, the version of jurisprudence he taught, is analytical. His reliance on analytical philosophy is both a strength and a limitation. While it provides clarity and precision, it often overlooks the broader social and historical contexts that shape legal systems. Even if it is contested whether hermeneutical insights can provide a more comprehensive understanding of law, it is fairly evident that it is valuable as a part of the study of jurisprudence[49]. With the tendency of jurisprudence to discuss such a wide range of issues that are indeed relevant for legal studies, and with the ever-present tendency to redefine its ways

[46] Spaić 2014a: 131.

[47] Some European examples of this approach that notable in Italy in the work of Riccardo Guastini (2014), used for teaching jurisprudence in Italy and outside of it, or Giorgio Pino (2016).

[48] Some contemporary introductions to philosophy of law on the European continent approaching the topic from this perspective are present in the work of Alexander Somek (2018), Thomas Vesting (2018), and others.

[49] The Jurisprudence page on the University of Oxford website states: «Jurisprudence, in the sense relevant to this subject, is the philosophy of law. In studying it, you will learn to reflect in a disciplined and critical way on the nature, role, and importance of legal systems, legal reasoning, and legal institutions, often using examples from other parts of your law studies». A little down in the text, it is explained that the course covers the core topics by including «six tutorials covering some core topics in philosophy of law, in the traditional way». The text is available on the following link: https://www.law.ox.ac.uk/content/jurisprudence

of discussing law[50], it seems that Gardner doesn't give enough credit to the very methods that the analytical philosophy of law employs in the work of legal scholars and practising lawyers.

But even if we grant that the philosophy of law is confined to a narrow set of issues, it is doubtful that only those inquiries that qualify as inquiries into the essential properties of things are within reach. As with any form of human knowledge, the ultimate goal of conceptual analysis is improved understanding. For Michael Giudice, this means 1) revealing confusion and disagreement, 2) explaining, organising, and structuring features of social life, and 3) introducing new vocabulary meant to provide us with better means of explaining, understanding, and speaking about law[51]. Julie Dickson argues that legal necessities and contingencies are invaluable for philosophy and law. They both constitute worthwhile theoretical endeavours. The philosophical task of dealing with the contingent, significant and essential features of law seeks to illuminate a human practice, identify its features and evaluate its import on lives[52]. Other philosophers of law claim that there are no necessary features of the law and that there is nothing that law, as a human artefact, essentially is.

5.3. Why?

If one belongs to the analytical tradition in jurisprudence, one might argue that the previous distinctions are contested, even confused. Still, even within the field of analytical jurisprudence, there is wide agreement that we can distinguish jurisprudential inquiries based on the aims that they wish to achieve. Herbert Hart famously characterised his effort in *The Concept of Law* as "descriptive sociology." Hardly anyone today would characterise his inquiries as such, given that he followed J. L. Austin's dictum that «a sharpened awareness of words» allows us to «sharpen our perception of the phenomena»[53].

More importantly, in the *Postscript* to *The Concept of Law*, it is Hart who makes the distinction between a jurisprudence that is *general and descriptive* and a jurisprudence that is *evaluative and justificatory*[54]. The dominant strain in analytical circles is general in that it is not tied to any legal system or culture and gives an explanation and clarification of the law. The task of general jurisprudence in this sense is to address the common knowledge of, Hart argues, an "educated man" about the essential aspects of national legal systems. The descriptive character of

50 Postema 2021.
51 Giudice 2011: 65-66.
52 Dickson 2017: 29-30.
53 Hart 1994: v.
54 Hart 1994: 240.

jurisprudence is warranted because it is morally neutral without justificatory aims, a task that is preparatory for moral criticism of the law[55].

An alternative account, one rooted in the idea that jurisprudence is the general part of adjudication, is *evaluative and justificatory*. According to Ronald Dworkin, general theories of law are, for all the attempts at being morally neutral, constructive interpretations trying to show the legal practice in its best light[56]. Dworkin insisted that the descriptive approach championed by Herbert Hart is ultimately futile as an account of the law and that his evaluative account should replace the attempts at describing the law. Dworkin's is an old argument. In the first half of the 19th century, the historical school of law of Gustav Hugo and Friedrich Carl von Savigny made it a point to claim that the development of law is driven by the debates surrounding legal issues and that settling those debates requires an interplay of legal practice, legal science, and legal philosophy. Jurisprudence, broadly understood as knowledge about law, is an attempt to understand a community's living law in its development sustained by the work of legal science and legal philosophy[57].

From the perspective of this paper, it seems sensible to adopt the commonsensical attitude adopted by Hart and even endorsed by Dworkin up to a point, according to which «it is not obvious why should there be or indeed could be any significant conflict between enterprises»[58]. What is more critical for us is that jurisprudence's aims determine the content taught to students within jurisprudence courses. In this sense, we can distinguish between a) *descriptive jurisprudence* that aims at identifying the necessary and sufficient conditions of law by distinguishing law from non-law (conceptual jurisprudence) or describing law as a social phenomenon by using social science or relying on it (often called sociological jurisprudence or more recently law and society); b) *normative jurisprudence* concerned with the evaluation and justification of law and various legal rules and principles, and aimed at answering the questions of the justification of the legal restriction of freedom, obligation to obey the law, justification of punishment and so on; c) *critical theories of law* that from various perspectives challenge the traditional accounts of law by relying on alternative philosophical accounts of society, knowledge, decision-making, etc. Coupled with a substantive outlook in political philosophy, normative jurisprudence can and often does take the form of specific reinterpretations of jurisprudence like the ones developed by Jeremy Waldron. Waldron, for example, explores the prospects of a particular democratic jurisprudence and argues that some aspects of legal positivism, as an analytic jurisprudence, are compatible in some ways with

55 Hart 1994: 240.
56 Dworkin 1986: 90.
57 Becchi 2009: 203.
58 Hart 1994: 240.

his idea of democratic jurisprudence while at the same time lacking in others[59]. Normative theories of legal interpretation have been at the forefront of jurisprudential interests in many jurisdictions for quite some time, with originalism dominating the US debates and evolutionary interpretation dominating the European debates[60]. Critical legal theories have gained prominence in the last couple of decades by arguing that law should be amended to eliminate racial and gender bias[61]. Experimental jurisprudence has been doing its best to test the philosophical intuitions behind the crucial jurisprudential insights[62].

Jurisprudence, even in its conceptual and descriptive forms, gives the law student the tools to think about the problem and argue for a solution without necessarily being committed to any proposed philosophical solutions. Instances of normative and critical jurisprudence often provide substantive performative knowledge usable by lawyers in court proceedings, adjudication, administrative application, and law creation. When he argues that one of jurisprudence's tasks is to develop law students' argumentative skills, Gardner is more inclined to Dworkin's position than he would care to admit, especially if the analytical tools of conceptual jurisprudence are translated into normative and critical jurisprudence.

5.4. Who?

Jurisprudence as an enterprise that is distinguished both from legal and philosophical inquiry was defended by Dennis Lloyd. According to him, it is a separate discipline, a "bricolage" and open-minded curiosity about law. Julius Stone understood it as a lawyer's extraversion, using tools of other disciplines to understand law. William Twining defined it as the general or theoretical part of the law as a discipline[63]. Dominant strains of contemporary jurisprudence, including the account of jurisprudence advanced by John Gardner, have insisted that jurisprudence does not deal with legal but with philosophical problems and that jurisprudence that is not rooted in the philosophy of law is inept at tackling philosophical issues[64]. In contemporary Anglophone legal writing, jurisprudence has, for the most part, been incorporated into legal philosophy. This move has made it so that the methods, problems, forms of argument, and relevance criteria are validated by the academic discipline of philosophy and not by the academic discipline of law. In this way, in most of the anglophone world, philosophy of law is considered to be a branch of

59 Waldron 2008: 13-14.
60 Spaić 2024.
61 Green 2020.
62 Tobia 2022.
63 Cotterrell 2014: 43-44.
64 Cotterrell 2014: 41.

philosophy that takes law as its object. The main quarrel that the philosophy of law, so conceived, had with jurisprudence is the syncretism of methods and influences characteristic of most introductions to jurisprudence.

If we conceive of jurisprudence as a theory or philosophy of law, an important classification seems to stem from the fact that the backgrounds of scholars engaged in jurisprudence are very different in various jurisdictions. Norberto Bobbio formulated this distinction as a result of the fact that the philosophy of law was traditionally undertaken by either philosophers who discussed law from the perspective of their elaborated and often comprehensive systems of thought or by jurists who used philosophical frameworks to either explain or solve the legal problems that they encountered. The distinction is not new, but it can be identified in the differences between Aristotle and Cicero, Augustine and Gratian, Thomas Aquinas and Bartolus, Leibniz and Grotius[65]. In contemporary jurisprudential writing, this distinction has an interesting twist. It is not so much that the philosophers are approaching law from the perspective of their all-encompassing views on social reality. It is that vocational philosophers are philosophising about law with a philosophical outlook. Contemporary philosophers' philosophy of law solves philosophical problems and deals with legal issues only as an afterthought. There are numerous core instances of this, but it is generally best exemplified by the fact that lawyers are unable to understand the vernacular used in the contemporary philosophy of law.

In the US, jurisprudence is commonly studied and taught by philosophers. Following Norberto Bobbio, we can say that the typical Anglo-American approach to jurisprudence follows the footsteps of *philosophers' philosophy of law*. In continental Europe, lawyers study and teach jurisprudence in the rest of the world. Following Bobbio again, we will call this *jurists' philosophy of law*. Traditionally, jurists' philosophy of law was even converted on the European continent into "theory of law" – the most general discipline of legal science, general dogmatics, *Allgemeine Rechtslehre*[66]. This development has been chiefly understood in connection to the continental positivist views on law inspired by Hans Kelsen. In contemporary jurisprudential writing, this is manifested as a tendency of the philosophy of law to primarily communicate with legal science and legal practice, attempting to translate the philosophical vernacular into explanations or evaluations that are understandable to lawyers.

Both philosophers' and jurists' jurisprudences have had very different topics of interest and histories in various parts of the world[67]. In common law, countries effectively share similar background cultures and the same language. In this sense, there are no real boundaries between various jurisprudential interests. In the civil law world,

[65] Vega 2018: 72.
[66] Vega 2018: 73.
[67] Pattaro & Roversi 2016: xxxv.

there is a patchwork of positions and views that depend heavily on the various influences and relations between countries and the reception of the main sources of original philosophical thought[68]. One of this distinction's most important consequences is that most lawyers' jurisprudence is driven by legal problems. Most philosophers' jurisprudence is driven by philosophical problems. Commonly, lawyers undertaking jurisprudential issues are focused on providing a conceptual analysis, a philosophical explanation, a justification, or even a set of standards in a domain. On the other hand, philosophers tend to start with an intellectual problem exemplified in the practice of law and discuss this problem by taking law into account.

Understood outside of the philosophical core most commonly taught at law schools in anglophone legal philosophy, jurisprudence arises not from philosophical problems but legal problems[69]. If it is interested in «promoting the well-being of the idea of law as a socially valuable practice of regulation», it cannot just dispense of contingent social practices that give rise to the substantive law of a time and place[70]. Roger Cotterrell argues for a jurisprudence that is both broader in that it considers moral and political issues and deep in that it inquires into socio-legal conditions. According to him, both directions align with the idea that jurisprudential problems should arise from law as a practice and as an experience[71]. This "bricolage" of jurisprudence that is taught in law schools on the European continent, often as an *Introduction to jurisprudence* to first-year students of law, combines hermeneutical and analytical insights to have basic knowledge about legal concepts, developments, and phenomena that might come as a surprise to anglophone lawyers who have invested some time in the study of Gardner's kind of jurisprudence.

6. Conclusion: Jurisprudence as a DLC in Legal Studies

The perceived unimportance of jurisprudence and its status as a side-quest in legal studies is rooted in the narrow and often dogmatic focus of some contemporary strains of jurisprudential thought. These limited perspectives, which Gardner endorses to a degree, have led to jurisprudential issues being removed from dominant legal matters and dominant philosophical issues. In this sense, arguing that jurisprudence is a side quest with a limited scope in jurisprudential studies might

[68] This is perhaps most noticeable in the various schools on the European continent and their respective foci of interest. In the last couple of generations, the philosophy of law in Genova was mainly concerned with legal interpretation, Girona is focused on evidential reasoning and evidence, and Krakow is focused on social ontology and experimental jurisprudence. My department has produced a body of literature on legal reasoning, collective rights, and international law.

[69] Cotterrell 2014: 49.

[70] Cotterrell 2014: 51.

[71] Cotterrell 2014: 52-53.

be a faithful elaboration of one's jurisprudential views. Still, it most probably leads to a lack of interest in philosophical questions among students of law and jurists (ironically, it does not entice much excitement among philosophers either), who unfortunately often share Dworkin's argument that jurisprudence so conceived is

distinct not only from the actual practice of law but also from the academic study of substantive and procedural fields of law', from 'normative political philosophy' and from 'sociology of law or legal anthropology [...] It is, in short, a discipline that can be pursued on its own with neither background experience nor training in or even familiarity with any literature or research beyond its narrow world and few disciples. The analogy to scholastic theology is [...] tempting[72].

Narrowly conceived jurisprudence produces narrow propositional and performative knowledge. This isn't to say that the way to teach the discipline is to integrate all of the faces of jurisprudence discussed in the paper. It is to argue for a kind of teaching of jurisprudence that integrates its crucial aspects in a coherent program of legal studies. Depending on the exact modality and space in the academic program can provide students with knowledge that can encompass: 1) entire constructed conceptions of the law of geographically or thematically determined legal areas, 2) elucidated, constructed and refined legal concepts and conceptual frameworks, 3) normative theories of justice, human rights, values, 4) middle order empirical hypothesis, generalisations that help in understanding the law, 5) developed working theories of law-making, advocacy, negotiation, adjudication, 6) critically examined assumptions and presuppositions of various disciplines of legal dogmatics, such as criminal law, family law, international law etc.[73]. From my parochial teaching experience, I would argue that all those possibilities are best covered if jurisprudence is taught as (a) a general theory of law in the early years of legal studies and as (b) a philosophy of law in the later years of legal studies. As courses for law students, both are to be focused on imparting propositional knowledge to law students that is relevant for those students.

Having all this in mind, Gardner's points can be brought up again with minor but essential revisions:

1. Jurisprudence has the potential to present students with propositional knowledge about the main legal concepts and phenomena. This propositional knowledge is philosophical in that it's often disputed and presented as possible conceptions of various concepts. Still, it is often the only account of those main concepts that a student of law encounters. This applies to the concepts of obligation, norm, punishment, liberty, constitution, rights, and others. Philosophy of law provides propositional knowledge on the positions of actors in various

[72] Dworkin 2002: 1679.
[73] Twining 2009: 9.

debates in the philosophy of law, including students in a dialogue between philosophers of law on various jurisprudential issues.

2. Jurisprudence, in its various forms, provides tools for lawyers to approach legal problems that often go beyond the content of legal texts. This is always true when lawyers face ambiguous, vague, or contested legal texts, and it's usually the case when seemingly straightforward legal texts are skilfully challenged by various parties. Oftentimes, particular legal disciplines, mainly when studied within legal science or legal dogmatics on the European continent, leave the impression that legal knowledge can be transferred apodictically, as either falls or valid claims about the content of law. Interpretative and factual problems in law, however, yield multiple competing interpretations and evaluations, either actually or potentially. Jurisprudence can help students become aware of the possibilities regarding the solutions of legal cases instead of confining them to one dogmatic answer.
3. Finally, in the discussion and critical reflection on philosophical issues that arise out of the practice of law, jurisprudence develops the argumentative, logical, and linguistic skills required by lawyers and the rhetorical skills sometimes indispensable for legal practice. This performative knowledge and skill developed in students of jurisprudence are useful in legal practice as much as jurisprudence is able to identify and shed light on philosophical and legal issues arising from legal practice. In a sense, the amount of knowledge that can be gained from jurisprudence makes it more akin to important additional content of legal studies than to an optional side quest.

Most importantly, the character of jurisprudence within those studies will crucially depend on the exact kind of jurisprudence one is teaching, which is not just a matter of informing students about the most recent result of inquiries in a discipline, but also something that requires some performative knowledge of a didactic kind. Of course, it might still be proper to conceive of jurisprudence as a side quest that can be skipped in legal studies without many consequences. It might also be that propositional and performative knowledge points can be gained from studying other non-strictly-legal disciplines. In this sense, students might still consider it redundant and superfluous, opt for disciplines that promise technical skills, and be prone to skip it in favour of another subject matter. But at least, if my addendums to Gardner's view are at least minimally correct, it is much harder to understand why anyone would do it.

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SAGGI

(ESSAYS)

Piccola mappa del linguaggio giuridico (per non giuristi)

*Riccardo Guastini**

Riassunto

In questo saggio, l'autore propone e sviluppa una piccola mappa non già del "linguaggio del diritto" in senso stretto, bensì del linguaggio del diritto così come ricostruito dalla scienza giuridica. A questo scopo, l'autore ne analizza la morfologia (§1), la sintassi (§2) e la semantica (§3).

Parole chiave: Linguaggio giuridico. Scienza giuridica. Morfologia. Sintassi. Semantica.

Abstract

In this essay, the author proposes and develops a small map, not of legal language in the strict sense, but of legal language as reconstructed by legal science. To this end, the author analyzes its morphology (§1), syntax (§2) and semantics (§3).

Keywords: Legal Language. Legal Science. Morphology, Syntax, Semantics.

0. "Linguaggio giuridico"

La locuzione "linguaggio giuridico" può essere usata per denotare non meno di due cose concettualmente e logicamente distinte: il linguaggio *del* diritto e il linguaggio *sul* diritto, rispettivamente.

Diciamo, per intenderci: una cosa è la costituzione, una legge, un codice (il Codice civile, poniamo); altra cosa è un manuale universitario di diritto (un manuale di diritto civile o costituzionale).

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(i) Il linguaggio *del* diritto è, banalmente, il linguaggio dei testi normativi, ossia delle fonti del diritto[1]: le leggi, la costituzione, i regolamenti, e quant'altro.

(ii) Il linguaggio *sul* diritto è il linguaggio della (cosiddetta) "scienza giuridica"[2] o, se si vuole, della "giurisprudenza" nel senso classico di *prudentia juris*.

Questa distinzione costituisce già una prima, approssimativa, mappatura: disegna, per così dire, i confini ultimi del linguaggio giuridico[3].

Il linguaggio del diritto è, *prima facie*, un linguaggio normativo o prescrittivo, i.e. un insieme di enunciati che esprimono norme (con tutte le precisazioni e distinzioni che seguiranno), funzionalmente diretti a guidare la condotta.

Il linguaggio della scienza giuridica, per contro, si presenta (o si pretende) come un metalinguaggio descrittivo che verte sul diritto, cioè su norme. Un insieme di "proposizioni normative", si usa dire: proposizioni per la loro semantica (enunciati dotati dei valori di verità), normative per il loro oggetto (non fatti, ma norme).

Ma, in verità, le cose sono assai più complesse. Giacché la scienza giuridica non si limita affatto a descrivere il suo oggetto, il diritto (qualunque cosa ciò possa esattamente significare[4]): piuttosto lo ricostruisce, lo modella, e lo arricchisce.

La scienza giuridica ricostruisce e modella il suo oggetto – cioè, il diritto stesso – definendo o ridefinendo i concetti impiegati dalle fonti normative; lo arricchisce costruendo, con opportune operazioni inferenziali, norme che si pretende siano implicite (sebbene non in senso strettamente logico); risolve antinomie e colma lacune[5].

Ciò è quanto dire che tra diritto e scienza giuridica vi è una relazione osmotica

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1 Ciascuna delle quali corrisponde a una diversa autorità normativa. "Fonti del diritto" è una metafora trasparente, che non richiede elucidazioni.

2 "Cosiddetta", perché il suo statuto epistemologico è alquanto problematico. Ma non è questo il luogo per discuterlo.

3 Volendo, si potrebbe allargare lo sguardo a quello che, in mancanza di meglio, chiamerò il linguaggio *col* diritto. Mi riferisco al linguaggio degli organi dell'applicazione (giudici e pubblica amministrazione) e degli avvocati. Il cui discorso è principalmente un insieme di argomentazioni in cui gli enunciati delle fonti e della scienza giuridica svolgono il ruolo di premesse, e la cui conclusione, detto grossolanamente, è una prescrizione individuale e concreta (del tipo "L'assassino Tizio deve essere punito così-e-così", "Il contratto fra Caio e Sempronio è valido"). Ma questo terzo tipo di linguaggio, il linguaggio col diritto, qui mi limito a menzionarlo. Sfugge inoltre a questa classificazione il linguaggio della teoria generale del diritto, che, a mio modo di vedere, è una combinazione (ma non una confusione) di analisi dei concetti propri delle fonti e della scienza giuridica (laboratorio concettuale) e delle argomentazioni dei giuristi e degli organi dell'applicazione (metagiurisprudenza).

4 Come si può descrivere una norma, ad esempio la norma "Gli assassini devono essere puniti"? Sospetto che vi sia solo un modo: ripetere la norma come un'eco, o parafrasarla. Senonché l'eco di una norma – una "norma iterata" – non pare la descrizione di alcunché: pare null'altro che la norma stessa eventualmente riformulata e… debilitata. Scarpelli 2022. Altra cosa è la descrizione non di una norma, ma dell'uno o dell'altro fatto connesso ad una norma: ad esempio, la sua avvenuta promulgazione (non un fatto bruto, beninteso, ma un "fatto istituzionale"), la sua vigenza (in un senso che non posso qui specificare), la sua effettività, etc.

5 Bobbio 1949.

che, ferme restando le differenze concettuali o logiche (linguaggio v. metalinguaggio), rende spesso difficile tracciare un confine.

Sta di fatto che a me pare impossibile dire qualcosa di significativo sul linguaggio del diritto prescindendo dal modo in cui la scienza giuridica ne ricostruisce la struttura formale e i concetti fondamentali.

Sicché parlerò non propriamente del "linguaggio del diritto", bensì del *linguaggio del diritto così come ricostruito dalla scienza giuridica*.

1. Morfologia

Il diritto dirige il comportamento e disegna i rapporti sociali fondamentalmente in due modi: per un verso, modalizzando deonticamente la condotta e, per un altro verso, istituendo relazioni intersoggettive e distribuendo vantaggi e svantaggi ai soggetti coinvolti.

Orbene, i concetti fondamentali in cui si articola la morfologia del diritto si dispongono in due classi: i concetti deontici e i concetti "hohfeldiani" (così chiamati perché messi a punto da un grande giurista americano, Wesley N. Hohfeld, all'inizio del secolo scorso)[6].

(i) Le modalità deontiche sono quattro: obbligo, permesso, divieto, e facoltà.

Le modalità deontiche qualificano la condotta, e così facendo la dirigono. Ma raramente si incontrano nel linguaggio delle fonti: per l'appunto sono frutto di interpretazione e ricostruzione concettuale degli enunciati del diritto, appartengono cioè al metalinguaggio della scienza giuridica, più che al diritto stesso.

Prendete, ad esempio, le disposizioni di diritto penale, del tipo "Chiunque cagioni la morte di un uomo è punito con la reclusione così-e-così". Sono enunciati grammaticalmente indicativi, all'apparenza dichiarativi, che paiono constatare un fatto. Ma è a tutti ovvio che (a) esprimono una norma e (b) ne implicano un'altra. Detto semplicemente: "Gli assassini devono essere puniti", norma espressa, e "L'assassinio è proibito", norma implicita derivata. Norme, dunque, la cui formulazione appropriata sarebbe deontica.

I concetti deontici sono interdefinibili: obbligatorio significa non-permesso-che-non, vietato (o proibito) significa obbligatorio-che-non, e così avanti.

Questione interessante è se si debba assumere permesso o invece obbligo come concetto indefinito definiente. Spesso, nella letteratura di logica deontica si pre-

[6] Hohfeld 1969; Ross 1968: 116 ss. Tra i giuristi italiani, pochi, temo, conoscono questa letteratura. Una rara eccezione è Trimarchi 1983: cap. V.

ferisce permesso come indefinito definiente[7]. Ma vi è una buona ragione teorico-giuridica per preferire obbligo.

Supponiamo di avere un insieme di norme tutte solo permissive ("È permesso che *p*", "È permesso che *q*", e così avanti). Diremmo che si tratta di un ordinamento giuridico o, più in generale, di un ordinamento normativo della condotta? La risposta è, ovviamente, no: un insieme di norme siffatte, in assenza di anche una sola norma imperativa, sarebbe indistinguibile dal cosiddetto "stato di natura", caro alla filosofia politica moderna, nel quale, in assenza di diritto, tutto è permesso[8]. (In che senso? Ci ritorno tra un istante.)

Insomma, non c'è diritto senza (almeno) un obbligo. Il concetto di obbligo è parte necessaria del *definiens* di "diritto". E, aggiungerei, non c'è obbligo senza sanzione: in assenza di sanzioni non si hanno comandi, e dunque obblighi, ma consigli, raccomandazioni, suggerimenti[9]. Sicché "sanzione" è, a sua volta, parte necessaria del *definiens* di "obbligo", e per conseguenza dello stesso concetto di "diritto". Non c'è diritto senza sanzione.

Ma, tornando sul permesso, occorre domandarsi: "permesso" in che senso? Nel linguaggio del diritto, "permesso" significa permesso (non obbligatorio-che-non), punto. Per contro, nel linguaggio della scienza giuridica, e del resto anche nel linguaggio comune, "permesso" è vocabolo ambiguo. (a) In senso forte (o positivo), denota il contenuto di una norma permissiva. (b) In senso debole (o negativo), denota piuttosto l'assenza di qualunque norma imperativa. Il permesso in senso debole altro non è che la "libertà naturale", concettualmente preesistente a qualsivoglia ordinamento normativo della condotta. Discorso analogo vale per "facoltà".

"Obbligo", per contro, non ha un analogo senso debole: così è perché non si danno obblighi in natura. Non vi è obbligo in assenza di una norma positiva (cioè, posta da un atto normativo umano) che lo statuisca[10].

> (ii) I concetti hohfeldiani – quasi tutti artificiali se si guarda al linguaggio effettivo delle fonti – sono otto o, per meglio dire, quattro più le loro negazioni (le quali sono pertanto prive di autonomia concettuale).

I primi due – pretesa e obbligo (e relative negazioni) – catturano il contenuto di

7 Per es., von Wright 1951.

8 Scarpelli 1982.

9 Bobbio 1961.

10 Questione di grande interesse teorico è se i concetti deontici possano essere utilizzati, e in che senso, nel metadiscorso della scienza giuridica per descrivere il diritto vigente (che parrebbe cosa diversa dal ripetere le norme come un'eco). A questo riguardo, non si può non ricordare l'idea di Jeremy Bentham, secondo cui, nel discorso della scienza giuridica, intesa come scienza empirica, un enunciato del tipo "Tizio ha l'obbligo di fare x" è traducibile senza perdita di significato nell'enunciato (fattuale, predittivo di un futuro contingente) "Se non farà x, Tizio probabilmente incorrerà in una sanzione". In proposito: Hart 1982: cap. VI; Chiassoni 2016: 20 ss.

norme di condotta, e si prestano ad una riformulazione deontica.

I rimanenti due – potere e soggezione (e relative negazioni) – si riferiscono al contenuto di norme di competenza: si tratta di "norme sulla produzione giuridica", norme cioè che hanno ad oggetto non la condotta, ma atti normativi (i.e. creativi di norme), e, per quanto posso vedere, non si prestano ad una riformulazione deontica[11].

I concetti hohfeldiani non sono propriamente qualificazioni della condotta: denotano piuttosto situazioni soggettive di vantaggio o svantaggio, distribuite dal diritto, entro una relazione intersoggettiva, non personale o sociale, ma giuridica per l'appunto, i.e. istituita dal diritto, e in questo senso artificiale. Ad esempio, la relazione tra creditore e debitore, la relazione tra il potere legislativo e i cittadini, o la relazione tra il potere giurisdizionale e le parti del processo.

Il pregevole effetto di questa costruzione concettuale, che ora vado a chiarire, è la definitiva disambiguazione del concetto di "diritto (in senso) soggettivo" (in inglese: "right", non "law"), comunemente usato dai giuristi, come dalla gente comune, con una varietà di significati: un *catch-all concept*[12].

> (a) Si riferiscono alla condotta i concetti di pretesa, obbligo, e le loro negazioni: non-pretesa (espressione artificiosa, ma non esiste nella lingua italiana vocabolo appropriato) e libertà. Ad ogni pretesa di un soggetto corrisponde l'obbligo di un altro soggetto. All'assenza di pretesa corrisponde l'assenza di obbligo, ossia la libertà.

La corrispondenza sta in ciò, che un enunciato della forma "A ha una pretesa verso B" è traducibile, senza perdita di significato, nell'enunciato (deontico) "B ha un obbligo verso A".

> (b) Si riferiscono ad atti normativi i concetti di potere (o competenza), soggezione, e le loro negazioni: incompetenza, immunità. Alla competenza (al potere) di un soggetto corrisponde la soggezione di un altro soggetto. All'assenza di competenza, cioè all'incompetenza (l'assenza di potere), corrisponde l'immunità (la non-soggezione).

Non mi dilungo con esempi, ma faccio notare una cosa interessante.

Nel linguaggio della scienza giuridica, i termini "libertà" e "non-pretesa" – proprio come "permesso" e "facoltà" – sono ambigui. Talora, "libertà" è usato per descrivere il contenuto di una norma positiva (tipicamente: una norma permissiva

[11] Se non al prezzo di faticose e inutili contorsioni concettuali.

[12] I concetti hohfeldiani, di cui subito dirò, sono "atomici", non ulteriormente scomponibili in concetti più semplici, ma suscettibili di essere variamente combinati in situazioni complesse, "molecolari". Ad esempio, la situazione soggettiva di diritto civile detta "autonomia contrattuale" risulta dalla combinazione di diverse libertà e poteri. Accade anche che una situazione hohfeldiana si combini con una modalità deontica: ad esempio, nell'ordinamento vigente, il pubblico ministero ha il potere (hohfeldiano) e insieme l'obbligo (deontico) di esercitare l'azione penale (quando abbia una notizia di reato).

o facoltizzante, che espressamente conferisce una libertà, come tante norme costituzionali; oppure una norma che libera da un obbligo preesistente, per esempio abrogando una norma imperativa precedente o introducendo in essa una eccezione). Talaltra, "libertà" è usato per descrivere semplicemente la mancanza di esplicite norme imperative: il tale comportamento è libero perché (nel senso che) non vi è alcuna norma che lo imponga o lo vieti. Analogamente, "non-pretesa" può essere usato sia per descrivere il contenuto di una norma positiva (ad esempio, la norma che priva un soggetto di una pretesa precedentemente conferita; o la norma che abroga una precedente norma ascrittiva di una pretesa), sia per descrivere l'assenza di norme che conferiscano pretese.

In altre parole, nel linguaggio dei giuristi, anche "libertà" e "non-pretesa" (come "permesso" e "facoltà") possono assumere, in diversi contesti, un significato forte o un significato debole. Così è perché obblighi e pretese non esistono "in natura": sono entità (entità linguistiche, beninteso) create dal diritto.

Lo stesso, *mutatis mutandis*, può dirsi per i termini "incompetenza" e "immunità". Nel discorso della scienza giuridica, "incompetenza" può denotare il contenuto di una norma positiva (tipicamente: una norma che conferisce una immunità, come tante norme costituzionali; o una norma che revoca un potere precedentemente conferito, ad esempio abrogando una preesistente norma attributiva di potere); ma può anche denotare la mancanza di esplicite norme attributive di potere. Analogamente, "immunità" può denotare sia il contenuto di una norma positiva (ad esempio, la norma che libera da una precedente soggezione), sia l'assenza di norme che impongano una soggezione.

Così è perché i poteri e le soggezioni – proprio come le pretese e gli obblighi – non esistono "in natura": sono entità (linguistiche, fittizie direbbe Jeremy Bentham) create dal diritto.

2. Sintassi

Cerco ora di dire qualcosa sulla sintassi del linguaggio normativo.

Ma, di nuovo, la lettera delle fonti non è molto significativa da questo punto di vista. Gli enunciati delle fonti sono quasi sempre enunciati indicativi: mai imperativi, spesso (nella forma) dichiarativi, raramente deontici, talora "hohfeldiani"[13]. Una

[13] Sia detto per inciso (non è questo il luogo per approfondire l'argomento): la forma sintattica indicativa degli enunciati delle fonti può sollevare delicati problemi interpretativi. Un esempio: l'art. 87.4 Cost. dispone che il Presidente della Repubblica "autorizza" la presentazione alle Camere dei disegni di legge di iniziativa governativa. Pare ovvio (a chi scrive) che, così facendo, la Costituzione conferisca al Presidente un potere (politicamente molto rilevante, tra l'altro), non certo un dovere. Ma capita di leggere sulla stampa quotidiana che l'autorizzazione presidenziale sarebbe invece (addirittura) un "atto dovuto" (così ad es. Marzio Breda, "In questa fase il via libera di Mattarella è un atto dovuto", *Corriere*

volta di più, per apprezzarne le peculiarità sintattiche, dobbiamo non tanto guardare ai testi delle fonti nel loro tenore letterale, ma rivolgerci al modo in cui la scienza giuridica ne ricostruisce la struttura sintattica (spesso) nascosta.

Ebbene, con qualche eccezione cui farò cenno, generalmente parlando le norme giuridiche – e non solo le norme di condotta – talora esibiscono, più spesso nascondono, una forma sintattica

> (i) condizionale "Se…, allora…" ("Se omicidio, allora obbligo di punizione") o più raramente
> (ii) bicondizionale "Se, e solo se…, allora…" ("Se, e solo se, diciotto anni, allora maggiore età").

L'antecedente denota una classe di fatti: si usa chiamarlo "fattispecie", più precisamente "fattispecie astratta"[14]. Il conseguente denota una conseguenza giuridica, quale l'obbligo di imporre una sanzione, l'acquisizione di uno status o di un diritto soggettivo, la validità o l'invalidità di un atto, e così avanti.

Beninteso, l'antecedente può essere, secondo i casi, un "fatto bruto" (l'assassinio), o invece un fatto cosiddetto "istituzionale"[15] (la cittadinanza, la maggiore età), ossia un fatto qualificato a sua volta da altre norme, concatenate alla norma in questione. Come, ad esempio, sono tra loro concatenate le norme che definiscono la cittadinanza e, rispettivamente, quelle che ascrivono obblighi e diritti ai cittadini[16].

Così è con qualche eccezione, dicevo. Le eccezioni forse più evidenti sono le norme abrogatrici – "È abrogato l'art. x della legge y" – che non dispongono alcunché per l'avvenire, ma producono direttamente un effetto sistemico, nel senso che modificano diacronicamente il sistema giuridico. Fanno eccezione anche le norme che ascrivono poteri (o competenze).

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della sera, 11.07.2023, p. 6; Giuseppe Salvaggiulo, "L'argine del Colle", *La stampa*, 15.07.2023, p. 9). Ma la confusione tra potere e dovere non è solo un caso di analfabetismo costituzionale; è piuttosto il precipitato di una dottrina, arbitrariamente precostituita al testo costituzionale, secondo la quale nell'ordinamento vigente (una forma di "governo parlamentare") il Presidente sarebbe un "potere neutro", privo di qualsivoglia potere di indirizzo politico… checché ne dica la costituzione. Una questione analoga si pose nella dottrina francese, in relazione all'interpretazione dell'art. 13.1 della Costituzione del 1958 ("Le Président de la République signe les ordonnances et les décrets délibérés en Conseil des ministres"), all'epoca della prima "cohabitation" (Presidente di sinistra, Governo di destra). Troper 1987.

[14] Nel comune linguaggio dei giuristi si usa distinguere tra "fattispecie concreta" (un fatto singolo) e "fattispecie astratta" (una classe di fatti). Dal che si vede quanto il vocabolo "fattispecie" sia inadeguato: il suo uso naturale sarebbe per denotare un "fatto di specie", cioè un fatto singolare e concreto, e non una classe; di qui la necessità di aggettivare.

[15] Searle 1969: 50 ss.

[16] Sono tra loro concatenate anche le norme che statuiscono una regola generale e, rispettivamente, quelle che dispongono delle eccezioni. Per esempio: il danno ingiusto deve essere risarcito (art. 2043 Cod. civ.), ma non quando chi ha compiuto il fatto dannoso abbia agito per legittima difesa (art. 2044) o in stato di necessità (art. 2043). Ross 1968: 113 ss.

Ma c'è forse un'altra eccezione che merita attenzione: mi riferisco ai "principi" in quanto cosa distinta dalle "regole". Distinzione tormentata, oggetto ormai da molti anni, di una discussione interminabile e francamente stucchevole[17].

Per quanto possono vedere, nel pensiero giuridico comune molte norme sono considerate principi, del tutto indipendentemente dalla loro forma sintattica, per ragioni non logiche, ma assiologiche: perché si ritiene che rivestano nel sistema giuridico una speciale importanza etico-politica, perché sono percepite come norme caratterizzanti l'identità etico-politica del sistema. Volendo esemplificare, si possono menzionare il principio di eguaglianza e il principio della libera manifestazione del pensiero.

Nondimeno, va registrato un modo di vedere[18], alquanto diffuso, secondo il quale le regole avrebbero forma condizionale, mentre i principi avrebbero forma categorica, non condizionale, sarebbero "privi di fattispecie", cioè di antecedente[19].

Secondo questo modo di vedere, le regole hanno un campo di applicazione (relativamente) definito: se si verifica la fattispecie condizionante, segue indefettibilmente la relativa conseguenza giuridica[20]. I principi per contro, essendo privi di antecedente, non hanno un campo di applicazione definito.

Per questa ragione, la loro applicabilità all'uno o all'altro caso concreto è, sovente, discutibile. I principi sono defettibili (*defeasible*, si usa dire), cioè soggetti ad eccezioni implicite non identificabili *ex ante*[21]. E sempre la loro applicazione esige "concretizzazione".

La concretizzazione di un principio è l'esito di un ragionamento nomopoietico, più o meno complesso (e solitamente non deduttivo), nel quale il principio è usato come premessa – in combinazione con altre premesse di varia natura – per inferirne una regola inespressa, ma, si suppone, implicita. Per esempio: "La difesa è diritto inviolabile in ogni stato e grado del procedimento [principio costituzionale espresso]. L'interrogatorio dell'imputato costituisce parte del procedimento. Non c'è genuina difesa senza presenza del difensore. Pertanto, il difensore deve essere presente all'interrogatorio dell'imputato [norma inespressa derivata]".

Dove si vede bene la relazione osmotica che intercorre tra diritto e scienza giuridica.

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17 L'atto di nascita della discussione è un saggio, molto famoso, di un fine giurista americano, Ronald Dworkin. Il quale, nel lontano 1967, mise in discussione la tesi corrente che il diritto sia un insieme di "rules" (regole o norme, che dir si voglia), sostenendo che il diritto è piuttosto un insieme di "rules" e "principles", e negando che questi siano riducibili a quelle, per la loro struttura nonché per la loro fonte. Dworkin 1967.

18 Alexy 2002; Zagrebelsky 1992; Atienza & Ruiz Manero 1996.

19 La cosa è sicuramente vera per le norme a contenuto teleologico: ne sono esempi le disposizioni costituzionali dette "programmatiche".

20 Salve eventuali eccezioni espressamente disposte da altre norme.

21 Eccezioni derivanti dalla concomitante applicabilità di altri principi confliggenti. In alcune circostanze, la libertà di stampa fa eccezione ai diritti della personalità (onore, intimità della vita privata); in altre circostanze, i diritti della personalità fanno eccezione alla libertà di stampa.

3. Semantica

Dirò infine qualcosa sulla semantica del linguaggio del diritto, ossia delle sue fonti.

Si può convenire, come già dicevo fin dall'inizio, che il linguaggio del diritto sia un linguaggio normativo o prescrittivo[22]. Ciò è quanto dire che gli enunciati del diritto non hanno valori di verità. E questo è il tratto semantico fondamentale del discorso normativo in generale.

Ciò non vuol dire, però, che gli enunciati del diritto siano interamente privi di riferimento semantico. Al contrario, qualunque enunciato normativo non può non includere vocaboli e sintagmi che si riferiscano quanto meno alla condotta richiesta (o proibita, o permessa, etc.) ed eventualmente alle circostanze di fatto in cui essa è richiesta[23]. Beninteso, nel linguaggio naturale tutti i predicati (in senso logico: termini che denotano non entità individuali, ma classi) sono affetti da vaghezza, attuale o potenziale, e hanno dunque un riferimento parzialmente indeterminato[24].

Ma, detto questo, se avviciniamo lo sguardo, la mappa del linguaggio del diritto appare assai più frastagliata.

Anzitutto conviene, a fini analitici, fissare un concetto stretto di norma: una norma strettamente intesa, diremo, è (il significato di) un enunciato che ha ad oggetto la condotta, qualificandola deonticamente[25].

Si usa dire che le norme giuridiche siano "regole", come tali generali e astratte[26]. Che vuol dire? Ebbene, dal punto di vista dell'analisi logica del linguaggio, ciò vuol dire semplicemente questo:

(a) quanto alla generalità, una norma è un enunciato che include o sottintende il quantificatore universale ("tutti");

(b) quanto all'astrattezza, una norma è un enunciato (come già abbiamo visto) dotato di forma condizionale.

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[22] Nel modo di esprimersi comune tra i giuristi, tutti gli enunciati del diritto sono detti genericaa mente "norme" (senza peraltro distinguere tra gli enunciati, detti a volte "disposizioni", e i loro significati, "norme" in senso proprio). Ma, come vediamo subito, questo modo di esprimersi rende opaca l'articolata semantica del linguaggio delle fonti.

[23] Un fine filosofo del linguaggio (morale), Richard M. Hare, ha denominato "phrastic" la parte referenziale degli enunciati normativi, per distinguerla dal loro "neustic", ossia dalla loro parte non referenziale (i concetti deontici) e dalla loro funzione pragmatica (dirigere il comportamento). Hare 1952; Scarpelli 1985: 96 ss.

[24] Una forma particolare di vaghezza affligge poi le cosiddette "clausole generali", o "nozioni a contenuto variabile": termini o sintagmi che esprimono o presuppongono valutazioni, quali, ad esempio, «danno ingiusto», «buona fede», «buon costume», «pubblico interesse», «atti che, secondo il comune sentimento, offendono il pudore», «motivi di particolare valore morale o sociale», «giusta causa», e via enumerando.

[25] La distinzione tra enunciato e significato è cruciale sotto molti punti di vista, ed è il cuore stesso di qualunque teoria dell'interpretazione; ma nel presente contesto può essere trascurata.

[26] Crisafulli 1959.

In altre parole, una norma, per un verso, si riferisce non ad un caso, un evento, particolare, ma ad una classe di casi e, per un altro verso, non "provvede" ad una situazione particolare e concreta già esistente, ma "prevede" un evento futuro contingente e dispone una qualche conseguenza. Diversamente, in assenza di generalità e astrattezza, una norma non sarebbe distinguibile da un "provvedimento" (ad esempio, un esproprio, un'autorizzazione, una nomina, un atto di controllo amministrativo)[27].

Una norma è introdotta dal condizionale "se". Un provvedimento è introdotto, piuttosto, dalla clausola "poiché", la quale esprime non una condizione, ma piuttosto una sorta di "motivazione".

Questa semplice definizione di "norma" abbraccia ovviamente le norme imperative (comandi e divieti), ma anche le norme permissive e facoltizzanti. Nondimeno, non deve sfuggire, anzitutto, che le norme permissive e facoltizzanti, di per sé, non dirigono in alcun modo il comportamento e, inoltre, che esse sono funzionalmente dipendenti dalle norme imperative, nel senso seguente.

Una norma permissiva o facoltizzante può assumere l'una o l'altra di queste due funzioni: (i) abrogare (in tutto o in parte[28]) una norma imperativa preesistente, in virtù della metanorma *lex posterior derogat priori*, oppure (ii) invalidare preventivamente una possibile norma imperativa futura, in virtù della metanorma *lex superior derogat inferiori*[29]. (Ma su queste due metanorme dirò ancora qualcosa più avanti.)

Ora, non tutti gli enunciati delle fonti sono norme nel senso appena definito. Al contrario, il diritto è affollato di enunciati non-normativi, cioè non prescrittivi. Malgrado tutto, continuerò a chiamarli "norme", come del resto ho fatto sinora, conformemente al modo di esprimersi comune dei giuristi, per non appesantire il discorso. Ma si tratta di enunciati che né vertono sulla condotta, né sono (ricostruibili come) deontici[30]. Tra di essi, i seguenti, ma non garantisco che la piccola tassonomia che segue sia completa.

(i) In primo luogo, vi sono norme che ascrivono competenze: nel gergo della

[27] Il requisito dell'astrattezza esclude dal novero delle norme propriamente intese qualunque pree scrizione (sia pur generale) retroattiva.

[28] L'abrogazione "parziale" di una norma è quel che si dice una deroga.

[29] Il funzionamento della metanorma "lex superior" può essere chiarito nel modo seguente: sono permissive e facoltizzanti, tipicamente, le norme costituzionali che ascrivono diritti di libertà; ebbene, stante il carattere rigido della costituzione vigente (la legislazione ordinaria non può validamente contraddire la costituzione), le norme in questione hanno la funzione e l'effetto di rendere invalide eventuali norme imperative future di rango sub-costituzionale che pretendessero di comandare e/o proibire la condotta cui si riferiscono.

[30] In verità, si incontrano nelle fonti anche enunciati del tutto privi di qualsivoglia plausibile significato normativo, nel senso che non paiono ricostruibili né come norme di condotta (deontiche), né come norme di competenza (hohfeldiane). Un buon esempio è la clausola «fondata sul lavoro» (art. 1 cost.), riferita alla Repubblica, la quale appunto sembra non esprimere una qualche norma, ma solo dar voce ad un generico favore ideologico per le classi lavoratrici.

teoria giuridica, si dicono appunto "norme di competenza" o "norme secondarie" (essendo "primarie" le norme di condotta).

Si tratta di enunciati (li abbiamo già incontrati discorrendo di situazioni giuridiche soggettive) che vertono non sulla condotta, ma su atti normativi, cioè produttivi di norme. Ad esempio, verte su atti normativi l'enunciato costituzionale che ascrive alle Camere la funzione (i.e. la competenza) legislativa.

(ii) In secondo luogo, vi sono norme che ascrivono status, quale ad esempio lo status di "cittadino", o di "maggiorenne", o di "proprietario". Sono termini privi di riferimento semantico, non denotano alcunché nel mondo.

Uno status è una qualità artificiale attribuita dal diritto, all'incrocio (logico) di una o più norme concatenate che determinano l'antecedente e una o più norme che statuiscono il conseguente dello status in questione: ad esempio, le norme che stabiliscono le condizioni per l'acquisto della cittadinanza e, rispettivamente, le norme che conferiscono diritti o impongono obblighi ai cittadini; le norme che stabiliscono le condizioni di acquisto della proprietà (dello status di proprietario) e, rispettivamente, le norme che determinano le pretese e i poteri del proprietario[31].

(iii) In terzo luogo, il linguaggio del diritto è ricco di definizioni, quasi sempre fraseggiate (ingannevolmente) come "definizioni reali", del tipo "Il contratto è [non: per 'contratto' s'intende] l'accordo di due o più parti per costituire, regolare o estinguere tra loro un rapporto giuridico patrimoniale"[32].

Si può sostenere che le definizioni legali siano direttive interpretative (dunque norme in senso stretto) rivolte agli interpreti, e segnatamente ai giudici: al tale termine o sintagma deve essere attribuito questo e non altro significato[33]. Ma a me pare più plausibile configurarle come "frammenti" (logici) di tutti i rimanenti enunciati normativi in cui compare il termine definito. Ad esempio, secondo questo modo di vedere, la definizione di "contratto" altro non è che un frammento (logico) di tutte le norme che vertono sui contratti.

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[31] Ross 1976.

[32] Fraseggiate, cioè non come definizioni di un concetto, ma come descrizioni di un oggetto. See nonché le cosiddette "definizioni reali" sono non propriamente definizioni, ma enunciati (che si pretendono) empirici, sopra un oggetto che però andrebbe previamente identificato (mediante una definizione nominale, per l'appunto). Le definizioni, propriamente intese, non possono essere che "nominali": hanno ad oggetto il significato di termini e sintagmi, non la realtà sottostante. (Nel linguaggio volgare, "definire" è comunemente usato in luogo di "aggettivare", "qualificare", o "classificare".)

[33] Norme, cioè, che comandano agli interpreti, segnatamente ai giudici, di attribuire al termine o sintagma definito quello e non altro significato. Norme, però, che sovente i giuristi considerano non "vincolanti" per gli interpreti.

(iv) In quarto luogo, si incontrano altresì nelle fonti enunciati che hanno ad oggetto né comportamenti, né atti normativi, bensì altre norme (o gli enunciati che le esprimono): si tratta dunque di norme di secondo grado o metanorme. Ne sono esempi caratteristici le norme abrogatrici, le norme di rinvio, e le metanorme (le abbiamo incontrate poco sopra) che stabiliscono criteri per la soluzione di antinomie.

Le norme abrogatici, cui già accennavo in precedenza, hanno, banalmente, la forma "È abrogata la norma x"; nell'ordinamento vigente, combinate con il principio generale (generale, ma non costituzionale, fatta eccezione per la materia penale) di irretroattività, esse hanno l'effetto di circoscrivere nel tempo l'applicabilità della norma cui si riferiscono. Una norma fa "rinvio" ad un'altra norma (o ad una data fonte) ogniqualvolta non detta direttamente la disciplina della fattispecie cui si riferisce, bensì indica agli organi dell'applicazione in quale altra norma (o fonte) tale disciplina debba essere ricercata: ad esempio, "Le obbligazioni che nascono da contratto sono regolate [non dalla presente legge, ma] dalla legge nazionale dei contraenti"[34].

Due osservazioni per concludere su questo punto.

Prima osservazione. Tutte queste norme in senso generico di cui sono venuto parlando – ascrizioni di status, definizioni, norme di competenza, e metanorme – sono funzionalmente connesse alle norme in senso stretto. Acquistano senso, dal punto di vista pragmatico, solo in relazione alle norme di condotta. È ovvio, ad esempio, che ascrivere ai diciottenni la maggiore età sarebbe un inutile *flatus vocis* se tale ascrizione non costituisse l'antecedente di tutte le norme che determinano, nel conseguente, diritti e doveri dei maggiorenni.

Seconda osservazione. Le norme in questione sono dette, da alcuni, norme (o regole) "costitutive". A dire il vero, questo sintagma si incontra usato in più sensi[35], ma, in questo contesto, il senso rilevante mi sembra il seguente: si tratta di norme che non prescrivono a chicchessia di fare od omettere alcunché – sicché sono prive di destinatari, non possono essere obbedite né violate – ma realizzano direttamente (cioè, senza la mediazione di un qualche soggetto obbligato) una modificazione nel sistema normativo[36].

Una norma abrogatrice, ad esempio, né descrive (ovviamente) una abrogazione già avvenuta, né prescrive a chicchessia di compierla: semplicemente, la fa. Potremmo dire così: la promulgazione di una norma abrogatrice è una enunciazione per-

[34] Il rinvio si dice "recettizio" o "materiale" quando ha ad oggetto una disposizione determinata (o un insieme determinato di disposizioni): ad esempio, l'articolo tale della tale legge. Il rinvio si dice "mobile" o "formale" quando ha ad oggetto un tipo di fonte: secondo i casi, una fonte del medesimo ordinamento (ad esempio, la fonte "legge ordinaria dello Stato", la fonte "decreto ministeriale", etc.) o anche, come sovente accade nelle norme di diritto internazionale privato, una fonte appartenente ad un diverso ordinamento.

[35] Ross 1968; Searle 1969; Carcaterra 1974.

[36] Carcaterra 1974.

formativa di quel peculiare atto di linguaggio, squisitamente giuridico, che appunto chiamiamo "abrogazione".

Naturalmente, dire che una norma abrogatrice o una norma di competenza è "costitutiva" non è che un modo (inutilmente?) sofisticato per dire che non è prescrittiva, o "regolativa" (come pure si usa dire), ossia che non è una norma affatto nel senso stretto stipulato sopra a fini analitici.

Quanto alle metanorme "lex posterior" e "lex superior", un chiarimento è forse opportuno. Si tratta di metanorme che stabiliscono altrettanti criteri di soluzione dei conflitti tra norme, o antinomie che dir si voglia.

"Lex posterior" è una metanorma espressamente statuita nel diritto vigente (art. 15, disposizioni generali premesse al Codice civile), che regola la successione di norme nel tempo: la norma più recente abroga la precedente.

"Lex superior", invece, è frutto di costruzione della scienza giuridica: deriva dalla generalizzazione delle varie metanorme che istituiscono una relazione gerarchica tra le diverse fonti – specialmente tra legge e costituzione, tra regolamento e legge – sicché una data fonte (ad esempio, la legge) non può legittimamente disporre in contrasto con un'altra (ad esempio, la costituzione) perciò stesso "superiore". "Lex superior", al fondo, è una norma di incompetenza: la fonte "inferiore" non è competente a disporre in contrasto con la fonte "superiore", e in questo precisamente consiste la "superiorità" di quest'ultima[37].

Si osservi che il latinetto "derogat" assume due significati diversi nelle due metanorme rispettivamente: (a) la norma posteriore *abroga* la precedente; (b) la norma superiore non già abroga, ma rende *invalida* la norma inferiore (e l'invalidità può solo essere pronunciata da un organo giurisdizionale competente: secondo i casi, la Corte costituzionale, un tribunale amministrativo, etc.). E, d'altra parte, nell'ordinamento vigente, abrogazione e dichiarazione di invalidità hanno effetti sistemici differenti.

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[37] Così com'è una norma di incompetenza, per fare un altro esempio, l'art. 139 Cost., il quale dispone che la forma repubblicana dello Stato non può essere oggetto di revisione costituzionale.

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Una teoría de las antinomias constitucionales para uso de operadores jurídicos garantistas

*Pierluigi Chiassoni**

Resumen

En aras de proporcionar a los operadores jurídicos garantistas algunas herramientas útiles, el escrito se divide en tres partes. La primera parte proporciona una tipología de las antinomias constitucionales, destacando entre antinomias constitucionales en sentido genérico, en sentido proprio y en sentido impropio, y tratando además de las diferentes variedades de antinomias constitucionales lógicas y ontológicas (§§ 1-2). La segunda parte introduce las nociones de código identificatorio y código resolutorio bien construido (§ 3). La tercera parte ofrece el diseño, mediante un experimento mental, de tres códigos bien construidos (uno identificatorio y dos resolutorios) para uso de operadores jurídicos garantistas (§§ 4-7).

Palabras clave: Antinomias constitucionales. Antinomias constitucionales en sentido propio. Antinomias constitucionalmente relevantes. Código identificatorio bien construido. Código resolutorio bien construido. Garantismo.

Abstract

Aiming at providing guarentist legal professionals with some useful instruments, the paper divides into three parts. The first part outlines a typology of constitutional antinomies, distinguishing between constitutional antinomies in a generic sense, in a proper sense, and in an improper sense, and dealing with several varieties of logical or ontological constitutional antinomies (§§ 1-2). The second part introduces

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the notions of a well-ordered identification code and resolution code (§ 3). By way of a mental experiment, the third, and last, part provides the outline of three (one identification and two resolution) well-ordered codes for the use of guarentist legal professionals (§§ 4-7).

Keywords: Constitutional Antinomies. Constitutional Antinomies Proper. Constitutionally Relevant Antinomies. Well-Ordered Identification Code. Well-Ordered Resolution Code. Guarentism.

0. Premisa

En un ensayo publicado ya hace tiempo, *Una filosofía del derecho para el mundo latino. Otra vuelta de tuerca*, Manuel Atienza, al enunciar el primer punto de su «decálogo», sostiene que toda filosofa y todo filosofo del derecho tiene el deber de contribuir a la mejora de la práctica jurídica en los estados constitucionales, haciéndose guiar en esto, no ya por el «afán de originalidad», sino por el intento de «participar cooperativamente con otros»[1].

Comparto el ideal de la filosofia del derecho como empresa cooperativa que contribuye – sin afán de originalidad, pero de una manera imaginativa – al desarrollo y a la preservación de una cultura de los derechos fundamentales a la vez realista y atenta al goce efectivo por todo ser humano.

Por estas razones, dedicaré el presente escrito a considerar brevemente siete herramientas que, tal vez, podrían tener cierta utilidad para toda jueza, jurista o abogada garantista. A saber:

(1) la distinción entre antinomias constitucionales en sentido genérico, en sentido proprio y en sentido impropio;
(2) la distinción entre antinomias constitucionales lógicas y ontológicas;
(3) la noción de código para la identificación de antinomias (código identificatorio) bien construido;
(4) la noción de código para la resolución de antinomias (código resolutorio) bien construido;
(5) el esbozo de un código garantista para la identificación de antinomias constitucionalmente relevantes;
(6) el esbozo de un código garantista para la resolución de antinomias constitucionalmente relevantes;
(7) el esbozo de un código garantista para la resolución de antinomias constitucionales en sentido propio.

Las herramientas atañen a dos problemas medulares para el control judicial de constitucionalidad en un estado constitucional: el problema de la identificación y

[1] Atienza 2016: 48-49.

el problema de la resolución de antinomias constitucionales. No se puede *identificar* antinomias constitucionales, sin disponer de una tipología de las antinomias y de un código identificatorio bien construido[2]. Ni se puede *resolver* antinomias constitucionales, sin la ayuda un código resolutorio bien construido.

1. Antinomias constitucionales en sentido genérico, en sentido proprio, en sentido impropio

Una antinomia es una relación de incompatibilidad (una situación de "conflicto" o "concurso") entre dos normas simultáneamente aplicables en – simultáneamente vigentes para – un mismo orden jurídico.

La definición sugiere destacar tres tipos de antinomias constitucionales: antinomias constitucionales en sentido genérico, en sentido propio y en sentido impropio.

Una incompatibilidad entre dos normas es una *antinomia constitucional en sentido genérico*, si, y solo si, *por lo menos una* de las dos normas es una norma constitucional de cierto orden jurídico – siendo, bien una norma de la constitución, bien una norma derivable de leyes de revisión constitucional o de otras leyes constitucionales.

Una incompatibilidad entre dos normas es una *antinomia constitucional en sentido propio*, si, y solo si, *ambas* normas son *normas constitucionales* de cierto orden jurídico – siendo normas de la constitución o normas derivables de leyes constitucionales.

Por último, una incompatibilidad entre dos normas es una *antinomia constitucional en sentido impropio*, si, y solo si, una de las dos normas es una norma constitucional de cierto orden jurídico, mientras que la otra norma es, bien una *norma formalmente inferior* del mismo orden jurídico, o bien una *norma de otro orden jurídico positivo* o de *otro orden normativo*. Piensen en una norma de otro orden estatal, del derecho internacional, o de un orden normativo no jurídico positivo que el operador jurídico considere relevante, tal como cierto derecho natural o las normas de cierta moral crítica o social. Con respecto a las antinomias constitucionales en sentido impropio se podría también hablar de *antinomias constitucionalmente relevantes*.

Puede ocurrir – y ocurre a menudo – que una misma norma (formalmente) inferior (N1) sea, a la vez, incompatible con cierta norma constitucional (por ejemplo, N2) y compatible con otra norma constitucional (por ejemplo, N3). En estos casos,

[2] La tipología que voy a exponer a continuación se propone revisitar algunas tipologías corrientes en la teoría del derecho contemporánea, presentando sus elementos en formas quizás un poco más precisas. A saber: la tipología arquetipo propuesta por Alf Ross, donde se destacan antinomias "totales", "parciales unilaterales", y "parciales bilaterales" (Ross 1958: cap. IV); la tipología de Riccardo Guastini, donde se destacan antinomias "en abstracto" y "en concreto" (Guastini, 2011: 291-294). Estoy también tomando la ocasión para revisitar la tipología que yo mismo propuse en dos escritos anteriores: Chiassoni 1999: 274-283; Chiassoni 2011: cap. IV, §§ 6 e 7.

la resolución de la antinomia constitucionalmente relevante entre las normas N1 y N2 requiere la resolución previa de la antinomia constitucional en sentido propio entre las normas N2 y N3.

2. Antinomias constitucionales lógicas, antinomias constitucionales ontológicas

No toda incompatibilidad entre dos normas es una incompatibilidad lógica.

Por esta razón, hace falta que en la caja de las herramientas de todo operador jurídico garantista se encuentre no solo una tipología de las antinomias constitucionales lógicas, sino también una tipología de las antinomias constitucionales (que llamaré) ontológicas.

En su conjunto, las dos tipologías se proponen proporcionar una red conceptual apta para capturar las formas (más relevantes) de antinomia constitucional.

2.1. Antinomias constitucionales lógicas

Cabe destacar tipos diferentes de antinomia constitucional lógica.

Si nos preguntamos por los criterios que rigen tales distinciones, estos tienen que ver con tres aspectos de la *forma gramatical*[3] de las normas:

(a) los operadores deónticos (considerando por brevedad solo las normas prescriptivas);
(b) el ámbito de aplicación expreso: la conducta-tipo – la clase de conductas o comportamientos – expresamente regulada (considerando las normas generales, por lo menos en relación con su objeto normativo[4]);
(c) la estructura sintáctica.

Desde el punto de vista de los *operadores deónticos*, cabe destacar antinomias por contradicción y antinomias por contrariedad. Desde el punto de vista de los *ámbitos de aplicación expresos*, cabe destacar antinomias por superposición integral expresa, por inclusión y por intersección. Desde el punto de vista de las *estructuras sintácticas*, finalmente, cabe destacar antinomias simples y antinomias complejas.

2.1.1. Antinomias por contradicción, antinomias por contrariedad

Consideramos los cuatro operadores deónticos obligatorio (**O**), prohibido (**V**), permitido (**P**) y facultativo (**F**).

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[3] A saber, de la forma enunciativa que un operador atribuye a una norma en aras de tratarla y utilizarla al interior de un razonamiento.

[4] Cf. von Wright 1963: cap. I, § 11.

Mediante el uso de la negación ("no", "¬"), los cuatro operadores resultan inter-definibles (e intercambiables). Utilizando el operador permitido (**P**) como término primitivo:

(1) una conducta-tipo *p* (pasear por las calles de una ciudad; dictar disposiciones de ley en materia penal) es *permitida*, si, y solo si, se puede – deónticamente, normativamente – realizar *p* (**P***p*);
(2) una conducta-tipo *p* es *obligatoria* (**O***p*), si, y solo si, no se permite la omisión de *p*; si, y solo si, no está permitido (está no-permitido, está prohibido) no realizar *p* (**¬P¬***p*);
(3) una conducta-tipo *p* está prohibida (**V***p*), si, y solo si, no se permite la comisión de *p*; si, y solo si, no está permitido (está no-permitido) realizar *p* (**¬P***p*);
(4) una conducta-tipo *p* es, finalmente, facultativa (**F***p*), si, y solo si, se permite la omisión de *p*; si, y solo si, se permite no realizar *p* (**P¬***p*).

Las relaciones conceptuales entre operadores deónticos ofrecen la base para distinguir las antinomias lógicas en antinomias por contradicción y antinomias por contrariedad.

Una *antinomia lógica por contradicción* es una incompatibilidad entre dos normas, relativas a la misma conducta-tipo, de las cuales la una es *imperativa* y la otra es, según sea el caso, *permisiva* o *facultativa*. Por ejemplo, la conducta-tipo *p* está prohibida por la norma N1 (**¬P***p*) y permitida por la norma N2 (**P***p*); es obligatoria según la norma N3 (**¬P¬***p*) y facultativa según la norma N4 (**P¬**p). Los dos pares de operadores deónticos corresponden a dos pares de normas, en cada una de las cuales cada norma representa la negación deóntica de la otra. Desde un punto de vista práctico, del *quid agere*, el destinatario de dos normas contradictorias se encuentra en una situación problemática, pero no dilemática, tal que:

(i) no le es posible ajustar su comportamiento al mismo tiempo a las dos normas – las dos normas no pueden ser simultáneamente eficaces;
(ii) si elige ajustar su conducta a la norma imperativa, no incurre en ninguna violación de norma, ya que las normas permisivas o facultativas son, como se suele decir, inviolables.

Una *antinomia lógica por contrariedad* es una incompatibilidad entre dos normas ambas imperativas, concernientes a la misma conducta-tipo, de las cuales una es un *imperativo positivo*, la otra un *imperativo negativo*. Por ejemplo, la conducta-tipo *p* es obligatoria según la norma N1 (**¬P¬***p*) y prohibida según la norma N2 (**¬P***p*). Desde un punto de vista práctico, el destinatario de dos normas contrarias se encuentra en una situación dilemática:

(i) no le es posible ajustar su comportamiento al mismo tiempo a las dos normas – las dos normas no pueden ser simultáneamente eficaces;

(ii) cualquier conducta elija realizar constituirá una violación de una de las dos normas. Supongamos que el rescate marítimo esté, al mismo tiempo, prohibido y obligatorio para cualquier tripulación de buque mercante. Si una tripulación de un

buque mercante rescata a algunos náufragos, viola la norma de prohibición; si no los rescata, viola la norma de obligación.

2.1.2. Antinomias por superposición integral expresa, por inclusión, por intersección

Una antinomia lógica es una incompatibilidad entre dos normas que vierten sobre la *misma* conducta-tipo (*supra*, § 2.1.1).

A veces, las dos normas, conforme a su forma gramatical, se refieren ambas, expresa y exactamente, a una misma conducta-tipo; a veces, ellas tienen el mismo ámbito de aplicación expreso. Cuando esto sucede, estamos frente a una *antinomia por superposición integral expresa*. Piensen, por ejemplo, en la norma N1 ("Los ciudadanos pueden criticar al gobierno"; "Si ciudadano, entonces permitido criticar al gobierno"; "Está permitido criticar al gobierno por parte de los ciudadanos") y en la norma N2 ("Los ciudadanos no pueden criticar al gobierno"; "Si ciudadano, entonces prohibido criticar al gobierno"; "Está prohibido criticar al gobierno por parte de los ciudadanos").

Sin embargo, esto no siempre sucede. A veces, las dos normas antinómicas, según su forma gramatical, se refieren expresamente a conductas-tipo diferentes, pero tales que la conducta-tipo regulada por una de las dos normas resulta ser una especie, una subclase, totalmente incluida en el género, en la clase, correspondiente a la conducta-tipo regulada por la otra norma. Cuando esto ocurre, estamos frente a una *antinomia por inclusión*. Consideremos, por ejemplo, la norma N1 ("Los ciudadanos honestos pueden criticar al gobierno"; "Si ciudadano honesto, entonces permitido criticar al gobierno"; "Está permitido criticar al gobierno por los ciudadanos honestos") y la norma N2 ("Los ciudadanos no pueden criticar al gobierno"; "Si ciudadano, entonces prohibido criticar al gobierno"; "Está prohibido criticar al gobierno por parte de los ciudadanos"). N1 regula una conducta-tipo (criticar al gobierno por parte de ciudadanos honestos) que identifica una subclase de la clase correspondiente a la conducta-tipo regulada por N2 (criticar al gobierno por parte de ciudadanos). Cualquier crítica al gobierno por parte de un ciudadano honesto es una crítica al gobierno por parte de un ciudadano; pero no vale el revés. Esto sugiere entender las antinomias por inclusión como antinomias *por superposición integral parcialmente no expresada*: como relaciones de incompatibilidad por superposición integral de los ámbitos de aplicación entre una *norma de especie* (especial) *expresa* (en nuestro ejemplo, N1: "Si ciudadano honesto, entonces permitido criticar el gobierno") y una *norma de especie* (especial) *no expresada, derivada* o *implícita* (N2*: "Si ciudadano honesto, entonces prohibido criticar al gobierno"), que es consecuencia lógica – por medio de la regla de refuerzo del antecedente o de monotonicidad – de la *norma de género expresa* (en nuestro ejemplo, N2: "Si ciudadano,

entonces prohibido criticar al gobierno").

Finalmente, también puede ocurrir que las dos normas antinómicas, según su forma gramatical, se refieran expresamente a conducta-tipos *diferentes*, a las que corresponden clases que *no* están *en relación de inclusión*, *no* son *complementarias*, son conceptualmente *no relacionadas*, y resultan identificadas por *propiedades lógicamente compatibles* (cuya conjunción identifica clases lógicamente posibles). Cuando esto ocurre, estamos frente a una *antinomia por intersección*. Consideremos, por ejemplo, la norma N1 ("Los ciudadanos pueden criticar al gobierno"; "Si ciudadano, entonces permitido criticar al gobierno"; "Está permitido criticar al gobierno por parte de los ciudadanos") y la norma N2 ("Los agricultores autónomos no pueden criticar al gobierno"; "Si agricultor autónomo, entonces prohibido criticar al gobierno"; "Está prohibido criticar al gobierno por parte de los agricultores autónomos"). La norma N1 ("Si ciudadano, entonces permitido criticar al gobierno") implica, por refuerzo del antecedente, la norma N1* ("Si ciudadano y agricultor autónomo, entonces permitido criticar al gobierno"). La norma N2 ("Si agricultor autónomo, entonces prohibido criticar al gobierno") implica, por refuerzo del antecedente, la norma N2* ("Si agricultor autónomo y ciudadano, entonces prohibido criticar al gobierno"). La clase de los ciudadanos y agricultores autónomos, la clase regulada por las dos normas implícitas N1* y N2*, representa la intersección entre las dos clases iniciales. Quien pertenece a la clase de intersección, quien es simultáneamente ciudadano *y* agricultor autónomo, *puede* criticar al gobierno, según la norma N1*, y *no puede* criticar al gobierno, según la norma N2*. Este elemento estructural sugiere que las antinomias por intersección también pueden entenderse como antinomias *por superposición integral totalmente no expresada*.

2.1.3. Antinomias simples, antinomias complejas

Un tercer, y último, aspecto que parece oportuno considerar al diseñar tipos de antinomias lógicas útiles para la práctica argumentativa en un estado constitucional es la *estructura sintáctica* de la forma gramatical de las normas antinómicas.

Una forma gramatical es *simple*, si, y sólo si, resulta apta para expresar, sintácticamente, una y sólo una norma ("Los ciudadanos tienen derecho a la inviolabilidad del domicilio"; "Si ciudadano, entonces derecho a la inviolabilidad del domicilio").

Una forma gramatical es *compleja*, si, y sólo si, resulta apta para expresar, sintácticamente, dos o más normas conjuntamente[5]. Consistiendo, por ejemplo: en un enunciado categórico paratáctico ("Los ciudadanos tienen derecho a un sistema educativo y de protección de salud público y gratuito"); en un enunciado condicio-

[5] Dejaré para otra ocasión considerar la complejidad de una norma por disyunción incluyente o excluyente.

nal dotado de un antecedente disyuntivo o de un consecuente conjuntivo ("Si ciudadano o apátrida, entonces derecho a la inviolabilidad del domicilio"; "Si ciudadano, entonces derecho a la inviolabilidad del domicilio y de la correspondencia"); en un enunciado bicondicional ("Si, y solo si, ciudadano, entonces derecho a la libertad de expresión").

Podemos llamar *antinomias simples* a las incompatibilidades lógicas entre dos normas, ambas dotadas de una forma gramatical simple. Y *antinomias complejas* a las incompatibilidades lógicas entre dos normas, por lo menos una de las cuales dotada de una forma gramatical compleja.

Las antinomias consideradas en el apartado anterior (*supra*, § 2.1.2) – antinomias por superposición integral expresa, por inclusión, por intersección – son antinomias simples.

En lo que respecta a las antinomias complejas, cabe distinguir las antinomias *por complejidad bilateral* y las antinomias *por complejidad unilateral*.

Una *antinomia por complejidad bilateral* es una incompatibilidad lógica entre dos normas, ambas complejas. Una variedad (una subclase) de este tipo de antinomia consiste en las *antinomias por exclusividad bilateral*. Estas ocurren cuando ambas normas tienen la forma gramatical de un enunciado bicondicional. Consideremos, por ejemplo, la norma N1 ("Si, y sólo si, ciudadano por nacimiento, entonces permitido expresar libremente opiniones políticas") y la norma N2 ("Si, y sólo si, ciudadano naturalizado, entonces permitido expresar libremente opiniones políticas"). La norma N1 consiste en la conjunción de dos normas: N1.1 ("Si ciudadano por nacimiento, entonces permitido expresar libremente opiniones políticas") y N1.2 ("Si no ciudadano por nacimiento, entonces no permitido expresar libremente opiniones políticas"). De manera similar, la norma N2 consiste en la conjunción de dos normas: N2.1 ("Si ciudadano naturalizado, entonces permitido expresar libremente opiniones políticas") y N2.2 ("Si no ciudadano naturalizado, entonces no permitido expresar libremente opiniones políticas"). La estructura de una antinomia por exclusividad bilateral consiste pues, mirándolo bien, en la conjunción de dos antinomias simples: la antinomia simple entre la norma N1.2* ("Si ciudadano naturalizado, entonces no permitido expresar libremente opiniones políticas"), derivada de la norma N1.2, y la norma N2.1 ("Si ciudadano naturalizado, entonces permitido expresar libremente opiniones políticas"); la antinomia simple entre la norma N1.1 ("Si ciudadano por nacimiento, entonces permitido expresar libremente opiniones políticas") y la norma N2.2* ("Si ciudadano por nacimiento, entonces no permitido expresar libremente opiniones políticas"), derivada de la norma N2.2.

Una *antinomia por complejidad unilateral* es una incompatibilidad lógica entre dos normas, sólo una de las cuales es compleja. Una variedad (una subclase) de este tipo de antinomia consiste en las *antinomias por exclusividad unilateral*. Estas ocurren cuando una de las dos normas tiene la forma gramatical de un enunciado bicondicional y la otra la forma de un condicional simple. Consideremos, por ejemplo,

la norma N1 ("Si, y sólo si, ciudadano por nacimiento, entonces permitido expresar libremente opiniones políticas") y la norma N3 ("Si ciudadano naturalizado, entonces permitido expresar libremente opiniones políticas"). En este caso, la antinomia consiste en la incompatibilidad lógica entre la norma N3, por un lado, y la norma N1.2*, derivada de la norma N1.2, por el otro.

Las tipologías de antinomias lógicas (por contradicción o por contrariedad; simples o complejas; simples por superposición integral expresa, por inclusión, por intersección; complejas bilaterales o unilaterales, etc.) son útiles para identificar antinomias constitucionales, sea en sentido propio (entre normas ambas constitucionales), sea en sentido impropio (constitucionalmente relevantes).

En los sistemas constitucionales vigentes, sin embargo, las antinomias lógicas son aves bastante raras. Las formas más comunes de antinomia constitucional, en sentido propio o impropio, consisten en antinomias no lógicas u ontológicas.

2.2. Antinomias constitucionales ontológicas

En las antinomias constitucionales lógicas, dos normas regulan la misma conducta-tipo de manera deónticamente contraria o contradictoria (*supra*, § 2.1.1.).

Las antinomias constitucionales no lógicas consisten en formas diferentes de incompatibilidad normativa.

Parece útil distinguir (por lo menos) cinco tipos: antinomias *de competencia*, *instrumentales absolutas*, *instrumentales relativas*, *teleológicas*, y *axiológicas*.

En su conjunto, estos cinco tipos corresponden a otras tantas variedades de antinomias ontológicas. Las llamaré así porque, como veremos, corresponden a situaciones de incompatibilidad en las que la vigencia (actual o potencial) de una de las dos normas constituye o favorece un estado de cosas, un mundo jurídico, el cual es distópico con respecto al estado de cosas, al mundo jurídico, propugnado por la otra norma.

2.2.1. Antinomias de competencia

Una antinomia de competencia es una incompatibilidad ontológica entre una (meta)norma de competencia, por un lado, y una norma producida en violación de la norma de competencia, por el otro.

Piensen, por ejemplo, en la meta-norma constitucional de competencia N1 ("Está prohibido dictar leyes penales que establezcan la pena de muerte para un cualquier delito") y en la norma de ley penal N2 ("Quien prive a alguno de la libertad personal puede ser castigado con la muerte").

La co-vigencia de las normas N1 y N2 no da lugar a una antinomia lógica. Las

dos normas se refieren a conductas-tipo diferentes, por parte de sujetos diferentes. Sin embargo, nótese lo siguiente. La norma N1 expresa la preferencia del orden constitucional por un mundo jurídico en el que no haya lugar para la pena de muerte. En el que en ninguna circunstancia la comunidad, a través del aparato sancionador penal, puede privar de la vida a un ser humano. No obstante, la vigencia de la norma N2 crea un mundo jurídico en el que la imposición y la ejecución de la pena capital constituyen una posibilidad. La norma N1 requiere un mundo jurídico sin pena de muerte. La norma N2 realiza un mundo jurídico – altamente negativo y éticamente inaceptable desde el punto de vista de la norma N1 – entre cuyas sanciones penales figura dar la muerte a alguien.

2.2.2. Antinomias instrumentales absolutas

Una antinomia instrumental absoluta es una incompatibilidad ontológica entre una norma final (que prescribe a una autoridad normativa perseguir un determinado objetivo) y una norma de conducta o constitutiva, la cual se produce cuando esta última norma prescribe conductas, o realiza estados de cosas, que impiden alcanzar el objetivo prescrito por la norma final.

Consideremos, por ejemplo, la norma constitucional final N1 ("La República debe garantizar la salud de los ciudadanos") y la norma legislativa de conducta N2 ("Las acerías podrán producir sin instalar cortinas aislantes sobre los almacenes de carbón"). Las dos normas se refieren a conductas-tipo diferentes, por parte de sujetos diferentes. No son lógicamente incompatibles. Supongamos, sin embargo, que la no instalación de cortinas aislantes provoque una contaminación ambiental gravemente perjudicial para la salud de los ciudadanos que viven en las proximidades. En tal caso, habría que concluir que la norma N2 permite conductas que obstaculizan, que son condiciones *impeditivas* u *obstructivas* para, alcanzar la finalidad prescrita por la norma N1. Existe, por tanto, una incompatibilidad instrumental absoluta entre la norma N2 y la norma N1. Esta incompatibilidad constituye a la vez una forma de incompatibilidad ontológica. La vigencia de la norma N2 favorece la realización de un estado de cosas, de un mundo jurídico, distópico con respecto al mundo jurídico propugnado por la norma N1: un mundo en que la salud de determinados ciudadanos, lejos de estar garantizada, se ve seriamente comprometida por la realización de determinadas actividades industriales.

2.2.3. Antinomias instrumentales relativas

Una antinomia instrumental relativa es una incompatibilidad ontológica entre una norma final (que prescribe a una autoridad normativa perseguir un determina-

do objetivo) y una norma de conducta o constitutiva, la cual se produce cuando esta última norma prescribe conductas, o realiza estados de cosas, que resultan insuficientes para alcanzar el objetivo prescrito por la norma final.

Consideremos, por ejemplo, nuevamente la norma constitucional final N1 ("La República debe garantizar la salud de los ciudadanos") y la norma legislativa de conducta N3 ("Las acerías podrán producir instalando cortinas aislantes de tipo K1 en los almacenes de carbón"). Supongamos que la instalación de cortinas aislantes de tipo K1 no baste para evitar una grave contaminación ambiental perjudicial para la salud de los ciudadanos que viven en las proximidades, reduciéndola sólo en la medida de un 10%, mientras que la instalación de cortinas aislantes de tipo K2 lograría una reducción del 95% de las emisiones nocivas. En tal caso, debe concluirse que la norma N3 permite un comportamiento que constituye una *condición insuficiente* con respecto a la consecución de la finalidad prescrita por la norma N1. Existe, por tanto, una *incompatibilidad instrumental relativa* entre la norma N3 y la norma N1. Esta incompatibilidad constituye a la vez una forma de incompatibilidad ontológica. La vigencia de la norma N3 favorece la realización de un estado de cosas, de un mundo jurídico, distópico en relación con el mundo jurídico propugnado por la norma N1: un mundo en que la salud de algunos ciudadanos, lejos de estar plenamente garantizada, así como sería técnicamente posible, está en cambio protegida en una medida casi del todo insignificante.

2.2.4. Antinomias teleológicas

Una antinomia teleológica es una incompatibilidad ontológica entre dos normas finales, que se produce cuando, en relación con una conducta a regular, los objetivos que ambas normas exigen que se realicen no pueden realizarse al mismo tiempo.

Consideremos, por ejemplo, la norma constitucional N1 ("La República debe garantizar la salud de los ciudadanos") y la norma constitucional N4 ("La República debe garantizar el equilibrio presupuestario"). Supongamos que nos encontramos ante una pandemia cuya gestión requiere inversiones (por ejemplo, la construcción de nuevos hospitales) necesarias para garantizar la salud de los ciudadanos, pero tales que suponen un grave déficit presupuestario. Desde el punto de vista de la norma N1, la construcción de nuevos hospitales es algo que debe considerarse obligatorio. Consideraciones instrumentales justifican derivar de la norma constitucional final N1 ("La República debe garantizar la salud de los ciudadanos") la norma de conducta NC1 ("Si pandemia, entonces obligatorio construir nuevos hospitales"). Desde el punto de vista de la norma N4, en cambio, la construcción de nuevos hospitales es una conducta que debe considerarse prohibida. Consideraciones instrumentales justifican derivar de la norma constitucional final N4 ("La República debe garantizar el equilibrio presupuestario") la norma de conducta NC4 ("Si pan-

demia, entonces prohibido construir nuevos hospitales"). Una antinomia teleológica presenta pues una estructura compleja. Entre las normas de conducta derivadas NC1 y NC4 existe una antinomia lógica por contrariedad, simple, por superposición integral expresa (*supra*, § 2.1). Entre la norma de conducta NC4 y la norma final N1 existe una antinomia ontológica de tipo instrumental absoluta. E igualmente entre la norma de conducta NC1 y la norma final N4. La adopción de la norma de conducta NC1 realiza un mundo jurídico distópico en comparación con el mundo jurídico propugnado por la norma final N4. La adopción de la norma de conducta NC4 realiza un mundo jurídico distópico en comparación con el mundo jurídico propugnado por la norma final N1. ¿Cuál de los dos mundos *prima facie* distópicos debe considerarse tal *considerándolo todo*? La solución dependerá de cuál de los dos mundos jurídicos se considere que corresponde a la forma constitucionalmente correcta de establecer una jerarquía axiológica entre N1 y N4 (*infra*, § 6).

2.2.5. Antinomias axiológicas

Una antinomia axiológica, finalmente, es una incompatibilidad ontológica que se produce cuando algunas normas resultan en su conjunto incongruentes con la escala de valores presupuesta por las normas mismas, o bien establecida o presupuesta por otra norma o conjunto de normas.

Consideremos, por ejemplo, una norma constitucional compromisoria N1 ("La República reconoce la libertad personal como bien supremo")[6], una norma penal N2 ("Quien prive a alguien de la libertad personal será castigado con cinco días de prisión") y una norma penal N3 ("Quien destruya bienes muebles ajenos será castigado con diez años de prisión"). En su conjunto, las normas N2 y N3 son axiológicamente incompatibles con la norma N1. Si se mide el valor del bien jurídico protegido por ellas a la luz de la sanción penal establecida, el bien de la propiedad privada resulta ser objeto de una protección penal mucho más rigurosa que el bien de la libertad personal, aunque este sea el bien que la norma N1 reconoce como "supremo". Las normas N2 y N3 sí serían axiológicamente congruentes, en cambio, respecto de otra norma superior compromisoria N4 ("La República reconoce la propiedad privada como bien supremo"); la cual, sin embargo, en hipótesis no forma parte del derecho constitucional vigente. Si se quiere restablecer la congruencia axiológica entre las dos normas penales y la norma constitucional, habrá pues que

[6] Una norma constitucional es *compromisoria*, si, y solo si, a través de ella el Estado, la República, etc. toma posición a favor o en contra de ciertos valores, eventos, o estados de cosas. Por ejemplo, "reconociendo los derechos inviolables de todo ser humano", "reconociendo el derecho a una retribución adecuada a conducir una vida libre y digna", "rechazando la guerra como forma de resolución de las controversias internacionales", etc.

modificar una o las dos normas N2 y N3, adaptándolas a la escala de valores correspondiente a N1[7].

Una antinomia axiológica puede considerarse un caso especial de antinomia ontológica. Como sugiere el ejemplo, la vigencia sincrónica de *dos* normas, N2 y N3, realiza un estado de cosas, un mundo jurídico, que es distópico comparado con el mundo correspondiente a la norma N1.

Si de la norma compromisoria N1 se deriva una norma final, si se transforma N1 ("La República reconoce la libertad personal como bien supremo") en una norma prescriptiva final N1* ("La República debe garantizar la libertad personal como bien supremo"), la antinomia axiológica se transforma en una antinomia instrumental absoluta. Donde la vigencia sincrónica de las normas N2 y N3 es condición obstructiva para la realización de un mundo en que la libertad personal es tratada de bien supremo.

3. Código identificatorio y código resolutorio bien construido

La existencia de antinomias socava el buen funcionamiento (la racionalidad) de un orden jurídico en términos de coherencia interna y capacidad regulatoria, comprometiendo su valor ético-normativo.

Por un lado, la incompatibilidad lógica entre normas de conducta perjudica la idoneidad del orden jurídico para regular los comportamientos socialmente relevantes de los seres humanos (personas, ciudadanos) de una manera que sea – por lo menos formalmente – respetuosa de su dignidad y autonomía de agentes morales.

Por el otro, en un estado constitucional, la presencia de antinomias ontológicas entre normas constitucionales y normas formalmente inferiores es índice de que la constitución ha sido violada (antinomias de competencia, instrumentales absolutas, teleológicas, axiológicas) o, en todo caso, no ha sido plenamente respetada (antinomias instrumentales relativas) por las autoridades normativas inferiores y, en particular, por el legislador ordinario.

Por estas razones, se suele pensar en las antinomias como defectos de un orden jurídico que deben ser eliminados. Por estas razones, los ordenamientos jurídicos positivos contienen reglas, expresas o implícitas, que funcionan de "criterios" para la resolución de las antinomias: prescripciones, cuyo desarrollo y precisión compete normalmente a la cultura jurídica, que establecen *cuál* entre dos normas incompatibles *debe preferirse*, y *cómo* (en qué manera o con qué efectos) *debe preferirse*.

Sin embargo, la resolución de una antinomia supone la identificación de la an-

[7] Según sugiere la definición, puede pasar que la escala de valores sea establecida o presupuesta no ya por normas de nivel jerárquico formalmente superior, como en el ejemplo apenas proporcionado, sino por el mismo conjunto normativo (derivable de la misma ley o del mismo código) al cual pertenecen las dos normas axiológicamente incongruentes.

tinomia. El fenómeno de las antinomias se presenta pues a todo operador jurídico como doblemente problemático. Lidiar con las antinomias, y, en particular, con las antinomias constitucionales (en sentido propio o impropio) requiere saber cómo *identificarlas* y, una vez identificadas, cómo *resolverlas*.

Si nos preguntamos por las herramientas de que un operador jurídico garantista podría servirse para llevar a cabo ambas operaciones, podemos pensar en cierto *código identificatorio* (para la identificación de antinomias constitucionales) y en cierto *código resolutorio* (para la resolución de antinomias constitucionales).

Un *código identificatorio* es un *conjunto finito* de reglas identificatorias, que un operador jurídico compone[8] y utiliza, expresa o tácitamente, en aras de *establecer la presencia* de una antinomia constitucional.

Un *código identificatorio* es *bien construido*, si, y solo si, consiste en un conjunto coherente y completo de instrucciones identificatorias. De manera que, al utilizarlo, el operador jurídico siempre llegará a una, y una sola, tesis identificatoria: según las circunstancias, positiva (si hay antinomia constitucional) o negativa (si no hay antinomia constitucional).

Un código identificatorio bien construido se compone de *reglas identificatorias* de dos tipos: reglas identificatorias en sentido estricto (*reglas de identificación*) y reglas identificatorias metodológicas (*meta-reglas identificatoria*). Contiene, en particular:

(a) una *meta-regla de propósito*, la cual establece el fin u objetivo que el operador jurídico debe perseguir al identificar antinomias constitucionales;
(b) una *meta-regla selectiva*, la cual establece las reglas de identificación de que el operador debe servirse, y puede ser *monista* (una sola regla de identificación), *pluralista* (dos o más reglas de identificación), o bien *holista* (todas las reglas de identificación en hipótesis utilizables según la cultura jurídica del tiempo);
(c) una *meta-regla procedimental*, la cual establece *cómo* utilizar las reglas de identificación seleccionadas (*si* conforme a un orden de precedencia, y *cuál*);
(d) una *meta-regla preferencial*, la cual establece *cuál* resultado identificatorio debe adoptarse como constitucionalmente correcto considerándolo todo, funcionando así de regla de clausura;
(e) una o más *reglas de identificación*, según el contenido de la meta-regla selectiva, cada una de las cuales se corresponde a una instrucción sobre cómo establecer la presencia de una antinomia, apuntando a ciertos *recursos identificatorios*.

En cambio, un *código resolutorio* es un *conjunto finito* de reglas resolutorias, que un operador jurídico compone y utiliza, expresa o tácitamente, en aras de *resolver* un problema de incompatibilidad normativa (si es un juez), o bien de *formular* una *propuesta de resolución* (si es una jurista o un abogado).

[8] Sobre la base del derecho vigente, de la cultura metodológica del tiempo, de su ideología del derecho, y de eventuales innovaciones metodológicas aportadas por él mismo. Son estas las *fuentes* de los códigos identificatorios, así como de los resolutorios.

Un *código resolutorio* es *bien construido*, si, y solo si, consiste en un conjunto coherente y completo de instrucciones resolutorias. De manera que, al utilizarlo, el operador jurídico siempre llegará a una (y una sola) tesis resolutoria: a una, y una sola, forma de resolución de la antinomia de que se ocupe.

Un código resolutorio bien construido se compone de *reglas resolutorias* de dos tipos: reglas resolutorias en sentido estricto (*reglas de prioridad*) y reglas resolutorias metodológicas (*meta-reglas resolutorias*). Al igual que su homólogo identificatorio, contiene, en particular:

(a) una *meta-regla de propósito*, la cual establece el fin u objetivo que el operador jurídico debe perseguir al resolver antinomias constitucionales;

(b) una *meta-regla selectiva*, la cual establece las reglas de prioridad de que el operador debe servirse, y puede ser *monista* (una sola regla de prioridad), *pluralista* (dos o más reglas de prioridad), o bien *holista* (todas las reglas de prioridad en hipótesis utilizables según la cultura jurídica del tiempo);

(c) una *meta-regla procedimental*, la cual establece *cómo* utilizar las reglas de prioridad seleccionadas (*si* conforme a un orden de precedencia, y *cuál*);

(d) una *meta-regla preferencial*, la cual establece *cuál* resultado resolutorio debe adoptarse como constitucionalmente correcto considerándolo todo, funcionando así de regla de clausura;

(e) una o más *reglas de prioridad*, según el contenido de la meta-regla selectiva, cada una de las cuales se corresponde a una instrucción sobre cómo establecer la prevalencia de una norma sobre otra, apuntando a ciertos *recursos resolutorios*.

Adoptando una definición un poco tosca, un operador jurídico es *garantista*, si, y solo si, concibe a la democracia constitucional como un mecanismo entregado a la protección de los derechos fundamentales de libertad y sociales de las personas humanas, rechazando a la vez cualquier concepción mínima, mayoritaria, populista, neocón o autoritaria. Si nos ponemos en la perspectiva de operadores jurídicos garantistas, podemos pensar, a modo de experimento mental, en tres códigos garantistas bien construidos[9].

El primero concierne a la *identificación* de antinomias constitucionalmente relevantes entre normas constitucionales y normas inferiores del mismo orden jurídico (*infra*, § 4.)

El segundo concierne a la *resolución* de antinomias constitucionalmente relevantes entre normas constitucionales y normas inferiores del mismo orden jurídico (*infra*, § 5.).

El tercero concierne, en fin, a la *resolución* de antinomias constitucionales en sentido propio, a saber, entre normas constitucionales del mismo orden jurídico (*infra*, § 6.).

[9] Dejaré a la imaginación de las lectoras el dibujo de un código identificatorio garantista relativo a las antinomias constitucionales en sentido propio.

4. Un código garantista ben construido para identificar antinomias constitucionalmente relevantes

Si, por vía de un somero experimento mental, pensamos en un código garantista bien construido para identificar antinomias entre normas constitucionales y normas inferiores (a continuación: antinomias constitucionalmente relevantes), podríamos imaginar un código compuesto de nueve reglas identificatorias: cuatro meta-reglas (respectivamente: de propósito, selectiva, procedimental, preferencial) y cinco reglas de identificación.

(1) La *meta-regla de propósito* establece un *propósito maximalista*: promover la máxima expansión posible del control (centralizado) de constitucionalidad. De forma que *se elimine*, en lo posible, *cualquier* norma y *cualquier* disposición inferior (de las clases relevantes) sospecha de inconstitucionalidad, rechazando toda actitud de *confianza* o *deferencia metódica* hacia las fuentes subordinadas, y contribuyendo así a garantizar la supremacía de la constitución.

(2) La *meta-regla selectiva* tiene carácter de regla *pluralista*. A la luz de lo que pasa en las experiencias jurídicas actuales, podría apuntar, en particular, a cinco reglas de identificación de antinomias constitucionalmente relevantes:
   (a) la regla de interpretación garantista;
   (b) la regla de razonabilidad intrínseca;
   (c) la regla de razonabilidad comparativa;
   (d) la regla de ponderación;
   (e) la regla de proporcionalidad.

(3) La *meta-regla procedimental* se presenta como una de regla jerárquica de oro (*hierarchical rule of thumb*). Prescribe utilizar las reglas de identificación que, de vez en cuando, se revelen más adecuadas a las circunstancias, siempre bajo la guía del propósito maximalista que debe inspirar toda operación identificatoria, ascribiendo prioridad a las tres primeras reglas de identificación, y sugeriendo una actitud de sospecha frente a las dos demás.

(4) La *meta-regla preferencial*, en fin, desempeña la función de *regla de clausura.* Estableciendo que si la utilización de las reglas de identificación conforme a la meta-regla procedimental lleva a un resultado dudoso (se puede razonablemente sostener que hay, como que no hay, antinomia), se debe optar por la tesis positiva (*in dubio pro constitutione*).

Pasamos a ver brevemente las cinco reglas de identificación.

(1) La *regla de interpretación garantista* – la primera regla de identificación – impone al operador un doble esfuerzo interpretativo.

Por un lado, le requiere interpretar las disposiciones constitucionales en manera tal que se amplíe al máximo el ámbito de aplicación de las normas constitucionales, tanto expresas como implícitas ("hiper" o "sobre" interpretación constitucional),

utilizando antes que nada las reglas de la interpretación sistemática y evolutiva[10].

Por el otro, le requiere interpretar las disposiciones inferiores evitando, o limitando al máximo, el recurso a la interpretación conforme[11].

Todo ello, teniendo en cuenta que existen no sólo antinomias lógicas (*supra*, § 2.1), sino también, y predominantemente, antinomias ontológicas, que son más difíciles de identificar y, por lo tanto, más insidiosas (*supra*, § 2.2).

Al utilizar la regla de interpretación garantista, el operador jurídico debe llevar a cabo una *estrategia especificacionista*, atenta a identificar de una forma precisa el ámbito de aplicación de la norma constitucional en relación con el ámbito de aplicación de la norma inferior. Adoptando esta estrategia – optando por un enfoque categorial – el intérprete garantista debe:

(a) identificar las conductas-tipo (clases de conductas) que, respectivamente, resultan protegidas o no protegidas por la norma constitucional;
(b) identificar las conductas-tipo disciplinadas por la norma inferior;
(c) comparar el ámbito de aplicación de la norma constitucional con el ámbito de aplicación de la norma inferior[12].

De forma que hay antinomia, si, y solo si, la norma inferior prohíbe, sanciona o, en todo caso, afecta negativamente a una conducta-tipo protegida por la norma constitucional. En tal caso, en la fase subsecuente de la resolución, será menester aplicar la regla de superioridad formal (*infra*, § 5). Si, en cambio, el ámbito de aplicación de la norma inferior no se sobrepone al ámbito de las conductas-tipo protegidas por la norma constitucional, no hay antinomia. Por lo tanto, no hace falta pasar a la fase resolutoria, ni aplicar alguna regla de prioridad.

(2) La *regla de razonabilidad intrínseca* – la segunda regla de identificación – requiere evaluar si la norma inferior sea justificable desde el punto de vista de su *razonabilidad* o *racionalidad interna*, *intrínseca*, o *absoluta*, asumiendo como parámetro constitucional el proteiforme "principio de razonabilidad" o "principio" (o "canon") "de racionalidad", entendido de meta-norma de competencia que prohíbe al legislador ordinario dictar normas "internamente" irrazonables o irracionales[13].

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[10] Sobre este último punto véase, por ejemplo, Ferrajoli 2012: 211 ss.; Ferrajoli 2013: 277 ss.

[11] La regla de propósito de un código identificatorio de corte mayoritario o populista, en cambio, prescribe típicamente que, al identificar antinomias entre normas constitucionales y normas de ley, siempre se tribute el máximo respeto al legislador democráticamente elegido, limitando al máximo las situaciones de incompatibilidad, presumiendo metódicamente la constitucionalidad de las leyes, y adoptando una política de interpretación minimalista e hiper-restrictiva del texto constitucional (de "hipo-interpretación" o "sub-interpretación" constitucional), combinada con una política de generosa interpretación conforme de las disposiciones de ley.

[12] Véase, por ejemplo, Ely 1975: 1482-1508, y las sentencias de la Corte Suprema de los EE. UU. en los casos Brandenburg *v.* Ohio (1969) y Cohen *v.* California (1971).

[13] Véase, por ejemplo, Paladin 1984: 219 ss., y las sentencias de la Corte constitucional italiana nn. 91/1973, 98/1975, 151/1975, 215/1983, 300/1983.

Conforme a esta regla, hay antinomia, por ejemplo, si la norma inferior se sea revelada intrínsicamente irrazonable o internamente irracional:

(a) por ser un medio instrumentalmente inadecuado para promover o realizar el fin en vista del cual ha sido dictada (*instrumento irracional*);

(b) por ser un medio instrumentalmente adecuado para promover o realizar un fin que, sin embargo, es fruto de una ponderación irracional de los intereses (*objetivo irracional*)[14];

(c) por tener un contenido en sí mismo irracional (*contenido absurdo*)[15].

(3) La *regla de razonabilidad comparativa* – la tercera regla de identificación – requiere evaluar si la norma inferior sea justificable desde el punto de vista del principio de igualdad formal o igualdad ante la ley, entendido de meta-norma de competencia que prohíbe dictar normas que introduzcan diferencias o equiparaciones irrazonables.

Conforme a esta regla, hay antinomia en situaciones de dos tipos:

(a) si la norma inferior trata casos (conductas-tipo) similares de manera diferente – por ejemplo, en relación con la asistencia a los hijos menores, atribuyendo cierto derecho a las madres trabajadoras y a la vez negándolo a los padres trabajadores (*diferenciación irrazonable*);

(b) si la norma inferior trata casos (conductas-tipo) diferentes de la misma manera – por ejemplo, sancionando penalmente tanto la ayuda al suicidio no terapéutico, como la ayuda al suicidio terapéutico (*asimilación irrazonable*)[16].

(4) La *regla de ponderación* – la cuarta regla de identificación – requiere establecer la existencia de antinomias entre normas constitucionales y normas inferiores aplicando un conjunto de criterios que involucra típicamente una cualquier forma de análisis coste-beneficio[17].

Por ejemplo, según una cierta manera de concebir la regla de ponderación, en aras de establecer si hay antinomia, o no, entre cierto derecho constitucional y una norma inferior que introduce cierta limitación a cierta conducta-tipo (por ejemplo, prohibiéndola y sancionándola penalmente), es menester considerar, en secuencia:

(a) si la limitación sirve para promover o realizar un fin (un interés) constitucionalmente legítimo;

(b) si la limitación sirve para promover o realizar un fin (un interés) sustantivo (imperioso, notable, de importancia sobresaliente);

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[14] Corte constitucional italiana, sentencia n. 300/1983.

[15] En la sentencia n. 215/1983, la Corte constitucional italiana ha considerado "en absoluto irraa cional", esto es, intrínsicamente absurda, una norma que imponía al juez disponer la *detención preventiva* para delitos sancionados solamente con penas de carácter pecuniario.

[16] Véase, por ejemplo, Paladin 1984: 219 ss., y las sentencias de la Corte constitucional italiana nn. 53/1958; 21/1961; 26/1979, 103/1982, 242/2019; Bin 2023: 323-334.

[17] Véase, por ejemplo, Ely 1975; Aleinikoff 1987: 943-1005, y las sentencias de la Corte Suprema de los EE.UU. en los casos United States *v.* O'Brien (1968), New York *v.* Ferber (1982), Tennessee *v.* Garner (1985), Mathews *v.* Eldridge (1976); Bin 1992; Cohen-Eliya, Porat 2013; Bin 2022: 257-270.

(c) si la limitación representa el medio mínimo necesario para promover o realizar el fin sustantivo y legítimo;
(d) si los beneficios que se derivan de la limitación son presumible o acertadamente superiores a los costes para los intereses que la limitación penaliza[18].

(5) Finalmente, la *regla de proporcionalidad* – la quinta regla de identificación – requiere que la existencia de una antinomia se establezca valorando la *proporcionalidad* de la norma inferior frente a cierta norma constitucional que, *prima facie*, parece resultar negativamente afectada por la primera.

En su variante más amplia, la regla se articula en seis pasos imponiendo considerar, en secuencia:

(a) si el fin de (el interés protegido por) la norma inferior sea constitucionalmente legítimo (legitimidad del fin de la norma inferior);
(b) si el fin legítimo de (el interés protegido por) la norma inferior sea sustantivo (importancia del fin de la norma inferior);
(c) si el medio que la norma inferior prescribe sea constitucionalmente legítimo (legitimidad del medio adoptado por la norma inferior);
(d) si el medio legítimo sea instrumentalmente adecuado al objetivo que la norma inferior se propone conseguir o promover (adecuación instrumental del medio adoptado por la norma inferior);
(e) si el medio legítimo sea necesario, a saber, corresponda a la forma menos onerosa de promover o realizar el fin (necesidad del medio adoptado por la norma inferior);
(f) si el medio sea, por último, proporcionado (no desproporcionado): a saber, si los costes de la interferencia negativa sobre el bien protegido por cierta norma constitucional sean inferiores a los beneficios que se consiguen al perseguir el fin de la norma inferior (proporcionalidad en sentido estricto del medio adoptado por la norma inferior)[19].

Se habrá notado que he situado entre las reglas de *identificación* de las antinomias constitucionalmente relevantes algunas reglas (criterios, principios, técnicas) que se suele concebir como aptas, más bien, para la *resolución* de antinomias. Pienso, en particular, en la regla de ponderación y en la regla de proporcionalidad. Mi explicación – bastante simple – es la siguiente.

En relación con la argumentación constitucional, los ambiguos e indeterminados rótulos "ponderación" y "proporcionalidad" se refieren (por lo menos) a dos conjuntos distintos de herramientas metodológicas.

Por un lado, ellos denominan reglas utilizables para la identificación de antinomias entre normas constitucionales y normas inferiores (antinomias constitucionalmente relevantes).

[18] Hay formas diferentes de entender los criterios de la regla de ponderación. La forma en el texto se corresponde a la empleada por la Corte Suprema de los EE. UU. en la sentencia New York *v.* Ferber (1982).

[19] Véase, por ejemplo, Cohen-Eliya, Porat 2013; Heintzen 2015.

Por el otro, ellos denominan reglas o criterios utilizables para la resolución de antinomias entre normas constitucionales (antinomias constitucionales en sentido propio).

Por esta razón, al esbozar un código resolutorio garantista para antinomias entre normas constitucionales, propondré prescindir de tales términos (*infra*, §§ 6 y 7).

5. Un código garantista ben construido para resolver antinomias constitucionalmente relevantes

Un código garantista bien construido para resolver antinomias entre normas constitucionales y normas inferiores es bastante simple. En forma de un somero experimento mental, puede imaginarse como compuesto por tres reglas resolutorias: una *meta-regla de propósito*, una *meta-regla selectiva* y una *regla de prioridad*.

La *meta-regla de propósito* establece que, al resolver antinomias o proponer maneras de resolverlas, el operador jurídico debe perseguir el objetivo de asegurar la superioridad (soberanía, supremacía) efectiva de la constitución, y en particular de sus normas adscriptivas de derechos fundamentales de libertad y sociales, al respecto de toda norma inferior. Ya hemos visto, esbozando un código identificatorio garantista (*supra*, § 4), como este objetivo tenga que ser perseguido ya a la hora de *identificar* las antinomias entre normas constitucionales y normas inferiores. Cómo, en otros términos, la actitud frente a la identificación de este tipo de antinomias juegue un papel medular.

La *meta-regla* resolutoria *selectiva* es de carácter *monista*. Identifica una, y solo una, regla de prioridad: un, y un solo, criterio resolutorio, que el operador debe utilizar en vista del objetivo enunciado por la meta-regla de propósito. Tratase de la *regla de superioridad formal* (*lex superior formalis*, o, simplemente, *lex superior*): la norma de nivel formalmente superior – la norma de mayor valor institucional formal, la que vale institucionalmente más por razones genealógicas y topográficas – debe ser preferida a la norma de nivel formalmente inferior: a la norma que, por razones genealógicas y topográficas, vale institucionalmente menos. Cualquier norma constitucional, explícita o implícita, debe ser preferida, en caso de incompatibilidad, a cualquier norma inferior. Las consecuencias de la preferencia quedan establecidas por las normas positivas que regulan los efectos de las declaraciones judiciales de inconstitucionalidad.

6. Un código garantista bien construido para resolver antinomias entre normas constitucionales

Un código garantista bien construido para resolver antinomias entre normas constitucionales tiene un contenido bastante amplio y articulado.

En forma, nuevamente, de un somero experimento mental, podemos imaginar

que el código garantista, el código para uso de operadores garantistas, se componga de ocho reglas resolutorias: tres *meta-reglas* – respectivamente: *de propósito*, *selectiva pluralista* y *procedimental jerárquica* – y cinco reglas de prioridad.

(1) La *meta-regla de propósito* prescribe que la resolución de las antinomias entre normas constitucionales debe garantizar, en todo caso, la primacía de los principios y valores "fundamentales", así como se desprenden a partir de las disposiciones atributivas de libertades y derechos sociales, sobre las normas constitucionales cuyo contenido sea "menos fundamental" o "no fundamental".

(2) La *meta-regla selectiva* es de carácter *pluralista*. Apunta a cinco reglas de prioridad que el operador debe utilizar, conforme a la meta-regla procedimental, para resolver antinomias entre normas constitucionales. A saber:
   (a) la regla de especialidad (*lex specialis*);
   (b) la regla cronológica (*lex posterior*);
   (c) la regla de superioridad sustantiva en abstracto (*lex superior substantialis in abstracto*);
   (d) la regla de superioridad sustantiva en concreto (*lex superior substantialis in concreto*);
   (e) la regla de conciliación.

Las primeras dos reglas son bien conocidas, pues se encuentran canonizadas en la tradición metodológica desde siglos. Para las demás, estoy utilizando (y proponiendo utilizar) una denominación diferente, y quizás un poco más transparente, de la denominación con la cual se suele tratarlas (o tratar algo parecido). Aludo al rótulo metafórico y oscuro de "ponderación" ("balance", "equilibrio").

La *regla de especialidad* (*lex specialis*) establece que, dada una antinomia lógica por inclusión entre dos normas constitucionales, la norma constitucional de especie (especial) debe ser preferida a la norma constitucional de género (general) (*supra*, § 2.2). El resultado de la resolución de la antinomia suele consistir en una modificación de la forma gramatical original de la norma constitucional de género. La modificación consiste, en particular, en una *especificación*. La norma de género se reformula en manera de circunscribir su ámbito de aplicación a la *conducta-tipo complementaria* respecto de la conducta-tipo regulada por la norma de especie. De este modo se garantiza la coexistencia no conflictiva de las dos normas, cuyos respectivos ámbitos de aplicación encajan ahora perfectamente, dejando de superponerse.

La *regla cronológica* (*lex posterior*) establece que, dada una antinomia (lógica u ontológica) entre dos normas constitucionales promulgadas en épocas diferentes, la norma constitucional más reciente debe preferirse a la norma más antigua. El resultado de la resolución de la antinomia suele consistir en la derogación total o parcial de la norma constitucional más antigua.

La *regla de superioridad sustantiva en abstracto* (*lex superior substantialis in abstracto*) establece que, dada una antinomia (lógica u ontológica) entre dos normas constitucionales, la norma constitucional dotada de *mayor valor ético-normativo en*

abstracto (la norma constitucional cuyo contenido, en sí considerado, vale éticamente más "desde la constitución") debe ser preferida a la norma constitucional dotada de *menor valor ético-normativo en abstracto* (cuyo contenido, en sí considerado, vale éticamente menos "desde la constitución"). El uso de la regla de superioridad sustantiva en abstracto requiere suponer la existencia de una jerarquía axiológica fija entre normas constitucionales. Que, por ejemplo, sea correcto sostener, a la luz de la constitución, que los principios de seguridad, libertad y dignidad humana tienen en sí mismos mayor valor ético-normativo que el principio de libre iniciativa económica privada. El resultado de la resolución de la antinomia suele consistir, a la vez, en el uso (aplicación) de la norma predominante y en el no uso (no-aplicación) de la norma vencida.

La *regla de superioridad sustantiva en concreto* (*lex superior substantialis in concreto*) establece que, dada una antinomia (lógica u ontológica) entre dos normas constitucionales, la norma constitucional dotada de *mayor valor ético-normativo en concreto* debe ser preferida a la norma constitucional dotada de *menor valor ético-normativo en concreto*. El valor ético-normativo en concreto de las dos normas es el valor que se les puede atribuir considerando, no ya su valor ético-normativo abstracto (que depende, como hemos visto, de su contenido en sí considerado), sino del valor ético-normativo de la disciplina de una cierta conducta-tipo que ellas, respectivamente, serían aptas para justificar. Es esta regla de prioridad la que se utiliza, aparentemente, cuando se afirma, por ejemplo, que el derecho al honor debe ser preferido al derecho a la libertad de prensa, *si* la conducta-tipo de quien pretenda ejercer este último derecho consiste en difundir noticias falsas o culpablemente no verificadas, o bien carentes de interés público, o bien con modos de expresión incontinentes.

Por último, la *regla de conciliación* establece que, delante de una antinomia (lógica u ontológica) entre dos normas constitucionales, se debe adoptar la solución que, en lo posible, satisfaga a la vez las exigencias protegidas por cada una de ellas.

La meta-regla selectiva, como sabemos, solo establece *cuáles* reglas de prioridad deben utilizarse. No dice nada, empero, acerca del *cómo* utilizarlas: de la manera, y eventualmente de la secuencia, en que utilizarlas. En un código resolutorio garantista bien construido, de este problema se encarga una meta-regla procedimental jerárquica.

(3) La *meta-regla procedimental jerárquica* establece un *orden de preferencia* en la aplicación de las cinco reglas de prioridad identificadas por la meta-regla selectiva. A grandes rasgos, el orden podría ser el siguiente.

(I) En primer lugar, hay que aplicar la regla de *superioridad sustantiva en abstracto*. Entre dos normas constitucionales antinómicas, la norma que vale éticamente más en abstracto debe ser preferida a la norma que vale éticamente menos en abstracto. Y eso, aunque esta última sea posterior, especial, podría valer más en concreto, o habría espacio para una solución conciliatoria. La regla de superioridad sustantiva en abstracto es, en suma, la regla de prioridad suprema en un código resolutorio

garantista: prioritaria en relación con todas las demás reglas de prioridad (cronológica, de especialidad, de superioridad sustantiva en concreto, de conciliación).

Parece útil esclarecer un poco más su manera de funcionar.

Supongamos que, en relación con un plan de inversiones necesarias (instrumentalmente adecuadas) y no derrochadoras (eficientes) para la modernización del servicio sanitario nacional, sea menester resolver una antinomia entre el principio de tutela de la salud (P1: "La República debe garantizar la salud como derecho fundamental de toda persona"), por un lado, y el principio de equilibrio presupuestario (P2: "La República debe garantizar el equilibrio presupuestario"), por el otro.

Si el valor ético-normativo abstracto del principio de tutela de la salud es superior al valor ético-normativo abstracto del principio de equilibrio presupuestario, si el principio P1 vale éticamente más, en sí mismo, que el principio P2, entonces, conforme a regla de superioridad sustantiva en abstracto, se debe, a la vez, aplicar P1 y no-aplicar P2, considerando las inversiones como constitucionalmente permitidas o incluso obligatorias.

Nótese que, en términos de los llamados "principio de proporcionalidad" y "análisis de proporcionalidad"[20], la aplicación de la regla de superioridad sustantiva en abstracto requiere considerar solo dos rasgos: la "idoneidad" (adecuación instrumental) y la "necesidad" (eficiencia) de la medida en cuestión (en el ejemplo: el plan de inversiones para modernizar el servicio sanitario nacional). En cambio, un tercer rasgo, el rasgo medular, la "proporcionalidad en sentido estricto", no puede ser tomado en consideración. Desde una perspectiva garantista, esto puede admitirse, si, y solo si, las normas constitucionales antinómicas tienen en hipótesis el mismo valor ético-normativo abstracto (véase *infra*, punto (V)).

En este respecto, un partidario del análisis de proporcionalidad (un "proporcionalista") podría objetar que la precedencia en todo caso de la regla de superioridad sustantiva en abstracto es irrazonable. Que implica rehusar de considerar la posibilidad de que una misma norma constitucional valga, a la vez, éticamente más en abstracto y éticamente menos en concreto que otra norma constitucional. Piense-se en el caso siguiente.

Supongamos que una industria adopte un nuevo proceso productivo el cual hace posible doblar la producción y, por efecto de eso, aumentar de una manera relevante las ganancias de los inversores y el salario de los empleados. Supongamos, sin embargo, que el nuevo proceso productivo cause sistemáticamente a todo empleado, cada año, una enfermedad consistente en una gripe, con fiebre de 38° durante una semana, sin otras consecuencias. Supongamos que la cuestión de si el nuevo proceso productivo sea constitucionalmente lícito llegue al tribunal constitucional, y que el tribunal opine que, en aras de decidir, hace falta resolver una antinomia (teleológica)

[20] Sobre estos temas, además de las obras citadas antes, en las notas 14 y 16, véase, por ejemplo, Morrone 2014; Alexy, 2021: Parte II.

entre el principio de tutela de la salud (P1: "La República debe garantizar la salud como derecho fundamental de toda persona") y el principio de libertad de iniciativa económica privada (P3: "La República debe garantizar la libertad de iniciativa económica privada"). Ahora bien: si se estima que el principio P1 valga éticamente más en abstracto que el principio P2, y se aplica por ende la regla de superioridad sustantiva en abstracto, es menester decidir por el carácter constitucionalmente ilícito del nuevo proceso productivo. Sin embargo, un análisis costes-beneficios sugiere que una semana de gripe cada año para cada empleado vale económicamente mucho menos que las pérdidas económicas – para inversores, empleados, y la sociedad en su conjunto – de reducir la producción a la mitad. De forma que se puede sostener que el principio de libertad de iniciativa económica privada (P3), que vale éticamente menos en abstracto, valga éticamente más en concreto, siendo también esta última libertad algo de éticamente valioso para la constitución.

El argumento del proporcionalista, se note, sugiere abandonar la regla de superioridad sustantiva en abstracto y adoptar, en cambio, como regla de prioridad principal, el principio de proporcionalidad o la regla de ponderación. ¿Qué podría replicar un operador jurídico garantista?

Puede imaginarse una respuesta articulada en dos puntos.

En primer lugar, según sostiene el garantista, hace falta considerar si la tutela constitucional de la salud *requiera* prohibir el empleo del nuevo proceso productivo. Hace falta considerar, en otros términos, la idoneidad (adecuación instrumental) de la prohibición en relación con la tutela constitucional de la salud. Por un lado, se podría sostener que sí, que sea idónea: eliminar la causa de una gripe que afecta a centenares de empleados es tutelar la salud de las personas. Por el otro, sin embargo, se podría sostener que no, que no sea idónea: pues la tutela constitucional de la salud, aun entendiéndola de una manera garantista, *no* abarca la protección de las personas contra una gripe leve, temporánea y sin efectos.

Si se opta por la segunda alternativa, se respeta la primacía ética abstracta del principio de tutela de la salud, concluyendo que el principio, considerándolo en sí mismo (aunque a la luz de las circunstancias), no exige prohibir el nuevo proceso productivo, sino que justifica su permisión.

Si se opta por la primera alternativa, en cambio, hace falta considerar si la prohibición, además de idónea, sea también necesaria (eficiente). Aquí caben dudas. Quizás hay maneras menos costosas de prevenir la gripe. Si las hay, hace falta permitir el empleo del nuevo proceso productivo, condicionándolo a la adopción de ciertas medidas de prevención. Si no las hay, si no hay otro remedio para garantizar la salud de los empleados, entonces sí, cabe concluir que la prohibición del nuevo proceso sea constitucionalmente justificada. La decisión, aunque pueda parecer absurda, sería la única compatible con la superioridad sustantiva abstracta del principio de tutela de la salud. La única compatible con la idea, propia del garantismo, de la supremacía de los derechos fundamentales de libertad y sociales.

La réplica garantista sugiere un par de consideraciones que merece la pena expresar.

Hay por lo menos dos maneras diferentes de ser garantistas. Una manera (digamos) menos intransigente, más razonable, y una manera (digamos) más intransigente, menos razonable. El garantismo más razonable coincide, en el ejemplo, con la postura que excluye la relevancia constitucional de la gripe leve, temporánea y sin efectos. La distinción, más allá del ejemplo, resalta que el garantismo no es una postura monolítica. Y que un punto crucial al respecto se encuentra en la manera de entender, precisar y desarrollar el alcance de los derechos fundamentales éticamente supremos.

Ambas variantes de garantismo convergen en tomar en serio la idea de que hay derechos fundamentales dotados de primacía ético-normativa abstracta, y que estos exigen que su aplicación dependa de consideraciones que atañen a los mismos derechos de que se trate, y no a otros derechos o intereses éticamente menos valiosos. Ambas variantes rechazan así la idea, extendida en la "edad de la ponderación", según la cual *cualquier* derecho fundamental es ("necesariamente") apto para toda forma de compromiso, de negociación, de "balanceo", de "ponderación", y puede ser vencido por exigencias de menor valor constitucional.

Con esto, podemos seguir en la exposición de las otras articulaciones de la meta-regla procedimental.

(II) Si dos normas constitucionales antinómicas tienen el mismo valor ético-normativo abstracto y no son sincrónicas, debe aplicarse la *regla cronológica*: la norma constitucional posterior debe preferirse a la norma constitucional anterior.

(III) Si, dadas dos normas constitucionales antinómicas de *igual valor ético-normativo abstracto* y *no sincrónicas*, la norma constitucional *anterior* es una *norma de especie* y la norma constitucional *posterior* es una *norma de género*, se aplicará aquella norma, entre las dos, cuyo uso promueva o favorezca mejor la garantía global de los principios y valores fundamentales.

(IV) Si dos normas constitucionales antinómicas tienen el *mismo valor ético-normativo abstracto*, son *sincrónicas*, y están en una *relación de especie a género*, debe aplicarse la *regla de especialidad:* la norma constitucional especial (de especie) debe preferirse a la norma constitucional general (de género).

(V) Si dos normas constitucionales antinómicas tienen el *mismo valor ético-normativo abstracto*, son *sincrónicas* y *no* están en una *relación de especie a género*, debe aplicarse la *regla de superioridad sustantiva en concreto*: la norma constitucional que, en relación con cierta conducta-tipo, justifica la disciplina dotada de mayor valor ético-normativo (desde la constitución) debe ser preferida a la norma constitucional que, en relación con la misma conducta-tipo, justifica una disciplina dotada de menor valor ético-normativo (desde la constitución).

Supongamos que es menester determinar el límite de velocidad constitucionalmente correcto en las carreteras urbanas, y que tal determinación requiera resolver una antinomia (teleológica) entre el principio de tutela de la salud (P1: "La Repú-

blica debe garantizar la salud como derecho fundamental de toda persona") y el principio de tutela de la libertad personal (P4: "La República debe garantizar la libertad personal como derecho fundamental de toda persona"), asumiendo que los dos principios tengan el mismo valor ético-normativo abstracto y sean sincrónicos.

Supongamos, además, que el principio de tutela de la salud (P1) justifique como razonable (adecuado) el límite de velocidad de 30 km/h; mientras que el principio de tutela de la libertad personal (P4) justifique como razonable (adecuado) el límite de 50 km/h.

En esta situación, al principio P1 corresponde una disciplina que impone una velocidad máxima de 30 km/h. (R1: **¬P**V>30km/h.). Y al principio P4 corresponde, en cambio, una disciplina que impone una velocidad máxima de 50 km/h. (R4: **¬P**V>50km/h.). ¿Cuál es la disciplina constitucionalmente correcta, considerándolo todo?

Como los dos principios tienen en hipótesis el mismo valor ético-normativo abstracto, la solución pasa por medir su respectivo valor ético-normativo en concreto. Esto requiere calcular los costes y los beneficios de cada una de las dos reglas alternativas desde el punto de vista de cada principio en conflicto. En términos, por ejemplo: de la reducción del número de los muertos y heridos en los accidentes automovilísticos; de la fluidez de la circulación y la reducción del tiempo de las transferencias urbanas; del nivel de contaminación ambiental correspondiente a los diferentes límites; de la intensidad del ruido en las carreteras públicas; etc.

Supongamos que la adopción de la regla R1 aparezca en el conjunto más ventajosas que la adopción de la regla R4. En tal caso, cabe concluir que el principio P1 vale éticamente más en concreto que el principio P4. Por lo tanto, P1 debe ser preferido a P4: se debe aplicar P1 y no aplicar P4. Lo que involucra adoptar la regla R1 y rechazar la regla R4.

¿Qué hacer si, al aplicar la regla de superioridad sustantiva en concreto, ocurre que las normas constitucionales antinómicas tienen el mismo valor ético-normativo concreto? ¿Qué hacer, además, si tal valor queda indeterminado o dudoso?

En el primer caso, cualquier resolución de la antinomia, a favor bien de la una o bien de la otra de las normas en conflicto, es constitucionalmente correcta. En el segundo caso, es menester aplicar la última regla de prioridad que hemos encontrado listada en la meta-regla selectiva: la regla de conciliación

(VI) Si dos normas constitucionales antinómicas tienen el *mismo valor ético-normativo abstracto*, son *sincrónicas*, *no* están en una *relación de especie a género*, y *tienen un valor ético-normativo concreto* indeterminado o dudoso, debe aplicarse la *regla de conciliación*: se debe adoptar la solución que, en lo posible, satisfaga a la vez las exigencias protegidas por cada una de las dos normas en conflicto.

Supongamos nuevamente que es menester determinar el límite de velocidad constitucionalmente correcto en las carreteras urbanas y que tal determinación requiere resolver una antinomia (teleológica) entre el principio de tutela de la salud

(P1: "La República debe garantizar la salud como derecho fundamental de toda persona") y el principio de tutela de la libertad personal (P4: "La República debe garantizar la libertad personal como derecho fundamental de toda persona"), asumiendo, como antes, que los dos principios tengan el mismo valor ético-normativo abstracto y sean sincrónicos.

Supongamos, además:

(a) que el principio P1 justifica como razonable (adecuado) todo límite de velocidad comprendido entre 30 y 50 km/h;
(b) que el principio P4 justifica como razonable (adecuado) todo límite de velocidad comprendido entre 40 y 60 km/h;
(c) que P1 y P4 convergen pues en justificar un límite de velocidad comprendido entre 40 y 50 km/h.;
(d) que el valor ético-normativo concreto de P1 y P4 queda indeterminado o de toda forma dudoso.

En tal situación, cabe aplicar la regla de conciliación. Conforme a ella, podría adoptarse el límite de velocidad de 45 km/h. Este representa en efecto el *valor intermedio* entre el límite compartido más favorable para el principio de tutela de la salud (40 km/h.) y el límite compartido más favorable para el principio de tutela de la libertad personal (50 km/h.)

7. Regla de especificación, principio de ponderación por prevalencia, principio de ponderación por conciliación, principio de proporcionalidad

En la literatura corriente sobre antinomias, además de los "criterios (de resolución) tradicionales" (*lex superior*, *lex posterior*, *lex specialis*), es habitual tratar de reglas de prioridad como la regla de especificación (o "estrategia especificacionista"), el principio de ponderación ("la ponderación"), este último en las variantes de la ponderación por prevalencia y de la ponderación por conciliación, y el "principio de proporcionalidad" o "análisis de proporcionalidad"[21].

¿Qué pasa con estas reglas de prioridad en el código de resolución garantista que acabo de esbozar? ¿Hay algún espacio para ellas, o no? Y si no, ¿por qué no? Vamos a ver.

La *regla de especificación* (la estrategia especificacionista o interpretativa) establece que, dada una antinomia lógica por superposición integral expresa, una antinomia lógica por intersección (*supra*, § 2.1.2.), o bien una antinomia teleológica (*supra*, § 2.2.4.) entre dos normas constitucionales de igual valor abstracto y sincrónicas, cada norma debe ser especificada (reinterpretada, reformulada, modificada) de forma que sus respectivos ámbitos de aplicación encajen perfectamente, sin su-

[21] Sobre estos criterios o principios resolutorios, véase por ejemplo Chiassoni 2019: 165-231.

perponerse. La norma no indica los criterios en función de los cuales debe llevarse a cabo la especificación (reinterpretación). La apelación, a veces preconizada, a los casos paradigmáticos en relación con los cuales la especificación de una u otra regla sería evidentemente correcta, es una apelación a modos de especificación que se consideran correctos desde un punto de vista ético-normativo[22]. La regla de especificación (la estrategia especificacionista o interpretativa), por ende, parece coincidir con la regla de superioridad sustantiva en concreto, o ser en todo caso algo muy parecido o equivalente.

El *principio de ponderación por prevalencia*, en su formulación genérica, establece que, dadas dos normas constitucionales antinómicas, la norma que vale (éticamente) más (que "pesa" más) debe preferirse a la norma que vale (éticamente) menos (que "pesa" menos) – de forma que se debe aplicar la norma que vale (que "pesa") más y no aplicar la norma que vale (que "pesa") menos. El valor (el "peso") de las normas a las que se refiere el principio no puede ser otra cosa sino su valor ético-normativo desde la constitución. Ahora bien, este valor se puede determinar *en abstracto* o *en concreto*. Si el valor de las dos normas se determina en abstracto, el principio de ponderación por prevalencia coincide con la regla de superioridad sustantiva en abstracto. Si, por el contrario, el valor se determina en concreto, en relación con clases de casos (con conductas-tipo), y esto ocurre cuando las normas antinómicas tienen el mismo valor abstracto, el principio de ponderación por prevalencia coincide con la regla de superioridad sustantiva en concreto.

El *principio de proporcionalidad* o *análisis de proporcionalidad* es una variante del principio de ponderación por prevalencia que se adopta para determinar la superioridad ético-normativa en concreto de normas constitucionales que pueden tener valor ético-normativo abstracto *diferente*. Trata-se en efecto del principio que informa la Formula del Peso de Alexy, y que Alexy, siguiendo a un uso extendido, suele llamar (principio de) "proporcionalidad en sentido estricto"[23]. Desde una perspectiva garantista, esta regla de prioridad es incompatible con la idea de que hay, en las constituciones de las democracias constitucionales contemporáneas, normas atributivas de derechos fundamentales que tienen un valor ético-normativo abstracto superior al de otras normas y, por lo tanto, deben ser preferidas sin más. Cabe no olvidar, sin embargo, la manera en que el criterio de superioridad sustantiva en abstracto podría ser usado por garantistas menos intransigentes o más razonables (*supra*, § 6. I).

Finalmente, el *principio de ponderación por conciliación* establece que, dada una antinomia entre dos normas constitucionales, debe preferirse la solución que satis-

[22] Propugnan una estrategia especificacionista o interpretativa José Juan Moreso y Juan Antonio García Amado: sobre tales posiciones, Chiassoni 2019.

[23] Véase, por ejemplo, Alexy 2021: Parte II; y los ensayos de M. Atienza dedicados a la ponderación en Atienza, García Amado 2012.

faga en la medida de lo posible las exigencias (intereses, derechos) protegidas *por ambas normas*.

La conciliación de exigencias conflictivas puede entenderse de dos maneras diferentes: bien como *conciliación sincrónica*, o bien como *conciliación diacrónica*.

La conciliación es *sincrónica* cuando se realiza al interior de cada decisión resolutoria individual. La conciliación es, en cambio, *diacrónica* si se realiza en relación con una secuencia de decisiones resolutorias, a lo largo de un cierto marco temporal, y en relación con diferentes clases de casos (diferentes conductas-tipo). De forma que, en el conjunto, ninguna de las dos exigencias siempre gana o siempre pierde, sino que algunas veces gana, y otras veces pierde, en una manera generalmente equilibrada.

Ahora bien: si la conciliación se entiende de manera diacrónica, el principio de ponderación por conciliación viene aparentemente a coincidir con la regla de superioridad sustantiva en concreto, o con algo de muy similar.

Si la conciliación se entiende, en cambio, de manera sincrónica, el principio de ponderación por conciliación viene aparentemente a coincidir con la regla de conciliación.

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Filosofia analitica e diritto amministrativo. Un terreno da esplorare

*Marco Q. Silvi**

Alice restò per diversi minuti senza parlare, intenta a guardarsi intorno in tutte le direzioni: era un paesaggio veramente strano. […] *e il suo cuore cominciò a battere forte, era tutta emozionata.*
Lewis Carroll

Riassunto

Nel presente lavoro, intendo mostrare la rilevanza e l'interesse teorico che il diritto amministrativo presenta per gli studi di filosofia analitica e di teoria generale del diritto. Assumendo una prospettiva d'analisi meta-giurisprudenziale, mostrerò, in primo luogo, che le decisioni della giustizia amministrativa costituiscono un terreno fecondo per testare la bontà delle teorie dell'interpretazione di stampo realista. Sempre in tale prospettiva, approfondirò, in secondo luogo, un elemento che ha innovato la fisionomia del diritto amministrativo e che consiste nell'avvento delle autorità indipendenti di regolazione, il cui operare (attraverso atti normativi motivati) innesca una dialettica con le decisioni giudiziali meritevole di essere indagata dalla teoria del ragionamento giuridico.

Parole chiave: Diritto amministrativo. Teorie dell'interpretazione e del ragionamento giuridico. Autorità amministrative indipendenti di regolazione. Analisi logica e analisi critica dei discorsi giudiziali.

Abstract

In this paper, I would like to demonstrate the relevance and theoretical interest that administrative law represents for analytic philosophy and general legal theory.

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Starting from a metajuristical perspective, I will first show that administrative law decisions constitute a fertile field for testing the validity of realist theories of interpretation. Against this background, I will secondly examine a recent phenomenon that has renewed the physiognomy of administrative law, namely the independent administrative regulatory authorities, whose activity (through reasoned regulatory acts) triggers a dialectic with judicial decisions that is worthy of examination by the theory of legal reasoning.

Keywords: Administrative Law. Theories of Interpretation and Legal Reasoning. Independent Administrative Regulatory Authorities. Logical *vs.* Critical Analysis of Judicial Discourses.

0. Una provocazione di Marco Mazzamuto

In un sapido lavoro relativamente recente, dal titolo volutamente provocatorio (*Il diritto amministrativo: un perfetto sconosciuto?*, 2022), Marco Mazzamuto ha invitato (o, forse meglio, ha sfidato) i filosofi e i teorici del diritto a prendere in seria considerazione, ai fini delle loro analisi e riflessioni, anche quei fenomeni che, in ordinamenti simili al nostro, sono riconducibili al diritto amministrativo che, secondo Mazzamuto, si atteggerebbe in modo affatto peculiare rispetto al diritto civile, cui normalmente si riferirebbe la letteratura giusteorica, ponendosi invece come una sorta di *tertium genus* rispetto agli usati modelli della *civil law* e della *common law*.

Con un'efficace sintesi, Mazzamuto traccia alcune delle linee portanti del diritto amministrativo in chiave storico-evolutiva (muovendo dall'ordito ottocentesco dello Stato francese), per mettere in luce il ruolo pretorio della giustizia amministrativa che, «avvalendosi di quella libertà che gli deriva dall'origine graziosa, [ha] sviluppato un'attitudine manipolatoria delle norme scritte di grado incommensurabilmente superiore al *modus operandi* di un semplice giudice civile (financo nella sua più emancipata versione odierna) o di un giudice di *common law*»[1]. Ciò in un contesto ordinamentale caratterizzato da produzione ipertrofica e mal coordinata di leggi e fonti sublegislative, che si estendono su settori diversissimi della vita: è qui che interviene la giustizia amministrativa, a comporre e sistemare un tale materiale (tendenzialmente) caotico e informe, anche attraverso la creazione della c.d. parte generale e dei principi del diritto amministrativo[2], così divenendo, essa stessa, fonte di certezza[3].

[1] Mazzamuto 2022: 174. Il saggio di Mazzamuto si concentra, come detto, su alcune linee essenziali d'un fenomeno come maturato nella Francia di fine XIX secolo. L'analisi storica, con riferimento al nostro ordinamento, è stata proseguita – in un confronto dialettico con tale saggio – da Della Cananea (2023).

[2] Cfr. Mazzamuto 2022: 173.

[3] Cfr. Mazzamuto 2022: 173: «Il mito della norma scritta, dalle XII tavole al codice napoleonico, come fonte di certezza non poteva trovare alcun riscontro nelle fonti scritte del diritto amministrativo,

Io credo che Mazzamuto abbia, in qualche modo, ragione, che il diritto amministrativo rappresenti un campo fenomenico ricco e interessante per l'indagine filosofica, in particolare per gli studi di filosofia analitica e di teoria generale del diritto: e ciò non solo nella prospettiva più specificamente meta-giurisprudenziale, ma anche per quel modo di praticare la filosofia analitica come laboratorio concettuale[4]. Ritengo, anzi, che, come per ogni branca del c.d. sapere giuridico, le implicazioni siano reciproche: da un lato, il diritto amministrativo offre un terreno fecondo per sperimentare e mettere alla prova teorie e concetti elaborati in sede filosofica; dall'altro lato, però, anche coloro che, a vario titolo, studiano e si occupano del diritto amministrativo, possono trarre dall'analisi filosofica utili stimoli e spunti. Basti pensare che alcuni nodi tematici centrali del diritto amministrativo ruotano attorno a concetti specificamente oggetto di indagine filosofica, quali quello di atto giuridico, di validità, di funzione (intesa come scopo, come fine), ecc.[5].

Ma è con riferimento alla teoria dell'interpretazione e dell'argomentazione giuridica, che Mazzamuto lancia la sua sfida, domandandosi «quanto le dotte disquisizioni sul rapporto tra la legge e il giudice o sulla teoria dell'interpretazione, costruite sul semplice modello del primato della legge e di un giudice, come quello civile, che vi dà applicazione, possano mai avere rilievo nei confronti di una giustizia amministrativa informata strutturalmente a una ben diversa ambientazione»[6].

È, quindi, in una prospettiva meta-giurisprudenziale che intendo concentrare la mia analisi. In realtà, è bene dirlo subito, le ricerche di filosofia analitica non si limitano al "mondo" del diritto civile, come sembra affermare Mazzamuto, ma si spingono ben anche in altri ambiti del diritto positivo, quali il diritto costituzionale[7], ma anche in quello penale[8], e pure nel tributario[9]. Vero è che il diritto ammini-

regno, come si è detto dell'ipertrofia, del caos e della mutevolezza normativa. Constatazione comune nella giuspubblicistica ottocentesca era infatti che la fonte della certezza fosse piuttosto il giudice pretore».

4 La distinzione è di Riccardo Guastini (2012).

5 Sulla filosofia dell'atto giuridico, sia consentito rinviare, anche per i riferimenti bibliografici a Silvi 2023. Sul concetto di funzione (di atti giuridici), in Italia, cfr. Incampo 1997 e 2012, nonché (proprio per i riferimenti a istituti tratti dal diritto amministrativo) Silvi 2017. Per quanto riguarda, invece, la filosofia della validità giuridica, segnalo l'interessante contributo di Michele Trimarchi (2012) che, recuperando tali filoni di ricerche giusteoriche indaga – nella prospettiva (dogmatica) della scienza giuspubblicista – la validità del provvedimento amministrativo.

6 Mazzamuto 2022: 174, in cui prosegue: «Certamente taluni schemi di ragionamento saranno ancora riproducibili, ma è evidente che, anche in tal caso, la riflessione "concettuale", per potere risuonare di una effettiva intelligibilità in una scienza pratica, quale è quella giuridica, presuppone una precognizione della realtà sottostante, e qui la "cosa" è diversa».

7 La letteratura giusfilosofica che, variamente, tocca tematiche costituzionali è ampia e non se ne può dare conto. Mi limito, tra i tanti, a rinviare a Guastini 2001 (ma cfr. anche Guastini 2010 e 2017), nonché a Pino 2019.

8 Non si può non ricordare almeno Ferrajoli 1989.

9 Cfr. a mero titolo di esempio Velluzzi 2015.

strativo è poco "frequentato" dai filosofi[10], ma forse (oso ipotizzare) solo perché i relativi contesti di decisione, ossia l'insieme delle disposizioni e delle vicende (anche fattuali) in cui si collocano le pronunce della giustizia amministrativa, sono di norma particolarmente complessi e richiedono spiegazioni e descrizioni di contorno, che certamente allungano la lettura (inevitabilmente appesantendola).

A me comunque pare che le decisioni della giustizia amministrativa costituiscano un terreno assai fecondo per la teoria dell'interpretazione (e più in generale per la teoria del ragionamento giuridico), e che valga la pena esplorare. Ciò in quanto, a mio avviso, consente di testare con successo la bontà di tesi e analisi svolte dalle c.d. teorie realiste dell'interpretazione[11].

A tal fine, procederò come segue. Dapprima, *sub* 1, cercherò, in modo sommario, e senza pretesa di completezza e precisione, di mostrare come le attività manipolative della giurisprudenza amministrativa, di cui parla Mazzamuto, possano trovare proficua tematizzazione nell'ambito d'una tale teoria dell'interpretazione di tipo realista. Il panorama che ne emergerà, però, a mio avviso non è così dissimile da quello che si può incontrare nell'ambito di contesti di decisione desunti da altri settori dell'ordinamento, siano essi il diritto civile o costituzionale, di sistemi di *civil law* o di *common law*; ciò non perché sia falso quanto afferma Mazzamuto sulle peculiarità del diritto amministrativo (che anzi rende, a mio avviso, molto "appetibile" tale terreno per l'analisi giusfilosofica), ma perché sono particolarmente proficui gli strumenti offerti dalla teoria dell'interpretazione (meglio, dalle famiglie di teorie) che si andrà a testare.

Sub 2, invece, darò sinteticamente conto anche d'un nuovo elemento (enfatizzato ad esempio da José Juan Moreso, in un commento al lavoro di Mazzamuto) che ha certamente innovato la fisionomia del diritto amministrativo, e che a mio avviso assume rilievo per le ricerche di teoria del ragionamento giuridico: l'introduzione delle c.d. autorità amministrative indipendenti, in particolare quelle di regolazione[12]. Infine, *sub* 3, formulerò alcune osservazioni conclusive.

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[10] Sia, anche qui, consentito rinviare a Silvi 2024.

[11] Teorie realiste dell'interpretazione sono quelle teorie secondo le quali (seguendo, ad esempio, Guastini 2014a: 238) «ogni testo normativo ammette […] una molteplicità di interpretazioni, nessuna delle quali può dirsi vera o falsa (gli enunciati interpretativi non hanno valori di verità), e pertanto neppure corretta o scorretta: l'interpretazione è atto di decisione, atto di volontà». Le teorie che possono rientrare in questo filone sono varie: farò qui riferimento principalmente alle ricerche di Riccardo Guastini (1985, 1990, 2004, 2006, 2011, 2014) e di Alf Ross (1965).

[12] La letteratura sulle autorità amministrative indipendenti è davvero vasta, e non è utile darne conto. Mi limito a rinviare a Merusi e Passaro 2011 e, più di recente, a Takanen 2022, nonché Bruti Liberati, 2020 e 2023. Come noto, si distingue normalmente tra (i) autorità di regolamentazione (o regolazione), le quali disciplinano, mediante l'adozione di norme generali e astratte, i comportamenti degli operatori economici d'un certo settore; e (ii) autorità di vigilanza (o controllo), le quali vigilano sui comportamenti degli operatori economici, rispetto a determinati ambiti meritevoli di tutela, con (solo) poteri di *enforcement*. In realtà, però, anche le autorità di regolamentazione sono dotate di poteri di

Prima di procedere, compio due precisazioni sui limiti di questo mio intervento, limiti dettati anche da evidenti esigenze di spazio. La prima è che farò principalmente riferimento alla teoria dell'interpretazione proposta da Riccardo Guastini, richiamando anche altri autori solo laddove utile alla mia analisi: non mi interessa, qui, tanto intervenire su specifiche questioni di teoria dell'interpretazione, ma mostrare la rilevanza dei ragionamenti della giustizia amministrativa per una tale teoria (specie se di tipo realista, qual è esemplarmente appunto quella di Guastini[13]). La seconda precisazione è che, all'interno del diritto amministrativo, prenderò in considerazione solo quei segmenti costituiti dalla disciplina dettata – per i settori dell'energia, ma anche del servizio idrico integrato e del ciclo dei rifiuti urbani e assimilati – da un'autorità di regolazione indipendente, l'Autorità di regolazione per energia, reti e ambiente (nel seguito: 'Arera'): si tratta, infatti, d'una disciplina che conosco abbastanza bene e che ha dato origine a una ricca produzione giurisprudenziale, che ha affermato importanti principi validi per tutte le autorità indipendenti.

1. Attività di costruzione giuridica nella giustizia amministrativa

1.1. Fenomenologia dei ragionamenti costruttivi

All'interno delle operazioni intellettuali alle quali normalmente ci si riferisce col termine 'interpretazione', è stato distinto tra: (i) attività genuinamente interpretative, o di *interpretazione in senso stretto*, consistenti nell'ascrivere un significato a un certo testo normativo ('norma' designa quindi il significato ricavabile per via interpretativa da un enunciato normativo, da una 'disposizione'), e (ii) attività di *costruzione giuridica*, volte a ricavare, appunto a "costruire" attraverso argomenti (a partire ovviamente da un certo testo) una norma "implicita", un significato che però non trova corrispondenza nel testo (si tratterebbe, quindi, d'una norma senza disposizione, di norma apocrifa)[14]. Per quel che qui rileva, è certamente questo secondo tipo d'attività ad assumere interesse in quanto, come ben si nota, si tratta di genuina attività nomopo-

enforcement, così come anche le autorità di controllo, coi loro provvedimenti sanzionatori (individuali), stabiliscono "precedenti" che, in termini generali, possono influenzare inevitabilmente le successive condotte degli operatori vigilati.

[13] Ovviamente non è la sola, e, nell'ambito di approcci realisti alla teoria del ragionamento giuridico, si registrano certamente orientamenti critici: cfr., a mero titolo d'esempio, Diciotti 2013; nonché Pino 2013 (su cui cfr. Guastini 2013).

[14] La distinzione tra interpretazione in senso stretto e costruzione giuridica è al centro della teoria dell'interpretazione proposta da Guastini, alla quale, come detto farò qui principalmente riferimento. Una tale distinzione è stata ad esempio approfondita in modo originale da D. Canale (2019) (contro le posizioni critiche di Diciotti e Pino).

ietica che l'interprete (nel nostro caso, il giudice) compie – e «ciò costituisce la parte quantitativamente e qualitativamente più importante del lavoro dei giuristi»[15].

Diverse sono le operazioni intellettuali attraverso cui la costruzione avviene, tutte variamente intrecciate tra loro: tra esse, di solito si menzionano (almeno) (i) la costruzione di lacune, (ii) la costruzione di gerarchie normative, (iii) la costruzione di eccezioni implicite e, soprattutto, appunto, (iv) la costruzione di norme inespresse[16]. Tutte queste operazioni sono ampiamente presenti nei ragionamenti del giudice amministrativo.

Prima di darne qualche esempio, può essere utile anche ricordare che, sempre in sede di teoria dell'interpretazione, è stato osservato che la costruzione di norme inespresse avviene secondo ragionamenti che, per quanto vari e articolati, sono comunque riconducibili – per quel che qui rileva – ad (almeno) due schemi logici: (A) da un lato, norme inespresse possono essere ricavate secondo ragionamenti *non logicamente validi* (non deduttivi), più o meno persuasivi, quali un entimema, un ragionamento analogico o per dissociazione, ecc.; (B) secondo un altro modello, norme espresse possono essere ricavate con ragionamenti (non importa se deduttivi o non deduttivi) che implicano la presenza di *assunzioni dogmatiche*, ossia «tesi teoriche costruite dai giuristi (o dai giudici) previamente e indipendentemente dall'interpretazione di qualsivoglia specifico enunciato normativo»[17].

Quest'ultima precisazione mi pare interessante, perché ragionamenti di tipo (B) sono diffusissimi nella giurisprudenza amministrativa – l'analisi di Mazzamuto, a ben vedere, lo sottende: come altrimenti avrebbe potuto la giustizia amministrativa approdare, nella scomposta disciplina legislativa di dettaglio, alla costruzione della

[15] Guastini 2017: 337, in cui scrive anche: «Con la espressione 'norme inespresse' mi riferisco a tutte quelle norme che nessuna autorità normativa ha formulato: norme cioè, che non possono essere considerate significati (plausibili) o come implicazioni logiche di alcuna disposizione normativa determinata. Costruendo norme inespresse, gli interpreti compiono una attività legislativa dissimulata».

[16] Cfr. ad esempio Guastini 1985, nonché 2011: 104 ss., e 2017: 307 ss. Tra le operazioni di costruzione giuridica rientra anche la soluzione delle antinomie, su cui non mi soffermerò, ma solo per ragioni di spazio. Ai fini del presente lavoro, mi limito a ricordare che le antinomie possono essere prevenute in via interpretativa, oppure prodotte per poi essere risolte con criteri (quali quello della *lex posterior* o della *lex superior*) di tipo costruttivo, in quanto incidono sull'ordinamento giuridico, espungendo da esso norme o eventuali loro basi enunciative: cfr. ad esempio Guastini 2017: 146-154.

[17] Guastini 2014b: 414. V'è anche un altro schema logico cui possono essere ricondotti i ragionamenti per ricavare norme inespresse da norme espresse, che consiste in ragionamenti logicamente validi, ossia deduttivi: si tratta, però, d'uno schema ritenuto meno interessante per la teoria del ragionamento giuridico. Per esibire comunque un esempio anche di tale schema, si può ricordare che, a fronte del potere riconosciuto (espressamente) dalla legge alla società Gestore dei Sistemi Energetici S.p.A. (società pubblica che svolge anche funzioni amministrativistiche) di decidere sull'ammissione agli incentivi per i produttori di energia rinnovabile, la giustizia amministrativa ha riconosciuto logicamente implicato anche il potere di verifica e decadenza dall'incentivo per il venir meno dei presupposti considerati ai fini dell'ammissione (cfr. *ex pluribus* CdS, Sez. II, sent. 11552/2022). Su norme inespresse, cfr. anche la sezione monografica curata da M. Barberis in «Analisi e diritto» (2020), nonché Diciotti 2015.

c.d. parte generale del diritto amministrativo, se non muovendo, appunto, da assunzioni dogmatiche (in qualche modo) precostituite[18]?

Può essere utile, ora, esibire alcune decisioni che, a mio avviso, esemplano i quattro tipi di operazioni costruttive sopra richiamate.

1.1.1. Creazione di lacune

Vi sono vari tipi di lacune[19]. Per restare al fenomeno più ovvio, per cui lacuna v'è quando una certa fattispecie non è disciplinata in alcun modo da una norma dell'ordinamento (c.d. lacuna normativa), è stato correttamente osservato che, molto spesso, le lacune non sono un dato "oggettivo" dell'ordinamento (un fatto empiricamente osservabile), ma sono il risultato di attività interpretativa: l'interprete può prevenire o (per quel che qui interessa) *creare* una lacuna[20]. E la creazione d'una lacuna, normalmente, costituisce il passaggio d'un più ampio ragionamento volto a sottoporre la fattispecie a una (diversa) norma – che non sarebbe altrimenti applicabile, qualora la lacuna non vi fosse[21].

Ecco un esempio a mio avviso interessante, sebbene richieda un minimo di inquadramento. Nel 2017, il legislatore nazionale (legge 205/2017, art. 1, co. 4-7 e 10) è intervenuto (per quel che qui rileva) con alcune disposizioni, dalla formulazione invero non felice, sancendo, per i settori dell'energia (elettrica e del gas naturale) il

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[18] Al riguardo, può essere anche utile ricordare che le assunzioni dogmatiche di cui qui si discute possono essere di almeno due tipi: (i) quelle che «descrivono, condensandolo in un solo enunciato, il contenuto d'una molteplicità di norme (previamente determinate per via di interpretazione) ovvero il principio che dà a esse fondamento»; (ii) quelle invece «costruite in modo indipendente da, e in modo logicamente antecedente a, l'interpretazione di qualsivoglia specifica disposizione normativa» (Guastini 2004: 932).

[19] La letteratura in tema di lacune è estremamente ampia, e non v'è ragione di darne conto. In Italia, mi limito a rinviare al *Saggio sulla completezza degli ordinamenti giuridici* di Amedeo G. Conte (1962), che distingue almeno quattro tipi di lacune: lacune *ontologiche*, o lacune senso stretto (che si hanno «se, d'almeno un comportamento, o la commissione o l'omissione sono né permesse né non permesse» – Guastini parla al riguardo di lacuna normativa), lacune *deontologiche* (o ideologiche) (che «integra[no] l'assenza d'una qualificazione giusta d'almeno un comportamento. Lacuna ontologica e lacuna deontologica si differenziano dunque in ciò: la prima è assenza d'una qualificazione in genere; la seconda d'una qualificazione giusta» – Guastini parla al riguardo di lacuna assiologica); lacune *teleologiche* (o *tecniche*) (che si hanno allorché manchi una o più norme che consentono a un'altra norma di operare: v'è, ad esempio, «una norma [che] prescriva la periodica convocazione del consiglio dei ministri, ma nessuna norma prescriva chi lo convochi»); lacune *logiche* (che «integra[no] la presenza di più norme incompatibili. V'è lacuna logica se v'è antinomia») (Cfr. Conte 1997: 111-118). Cfr. anche Chiassoni 1997.

[20] Cfr. ad esempio Guastini 2014b: 394-423.

[21] Si tratta, in particolare, d'un argomento che si svolge secondo il modello della c.d. norma generale esclusiva, secondo cui ciò che non è espressamente autorizzato dalla norma in esame (norma ricavata interpretativamente) è implicitamente precluso (cfr. ad esempio A.G. Conte, *Norma generale esclusiva*, in *Novissimo digesto*, Torino, Utet, 1965). Cfr. anche Guastini 2017: 328-329.

termine biennale per la prescrizione del «diritto al corrispettivo», sia nei rapporti tra venditori e utilizzatori finali, «sia nei rapporti tra il distributore e i venditori, sia in quelli con l'operatore del trasporto e con gli altri soggetti della filiera». Nei settori dell'energia – è importante chiarirlo subito – chi opera nel mercato della vendita è un soggetto giuridicamente diverso da coloro che gestiscono le infrastrutture di rete (reti di trasmissione/trasporto nazionali e di distribuzione locale), e necessita di ottenere la "collaborazione" di questi ultimi al fine di poter immettere l'energia compravenduta in rete e consegnarla ai propri clienti (finali), i cui impianti di consumo sono collegati alle medesime reti (dando così esecuzione ai contratti di somministrazione conclusi con detti clienti).

La legge 205/2017 ha anche assegnato compiti specifici ad Arera in tema di fatturazione dei consumi, nonché al fine di adottare alcune speciali tutele nei confronti di alcune tipologie di clienti finali (i consumatori). Arera, oltre ad adottare tali misure specifiche, ha però anche posto in essere interventi volti ad assicurare forme di coordinamento, tra i differenti soggetti interessati dai differenti servizi (vendita e trasporto/distribuzione), al fine di consentire una migliore operatività delle nuove disposizioni in tema di prescrizione biennale.

A tal fine, Arera ha fatto ricorso ai generali poteri di regolazione assegnatile dalla sua legge istitutiva, in particolare, dall'art. 2, co. 12, lett. h), e co. 37, legge 481/95. Si tratta del potere di emanare «direttive concernenti […] l'erogazione dei servizi», le cui «determinazioni […] costituiscono modifica o integrazione del regolamento di servizio»: un tale potere è considerato (anche da giurisprudenza amministrativa consolidata) idoneo a conformare (eterointegrandolo) il contenuto dei rapporti contrattuali tra esercenti i servizi e i relativi utenti[22], e Arera lo ha spesso esercitato proprio per consentire l'operatività di istituti civilistici a fronte del peculiare collegamento negoziale che si instaura, come visto, tra i contratti di somministrazione (tra venditore e cliente) e i contratti c.d. di rete (tra distributori o trasportatori e venditori)[23]. A quest'ultimo riguardo, a mero titolo di esempio, si può ricordare la c.d. eccezione di inadempimento (artt. 1460 e 1565 c.c.): per esercitare tale diritto nei confronti del proprio cliente inadempiente, il venditore necessita d'un intervento del distributore che materialmente sospenda l'erogazione di energia presso l'impianto di consumo di detto cliente allacciato alla sua rete: per assicurare l'operatività di tale istituto nell'ambito del rapporto tra venditore e cliente, Arera è quindi intervenuta a regolare i contratti tra venditori e distributori[24].

[22] Sui rapporti tra regolazione (indipendente) e contratto, come detto, la giurisprudenza è costante, soprattutto nel settore dell'energia: cfr. *ex plurimis* CdS, Sez. VI, sent. 4422/2019; CdS, Sez, VI, sent. 1958/2019; CdS, Sez. VI, sent. 2182/2016. In letteratura, cfr. ad esempio Gitti 2006 e 2012; Ferrari 2018; Angelone e Zarro 2022.

[23] Sul peculiare sistema di collegamento contrattuale che connota il settore dell'energia, cfr. Gitti 2014.

[24] Cfr. ad esempio, D'Adda 2015, nonché Silvi 2014.

Con riferimento specifico alla prescrizione biennale, dunque, Arera aveva (anche) introdotto alcuni obblighi informativi in capo ai distributori alla cui rete è allacciato l'impianto di consumo per il quale è maturato un credito relativo a prelievi contabilizzati con un ritardo maggiore a due anni. Arera, in particolare, aveva obbligato i distributori a rappresentare ai venditori eventuali elementi fattuali idonei a impedire la maturazione della prescrizione: si faceva riferimento, ovviamente, all'art. 2941, n. 8, c.c. (secondo cui «la prescrizione rimane sospesa […] tra il debitore che ha dolosamente occultato l'esistenza del debito e il creditore, finché il dolo non sia stato scoperto»), rispetto al quale possibili comportamenti dei clienti finali che manomettano il misuratore per impedire l'elaborazione del dato di misura, può essere rilevato solo dal distributore (e non dal venditore) in quanto è il distributore il responsabile della rilevazione dei consumi e il proprietario del misuratore[25]. In tal modo, dunque, il regolatore aveva inteso instaurare una forma di coordinamento tra le controparti di rapporti contrattuali collegati, al fine di consentire un'efficace operatività dell'istituto della prescrizione.

Il giudice amministrativo ha però ritenuto illegittimi tali obblighi per il distributore (cfr. Tar Lombardia, sent. 35/2023 e 36/2023; CdS, Sez. II, sent. 11358/2023 e 11360/2023), argomentando: (a) che la legge 205/2017 ha introdotto una disciplina speciale rispetto a quella della prescrizione definita dal codice civile, assegnando specifici compiti ad Arera; (b) che Arera non aveva titolo a incidere sulla disciplina della prescrizione, oltre alle competenza attribuitele dalla suddetta legge; (c) che tali competenze riguardano specificamente il rapporto tra venditore e cliente a tutela di quest'ultimo – e non anche il rapporto tra venditore e distributore; e che, insomma, (d) nessuna disposizione della legge 205/2017 assegna ad Arera «il compito di garantire la circolazione, tra le imprese della filiera, delle informazioni essenziali per far valere le loro reciproche pretese»; con la conseguenza che (e) «per quanto importanti fossero questi obiettivi e conseguentemente apprezzabile l'intenzione alla base delle delibere impugnate, l'intervento legislativo in parola non poteva costituire occasione per adottare misure […] non previste e non strettamente funzionali alla cura degli specifici interessi pubblici da quella stessa legge [205/2017] affidati [ad Arera]»[26].

Come si nota, il giudice interpreta le disposizioni della legge 205/2017 (in particolare, quelle attributive di determinate competenze ad Arera) seguendo un argomento *a contrario*, evidenziando cioè che l'intervento regolatorio non era riconducibile a tali disposizioni. L'argomento è usato, qui, con evidente funzione *costruttiva*, ritenendo che la legge *implicitamente vietasse* ad Arera di adottare interventi in tema di prescrizione diversi da quelli specificamente previsti nella legge medesima: ciò che determina l'illegittimità dell'esercizio, in tale materia, di altre competenze

[25] Cfr. artt. 5 e 6 della deliberazione 603/2023, nonché art. 9 deliberazione 604/2023: cfr. anche chiarimento di Arera pubblicato il 1 marzo 2024 (www.arera.it).

[26] Sent. 11358/2023, § 7.3.

eventualmente attribuitele da altre disposizioni che non abbiano espressamente a oggetto la prescrizione, quali, appunto, quelle previste dall'art. 2, co. 12, lett. h), e co. 37, della legge 481/95.

1.1.2. Creazione di gerarchie assiologiche

Una gerarchia assiologica è una relazione di valore tra norme, creata non dal diritto stesso, ma dagli interpreti, mediante un giudizio di valore che (espressamente o implicitamente) attribuisca maggior valore a una norma rispetto a un'altra[27]. Si tratta quindi d'una attività costruttiva, spesso strumentale a una più ampia attività di sistemazione (o sistematizzazione) del diritto compiuta dall'operatore giuridico[28], quando si trova soprattutto di fronte a testi normativi frammentati e scomposti – ciò che, come ha evidenziato Mazzamuto, avviene esemplarmente nel diritto amministrativo. Le tecniche per costruire gerarchie normative sono varie: si può interpretare una delle norme in discorso come un "principio" che caratterizza la fisionomia d'un certo settore disciplinare e offre fondamento assiologico (giustificazione) a una pluralità di regole[29]; oppure si possono anche interpretare diverse norme come principi (o regole attuative di principi) in conflitto tra loro e operare un bilanciamento tra essi (stabilendo cioè quale è più importante).

Nel diritto amministrativo, come detto, argomenti siffatti sono all'ordine del giorno. Ecco un altro esempio sempre tratto dal diritto dei settori regolamentati da Arera.

La regolazione tariffaria dei servizi di rete nel settore dell'energia, nonché quella relativa al servizio idrico integrato, prevede che, in caso di trasmissione tardiva (da parte del gestore del servizio ad Arera) della documentazione idonea a conseguire il riconoscimento tariffario degli investimenti compiuti sugli impianti, o comunque in caso di tardiva rettifica dei dati a tal fine rilevante, la successiva rettifica della tariffa dell'impresa (qualora comporti un beneficio per quest'ultima) avrà effetto solo *ex nunc*, ossia solo a valere sulle tariffe applicabili in futuro (il riconoscimento tariffario conseguente alla rettifica, quindi, non è fatto retroagire alla data in cui effettivamente è stato compiuto l'investimento tardivamente comunicato).

Tali disposizioni sono state criticate da alcuni operatori economici in quanto in patente contrasto con le norme – derivate dai testi legislativi settoriali e dalla legge istitutiva (come pacificamente interpretate dalla giurisprudenza) – che prevedono che la disciplina tariffaria debba assicurare la copertura dei costi e la remuneratività del servizio: è evidente, infatti, che un investimento effettuato dall'impresa al tempo t_0, se riconosciuto solo con effetto dal momento t_n in poi (ossia solo dal momento in

[27] Cfr. ad esempio Guastini 1998. Cfr. anche Pino 2008.
[28] Sull'attività di sistemazione (e sistematizzazione) del diritto, rinvio a Ratti 2008.
[29] Cfr. ad esempio Guastini 1990: 109-137.

cui quel costo è stato tardivamente rappresentato all'autorità di regolazione), rappresenta un costo che resta in parte a carico dell'impresa, che non riesce a recuperarlo integralmente.

La giustizia amministrativa, tuttavia, è pervenuta a giudicare legittima una tale disciplina regolatoria (Tar Lombardia, sent. 1243/2015, 2605/2015, 2114/2017, 1610/2024; CdS, Sez. VI, sent. 1958/2019), argomentando che: (a) la legge 481/95 (in particolare, all'art. 1, co. 1) individua, tra i vari obiettivi che la regolazione tariffaria di Arera deve perseguire, non solo quello (invocato dai ricorrenti) di far sì che il servizio sia svolto «in condizioni di economicità e di redditività», ma anche quello che il medesimo sistema tariffario sia «certo, trasparente e basato su criteri predefiniti, promuovendo la tutela degli interessi di utenti e consumatori»; che (b) spetta ad Arera «nell'esercizio del suo potere regolatorio, il compito di stabilire il punto di equo contemperamento tra tale interesse e quello, che eventualmente vi si contrapponga, alla certezza della tariffa e alla tutela degli utenti e dei consumatori»[30]; che (c) il bilanciamento trovato nel caso di specie risulta coerente coi «principi costituzionali di buon andamento dell'attività amministrativa (art. 97 Cost.), oltre che di proporzionalità dell'azione amministrativa stesso (quest'ultimo di derivazione comunitaria); non potendosi ammettere che l'Autorità di regolazione, a fronte di errori imputabili solo all'operatore, disponga rettifiche tariffarie in danno dei consumatori per un ampio intervallo temporale»[31].

Come si nota, la giustizia amministrativa, nel caso di specie, costruisce una gerarchia assiologica per giustificare l'istituto regolatorio in esame, il cui fondamento è ricondotto a una disposizione della legge 481/1995 interpretata come un principio (principio della certezza della tariffa e della tutela degli utenti) che, in esito a un giudizio di bilanciamento, viene fatto prevalere sull'antitetico principio (quello dell'economicità e redditività della tariffa), pure ricavato dal medesimo testo legislativo. Il giudizio di bilanciamento è operato facendo riferimento a valori sovralegislativi espressi da altri principi ricavati da disposizioni costituzionali (principio del buon andamento della P.A.) e da disposizioni comunitarie (principio di proporzionalità dell'azione amministrativa).

1.1.3. Creazione di eccezioni implicite

Per creare eccezioni inespresse si ricorre normalmente alla tecnica della dissociazione consistente nell'introdurre, rispetto alla classe di fattispecie individuate dal legislatore, una distinzione che, però, il legislatore non ha fatto, e costruire, in tal modo, una *deroga* alla norma presa in considerazione.

[30] Tar Lombardia, sent. 2605/2015, § 7.
[31] Tar Lombardia, sent. 1243/2015, §1.

Emblematica al riguardo, a mio avviso, è l'operazione compiuta dalla giustizia amministrativa per sottoporre gli atti di regolazione delle autorità indipendenti all'obbligo di motivazione, nonché agli obblighi di partecipazione dei soggetti interessati.

Come noto, infatti, la legge 241/1990 sul procedimento amministrativo, all'art. 3, co. 2, esclude dall'obbligo di motivazione (previsto in via generale dal co. 1) «gli atti normativi e […] quelli a contenuto generale»; inoltre, l'art. 13, co. 1, sottrae dall'applicazione delle disposizioni sulla partecipazione al procedimento amministrativa (di cui all'art. 7 e ss.), i procedimenti per l'adozione di atti normativi e di atti amministrativi generali. Tra tali classi di atti, non v'è dubbio che ricorrano anche i provvedimenti di regolazione delle autorità indipendenti.

Tuttavia, proprio con alcune pronunce rese nei confronti di Arera (ma con affermazioni valide per tutte le autorità di regolazione indipendenti – cfr. CdS, Sez. VI, dec. 2007/2006, 2201/2006, 7972/2006), la giustizia amministrativa ha affermato: che (a) «ai procedimenti regolatori condotti dalle Autorità indipendenti non si applicano le generali regole dell'azione amministrativa che escludono dall'obbligo di motivazione e dall'ambito di applicazione delle norme sulla partecipazione, l'attività della pubblica amministrazione diretta alla emanazione di atti normativi e amministrativi generali (artt. 3 e 13 l. n. 241/90)»[32]; che (b) tale deroga discende dalla peculiarità delle autorità indipendenti, consistente nel fatto di essere «poste al di fuori della tradizionale tripartizione dei poteri, e quindi al di fuori del circuito di responsabilità delineato dall'art. 95 Cost.» in ragione della loro indipendenza e neutralità dal potere esecutivo, cui risale la responsabilità delle amministrazioni statali; che (c) in tale contesto, pertanto, il potere di regolazione di tali autorità «può trovare un fondamento dal basso a condizione che siano assicurate le garanzie del giusto procedimento e che il controllo avvenga poi in sede giurisdizionale»[33], ciò che richiede un'espressa motivazione delle decisioni regolatorie assunte.

Come si nota, il giudice ha costruito, sulla base di ragionamenti che muovono soltanto da assunzioni dogmatiche, un'eccezione implicita alla norma che esclude l'obbligo di motivazione (e a quella che esclude le garanzie partecipative) per gli atti amministrativi a contenuto generale; ciò all'evidente scopo di sottoporre gli atti di regolazione delle autorità indipendenti ai vincoli motivazionali e partecipativi previsti per i restanti provvedimenti amministrativi[34].

[32] Dec. 7972/2006, pag. 7.

[33] Dec. 7972/2006, pag. 7.

[34] Al riguardo, può essere anche interessante segnalare che una tale eccezione implicita è, a volte, ricavata muovendo anche da altre assunzioni dogmatiche, connesse a un peculiare modo di intendere il principio di legalità, secondo il quale, nel caso delle autorità indipendenti, il c.d. principio di legalità in senso sostanziale verrebbe a essere "dequotato" (depauperato), ciò che necessita d'una compensazione attraverso un rafforzamento della c.d. legalità procedurale. Cfr. ad esempio, con riferimento alla Consob, CdS, Sez. VI, sent. 7972/2020.

1.1.4. Creazione di norme inespresse

Esempio emblematico d'un argomento che a volte ricorre, nella giurisprudenza amministrativa (per restare alla regolazione delle autorità indipendenti), per costruire norme in espresse, è la c.d. teoria dei poteri impliciti, secondo la quale, in estrema sintesi, pure in assenza d'una disposizione da cui possa trarsi un norma attributiva d'un certo potere (P1), in capo a una certa amministrazione, l'attribuzione di quel medesimo potere può essere comunque ricavabile ("implicitamente") da una disposizione interpretabile come una norma che imponga alla medesima amministrazione uno scopo (norma teleologica) per il cui conseguimento quel potere (P1) costituisca mezzo, oppure una disposizione interpretabile come un potere *diverso*, al cui esercizio il potere implicito (P1) sia comunque strumentale[35].

Ho esaminato altrove, in una prospettiva meta-giurisprudenziale, la struttura argomentativa che sta dietro la teoria dei poteri impliciti (e le strutture degli argomenti critici svolti contro tale teoria)[36]. Ai fini del presente lavoro, mi limito a richiamare un esempio che, sebbene risalente, è ancora molto citato tra gli amministrativisti (anche se si tratta dell'unico caso di "genuino" argomento dei poteri impliciti che ho rintracciato nella giurisprudenza formatasi sugli atti di Arera).

Nel 2003, Arera stabilì un obbligo assicurativo per infortuni derivanti dall'uso del gas distribuito a tutti i clienti civili, affidando la stipula e la gestione d'un contratto unico a livello nazionale al Comitato Italiano Gas (CIG), e istituendo una componente tariffaria *ad hoc* per la copertura dei relativi costi (cfr. deliberazione 152/03). Ora, nonostante le disposizioni che conferiscono e regolano i poteri di Arera abbiano normalmente un contenuto ampio, ciò che rileva è che, ciononostante, non v'era nella legge 481/1995 istitutiva di Arera (ma nemmeno nel d.lgs. 164/2000, relativamente ai suoi compiti nel settore del gas naturale) nessuna disposizione il cui senso fosse quello di conferire ad Arera il potere di imporre obblighi al CIG.

Tuttavia, il giudice amministrativo ha ritenuto che Arera avesse «esercitato un compito attribuitole dal legislatore: la tutela della sicurezza degli impianti, e, mediante un congruo e giusto procedimento ha individuato la regola tecnica più opportuna per il perseguimento di tale finalità» (CdS., Sez. VI, dec. 5827/05). Il potere di imporre obblighi al CIG è stato quindi ritenuto oggetto d'una norma inespressa ricavabile da una norma teleologica, in particolare da una norma (estratta dalla legge 481/1995) che assegna ad Arera la finalità di garantire la sicurezza degli impianti.

Se ben si osserva, l'argomento impiegato muove, anche qui, da una precisa assunzione dogmatica, che riguarda il modo di intendere il principio di legalità. La teoria dei poteri impliciti, infatti, reputa che, nel caso delle autorità indipendenti,

[35] La letteratura sui poteri impliciti è davvero vasta, e si intreccia con quella – davvero sterminata – sul principio di legalità: ai limitati fini del presente lavoro, mi limito a rinviare a Bassi 2001 e Morbidelli 2007.

[36] Cfr. M.Q. Silvi, *Chi ha paura dei poteri impliciti?* in fase di valutazione.

il principio di legalità non debba essere inteso in modo rigoroso (c.d. legalità sostanziale): «non può lamentarsi – si legge infatti nella decisione in esame (pp. 9-10) – alcuna carenza di prescrittività del dato normativo, che, stabiliti i poteri e le finalità dell'Autorità, secondo una la tecnica del "programma legislativo aperto", rinvia al procedimento e alle garanzie di partecipazione per fare emergere la regola, che dopo l'intervento degli interessati, appaia, tecnicamente, la più idonea a regolare la fattispecie».

1.2. Estesa discrezionalità del giudice amministrativo

I quattro esempi esibiti *sub* 1.1 mostrano, da un lato, che anche il giudice amministrativo compie operazioni costruttive come tutti i giudici e, come tutti i giudici, manipola i testi di legge compiendo atti di legislazione mascherata; dall'altro lato, però, come ha segnalato Mazzamuto, ragionamenti come quelli esibiti sono molto diffusi nella prassi giudiziale e sono anche indice d'una ampia discrezionalità che i giudici amministrativi hanno – e si concedono.

Mazzamuto argomenta che tale ampia discrezionalità sia insita nella *forma mentis* dei giudici e abbia delle origini storiche ben precise. Non posso dire nulla al riguardo: evidenzio però che, da un punto di vista logico, un'ampia discrezionalità mi pare insita nella fisionomia del tipo di tutela che il giudice amministrativo è chiamato a garantire. Limitandoci (per comodità espositiva) alla (sola) azione di annullamento dell'atto amministrativo illegittimo, sono tre le condizioni sufficienti che il giudice deve valutare in giudizio: eccesso di potere, incompetenza e violazione di legge (cfr. da ultimo art. 10 c.p.a.; art. 21-*octies* l. 241/90).

Ma, come è facile intuire, ognuna delle tre valutazioni sottese ai tre tipi di vizi conferisce al giudice un'ampia discrezionalità nella sua attività interpretativa e (soprattutto) di costruzione giuridica, sia con riferimento al contenuto dell'atto adottato, sia con riferimento alle norme di legge attributive del potere, o ad altre norme di legge che si pretendono violate secondo la prospettazione di parte ricorrente. Cosa vuol dire, infatti, 'eccesso di potere'? Si tratta d'una clausola generale, ossia «termini o sintagmi contenuti in enunciati normativi e caratterizzati da peculiare vaghezza o da indeterminatezza che comporta un'attività di *integrazione valutativa* peculiare del giudice»[37]: il giudice sarà quindi chiamato a compiere valutazioni politiche (in senso lato), sulla base di valori, e di assunzioni dogmatiche. Anche l'incompetenza e la violazione di legge si misurano operando (quanto meno) un'attività interpretativa (*lato sensu*) sui testi normativi invocati dalle parti[38]; malauguratamente – come

[37] Mutuo, qui, la (ri)definizione proposta da Velluzzi 2010: 42.

[38] Nel caso della violazione di legge, se ben si osserva, l'azione d'annullamento non è altro che un'azione volta ad applicare il principio della *lex superior*, al fine di risolvere così un'antinomia tra il

ricorda Mazzamuto – si tratta normalmente di testi poco chiari e mal coordinati, i quali forniscono, pertanto, un ricco materiale per le più disparate operazioni di costruzione giuridica.

Gli esempi esibiti *sub* 1.1 ne danno conferma. Le disposizioni sulla prescrizione biennale, ad esempio, si affastellano e si giustappongono in modo davvero scoordinato rispetto a quelle sul potere di direttiva e di integrazione dei contratti, ma il giudice decide di ragionare *a contrario*, pur avendo parimenti potuto ragionare *a simili* (a fronte d'analoghi interventi regolatori, funzionali a consentire, ad esempio, la corretta esecuzione dell'eccezione di adempimento rispetto al collegamento che intercorre tra il contratto del venditore col cliente finale e il contratto del venditore col distributore alla cui rete il medesimo cliente è allacciato).

Anche le disposizioni in tema di sicurezza sono sparpagliate e male organizzate, e, di fronte all'assenza d'una espressa disposizione attributiva ad Arera del compito di regolare l'assicurazione dei clienti finali, il giudice avrebbe potuto ragionare *a contrario*, ma non lo ha fatto, ricavando piuttosto un potere implicito. Neppure di fronte all'art. 3 della legge 241/90 – che esclude in modo davvero chiaro l'obbligo di motivazione per tutti gli atti a contenuto generale – l'attività nomopoietica si è arrestata, costruendo un'eccezione implicita per gli atti a contenuto generale delle autorità indipendenti.

È interessante, poi, notare che un elemento notevole è la presenza (nei ragionamenti costruttivi svolti) di tesi dogmatiche. Come detto sopra, infatti, il ricorso ad assunzioni dogmatiche è estremamente ricorrente nei ragionamenti dei giudici. Anzi, si può forse dire (con qualche semplificazione che gli amministrativisti perdoneranno), che l'intero ordito teorico della c.d. parte generale del diritto amministrativo si basa su concetti e assunzioni dogmatiche. Sono, ad esempio, assunti dogmatici: (i) il principio di legalità (sia esso inteso in senso sostanziale, in senso formale, ma anche la c.d. legalità procedurale); (ii) la tesi per cui l'amministrazione necessita d'una legittimazione democratica; (iii) la tesi per cui il giudice amministrativo non può sostituirsi all'amministrazione ed entrare nel merito delle scelte compiute; (iv) lo stesso concetto di interesse legittimo è una costruzione dogmatica[39].

Come visto, gli assunti dogmatici – e quindi i concetti (dogmatici) che su questi poggiano – sono tesi che esprimono *concezioni*, ideologie (ossia tesi riferite a valori), che circolano nell'ambito della c.d. cultura giuridica diffusa all'interno della comunità dei giuristi (di coloro che a vario titolo partecipano alle attività di interpretazione, sistemazione e applicazione del diritto: non solo giudici, quindi, ma anche la c.d. dottrina che coi

provvedimento legislativo e, appunto, una norma ricavata da disposizioni di rango superiore; e, come messo in evidenza nella precedente nota 16, la presenza o l'assenza di antinomie è risultato d'una attività interpretativa.

[39] La teoria generale del diritto non conosce la figura dell'interesse legittimo, ma – seguendo Wesley N. Hohfeld – solo quattro situazioni soggettive vantaggiose elementari (pretesa, libertà, potere, immunità).

giudici si confronta – se non altro perché molti studiosi sono anche bravi avvocati…)[40].

Non è possibile, qui, approfondire questo aspetto (comunque rilevante). Mi limito solo a due, brevi, osservazioni. La prima è che, ovviamente, nell'ambito d'una medesima cultura giuridica, le ideologie e le concezioni che circolano sono varie e spesso divergenti e conducono ad affermare tesi dogmatiche anche confliggenti tra loro[41]: ne è un esempio emblematico, nel diritto amministrativo, il dibattito attorno alla richiamata teoria dei poteri impliciti.

La seconda osservazione è che, come ha ben messo in rilievo Al Ross, il giudice, nella sua attività interpretativa è (necessariamente) «guidato da esigenze sociali e da considerazioni giuridico-sociologiche», con la particolare conseguenza che, nella sua attività interpretativa-costruttiva, «la "ragione giuridica" immanente nella norma giuridica non può essere separata dagli scopi pratici che vivono fuori dalla norma, né la "conseguenza formale" può essere indipendente da un adattamento valutativo delle norme in rapporto ai valori presupposti»[42]. Ciò vale con particolare evidenza per il diritto amministrativo, in cui il giudice si trova a decidere, normalmente, sulla legittimità di atti della pubblica amministrazione che coinvolgono interessi rilevanti: ad esempio, quando il giudizio riguarda atti di regolazione di autorità indipendenti, essi normalmente incidono sulla libertà di impresa o di iniziativa economica, che si può trovare in conflitto con la promozione della concorrenza, l'economicità e l'efficienza dei servizi, la tutela dell'ambiente, o dei consumatori contrattualmente deboli, ecc.

2. Interesse per le autorità indipendenti di regolazione

2.1. Attività di sistematizzazione del diritto settoriale

D'accordo con Moreso, uno degli aspetti interessanti per la filosofia del diritto, che ha modificato il panorama del diritto amministrativo, è certamente l'avvento delle

[40] Cfr. ad esempio Ross 1965: 94: «[i]l diritto è legato al linguaggio come mezzo per comunicare significati, e il significato che è connesso alle parole del diritto è condizionato per mille vie da taciti presupposti sotto forma di credenze e di pregiudizi, di aspirazioni, modelli di comportamento e valutazioni, esistenti nella tradizione culturale che è comune al legislatore e al giudice», e anche, più in generale, alla scienza giuridica. Alf Ross parlava, al riguardo, di *ideologie delle fonti* e di *ideologie del metodo interpretativo*, consistenti, rispettivamente, nell'insieme (i) di «direttive che […] indicano il modo secondo il quale il giudice dovrà procedere per scoprire la direttiva o le direttive rilevanti per la controversia di cui si tratta» (1965: 72), nonché (ii) di quelle che indicano il modo secondo cui dovrebbero essere interpretate e applicate le direttive per la soluzione della controversia (individuate in base all'ideologia delle fonti – cfr. 1965: 103-105, 146-148).

[41] Per un approfondimento di tale aspetto, cfr. ad esempio Pino 2011: 848 e ss., che distingue tra ideologie sostanzialiste e ideologie formaliste, le quali, al loro interno, si possono presentare con gradazioni e sfumature differenti (cfr. anche Pino 2021: cap. IX).

[42] Ross 1965: 137 e 148. Su tale aspetto, sia consentito rinviare anche a Silvi 2018.

autorità indipendenti di regolazione[43]. Diversamente da Moreso, però, che osserva il fenomeno più nella prospettiva della filosofia politica, a me pare che il fenomeno assuma rilevanza anche nella prospettiva dell'analisi meta-giurisprudenziale offerta dalla filosofia analitica: da tale punto di vista, infatti, le autorità indipendenti, e in particolare quelle di regolazione, costituiscono un fattore interessante che si inserisce nella (consueta) dialettica tra giurisprudenza e scienza giuridica (o tra giurisprudenza, scienza giuridica e legislatore in senso materiale), e che è normalmente presa in considerazione dalla teoria dell'interpretazione e del ragionamento giuridico.

Da un certo punto di vista, le autorità di regolazione indipendenti sono più simili ai giudici amministrativi che all'amministrazione (giudici amministrativi che, peraltro, come noto, non sono pienamente indipendenti dall'esecutivo). Le autorità indipendenti, infatti, sono collegi indipendenti dal potere esecutivo (oltre che dall'interesse delle imprese che operano nel settore regolato – imprese che spesso sono in mano pubblica): sono nominati secondo procedure che dovrebbero riflettere una rappresentanza *bipartisan* rispetto alla formazione parlamentare presente al momento della nomina; la loro nomina non può essere revocata, né rinnovata (salva l'applicazione della *prorogatio*), e normalmente perdura per un periodo che eccede quello della singola legislatura; dovrebbero essere scelti tra personale "tecnico" altamente qualificato nei settori regolati (e sono supportati da una struttura di funzionari dall'elevata competenza tecnica).

Tuttavia, le autorità di regolazione non sono organi dell'applicazione giuridica, ma della produzione: non applicano norme ma le producono. Esse operano come una sorta di micro-legislatori delegati a disciplinare varie attività, in coerenza con alcune disposizioni legislative (nazionali/comunitarie) che hanno (almeno di norma) carattere generale, e sono spesso interpretate come principi che orientano l'esercizio del potere normativo dell'autorità. Al riguardo, un aspetto certamente innovativo è connesso al fatto, cui si è fatto cenno *sub* 1.1.3, che le autorità di regolazione sono tenute a motivare i propri atti di produzione, al fine di giustificare la regolazione prodotta rispetto al quadro legislativo (nazionale e comunitario). Ciò comporta che, in tali atti di regolazione sono normalmente (meglio, devono essere) compresenti due diversi tipi di discorsi:

(i) sia discorsi normativi in senso stretto, propri d'un organo della produzione giuridica, contenenti quindi le disposizioni vere e proprie;
(ii) sia (meta)discorsi e operazioni interpretative (in senso lato), che vertono sia sul discorso *sub* (i), sia su previgenti disposizioni contenute in documenti legislativi o altri documenti normativi (tra cui anche altri documenti della stessa autorità di regolazione) rispetto ai quali il discorso *sub* (i) dovrebbe trovare fondamento.

[43] Cfr. Moreso 2023: 170-171.

In altre parole, le norme adottate dalle autorità di regolazione – ricavabili dal discorso *sub* (i) – sono (di solito) il risultato d'una attività argomentativa – discorso *sub* (ii) – svolta dalla medesima autorità e composta (anche) di atti interpretativi (in senso stretto) nonché (soprattutto) di atti di costruzione giuridica, orientati (in modo diretto o indiretto) a *sistemare* il dato normativo (legislativo e regolatorio) entro il quale si iscrivono le nuove disposizioni adottate. Ciò significa che il discorso normativo *sub* (i), normalmente, trova già un inquadramento di tipo dogmatico, o comunque sistematico (o, meglio, con pretese di sistematicità) nell'ambito dei discorsi *sub* (ii), contenuti nella motivazione del provvedimento regolatorio. L'autorità di regolamentazione, insomma, svolgendo un'attività di (almeno tendenziale) sistemazione del diritto settoriale, compie (anche) attività dogmatica, venendo ad affiancarsi alla giurisprudenza e alla dottrina.

A quest'ultimo riguardo, in particolare, seguendo Giovanni Battista Ratti, può essere non inutile distinguere, rispetto a una nozione ampia di sistemazione (che consiste, in generale, nel «complesso delle operazioni necessarie a strutturare sistematicamente un certo insieme di materiali giuridici»), una nozione di (a) *sistemazione in senso stretto*, intesa come le operazioni mediante le quali si rimuovono le contraddizioni all'interno d'un sistema, e la nozione di (b) *sistematizzazione*, intesa nel senso «di sviluppo (*development*, *desarrollo*) logico di un certo insieme di norme giuridiche»[44]. È possibile, poi, distinguere anche diverse attività (e relative caratteristiche) di sistemazione e di sistematizzazione, a seconda che esse siano compiute dagli organi della produzione (sistemazioni legislative), o dell'applicazione (sistemazioni giudiziali), o, infine, dalla c.d. scienza giuridica (sistemazione dottrinale).

Secondo Ratti, solo raramente il legislatore compie attività di sistematizzazione, diversamente dai giudici o, ancor più, dalla dottrina. A me pare, invece, che, nel caso elle autorità di regolamentazione (almeno in quello di Arera su cui soffermo la mia analisi), nell'ambito dei discorsi che queste sviluppano nelle motivazione dei provvedimenti, siano rintracciabili operazioni di sistematizzazione, ad esempio, operazioni di c.d. analisi giuridica («che consiste nella scomposizione, per via di successive astrazioni da casi concreti, dei concetti giuridici fondamentali»), o di c.d. contrazione logica («che consiste nell'inferire dei principi generali dalle disposizioni normative di dettaglio»), che possono risultare prodromiche a una ulteriore attività di «sviluppo delle conseguenze logiche di tali principi»[45].

Non è possibile, qui, approfondire un tale aspetto. Mi limito a ricordare solo che, ad esempio con riferimento al settore dell'energia, Arera ha rivendicato, sin dall'inizio della sua operatività, un tale "compito" di «presidiare anche l'esigenza di unità e di unificazione sistematica dell'assetto normativo delle relazioni commerciali

[44] Ratti 2008: 69-75.
[45] Ratti 2008: 89.

nelle quali si traduce l'esercizio delle diverse attività»[46]. E ciò non solo mediante gli argomenti svolti (e le tesi affermate) nella motivazione dei suoi provvedimenti di regolazione (motivazione che è stata arricchita anche di appositi documenti che accompagnano il provvedimento – c.d. relazioni tecniche; e che lo precedono – c.d. documenti per la consultazione), ma anche muovendosi su (almeno) altre tre direttrici: (i) valorizzando le funzioni propositive e di segnalazione assegnatele dalla legge – nei confronti di Parlamento, Governo e del Ministro competente al rilascio di autorizzazioni o concessioni[47]; (ii) attraverso una consolidata prassi di pubblicare (sul proprio sito internet) una serie di chiarimenti interpretativi e applicativi della propria regolazione, rispetto a casistiche dubbie (o controverse) segnalate dagli operatori di settore; (iii) infine, tale attività interpretativa e di chiarimento è svolta anche (a volte) nell'ambito dei vari provvedimenti applicativi della sua regolazione generale (si pensi, ad esempio, ai provvedimenti sanzionatori, o a quelli di approvazione delle proposte tariffarie, o, ancora, a quelli di approvazione di determinate clausole contrattuali, ecc.).

2.2. Autorità di regolazione e giustizia amministrativa

Come ha osservato Mazzamuto, nella caotica dispersione e frammentazione delle fonti scritte (legislative e sublegislative), è la giustizia amministrativa a garantire la certezza attraverso, innanzi tutto, la produzione dei principi di c.d. parte generale, e in secondo luogo, un'attività di coordinamento, di sistemazione (di sistematizzazione) del dato normativo dei vari settori della vita su cui si affastellano le varie e mutevoli disposizioni scritte.

Ora, le autorità di regolazione indipendenti incidono su questi due aspetti, ancorché in modo diverso.

2.2.1. Nella sistemazione della legislazione settoriale

Innanzi tutto, all'interno dei singoli settori che esse devono presidiare, le autorità indipendenti si *affiancano* al giudice, proprio nell'attività di *sistemazione* (e *sistematizzazione*) del caotico dato normativo. E lo fanno in una prospettiva di necessaria dialetticità col giudice amministrativo, visto che quest'ultimo è chiamato

[46] Cfr. Relazione Tecnica alla deliberazione 55/04, pag. 3.

[47] Tale riflessione è stata sviluppata in modo rigoroso nell'ambito della Relazione Tecnica alla deliberazione 55/04, in cui Arera ha cercato di sistematizzare le competenze a essa attribuite rispetto a quelle che la legge conferisce, nei settori interessati, al Ministro competente al rilascio degli atti concessori, o comunque abilitanti d'una certa attività in cui si declina la filiera. Sia consentito rinviare sul punto a Silvi 2016: 412-416.

a valutare la legittimità dei provvedimenti delle autorità di regolazione: in tale valutazione però, inevitabilmente, il giudice si trova a doversi confrontare con le tesi interpretative dell'autorità indipendente e con le sistematizzazioni da essa compiute del dato normativo e dei suoi provvedimenti.

Vale la pena, al riguardo, recuperare alcuni esempi riportati *sub* 1.1. Ad esempio, le tesi sul potere di eterointegrazione, insito nel potere di direttiva assegnato ad Arera dalla sua legge istitutiva (art. 2, co. 12, lett. h), legge 481/1995), sono state affermate da Arera sin dai primi suoi provvedimenti di regolazione, ma sono state anche accolte dalla giustizia amministrativa che, sul punto, ha prodotto una ricca giurisprudenza con varie varianti e precisazioni; tra tali pronunce, rientrano anche quelle sulla prescrizione biennale (*sub* 1.1.1), che si pongono in certa discontinuità, escludendo tale istituto dallo "spazio" di intervento di Arera sui contratti sottoposti a regolazione. Si prenda anche l'esempio dell'istituto della rettifica tardiva di dati tariffari previsto da Arera, e giustificato dalla giustizia amministrativa (*sub* 1.1.2): è la ricca giurisprudenza formatasi sulla regolazione tariffaria ad aver più volte confermato il c.d. principio del *full recovery cost*; salvo però (proprio nell'interazione dialettica con Arera) non solo riconoscere la deroga nei casi di produzione tardiva dei dati tariffari, ma ancorare tale istituto a principi costituzionali.

La relazione dialettica tra giustizia amministrativa e autorità indipendenti (soprattutto) di regolazione è certamente meritevole di approfondimento da parte della filosofia analitica, se non altro perché i due attori, a ben vedere, sono portatori di differenti conoscenze e "culture" (in senso ampio[48]) – alla luce delle quali esse valutano però i medesimi interessi in gioco (anche rispetto al caso che viene in esame): l'autorità giudiziaria è portatrice (principalmente) d'una cultura *giuridica*, mentre l'autorità amministrativa indipendente è portatrice (principalmente) d'una cultura *tecnica* (meglio, tecnico-economica). Come ho detto sopra, infatti, i giudici partecipano (come la dottrina) a una medesima cultura giuridica (in cui evidentemente circolano ideologie, tesi, posizioni anche differenti tra loro). Di tale cultura giuridica le autorità amministrative indipendenti pure partecipano, anche se marginalmente (ossia nella precisa misura in cui esse sono assistite anche da giuristi): principalmente, infatti, la regolazione settoriale è il frutto di scelte su interessi e valori filtrati attraverso ideologie, tesi, teorie di tipo tecnico e (soprattutto) economico (di economia della regolazione) – ciò che, come noto, costituisce un aspetto qualificante del fenomeno delle autorità indipendenti (e che le caratterizza, appunto, come autorità "tecniche")[49].

[48] Uso, qui, il termine "cultura" in senso volutamente atecnico e impreciso, per identificare più un "ambiente culturale", costituito dall'insieme delle tesi, delle ideologie, delle posizioni teoriche (anche eterogenee) che hanno coloro che operano in una certa scienza sociale, come il diritto, l'economia, la politica, l'arte.

[49] È in tale prospettiva, a mio avviso, che si collocano le considerazioni di Bruti Liberati (2023: 292), secondo le quali le regolazioni delle autorità indipendenti, quando riguardano (come avviene ad

2.2.2. Nell'elaborazione dei principi di parte generale

Il secondo aspetto su cui le autorità indipendenti rilevano è quello dei c.d. principi e della parte generale del diritto amministrativo. Non perché esse affrontino tali temi nell'ambito delle motivazioni dei loro provvedimenti; ma perché, col loro modo peculiare di operare (e per il peculiare contenuto delle norme attributive delle loro competenze), esse stesse sono divenute *oggetto* dell'attività (dogmatica) di sistemazione compiuta dalla giustizia amministrativa, la quale, in più occasioni, si è trovata a rivedere e aggiustare tesi e principi della parte generale, al fine di inquadrare e sistematizzare il nuovo fenomeno istituzionale delle autorità indipendenti di regolazione.

Ne sono esempi emblematici le pronunce (richiamate *sub* 1.1.3) che hanno sottoposto le autorità all'obbligo di motivazione e al principio del giusto procedimento, così come anche la costruzione (meglio, la riformulazione) della teoria dei poteri impliciti (*sub* 1.1.4). Ulteriore esempio interessante è costituito da quelle pronunce in cui la giustizia amministrativa ha ampliato l'estensione del proprio sindacato sugli atti di regolazione, sindacato che non può (più) «essere limitato a un sindacato meramente estrinseco, estendendosi al controllo intrinseco, anche mediante il ricorso a conoscenze tecniche appartenenti alla medesima società specialistica applicata dall'amministrazione indipendente, sulla attendibilità, coerenza e correttezza degli esiti, in ispecie rispetto ai fatti accertati e alle norme di riferimento attributive del potere»[50].

Quest'ultimo esempio mi pare interessante, soprattutto se si considerano le due "culture" (cui ho fatto cenno *sub* 2.2.1) di cui sono portatori la giustizia amministrativa e le autorità indipendenti. Non è evidentemente facile, qui, per il giudice, trovare un punto di equilibrio "corretto" – anche perché (è bene ricordarlo) stiamo parlando pur sempre di tesi e di assunti dogmatici che, come tali, si basano su valutazioni tutto sommato indecidibili, essenzialmente contestabili. Non a caso, è possibile che, nelle sue decisioni, il giudice semplicemente sbagli, nel senso che inserisca, nei suoi argomenti, tesi che pretende di mutuare dalla scienza economica, ma che, proprio per la scienza economica, sono sbagliate.

Per fare un recente esempio, il giudice amministrativo ha annullato una regolazione di Arera che, nel settore del ciclo dei rifiuti urbani, rispetto alla fase del c.d. trattamento, ha esercitato il potere tariffario previsto dall'art. 1, co. 527, lett. g) legge 205/2017 (si tratta del potere di «fissazione dei criteri per la definizione delle tariffe di accesso agli impianti di trattamento»), adottando una regolazione dei corrispettivi da applicare (solo) a determinati impianti (c.d. minimi). Alla base della sua decisione, il Consiglio di Stato ha sostenuto che la regolazione introdotta avrebbe

esempio nel caso di Arera) «mercati in cui operano poteri privati insidiosi per il pluralismo economico e politico e per la tutela dei diritto fondamentali dovranno essere caratterizzate da una notevole radicalità».

[50] CdS, Sez. VI, sent. 2111/2022.

(avuto) l'effetto di sottrarre i titolari di tali impianti «[d]all'ambito concorrenziale del mercato del trattamento e smaltimento dei rifiuti», e così Arera si sarebbe sostituita al «decisore politico» cui solo spetta stabilire se sottoporre o meno a riserva una certa attività lasciata altrimenti in concorrenza[51]. Peccato però che, secondo i rudimenti della scienza economica (ben espressi invece in altre pronunce dello stesso Consiglio di Stato[52]), per definizione, è *sottratta* alla concorrenza proprio quell'attività che il legislatore sottopone a regolazione tariffaria, come è appunto avvenuto col trattamento dei rifiuti (a opera del citato art. 1, co. 527, lett. g), legge 205/2017): dunque, il ragionamento del giudice è, qui, visibilmente sbagliato – o almeno, è sbagliato proprio alla luce (delle nozioni di base di) quella scienza economica cui esso stesso si appella.

3. Analisi logica e analisi critica

Nelle analisi che precedono, sebbene con inevitabili semplificazioni, spero di aver mostrato, raccogliendo la sfida di Mazzamuto, la rilevanza e l'interesse che il diritto amministrativo può avere per gli studi di filosofia analitica, intesa in particolare come meta-giurisprudenza.

Ma, come ho già detto in apertura, le relazioni tra l'analisi giusteorica e le riflessioni dogmatiche sono circolari, nel senso che la scelta di sottoporre ad analisi meta-giurisprudenziale le decisioni della giustizia amministrativa, può fornire contributi utili agli stessi cultori del diritto amministrativo. Quali? Almeno uno a mio avviso, che consiste in questo: le varie teorie analitiche sull'interpretazione (quale quella realista proposta da Guastini, che ho seguito nella mia analisi) intendono elaborare strumenti concettuali per sottoporre ad analisi logica (tendenzialmente neutra e asettica dal punto di vista valutativo) gli argomenti impiegati dalla giurisprudenza e farne emergere eventuali carenze, percorsi nascosti e tesi di politica del diritto, e mostrare in tal modo la reale attività nomopoietica del giudice.

Ora, una tale *analisi logica*, assiologicamente neutra, può costituire la base per una *riflessione critica* sulle decisioni esaminate. È possibile cioè passare da una *teoria* dell'interpretazione e dell'argomentazione, volta a descrivere come gli interpreti operano, a una *dottrina* del ragionamento giuridico, che valuta, giudica, il prodotto degli interpreti – rispetto, ovviamente, ad altri valori. Si esce così dal terreno della filosofia analitica del diritto e si ritorna nel contesto delle assunzioni dogmatiche,

[51] CdS, Sez. II, sent. 2255/2024, § 5.1.

[52] Cfr. ad esempio la già citata sent. 2111/2022, § 8.3: «In linea di principio, gli atti di regolazione tariffaria delle autorità indipendenti non regolano un mercato libero, ma un servizio pubblico, al fine di individuare i criteri di determinazione della tariffa applicabile come controprestazione della fornitura del servizio medesimo».

delle ideologie giuridiche, sebbene dotati di lenti più potenti per sottoporre ad *analisi critica* i discorsi della giustizia amministrativa.

A me pare, infatti, che un'analisi meta-giurisprudenziale, come quella che ho sperimentato nel presente lavoro, alla fine, restituisca (anche) della giustizia amministrativa un quadro meno idilliaco e agiografico, rispetto a quello che sembra emergere dallo scritto di Mazzamuto: «Il diritto pretorio» creato dalla giustizia amministrativa «che […] soprattutto ha negato all'amministrazione una sfera di libero arbitrio, come quella di cui gode un privato, sindacandone le scelte discrezionale»[53], infatti, è, a sua volta, esercizio d'un potere altrettanto grande, che può risultare, a volte, altrettanto arbitrario, sebbene anche il giudice amministrativo, per Costituzione, sia soggetto alla legge (art. 101) anche quando giudica e annulla gli atti della pubblica amministrazione (art. 113, co. 3).

Il caso delle autorità indipendenti di regolazione è emblematico. Le autorità hanno un grande potere, che trova il principale contrappeso proprio nel sindacato giurisdizionale: di ciò, come visto, sembra ben conscia la giustizia amministrativa che, se, da un lato, è stata disposta ad adeguare la c.d. parte generale del diritto amministrativo per far posto a tale nuova realtà istituzionale, dall'altro lato, ha avuto modo di sottoporre la stessa a precisi vincoli che consentono al giudice un sindacato penetrante sul potere esercitato dalle autorità indipendenti.

Ma, così facendo, la giustizia amministrativa esercita un potere ancora più grande, avendo (tendenzialmente) lei l'ultima parola (emblematico il caso degli impianti di trattamento dei rifiuti visto *sub* 2.2). Ciò comporta, a mio avviso, una grande *responsabilità* della giustizia amministrativa, che va coltivata e stimolata anche con l'analisi critica delle sue decisioni. E al riguardo, come visto, la filosofia analitica (con la sua analisi logica) ha molti strumenti da offrire.

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[53] Mazzamuto 2022, p. 171.

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