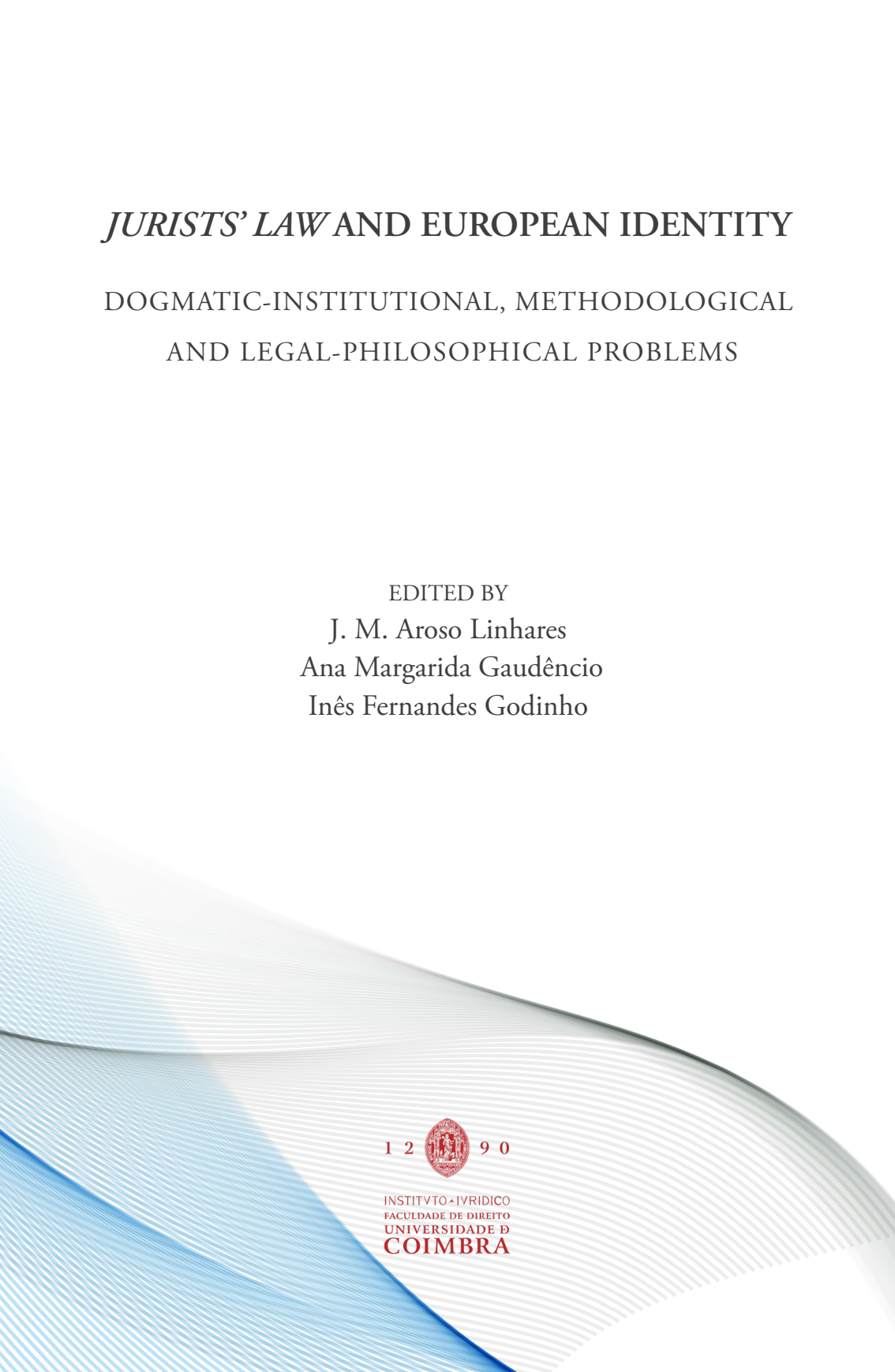
JURISTS' LAW AND EUROPEAN IDENTITY

DOGMATIC-INSTITUTIONAL, METHODOLOGICAL AND LEGAL-PHILOSOPHICAL PROBLEMS

EDITED BY
J. M. Aroso Linhares
Ana Margarida Gaudêncio
Inês Fernandes Godinho



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INTRODUCTORY NOTE

The fourteen chapters which compose this book were written in the context (and under the inspiration) of the *First Luso-Polish Conference on Legal Theory and Legal Method(-nomo)logy* (Faculdade de Direito da Universidade de Coimbra, 26th-27th April 2017): some of them correspond to the given oral presentation, the most part has however significantly *grown* since that presentation, incorporating developments and answers (if not important thematic changes) which, being directly inspired by the felicitous dialogue among the participants (during and after the two-days encounter), do free its autonomous outcome from the structural and reflexive constraints of a proceedings register. Now that the *Second Luso-Polish Conference* has already taken place (Warsaw, Supreme Administrative Court, 10th and 11th May 2018) and that a third one is already in preparation (Coimbra, 2020), it's time to *unveil* the essays which the first one has produced. The alluded freedom allows us in fact to propose a thematic progression which, notwithstanding the plurality of conceptions and perspectives, justifies a distribution in four different steps or grounds: the first one (first part, chapters 1 and 2) exploring the his-

NOTA INTRODUTÓRIA

Os catorze capítulos que compõem este livro foram escritos no contexto (e sob a inspiração) do *Primeiro Encontro Luso-Polaco de Teoria do Direito e Metodo(nomo)logia* (Faculdade de Direito da Universidade de Coimbra, 26 e 27 de Abril de 2017): alguns correspondem à comunicação oral ali proferida, a maior parte dos ensaios, contudo, cresceu significativamente desde a dita apresentação, tendo incorporado desenvolvimentos e respostas (se não mesmo importantes mudanças temáticas) que foram directamente inspiradas pelo profícuo diálogo entre os participantes (durante e depois do encontro de dois dias) e que assim libertam o seu resultado autónomo das limitações estruturais e reflexivas de um livro de actas. Agora que o *Segundo Encontro Luso-Polaco* já se realizou (Varsóvia, Supremo Tribunal Administrativo, 10 e 11 de Maio de 2018) e que um terceiro encontro já se encontra em preparação (Coimbra, 2020), é o momento de *desvelar* os estudos que o primeiro encontro produziu. A referida liberdade permite-nos, de facto, propor uma progressão temática, a qual, não obstante a pluralidade de concepções e perspectivas, justifica uma distribuição por quatro

tory of legal philosophical thinking (and this one as a dimension of European identity and/or heritage) under the motto of *natural law* (transcendent and immanent) *traditions* (and their dark and luminous *justificatory* sides); the second one (part II, chapters 3 to 6) discussing the *place* of jurists' law from the perspective of rationality, emergence and content — which means revisiting the claims of *legal science* and the theory of *legal sources*, as well as exploring the experience and dynamics of the *legal system* (the connections of *jurists law* with statutory institutionalization and principles specification); the third one (part III, chapters 7 to 9) considering specific projections into legal dogmatic problems; the fourth one (part IV, chapters 10 to 14) developing at last plausible methodological approaches concentrated on jurisdictional adjudication and on the discharge function *(die Entlastungsfunktion)* which is (and should be) played by *Juristenrecht.*

diferentes territórios ou etapas: a primeira (primeira parte, capítulos 1 e 2) a explorar a história do pensamento jurídico-filosófico (e deste como dimensão da identidade e/ou da herança europeias) sob o mote das *tradições* jusnaturalistas (transcendentes e imanentes) e da sua dimensão *justificatória* (obscura e luminosa); a segunda (parte II, capítulos 3 a 6) a discutir o *lugar* do direito dos juristas na perspectiva da sua racionalidade, emergência e conteúdo — o que significa revisitar as pretensões-exigências da *ciência do direito* e a teoria das *fontes do direito*, bem como explorar a experiência e a dinâmica do *sistema jurídico* (as conexões do direito dos juristas com a institucionalização legislativa e a especificação de princípios); a terceira (parte III, capítulos 7 a 9) a considerar projecções específicas em problemas dogmáticos; a quarta (parte IV, capítulos 10 a 14) a desenvolver, por fim, possíveis abordagens metodológicas concentradas na decisão jurisdicional e na função desoneradora *(die Entlastungsfunktion)* que é (e deve ser) desempenhada pelo *Juristenrecht.*

J. M. Aroso Linhares
Ana Margarida Gaudêncio
Inês Fernandes Godinho

PART I

THE "JUSTIFICATION" OF LAW AND JURIDICAL VALIDITY AS A DIMENSION OF EUROPEAN IDENTITY AND HERITAGE

1

THE «SYMBOLIC POWER» OF IBERIAN ACADEMIA AT THE COLONIAL *JUS GENTIUM EUROPAEUM* FOUNDING MOMENT

Miguel Régio de Almeida

1. (Iberian) Academia and its «symbolic power»

Although this is but a fragment of a larger puzzle,[1] when asked to think about «European identity» in a legal academic context, and considering its nuclear pedagogical function, it is quite easy for one to recall Jacques Lacan's «mirror stage».[2] After all, Academia is the original space, and mirror, where the idea of the legal subject, the legal

[1] The text follows on my PhD research, funded by the Portuguese National Funding Agency for Science, Research and Technology (FCT). I am grateful to my supervisor, Professor Mário A. Reis Marques, and to Professor José M. Aroso Linhares, for the opportunity to participate in this academic event.

[2] See Jacques Lacan, "The Mirror-phase as Formative of the Function of the I", in Slavoj Žižek, ed., *Mapping Ideology*, UK: Verso, 1994, 93-99.

agent and the legal order are built and reproduced. It is a privileged «ideological state apparatus», to allude to the French philosopher Louis Althusser.[3] Or, to quote Hannah Arendt's proposition, one can speak about «Academia's authentically political meaning», as Plato had already noted,[4] concerning the highly-regarded discourses here produced. It is first-of-all within Academia that the many bricks that build the European legal identity and thought are shaped, giving the aspiring-jurist a role and characteristics to which he or she can identify with, as well as recognize on international standards. However, such recognition is sometimes grounded on «hegemonic» narratives, or even on «invented traditions», as Antonio Gramsci[5] and Eric Hobsbawm[6] have put it. «Modern legal mythologies»[7] built to reproduce orders of power, alienating or subordinating other historical or spatial views, burying previous «epistemicides»[8] or «memorycides».[9] Thus, what will follow here is just a brief effort to help fighting the «legal eurocentrism» and «orientalism»,[10] to challenge the epistemic "uni-versity" through "pluri-versity" and the decolonization of legal knowledge.

I would like to address the orthodox legal academic vision and power at the time of the so-called 'Colonial Encounter', five hundred years ago. My aim is to engage in a critical legal analysis of the «death of Columbus», the «irreversible colonization» that was Europe's «original sin», as the Portuguese philosopher Eduardo Lourenço wrote.[11] Therefore, this essay is about the founding myth

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[3] *Vide* Louis Althusser, "Ideology and Ideological State Apparatuses (Notes towards an Investigation)", in Slavoj Žižek, ed., *Mapping Ideology*, uk: Verso, 1994, 100-140.

[4] Hannah Arendt, *Verdade e Política*, Lisboa: Relógio D'Água, 1995 [1967], 56.

[5] *Vide* Antonio Gramsci, *Gramsci. A Cultura e os Subalternos*, Lisboa: Edições Colibri, 2012.

[6] *Vide* Eric Hobsbawm, "Introduction: Inventing Traditions", in Eric Hobsbawm / Terence Ranger, *The Invention of Tradition*, uk: Cambridge University Press, 2000 [1983], 1-14.

[7] *Vide* Peter Fitzpatrick, *The Mythology of Modern Law*, uk: Routledge, 1992; Id., *Modernism and the Grounds of Law*, usa: Cambridge University Press, 2001.

[8] *Vide* Boaventura de Sousa Santos, *A crítica da razão indolente. Contra o desperdício da experiência* [*Para um novo senso comum. A Ciência, o direito e a política na transição paradigmática — Volume 1*], Porto: Edições Afrontamento, 2002.

[9] *Vide* Bartolomé Clavero, *Derecho global. Por una historia verosímil de los derechos humanos*, Madrid: Editorial Trotta, 2014.

[10] *Vide* Ugo Mattei / Laura Nader, *Plunder. When the rule of law is illegal*, Singapore: Blackwell, 2008.

[11] Eduardo Lourenço, *A Morte de Colombo. Metamorfose e Fim do Ocidente como Mito*, Lisboa: Gradiva, 2005, 13, 163.

and episteme regarding the birth of modern European International Law, and subsequently its legal thought and identity. It is assumed that an «identity», the way European jurisprudence sees and builds itself, is necessarily deeply connected to the representation of an Other subject (and space), since that is at least a bilateral relation. *Ratione materiae*, this text will focus on three key-figures of the Iberian School of Natural Law, from the 15th to the 17th centuries, who theorized on the 'Colonial Encounter', and developed the correspondent natural law fundaments and legal framework. The aim is to expose some of their ambiguous contributions to the development of the modern, globalized, European legal mind. This can be observed through a contextualized reading of their works, taking notice of the expected legal effects from the «symbolic power» of the Iberian *homo academicus*, to use concepts from the French sociologist Pierre Bourdieu.[12] Since this was the time where the first dogmatic corpus regarding the *Ius Publicum Europaeum* was established — and therefore had an everlasting influence —, it is historically relevant in order to understand the development of the subsequent *Juristenrecht*.

However, there still is a generalized international lack of recognition regarding the Iberian School of Natural Law — also known as Neo- or Second-Scholastic, or still branded (quite problematically and polemically, in my point of view) as «Iberian School of Peace»[13] — albeit this is where the founding scholars of modern International Law lie. Such perspective stands in direct opposition to the hegemonic view that bestows Hugo Grotius in such role,[14] erroneously[15] taking as the mythological origin of the European *Ius Publicum* the 1648 Peace of Westphalia. But this pressing recognition is not something newly-fangled. Three international legal scholars should be pointed out as precursors of this revisionist view: the Belgian Ernest Nys,[16] in the 19th century; the North-American James Brown Scott,[17] in

[12] *Vide* Pierre Bourdieu, *Homo Academicus*, Portugal: Edições Molemba & Edições Pedago, 2016 [1984].

[13] *Vide* Pedro Calafate / Ramón E. Mandado Gutiérrez, dir., *Escola Ibérica da Paz: a consciência crítica da conquista e colonização da América — 1511-1694*, España: Editorial de la Universidad de Cantabria, 2014.

[14] And his *De iure belli ac pacis* (1625).

[15] *Vide* Richard Joyce, "Westphalia. Event, memory, myth", in Fleur Johns / Richard Joyce / Sundhya Pahuja, ed., *Events: The Force of International Law*, usa & Canada: Routledge, 2011, 55-68.

[16] And his *Les origines du droit international* (1894).

[17] With his *The Catholic Conception of International Law. Francisco de Vitoria & Francisco Suárez* (1934).

the 20th; and also, most famously, the German philosopher and jurist Carl Schmitt.[18] Nowadays, shaping theoretical trends as the Third World Approaches to International Law, the New Stream of International Law and the legal developments of Decolonial Theory, one should not ignore the works of critical legal scholars as the North-American Antony Anghie,[19] the Finnish Martti Koskenniemi,[20] and the Colombian José-Manuel Barreto,[21] among many others.[22] By accepting this revisionist and critical view, the Iberian School must also be depicted as an important precursor of Colonial Law, or even, according to some views (with whom I disagree, first of all due to historiographic reasons), of Human Rights.[23]

Nevertheless, it is without a doubt to the Portuguese and the Spanish legal thinking of those centuries, deeply connected with the Christian mind and Church, that the conception of a new

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[18] *Vide* Carl Schmitt, *The* Nomos *of the Earth in the International Law of the* Jus Publicum Europaeum, usa: Telos Press, 2006 [1950], from where it was gathered inspiration for the title of the present text.

[19] *Vide* Antony Anghie, "Francisco de Vitoria and the Colonial Origins of International Law", *Social Legal Studies*, 5 (1996) 321-336; Id., *Imperialism, Sovereignty and the Making of International Law*, usa: Cambridge University Press, 2004.

[20] *Vide* Koskenniemi, Martti, "Colonization of the «indies». The origin of International Law?", in Yolanda Gamarra Chopo, coord., *La idea de América en el pensamiento* ius *internacionalista del siglo xxi (Estudios a propósito de la conmemoración de los bicentenarios de las independencias de las repúblicas latinoamericanas)*, España: Institución «Fernando el Católico», 2010, 43-63; Id., "Empire and International Law: The Real Spanish Contribution", *University of Toronto Law Journal*, 61/1 (2011) 1-36; Id., "Vitoria and Us. Thoughts on Critical Histories of International Law", *Rechtsgeschichte Legal History* 22 (2014) 119-138.

[21] *Vide* José-Manuel Barreto, "Imperialism and Decolonization as Scenarios of Human Rights History", in José-Manuel Barreto, ed., *Human Rights from a Third World Perspective: Critique, History and International Law*, uk: Cambridge Scholars, 2013, 140-171; Id., "A Universal History of Infamy. Human Rights, Eurocentrism, and Modernity as Crisis", in Prabhakar Singh / Benoît Mayer, ed., *Critical International Law. Postrealism, Postcolonialism, and Transnationalism*, India: Oxford University Press, 2014, 143-166.

[22] As deductible, the approach pursued in this essay draws on these critical legal trends.

[23] *Vide e.g.* Oris de Oliveira, "Contribuição de Francisco de Vitoria ao Direito Internacional Público no 'Indis Recenter Inventis, Relectio Prior'", *Revista da Faculdade de Direito da Universidade de São Paulo*, 68/2 (1973), 361-384; Antonio García, "The Spanish School of the Sixteenth and Seventeenth Centuries: A Precursor of the Theory of Human Rights", *Ratio Juris* 10/1 (1997) 25-35; Manuel Maceiros Fafián / Luis Méndez Francisco, coord., *Los Derechos Humanos en su origen — La República Dominicana y Antón Montesinos*, Salamanca: Editorial San Esteban, 2011.

world legal order and the legitimization of global imperialism (with its indissociable exploitation of natural and human resources) are owed. After all, these were the two leading kingdoms responsible for the colonization of the so-called 'New World', which for a time have inclusively been merged under the same Crown, during the Iberian Union of 1580-1640. Thus, it was quite common then for scholars, who were all Latin-speakers and mostly clergymen, to teach in different universities in the kingdoms of Portugal and Spain. Since they were the vanguard of scribes of the ideological state apparatuses at the time, they are as accountable for the so-called 'revolutionary humanism' as for the development of Colonial Law. One does not occur without the other, «modernity» does not exist without «coloniality». Consequently, Iberian Academia keeps lacking the official acknowledgement of its responsibility regarding «the darkest side of Western Modernity», as the Argentinian semiotician Walter Mignolo puts it.[24] This might not be as plain as it sounds, since both countries were, until the 1970s, under fascist regimes, both supported by the Christian Church, following on a tradition of centuries of alliance between the Vatican and the Iberian political powers. As a result, the hegemonic legal academic episteme became quite conservative ideologically, and influenced by an extreme legal positivism, which deeply influences how to read History, to select sources, to interpret norms, and to judge facts.[25] Such watermarks take their time to be washed away.

2. Iberian Academia and the 'New World'

To begin with, it is crucial to highlight how important universities were in the 15th century. Funded by the Crowns, with most intelligentsia coming from the Church or Christian institutions alike, theologians had a political and pedagogical key-role. Being royal confessors and advisers, they were very well informed about State arcana and influenced decision-making, as the Portuguese legal historian Paulo Merêa recognized.[26] Being the most respected

[24] *Vide* Walter Mignolo, *The Darkest Side of Western Modernity. Global Futures, Decolonial Options*, usa: Duke University Press, 2011.

[25] Regarding the case of Portugal, cf. António Manuel Hespanha, *Cultura Jurídica Europeia — Síntese de um Milénio*, Mem Martins: Publicações Europa-América, 2003, 311-314, 328-331.

[26] Paulo Merêa, "A ideia de origem popular do poder nos escritores portugueses anteriores à Restauração", in *Estudos de Filosofia Jurídica e de História das Doutrinas*

lecturers, they played an essential ideological function, educating nobles and commoners, spreading the 'common sense' according to Crown and Church desires. This epistemological context became standard since the 'rediscovery' of the *Corpus Iuris Civilis*, in the beginning of the 12th century, thus turning the Common Law at the time of the Christian Republic a fusion of civil and canon law.

As Professor Mário Reis Marques states, at that time jurists made «a political management» of all the interests in conflict, since they were the ones who «draw a line between legality and illegality». They had an «autonomous power» regarding the «rationalization of social practices», which made them the «protagonists» of a discourse that relied on the importance and international authority of Common Law. As is well known, such privileged position was primarily dependent on a 'linguistic community' restricted to a very powerful language (because literally esoteric), Latin. Not easily accessible to the so-called «rustic»,[27] the legal language and the legal knowledge were officially breed solely at universities, ritualized spaces that operated through the reading of lectures and the reproduction of its contents in exams. Therefore, Faculties of Law and Canons had a colossal «symbolic power», turning themselves into «agents of imposition and control», through the development of a professional group that dominated over a specific and qualified discursive space, unachievable to most people. Furthermore, the modes of production and reproduction of this symbolic power, primarily based on repetition, fomented the lack of ideological debates, making the discussion or the integration of new elements quite difficult. Thus, it kept the structural organization of the medieval society safe, as well the position jurists occupied there. It also made the *Corpus Iuris Civilis* and the *Corpus Iuris Canonicis* the core of the medieval Common Law.[28] Consequently, the power to interpret such ancient field of knowledge also became the key--function regulating the international relations of the time.

This is an essential *topos*, since the legal agent was depicted *per definitionem* as a Christian, representing the infidels — namely

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Políticas, Lisboa: Imprensa Nacional-Casa da Moeda, 2004, 89-100 [1923]: 91; Id., "Suárez, jurista. O problema da origem do poder civil", in *ibidem*, 107-185 [1917]: 111-113.

[27] Regarding the key-opposition (because not only jurisdictional, but epistemological) between the «law of the scholars» and the «law of the rustics» (*ius rusticorum*), cf. A. M. Hespanha, *Cultura Jurídica Europeia*, 192-199.

[28] Mário Reis Marques, "Ciência e Acção: o Poder Simbólico do Discurso Jurídico Universitário no Período *Ius Commune*", *Penélope — Fazer e Desfazer a História* 6 (1991) 63-72.

Muslims — as inferior legal subjects, to whom it was essentially legitimate to wage (a just) war. It is imperative to recall that Medieval Christianity introduced the first global criterion regarding what is now called 'biopolitics', differentiating between 'pure' and 'contaminated' bloods, in order to hierarchize different people. Such biopolitics operated through Law and was essential in framing the legal link between the Iberian *Ius Commune* and the people then 'discovered', at the time also non-Christians. Actually, this issue had been particularly raised half-a-century before, when Portugal invented *de facto* the intercontinental slave trade, in 1444.[29] Not even a decade had passed when the Pope Nicholas V approved it, and even promoted it *de iure*, through the bulls *Dum Diversas* (1452) and *Romanus Pontifex* (1455), allowing the kingdom of Portugal to conquer and convert the infidels in Africa.

Deeply connected with this biopolitics was the issue of the legitimate appropriation of land, what Carl Schmitt called the «radical title» concerning that legal world order. We can trace such paradigmatic evidence to the notion of *ius gentium* itself given by Saint Isidore of Seville, in the 6th century. He states that «Common Law consists on land occupation, city and fortifications building, wars, imprisonments, servitude, reprisals, peace and war treaties, armistice, emissaries inviolability and the prohibition of marrying with a foreigner.»[30] This ancient notion of Common Law was clearly assumed in the previously mentioned 'rediscovery' of Roman Law, as it figures in the first part of the *Corpus Iuris Canonicis*, by the *Decretum Gratiani* (mid-12th century).

2.1. The Treaty of Tordesillas

In order to illustrate the international connection between Politics, Religion and Law, it is inevitable to recall the legal aftermath of the first voyage of Columbus, in 1492, two years after which the Iberian kingdoms celebrated the Treaty of Tordesillas (signed in June 7, 1494, between Ferdinand II of Spain and John II of Portugal). In this bilateral Treaty, a *raia* was drawn, a «global line» dividing

[29] Anthony Padgen, *Povos e Impérios*, Mem Martins: Círculo de Leitores, 2003, 106.

[30] *Jus gentium est sedium occupatio, aedificatio, munitio, bella, captivitates, servitutes, postliminia, foedera pacis, induciae, legatorum non violandorum religio, connubia inter alienigenas prohibita*. In *Etymologiae*, *apud* Carl Schmitt, *The* Nomos *of the Earth*, 44.

the 'New World' between the two Crowns to conquer it, with the official support of the Christian Church. As Carl Schmitt puts it, the spatial order was conceived according to the Christian mind, and therefore it was a space where Christians always had a superior right toward the non-Christians. Thus, this was a mere update from the Crusades. As long as Portugal and Spain accepted the authority of the Church, they had «the freedom to occupy», and equal rights to conquer the non-Christian 'New World'. Portugal had already been doing it for fifty years in Africa by now, hailed by the Church for how successfully the so-called infidels were being enslaved. Another very important novelty, introduced by the Tordesillas document, was that both Crowns abdicated from the Church jurisdiction, thus making it a truly modern treaty, independent of that international authority.

What needs to be highlighted, in my opinion, is that the Treaty of Tordesillas should be seen as the *first legal representation* and *colonial mapping* of the 'New World', where half of it is *legally exposed* to the colonial power of two kingdoms. Two nations who explicitly declared their plan, from the beginning, to exploit the natural and human resources of the lands soon to be occupied. As a matter of fact, this is precisely what was stated in the famous 1493 *Letter of Columbus*,[31] where the famous *Conquistador* announces to the Spanish Crown the new land and people discovered, and how easy it would be to conquer them. Consequently, and just by contextualizing the already consummated facts beforehand the correspondent legal theory was developed, it is already forecastable how the *Realpolitik* at the foundation of the Modern International Law was *formally* and *substantially* colonialist.

2.2. Francisco de Vitoria

There are three key-figures from the Iberian School of Natural Law that ought to be addressed, however briefly: the two best-known scholars, Francisco de Vitoria and Francisco Suárez, and the famous missionary and activist Bartolomé de las Casas. Thus, in a time when the Spanish Inquisition (1478-1834) could be *de facto* expected by everyone, clergymen owned a vast symbolic power, on civil and canon law, connecting both on the grounds of natural law, through the development of the teachings of Aristotle and Thomas

[31] *Vide* Cristóbal Colón, *La Carta de Colón anunciando el descubrimiento del Nuevo Mundo*, Madrid, 1956 [1493].

Aquinas. Indeed, the main academic branch in the 16th century was Neo-Thomism, or Neo-Scholasticism, noteworthily at Salamanca and Coimbra. Hence, the transition from Medieval to Modern Thought, after the Colonial Event, was made through such natural law conceptions, developed with the aim of solving practical problems, not theoretical speculations. This School of Natural Law gave then evidence of a deep Legal Philosophy, as the Portuguese legal philosopher Luís Cabral de Moncada recognized.[32] Their jurisprudence merged medieval Natural Law conceptions with Common Law prescriptions, giving birth to what became Modern International Law. Accordingly, a couple of decades after the Treaty of Tordesillas was celebrated, the entitlements concerning the occupation of land without a legal owner *(terra nullius),* and the waging of just war *(bellum iustum)* became two of the main issues then theorized.

It is from this background that emerges Francisco de Vitoria (1483-1546), a Dominican scholar who taught at Salamanca, but never set foot in the 'New World'. Today he is commonly known for having depicted the Amerindians as subjects of International Law, recognizing that they had the capacity to use Reason, although being limited like children — thus lacking guidance, namely from the Christian Spaniards. Accordingly, he is now acknowledged as a pioneer of modern Common Law, having deeply influenced Hugo Grotius. Vitoria understood Common Law as akin to Natural Law and natural Reason, therefore as a sum of legal rules and principles common to all organized communities, as «law between people», *ius inter gentes*. He wrote two important lectures that got known as *On the Indians (De Indis),*[33] delivered on the academic year of 1538-39. In the first lecture, he not only recognized that Amerindians were able to use Reason and to be subjects of Common Law, but also that they were owners of their lands. Therefore, *against* the common opinion of the time, Francisco de Vitoria claimed that nor the Pope nor the Emperor had any rights over the whole world. He also argued that the Spaniards did not had any previous legal title to conquer those 'new' lands, since they were not *terra nullius*. Because of this, Vitoria

[32] Luís Cabral de Moncada, "Subsídios para uma História da Filosofia do Direito em Portugal (1772-1911)", in *Subsídios para a História da Filosofia do Direito em Portugal*, Lisboa: Imprensa Nacional-Casa da Moeda, 2003, 17-184 [1937]: 19-24.

[33] The lectures are *De Indis Noviter Inventis* (or *De Indis Relectio Prior*) and *De Jure Bellis Hispanorum in Barbaros* (or *De Indis Relectio Posterior*), and posthumously published in 1557 as *Franciscus de Victoria De Indis et De Iure Belli Relectiones*. *Vide* Francisco de Vitoria, *Relecciones sobre los Indios y el Derecho de Guerra*, Madrid: Espasa-Calpe, 1975.

is still considered a revolutionary humanist, since his argumentation was then unprecedented. He did make a radical critique of the standard legal view, stating that Amerindians were human beings, not irrational animals or things. And this is, indeed, the brighter side of his thought.

However, it is a mistake to read Francisco de Vitoria solely under this light. Because in those same lectures *On the Indians*, he elaborates on the legal and illegal titles to conquer the Amerindians, and about the indissociable *ius belli*, the right to wage war. There were three universal rights that, if violated, constituted a *casus belli*, a motive to wage just war: the right to do commerce *(ius commercii);* the right to travel *(ius peregrinandi);* and the right to preach the Christian faith *(ius praedicandi).* Here Vitoria uses a legal fiction, depicting the Amerindians as Muslims, consequently lacking the same legitimacy as the Christians, the only ones entitled to have sovereignty. Even so, the theologian puts on an equal legal level both Amerindians and Spaniards, and so formally, in abstract, they have the same rights and duties: if anyone violates one of those three rights, a just war could be waged. However, as it is, such theoretical construction manages to overlook the abyssal moat between the conqueror and the conquered in terms of weaponry: while the first had the most lethal army known to the European men of the time, the latter was militarily in a Neolithic condition.

In sum, Francisco de Vitoria had the genius of, while banishing Papal authority over the *Conquistadores* actions, legalize, through Christian natural law, the warlike and colonialist reaction of the Iberian Crowns against any opposition made by the Amerindians. Providing the much-needed new philosophic narrative after the Colonial Event, he recognized the Amerindians in the new Common Law in order to legally fight and subdue them. Therefore, I believe that we should depict Vitoria as a true supporter of the Spaniards' imperial aims, not as a defender of the Amerindians.

2.3. Francisco Suárez

A couple decades later, the most skilled theorist of the Iberian School of Natural Law would emerge. Francisco Suárez (1548-1617) was a Jesuit scholar who taught at Salamanca and Coimbra, among other Iberian universities, and who also never set foot on the 'New World'. As a clergyman who lived in the period of the Iberian Union, he was a fierce supporter of Spanish absolutism, and of Catholicism

against Protestantism. At a time when civil wars crossed Europe, and when there were many discussions regarding the origins of civil power and the right of resistance, the *Doctor Eximius* lectured and wrote about those themes, among others, and most famously in his 1612 book *On Laws (De Legibus ac de Deo Legislatore),*[34] another influence on Grotius.

This master on Scholasticism argued that the power of kings derived from popular sovereignty, and that civil or political power was necessarily a divine institution, since it was connected with natural law. His argument, by which he is still praised nowadays, is that it is the community itself who has the political power, and it is according to its will that such power should be transferred or exercised. However, this must not be misinterpreted: Suárez was a profound critic of democracy and thought that communities would do much better in transferring their political power to a king. Namely a Christian absolutist monarch, just as the Spaniards and the Portuguese of his time did. Therefore, he only supported the right of resistance theories against tyrants who disrespected (the Catholic) natural law.

Regarding Common Law, the 'Master of the School of Coimbra' understood it as positive human law, developed in accordance with the consensus of all people, and recognized the importance of customs and traditions in *making* such Common Law. More than a law between people and nations (not only *ius inter gentes*, but also *intra gentes*), it should be taken additionally as a law between all men, *ius inter homines*. Consequently, it was a law directed to the entire globe, *ius totius orbis*. He set on the same foot Christian and Amerindian *communities* and *individuals*, recognizing that both were legally equal — as long as they were in accordance with Christian faith. However, if we follow his logic, the necessary conclusions are that Amerindian communities should embrace Christianity, and ought to transfer their civil power to the Spanish king, making their right of anti-colonial resistance basically devoid.

In face of this, I argue that Francisco de Vitoria and Francisco Suárez, although depicting a truly new legal world order with many progressive features, were mainly giving an *a posteriori* legal basis for the already ongoing Iberian imperialism. Even when Suárez

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[34] *Vide* Francisco Suárez, *Selections from Three Works of Francisco Suárez, S. J. De Legibus, ac Deo Legislatore, 1612. Defensio Fidei Catholicae, et Apostolicae Adversus Anglicanae Sectae Errores, 1613. De Triplici Virtute Theologica, Fide, Spe, et Charitate, 1621*, Vol. II, James Brown Scott, ed., Oxford: Clarendon, 1944; and Francisco Suárez, *De Legibus. Livro I — Da Lei em Geral*, Lousã: Tribuna da História, 2004.

talks about the right of resistance — thus appropriating over such controversial discourse —, he only does so in order to benefit Spanish absolutism, scooping the emancipatory reaction from both Protestants and Amerindians. It is important to recall that this took place in a time when the violent *modus operandi* of the Conquests and the 'Discoveries' were already widely known.

2.4. Bartolomé de las Casas

Finally, on a different scale and living between the above mentioned two scholars, there is Bartolomé de las Casas (c. 1474-1566), a Dominican missionary in the Americas, who similarly shared the Iberian School of Natural Law theoretical background. He was not only the Bishop of Chiapas, in today's Mexico, but a historian and an activist for the Amerindian cause. And this is, in my opinion, the key-difference: he was on the field and became a witness. His best-known work is *A Short Account of the Destruction of the Indies (Brevísima relación de la destrucción de las Indias,* 1552),[35] a pamphleteer and legal report about the darkest side of Spanish colonialism. From someone who in his youth owned Amerindian slaves and took part on some conquering expeditions, Las Casas gave up of all his belongings and started a life of studying, traveling, writing and struggling. After getting acquainted with the genocidal methods used by Spanish conquerors and Portuguese slaveholders, he spent his life making appeals to the Spanish Crown and the Church, aiming to stop the inhumane treatment of Amerindians.

He was able to convince the Pope to enact the encyclical *Sublimis Deus* (1537), recognizing the full humanity of the Amerindians and condemning their exploitation. Las Casas even managed to influence the Spanish king to promulgate the *New Laws* (1542), by which the enslavement of Amerindians was prohibited and the *encomiendas* limited — a restriction lifted three years afterwards. Most noteworthy was his role in the symbolic 1550-51 Valladolid Debate, discussing the Justice of the Conquests, against Juan de Sepúlveda. Although the Debate did not have a conclusion and was merely a ceremonial procedure, Las Casas turned out to be the informal winner, spreading the view of how illegal the warlike strategy was, regarding the evangelic purpose of the Conquests. It

[35] *Vide* Bartolomé de las Casas, *A Short Account of the Destruction of the Indies*, UK: Penguin Books, 2004.

was not that the missionary was against the Conquests in themselves: he was against *how* they were being waged.

However, reaching the end of his life, Las Casas delivered in 1566 his conclusions to the Royal Council for the Indies. Considering the illicit titles, the thefts, the genocide, and all the systemic violence used by Spanish conquerors since the beginning, acting against divine, natural and civil laws, he concluded that the Amerindians had the natural right to resist the ongoing Spanish colonialism. So, in the end, and although being a supporter of an evangelic colonialism of the soul, Las Casas argued that the Amerindians were entitled to resist that form of Spanish colonialization.

3. Conclusion

All things considered, the symbolic power of the Iberian School of Natural Law was directly felt on both shores of the Atlantic Ocean. On one side as a relief for the conqueror's conscience, on the other as the justification for being conquered (and possibly for a relative resistance to such conquests). This symbolic power was the theoretical background to different legal worldviews, varying accordingly to the empirical knowledge and the inherent sensibility to it. Notwithstanding, it was always a Eurocentric view, deeming the Conquests as a religious mission, based on natural law. Due to theoretical developments as the ones *supra* described, and especially thanks to the activism of Dominican missionaries, some important measures were taken. Nevertheless, in my opinion, the Crown politics were dimly affected. It depends on how one looks at the historical facts.

This can be easily evidenced through four examples. In 1537, by the bull *Sublimis Deus*, the Pope Paul III stated as dogma that Amerindians were undoubtedly men, being able to receive sacraments and obtain salvation. Henceforth, Amerindians were no more 'sub-humans'; but they definitely got vulnerable to the right to preach the Christian faith. Regarding the Spanish Crown, in 1549 the Conquests were effectively suspended in order to the Valladolid Debate to take place. Nevertheless, the discussion was centred on how to conquer, and the colonization restarted soon after. Later, in 1566, the campaigns were indeed prohibited — unless there was no other way to annex the new territories to the Spanish Empire. Finally, on 1573, the Crown decreed the total prohibition of further conquests — with exception of the cases that might figure as legitimate defence, which basically constituted all the grounds for *casus belli*.

Thus, what by the end of the 15th century was announced in a religious narrative, as a mission by the most-Catholics King and Queen, was eighty years later a fully legalized imperial expansion, protected by the right to wage just war. The fact is that it took only around fifty years for the Spaniards to conquer the entire South- and Central-Americas, and part of the North, subjugating the Amerindians. In the end, following the Iberian School of Natural Law teachings, colonization of the soul was the only official motto and legal entitlement of the entire entrepreneurship. Accordingly, millions of Amerindian victims became vulnerable to the colonial and belligerent follow-ups of the rights to preach, to travel and to do commerce. To them, Academia's symbolic power had violent repercussions. The 'New World' fell under the dominion of the 'Old World'; the Renaissance put an end to the Dark Age; and the modern European identity was born over the fully-legalized colonization of the Amerindian and African subalterns. Re-thinking Europe and its juridical complex (Academia included) involves recognizing this historic underside. In other words, to recall Noam Chomsky and Howard Zinn, it means that that is also a «responsibility of the intellectuals» of today,[36] since «[no one] is neutral on a moving train»,[37] wherever the railroad goes.

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[36] Noam Chomsky, *Quem Governa o Mundo?*, Lisboa: Editorial Presença, 2016, 15-33.

[37] Howard Zinn, *You Can't Be Neutral on a Moving Train. A Personal History of our Times*, usa: Beacon Press, 2002 [1994], 8.

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2

THE PROBLEM OF THE LEGITIMATION OF LAW AS A METAPHYSICAL PROBLEM[1]

Tomasz Bekrycht

Introduction

The problem of the legitimation of law is presented in the literature as the justification for the external validity of law, or as a justification for its absolute validity.[2] In *The Rational as Reasonable*, Aulis Aarnio states: "First of all, two different meaning contents of the concept 'formal validity' must clearly be kept separate from each other. Let us call them *internal* and *external* validity of legal order. The first one of these concepts refers to the validity 'inside' the system,

[1] The following text was prepared as a part of research grant financed by the National Science Center (Poland), No. 2015/19/B/HS5/03114: "Democratic Legitimization of Judicial Rulings' Influence on Law Making".

[2] This text is based on my monograph: Tomasz Bekrycht, *Transcendentalna filozofia prawa. O zewnętrznym obowiązywaniu i uzasadnieniu istnienia prawa* [*The transcendental philosophy of law. On the external coercion and justification of the existence of law*], Łódź: Wydawnictwo Uniwersytetu Łódzkiego, 2015.

whereas the external validity tells something about the validity of the system itself".[3]

External or absolute validity answers the question regarding the basis of the validity of law itself. In other words, its subject is the justification of the existence of law. At this point our reflections need to go beyond a given system and a given legal order. Hence, we are forced to seek the answers in the very essence of being.[4]

The issue of the external justification is of the utmost importance from the practical (social) point of view. Experience shows that only those systems of social organization can be regarded as permanent which incorporate internal acceptance of their existing rules, understood not only as the content of law here and now, but also as formal rules — something along the lines of Fuller's inner morality of law.[5] The argument of power and of the likelihood of punishment or pain seems to be a weak social bond.

In search of the justification of the law

Considering the justification of the law thus presented, it will be useful to establish precise definitions, as this will help with the ambiguities encountered in the concept of the law. First of all, when discussing the external validity of the law, we are concerned with the justification of a special kind of being, which is usually referred to as positive or statutory law.

Secondly, the issue of justifying the law as a metaphysical project should be distinguished from justification at the level of the content of law and the validity of legal norms within the legal system (even in terms of vertical, dynamic, horizontal or static connections, following Kelsen).

This difference is based on the distinction between the justification of the existence of something that can be called the arrangement of interpersonal relations and the justification for such an arrangement of these relations that would enable the implementation of the idea of justice. In other words, if we are concerned with justifying the law

[3] Aulis Aarnio, *The Rational as Reasonable. A Treatise on Legal Justification*, Dordrecht: D. Reidel Publishing Company, 1987, 34.

[4] Aleksander Peczenik, "The Structure of a Legal System", *Rechtstheorie* 6 (1975) 4; Kazimierz Opałek / Jerzy Wróblewski, *Zagadnienia teorii prawa*, Warszawa: pwn,1969, 114-128.

[5] Lon Fuller, *The Morality of Law*, New Haven / London: Yale University Press, 1964, 33-94.

in a metaphysical project, then we will not be interested in justifying one or another specific content of law, but rather in justifying the law itself as a form of being. The difference between the concept of the justification of the law and the concept of its legitimacy should also be emphasized. It can be said that the concept of justification does not involve any social context, whereas with the concept of legitimacy such connotations may — or even must –appear.

The fact that in the history of the philosophy of law the issue of the justification of the law has constantly been addressed, up to the present day, results from a deficiency due to, on the one hand, the continual attempts to provide unambiguous answers to the questions posed, and, on the other, the elusive nature of the object of cognition.

This dialectical movement, which has been with us for at least twenty-five centuries, and which from the time of the Enlightenment has been accompanied by the ideal of scientific knowledge and the program leading to the "disenchantment of the world"[6], concerns the whole area of jurisprudence — the problem of making it scientific, and the precise definition of its fundamental concepts. On the one hand, the move towards the separation of law and morality, and the devaluation of law, became an opportunity and a basis for forming positive law and making jurisprudence a science, yet on the other hand did not only lead to the dehumanization of legal regulations, but it also made it apparent that reaching the essence of the positivity of law, or in other words the concept of positive law, is not an undertaking that can be based on the model of knowledge employed in the natural sciences.

On top of all this, law has lost its divine justification, that *sacrum* which was not only the basis of its existence and the justification for its content, but the real reason for its objectivity, and thus an argument for its recognition and observance.

The history of philosophical thought (or the history of the idea of natural law, and political and legal doctrines) reveals positive law to be a fleeting and elusive subject of investigation. This subject somehow eludes analysis, escaping either towards the concepts of law in general, or the concept of the normativity of the law, or the concept of a legal norm itself, or in the direction of issues concerning values and morals, or, finally, towards the general issues of theoretical and normative ethics.

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[6] Max Horkheimer / Theodor W. Adorno, *Dialectic of Enlightenment. Philosophical Fragments*. transl. Edmund Jephcott, Stanford: Stanford University Press, 2002, 1.

To this can be added the observation that much effort was devoted in jurisprudence to searching for the ideal content of law so as to reach the unattainable ideal of righteous law. Of course, this is understandable and desirable, which is why many intellectual analyses pursued this path in the past and continue to do so nowadays, and no doubt such searches will continue. However, as the history of ideas shows, this is simply unattainable, due to the many tensions between what is generally good, what is good for a single individual, and finally what is good for a given society.

These issues, however, belong to a different sphere of reflection in the philosophy of law than those that relate to the problem of the existence of positive law and it justification, but the conclusion regarding our cognitive abilities and formulating what we call objective judgments also applies to the issue of identifying the basis of being and grasping the phenomenon of positive law.

If we look at the history of the philosophy of law, or the history of political and legal doctrines on issues aimed at identifying the nature of positive law, by adopting a critical attitude we can easily discern that the majority of research is permeated by a hodgepodge of conceptual confusion.

Beginning with the ancient tradition, statements on the existence of law recognize that they were grappling with something like natural law and divine law, but also human law, which somehow exists differently and plays a different role than the law derived from nature or the law given by gods (and the law that governs the relationship between the gods). Nevertheless, statements concerning natural law and divine law are usually connected, to a greater or lesser extent, with statements on human law. "Both of them revolve around the fundamental problems of legal thought: what is the law, who creates it, why is the law in force, what is its content, what are its types and mutual relations?"[7]

The combined reflection on the concept of law in general and the concept of positive law stemmed from the potential and real conflict arising from the content of these laws, in other words between the law established by human beings and the laws originating from Gods or nature, and the desire to hierarchize these laws within the framework of one being. It can be assumed that in our culture this happened along with the decision made by Antigone, Heraclitus' philosophical

[7] Roman Tokarczyk, *Klasycy praw natury*, Lublin: Wydawnictwo Lubelskie,1988, 11.

concept of *logos*,[8] and Protagoras' treatment of established (positive) law as relativistic, entailing the supremacy of the laws of nature, which are the source of man as a psychophysical structure.[9] Adopting an idealistic standpoint, it could be said that this initiated reflection on the essence of natural law and divine law, and their content, as well as the relationship between these laws and positive law, and the catalog of the norms of natural law. However, the direction of research was always determined by the analysis of natural law and divine law, and only in the second instance were the cognitive results translated into positive law.

Even if in the oldest thought of antiquity there was perceived to be an irremovable dichotomy, with natural law and divine law on one side, and positive law on the other, reflection tended to lean towards natural and divine law, and it is from their perspective that the judgments on positive law were pronounced. This has always resulted in the heteronomous conception of positive law in relation to the autonomous conception of natural and divine law, and in the subordination of the former to the latter, one typical example of this being the Stoic doctrine.

Added to this is the issue of a second dichotomy, namely that of the relationship between law and morality, which further complicates the philosophy of law, in particular when it is necessary to determine the relationship between these four areas (natural law, divine law, morality and positive law).

Despite the fact that the highly developed speculative thought of antiquity distinguished these concepts, the weight of the analysis definitely leans towards ethical issues, i.e. the idea of good, virtue, equity and justice, and thus neglects analysis of the concept of positive law. Sergiusz Hessen argues that the fundamental failure to distinguish between morality and law in ancient philosophy and scholasticism can be traced to the philosophical approach of Socrates, who treated morality as knowledge, and not as the intuition of the

[8] "God is the universal Reason (*Λογος*), the universal law immanent in all things, binding all things into a unity and determining the constant change in the universe according to univeral law. Man's reason is a moment in this universal Reason, or a contraction and canalisation of it, ad man should therefore strive to attain to the viewpoint of reason and to live by reason, realising the unity of all things and the reign of unalterable law, being content with the necessary process of the universe and not rebelling against it, inasmuch as it is the expression of the all-comprehensive, all ordering (*Λογος*) or Law". Frederick Copleston, S.J., Frederick *A History of Philosophy, Vol. I, Greece and Rome*, New York: Image Books Doubleday, 1993, 43.

[9] Frederick Copleston, S.J., *A History of Philosophy, I,* 87-92.

Good, which made theoretical considerations concerning law similar to speculative analyses of the Good[10].

This attitude was not disturbed even by the gradual shift in the field of interest from natural law understood globally, encompassing both nature and humankind in its social dimension, to the human being only conceived of as a source of social rules; or by the tradition of Roman jurists who, despite the fact that they had worked out the fundamental conceptual apparatus for many institutions of positive law, "did not question the principle that *ius civile* cannot abolish, remove or change natural law, just as *ius gentium* was considered to be a part of *ius naturale*"[11].

Neither did Christian concepts pertaining to the philosophy of law bring about a shift in the considerations from natural law and morality towards positive law, since they introduced the concept of eternal (divine) law, in accordance with the Judeo-Christian tradition of the biblical God, the Creator. "In primitive Christianity, however, this distinction could not have been made [i.e., between law and morals — T.B.], because the law ('order') was despised and simply rejected in the name of morality, which was based on the principle of love of neighbor"[12].

However, when considering the scholastic period, it can be seen that the voluntarism of Duns Scotus, and then Ockham, definitely introduced progressive solutions — in terms of the concept of positive law — to the considerations regarding the essence of law in general, narrowing the scope of the universality and scope of natural law to certain intuitions which are applicable to the substance of positive law. A slow change in this disproportion in the considerations of the philosophy of law finally comes in the seventeenth century, along with the successive devaluation of religious explanations of the world, and the attempt to reduce the methodology of all the sciences to the methodology of natural science. In Hobbes's *Leviathan*, with its broad analyses of the role of power and its legitimation[13], and of issues relevant to positive law[14], it can be seen that a departure was made from combining the concept of natural law with considerations strictly concerned with the subject of positive law.

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[10] Sergiusz Hessen, *Studia z filozofii kultury*, Warszawa: pwn, 1968, 273.

[11] Roman Tokarczyk, *Klasycy praw natury*, 94.

[12] Sergiusz Hessen, *Studia z filozofii kultury*, 274.

[13] Thomas Hobbes, *Leviathan or the Matter, Forme, & Power of a Common-Wealth Ecclesiastical and Civil*, Andrew Crooke, 1651, ebook, chapter xx.

[14] Thomas Hobbes, *Leviathan*, chapter xxv.

If we were to single out a philosopher who explicitly separated positive law (and above all reflection on positive law) from natural law, divine law and morality, it seems that this would have to be Thomasius, who wrote: "Yet beware of thinking that natural and positive law, divine and human law, are of the same kind. Natural law and divine law are more like advice than commands, but human law in the proper sense is always a rule based on command"[15]. Thomasius argued that a legal obligation is exclusively an external obligation that arises as a result of coercion, and that only in this way can one be really obliged to do something; while moral norms lack this characteristic.

Kant continued this line of thought, conducting a classification of laws that clearly separates positive law[16], emphasizing the problems involved in answering the question of what law is, and indicating the ambiguity of this concept. Despite his not solving these problems, it can be said that Kant is the first philosopher who provided the theoretical justification for separating law and morality. Unfortunately, despite the intellectual effort that he put into the considerations contained in the *Introduction to the Doctrine of Right*, we do not learn much about the essence of positive law, apart from its function: "Right is therefore the sum of conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom"[17]. Nevertheless, Kant introduces the concept of external coercion, which is very important for the concept of positive law and is, in his opinion, a constitutive element of the concept of positive law, which in turn distinguishes between law and morality, which is founded, unlike positive law, on internal coercion (the categorical imperative)[18].

Subsequent ideas arising from the historical development of the philosophy of law develop conceptions of the mutual relationship between natural law, morality and positive law, yet they were not able to provide either a sufficiently precise definition of positive law, or a satisfactory account of its justification.

These centuries-old struggles in the attempt to determine the nature of law in general, and the nature of positive law, in a way that would satisfy not only the creators of the concept, but also

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[15] Christian Thomasius, *Institutes of Divine Jurisprudence. With Selections from Foundations of the Law of Nature and Nations*, transl. Thomas Ahnert, Indianapolis: Liberty Fund, 2011, 612.

[16] Immanuel Kant, *The Metaphysics of Morals*, transl. Mary Gregor, Cambridge: Cambridge University Press, 1991 55-61.

[17] Immanuel Kant, *The Metaphysics of Morals*, 56.

[18] Immanuel Kant, *The Metaphysics of Morals*, 57-58.

other philosophers of law, led, in the twentieth century, to most philosophers of law deciding that the construction of the ontology of law and the ontology of positive law is impossible, and thus the task was abandoned.

Philosophical attempts at the metaphysical justification of law

If we take a synthetic look at the historical development of the philosophy of law, which we could classify as being focused on the issue of justifying the existence of law, from the perspective of scholarly literature on the subject, we can most generally identify six trends which could be said to be final justifications, i.e. those which from point of view of the methodological characteristics indicate some final reason in the chain of their justifications. From a historical perspective, in the first group we could include the mythological tradition, in the second — theological (theistic), in the third — natural law, in the fourth — the Enlightenment, in the fifth — the philosophy of language, and in the sixth — naturalistic. The first three trends could also be referred to as religious traditions, and the second tradition could be reduced to the third, to encompass both secular and theistic trends.

One can look at the philosophical process of justifying the law from a different perspective, i.e. indicating two characteristic cores of this process.

Historically, the first of these is the legitimizing based on the concept of transcendence, and a transcendent being that is located spatially and temporally "outside" the subject. In other words — metaphorically speaking — the law comes from the outside, meaning that in terms of the source of its existence (onto-genesis) it is based on some being that is, or has always been, beyond or above the subject. The scholarly literature of the subject reveals that two such transcendent sources were identified as external legitimations of the law. The first was identified with God; the second with nature (conceived of in naturalist or non-naturalistic terms). This can be expressed in the following way: the transcendental argument legitimizing law is premised on transcendence in the form of God or nature[19].

The second core for legitimizing the law is the subject itself (as

[19] *Nota bene* there is a rather complicated relationship between them, i.e. between the understanding of God and nature. Added to this is the issue of natural law (of course, usually understood in an anti-naturalistic way), which is often derived from the concept of God, or a concept that "absorbs" this concept.

law-giver), its immanence, i.e. consciousness, rationality, intelligence and reason as the source of law, which is external to, and separate from, the law itself. Here, the ontological basis of law is human beings, understood as creatures endowed with rationality, not necessarily idealized — but in their rationality they are able to actively constitute principles and laws, as a transcendental I "from the inside", as it were.

The issue here is an understanding of human beings which is completely anti-naturalist (despite the fact that rationality is an innate quality of human beings, the quintessence of being a human being). In other words, it is a desubstantialized (noumenal) self, having its center and its ontic nature grounded in purely intelligible subjectivity, a pure self, which we can only posit and think of as a source of self-acting, unconditioned activity (agency), devoid of substance and elusive in experience. In this and exactly this sense, one can speak of the transcendental (and immanently human) justification for the existence of law.

From the point of view of the history of philosophy, the shift from the first perspective to the second became possible due to the process of the subjectivization of humanity and the Enlightenment ideal of the demystification of nature. On the other hand, from the point of view of the philosophy of law, it came into being along with the transcendental philosophy of Immanuel Kant and Johann Gottlieb Fichte.

Summary

In summing up the above remarks, I would like to stress that all of legal-philosophical thought (as is evident from an analysis of its history) is one great intellectual struggle with the issue of defining and justifying the position of positive law, as an element of the universal being, and this happened (and is happening) mainly through the prism of analyzing the idea natural law, ethical issues and the concept of God. However, it is puzzling why, given that our cultural circle has developed extremely sophisticated philosophical knowledge over twenty-five centuries, this has been a continual problem. It seems that the reason for this state of affairs lies in a certain hidden assumption adopted in legal-philosophical considerations, namely that in the analysis of the issue of justification of the law the concept of positive law has been inextricably bound up with the notion of natural law, the concept of God, and problems associated with the content of law — in particular the relationship between law and morality. Therefore,

the solution to the justification of law was sought in issues that are in themselves controversial, that continuously receive ambiguous solutions (and are maybe even insoluble). A certain helplessness can be detected in considerations of the essence of natural law, God or morality, both with regard to the fundamental reflections within the frameworks of these concepts and, for example, in the attempts to determine the content of natural law and basic ethical concepts. Yet in the entire history of the philosophy of law it was never asked why we need to associate the idea of positive law with the above-mentioned ideas. Maybe it does not have to be this way, maybe it was and it is a mistake; or maybe there is a necessary relationship between these ideas, which makes positive law and its justification somehow dependent on them. It has always been the case that legal-philosophical thought derived from philosophical issues arising within the main metaphysical issues, namely God, natural law, freedom, the immortal soul and epistemological issues, and the cognitive results, were translated into the problems of metaphysics and the ontology of law. I am not saying, of course, that this is a methodological error, but intellectual reflection such as this is not conclusive enough when it comes to grasping the essence of positive law and its justification, apart from invoking at most a philosophical conception argued in the context of certain philosophical considerations of a given author. Well, there is one answer: there has been a lack of ontological analyses (eidetic in the phenomenological sense) concerning positive law. Such analyses could show us (at least to some extent) whether or not there is "something to this" conceptual hodgepodge, with regard to questions about the essence of positive law and its justification.

Jacques Derrida put forward the same postulate in the *Force of Law*, i.e. that it is necessary to realize the difference between the concept of positive law and other concepts, which are often similar to it or even identified with it, such as justice, rule and law[20]. Derrida emphasized that the issues analyzed in the framework of deconstruction — the trend with which he is identified — are based on some intellectual destabilization, complicating, evoking paradoxes, whose source is conceptual ambiguity and the superficiality of analyses. "[…] such a deconstructive line of questioning is through and through a problematization of law and justice. A problematization of the foundations of law, morality and politics" [21].

[20] Jacques Derrida, "Force of Law", in Gil Anidjar, ed., *Acts of Religion*, New York/London: Routledge, 2002, 232-235.

[21] Jacques Derrida, "Force of Law", 235.

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PART II

THE "PLACE" OF *JURISTS' LAW* FROM THE PERSPECTIVE OF ITS RATIONALITY, EMERGENCE AND CONTENT: DISCUSSING PROLEGOMENA CONCERNING THE CLAIMS OF LEGAL SCIENCE, THE EXPERIENCE OF SOURCES OF LAW AND THE DYNAMICS OF JURIDICAL SYSTEM

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LEGAL SCIENCE AND *JURISTENRECHT:* THE RELEVANCY OF LANGUAGE AND DISCOURSE FOR THE CONCEPTUAL DISTINCTION

Pedro Moniz Lopes

0. Introduction

0.1. This paper corresponds to the written version — with some additional references and more sophisticated form — of the talk I gave at the University of Coimbra Law School within the *1st Luso-Polish Conference on Legal Theory and Methodology* on the subject of «*Jurist's Law (Juristenrecht) as a dimension of European identity: institutional, methodological and legal-philosophical problems*». I am indebted to Professor Aroso Linhares for the kind invitation and warm reception to his extraordinary *Alma Mater*.

0.2. My claim was very simple at the time. I intended to highlight the distinction between *legal science* and *Juristenrecht.* My primary focus was conceptual. I mainly aimed at clarifying — along the lines of Riccardo Guastini — that *legal science* is a second-order language whilst *Juristenrecht* is a first-order language. Nevertheless, I found the task of distinguishing the scientific statements of *legal science* from dogmatic statements of *Juristenrecht* of great social value. As mentioned below, the *scientific label* is a powerful vehicle for credibility. Many political projects — in law and other fields — have taken great efficacy in convincing a certain relevant audience that the underlying adopted method is scientific (sometimes this even goes without saying if such project is carried out by academics) or, in what concerns law, that a particular ideology is being endorsed through the performance of *legal science.*

0.3. *Scientific statements* and *ideological statements* must be kept apart. By accepting the basic Popperian assumptions, it should be understood that if purely ideological statements are made as regards legal problems, then such statements cannot be falsifiable; if they are not falsifiable, then they cannot be scientific; if they are not scientific — which is entirely legitimate —, then they ought not to be made under the guise of scientific statements. I find this ever more relevant in a legal system as the Portuguese, one that is depicted by Anglo-Saxons as *Law of the Professors (Professorenrecht).*

0.4. In view of the above, my presentation was predominantly expository in the sense that I tried to present the basic premises for my conclusion: that *Juristenrecht* is not legal science rather is *the object of legal science* (as it aspires — and sometimes rightfully succeeds — at becoming *law* which is accessible to the human mind). I tried to be faithful to that endeavor in the pages that follow. This suffices to justify the fact that this paper is structured as a chain of premises sustaining — more or less in sound fashion, I hope — the conclusions.

0.5. I do not expect this explanation to justify the obvious fact that my paper lacks in depth and dialectics. Neither do I wish it to be read as a set of statements which are self-justified *pieces of truth* uttered by someone who is definitively and irrevocably convinced of the ideas he conveys. Rather, I hope it serves the purpose of exposing myself to academic criticism through a very simple method: if one of the premises below is proven wrong then it may very well be the case that the conclusions do not last. As Frederick Schauer once said: "in a genuine academic conversation, everything we do is tentative"[1].

[1] See Bo Zhao, "Everything we do is tentative. An interview with Prof. Frederick Schauer", *Rechtsfilosofie & Rechtstheorie* 39/1 (2010) 79.

1. The meaning of legal science

1.1. The basic tenets of the theoretical positivistic account of law state *grosso modo* that:

1.1.1. law is *man-made* and an act of human will: all *universals* are man-made; law is a system of universals; *ergo* law is man-made[2];

1.1.2. the content of law is contingent, *i.e.,* it is not materially bound by any *a priori* standard. Therefore, what counts as law in any particular society is fundamentally a matter of social fact or convention ("the social thesis")[3];

1.1.3. ethical cognitivism is scientifically untenable as value judgments are not objective rather subjective (*positivist ethical subjectivism*) — value judgments are dependent upon the subject that performs them[4];

1.1.4. morals are not necessarily correlated with the identification of law *(inclusive positivism)* or morals are necessarily uncorrelated with the identification of law *(exclusive positivism)*[5].

1.2. Positivism, however, can also be understood methodologically, *i.e.,* as methodological positivism. In this sense, legal positivism is usually identified as the legal theory that best suits

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[2] «Laws are commands of human beings». See Herbert L.A. Hart, "Positivism and the Separation of Law and Morals", *Harvard Law Review* 71/4 (Feb., 1958) 601, Note 25 and p. 602-606. On the topic of *universals as man-made,* see İlham Dilman, *Are there Universals?* in *Quine on Ontology, Necessity and Experience*, London: Palgrave Macmillan, 1984, 42-71.

[3] See, for instance, Alf Ross, "Validity and the Conflict between Legal Positivism and Natural Law", in Stanley Paulson / Bonnie Paulson, ed., *Normativity and Norms: Critical Perspectives on Kelsenian Themes*, Oxford: Oxford University Press, 1998, 147 f.

[4] On the subject of the emotive conception of ethics and its cognitive implications, see Charles Stevenson, *Facts and Values — Studies in Ethical Analysis,* New Haven / London: Yale University Press, 55 f. On the issue of *subjectivism*, see John Mackie, *Inventing Right and Wrong,* Middlesex: Penguin Books, 1977, 17 f. See also Hans Kelsen, *Reine Rechtslehre,* Wien, 1960 — trad. portuguesa: *Teoria Pura do Direito,* de João Baptista Machado, 7.ª ed., Coimbra: Almedina, 2008, 73 f. A good summary of this positivistic stance may be seen in Mauro Barberis, *Introduzione allo Studio del Diritto*, Torino: Giappichelli, 2014, 18-19.

[5] See Wilfrid Waluchow, *Legal Positivism, Inclusive versus Exclusive,* in E. Craig, ed., *Routledge Encyclopedia of Philosophy,* London: Routledge. Retrieved September 18, 2008, from <*http://www.rep.routledge.com.libaccess.lib.mcmaster.ca/article/T064*>.

the purpose of performing *legal science*[6]. Legal positivism arises from the effort to transform the study of law into a true *adequate science* — *i.e.,* objective knowledge — that with the same characteristics of physics, mathematics and natural sciences[7].

1.2.1. Traditional jurisprudence has long been divided into two major subcategories: normative and descriptive. This division was made famous by John Austin, the nineteenth–century positivist who aimed at "determining the province of jurisprudence"[8].

1.2.2. Legal positivists endorse a shared view with all other philosophers self-labeled as positivists (in philosophy of science, epistemology, and elsewhere) a commitment to the idea that the phenomena comprising a given field of knowledge (*e.g.*, law, science) is accessible to the human mind[9].

1.2.3. In Austinian terms, the proper domain of jurisprudence is the descriptive analysis of the positive law, its basic concepts and relations[10]. Normative analysis of law, stated Austin, was the proper domain of legislation, not jurisprudence, and the two should not be

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[6] Dividing positivism into *(i)* ideological positivism, *(ii)* theoretical positivism and *(iii)* methodological positivism, see Norberto Bobbio, *Il Positivismo Giuridico — Lezioni di Filosofia del Diritto —* trad. portuguesa: *O Positivismo Jurídico,* de Márcio Pugliesi / Edson Bini / Carlos Rodrigues, São Paulo: Ícone Editora*,* 1999, 233 f. On methodological positivism, see also see Carlos Santiago Nino, *Introducción al Análisis del Derecho*, 2nd ed. / 12.th reimp., Buenos Aires: Ariel Derecho, 2003, 165 f.; Mauro Barberis, *Introduzione alle Studio del Diritto,* Torino: Giappichelli, 2014, 23 f.; and Juliano Maranhão, *Positivismo Lógico-Inclusivo,* Madrid: Marcial Pons, 2012, 33 f.

[7] Stating that «with a few exceptions, modern analytic approaches to law focus on the tradition of legal positivism and its critics», Dennis Patterson, *Introduction,* in Dennis Patterson, ed., *A Companion to Philosophy of Law and Legal Theory,* 2nd ed., Oxford: Wiley-Blackwell, 2010, 2.

[8] See John Austin, *The Province of Jurisprudence Determined,* Cambridge: Cambridge University Press, 1995, reprint 2001, 18 f.

[9] See Jules Coleman / Brian Leiter, *Legal Positivism,* in Dennis Patterson, ed., *A Companion to Philosophy of Law and Legal Theory,* 2nd ed., Oxford, Wiley-Blackwell, 2010, 228.

[10] See John Austin, *The Province of Jurisprudence Determined,* pp. 10ff. As Herbert L. A. Hart puts it, «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 laws, from sociological inquiries into the relation of law and other social phenomena, and from the criticism or appraisal of law whether in terms of morals, social aims, «functions,» or otherwise». See Herbert L.A. Hart, "Positivism and the Separation of Law and Morals", 601, Note 25 and p. 608-610.

confused, just as law and morality should not be confused[11].

> a. This positivist account of law the official definition of jurisprudence found in *Black's Law Dictionary*: "that science of law which has for its function to ascertain the principles on which legal rules are based, so as not only to classify those underlain rules in their proper order … but also to settle the manner in which doubtful cases should be brought under the appropriate rules. Jurisprudence is more a formal than a material science. It has no direct concern with questions of moral or political policy, for they fall under the province of ethics and legislation."[12]

1.3. In Bobbian terms, if science is the *evaluative description of reality*, then the positivist method is simply the scientific method and, therefore, one must endorse it if one wishes to perform legal science. Otherwise one will be dabbling into legal philosophy and legal ideology: but not into legal science[13].

1.4. Whether or not the positivist methodology is accepted — and definitely it is not accepted by many —, there seems to be good reasons to accept its view according to which *law is a discourse*[14].

1.4.1. Law is a discourse the performance of which is carried out through the *language of the law-giving or law-creating authorities*, also called the *sources of law* (whichever they are understood to be)[15].

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[11] «The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation. This truth, when formally announced as an abstract proposition, is so simple and glaring that it seems idle to insist upon it. But simple and glaring as it is, when enunciated in abstract expressions the enumeration of the instances in which it has been forgotten would fill a volume.» See John Austin, *The Province of Jurisprudence Determined*, 159.

[12] See Patricia Smith, *Feminist Jurisprudence,* in Dennis Patterson, ed., *A Companion to Philosophy of Law and Legal Theory,* 2nd ed., Oxford: Wiley-Blackwell, 2010, 292.

[13] See Norberto Bobbio, *Il Positivismo Giuridico*, p. 135 and 238. See also Riccardo Guastini, "Los Juristas a la Busqueda de la Ciencia", in *Distinguiendo. Estudios de Teoría e Metateoría del Derecho,* Barcelona: Gedisa Editorial, 1999, 263 f.

[14] See, among others, Riccardo Guastini, *Il Diritto come Linguaggio. Lezione*, 2nd ed., Torino: Giappichelli, 2000, 7 f.

[15] See Norberto Bobbio, *Scienza Giuridica,* in Norberto Bobbio, ed., *Contributi ad un dizionario giuridico,* Torino, G. Giappichelli Editore, 1994, pp. 335 ff.

a. The identification of *law-giving authorities* is not consensual[16].
b. Taking into account Searle's illocutionary force of speech acts, the *unidirectional discourse of law* includes the use of *prescriptive speech* and *declarative speech* (with the use of *performatives*)[17]; the latter is relevant, among others, for the understanding of the institutional dimension of law (*law as an institutional fact*) as well as for the correct depiction of norms of competence (*i.e.,* power-conferring norms)[18].
c. The account of law as a unilateral discourse hides many other interesting subjects [*e.g.* the possibility of *pragmatics* in law (conversational implicatures and such) mainly the *pragmatics* of legal silence, as regards the subject matter of legal gaps)[19].

1.5. How the discourse of law is (or should be) addressed is not clear cut.

1.5.1. *Legal science* and *legal dogmatics* (or *legal doctrine*) are different concepts (and different underlying enterprises and endeavors).

a. Sometimes the terms *legal science* and *legal dogmatics* are erroneously used interchangeably; these concepts should be carefully distinguished;
b. Legal science is a powerful tool for credibility: history

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[16] See Riccardo Guastini, "Fragments of a Theory of Legal Sources", *Ratio Juris* 9/4 (1996) 364 f. For a thorough discussion, see António Castanheira Neves, "Fontes do Direito. Contributo para a Revisão do seu Problema", in *Digesta — Escritos acerca do Direito, do Pensamento Jurídico, da sua Metodologia e Outros,* vol. II, Coimbra: Almedina, 1995, 7-93.

[17] See John Searle, *Speech Acts: An Essay on the Philosophy of Language,* Cambridge: Cambridge at the University Press, 1969, 68 f.; Dick Ruiter, "Legal Powers", in Stanley Paulson / Bonnie Paulson, ed., *Normativity and Norms: Critical Perspectives on Kelsenian Themes*, 2007, Oxford, 471 f.

[18] See Pedro Moniz Lopes, *The Nature of Competence Norms,* Mortimer Sellers / Stefan Kirste, ed., *Encyclopedia of Philosophy of Law and Social Philosophy,* Springer (2017), <https://rd.springer.com/referenceworkentry/10.1007/978-94-007-6730-0_223-1>.

[19] See Arend Soeteman, *On Legal Gaps,* in E. Garzón Valdés/W. Krawietz/G. H. Von Wright/R. Zimmerling, ed., *Normative Systems in Legal and Moral Theory*, Festschrift for Carlos E. Alchourrón and Eugenio Bulygin, Berlin: Duncker & Humblot, 1997, 323-332; Eugenio Bulygin, "Sobre la Equivalencia Pragmática entre Permiso y no Prohibición", *Doxa* 33 (2010) 283-296; Juan Ruiz Manero, *Algunas Concepciones del Derecho y sus Lagunas,* in F. Atria *et al.* ed., *Lagunas en el Derecho*, Madrid: Marcial Pons, 2005, 103-126.

has shown that *political projects* were successfully carried out through the usage of scientific parlance, particularly of so-called *hard science*[20].

c. Many times have scholars and legal practitioners claimed to be performing *legal science* when they are indeed performing *something else* (something entirely legitimate, even something necessary, yet *not legal science*).

1.6. The discourse of science (the *scientific* discourse) is necessarily assertive as it necessarily aims at describing phenomena (*i.e.,* it aims at describing *reality as it really is*)[21].

1.6.1. What is said through a discourse of science is, therefore, *true of false* under a certain account of truth. Under the mainstream theories of truth one may find[22]:

a. *Truth-correspondence*: the truth arising out of the correction between the content of a statement and the empirical reality to which such content refers to. For instance, «snow is white» is true if and only if snow is indeed white[23].

b. *Analytical truth*: the truth that derives from the internal relation between the terms of a proposition; Kant distinguished between statements that are true, roughly by definition, like "magnetic fields attract iron," and statements that are made true by facts about the world, like "magnetic fields are produced by the motion of electric charges." The former he called 'analytic truths,' and the latter, 'synthetic truths.' For obtaining knowledge of the truth of analytic statements all we

[20] For instance, it is claimed that Milton Friedman's account of economics was a (liberal) political project conveyed with the usage of *hard sciences* (such as physics and mathematics). See Raquel Franco, *Teoria Económica da Decisão — Percurso Evolutivo e Aplicações Jurídico-Normativas,* tese de mestrado apresentada na Faculdade de Direito da Universidade de Lisboa, inédito, 2013, p. 21 and 123. See also Lawrence Boland, *The Foundations of Economic Method — A Popperian Perspective*, 2nd ed., New York: Routledge, 187.

[21] See Hans Kelsen, *General Theory of Law and State*, Cambridge - Mass.: Harvard University Press, 1945, xiv.

[22] See Ralph Walker, *Theories of Truth* in *A Companion to the Philosophy of Language,* Oxford: Blackwell, 1998, 309 f.; and, among us, David Duarte, *A Norma de Legalidade Procedimental Administrativa — a Teoria da Norma e a Criação de Normas de Decisão na Discricionariedade Instrutória,* Coimbra: Almedina, 2006, 39 f.

[23] See Alfred Tarski, "The Semantic Conception of Truth and the Foundations of Semantics", in *The Philosophy of Language,* New York, 2001, 70.

need to know is the meaning of the words involved to establish their truth — *magnets are by definition iron attractors* or *bachelors are unmarried men*[24].

c. *Consensual truth*: the truth that relates to a convention on the material correctness in which the property of truth arises out of the agreement among a certain relevant community that something is something — *politicians in power primarily wish to perpetuate their power*[25].

1.6.2. For instance, the discourse of the *science of physics* is roughly a discourse over the *behavior of the physical bodies*. It asserts certain *laws* (which are true or false) but these are not *prescriptive laws*, rather propositions or *laws of nature (e.g., it is true that it is the case that body x behaves in manner y if z happens).*

1.6.3. Many other conditions for science may be pointed out, although there is no complete consensus — *e.g.* Popper's account of *scientificity as falsifiability*, addressed at framing certain ideological non falsifiable theories as *pseudo-science*[26].

1.7. In view of the above, one can therefore say that *legal science* is *ex definitione* a meta-discourse: *a discourse over a discourse*[27].

1.7.1. The main epistemological question of legal positivism is «why do we know what we know about law?». If we are certain that we know something, then there must be some *legal knowledge* which means that there should be possible to identify the objective criteria of truth or falsehood of propositions about the law.

1.7.2. Legal science is *scientific* if (among other requirements) its discourse is *assertive* and it aims to *describe law as it really is* (*i.e.,* it is an enterprise of *legal cognition*).

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[24] See Alex Rosenberg, *Philosophy of Science — a Contemporary Introduction,* 3rd ed., New York: Routledge, 11 f.

[25] See Anna Pintore, "Consenso y Verdade en la Jurisprudencia", *Doxa* 20 (1997) 281 f.; Robert Alexy, *Theorie der Juristischen Argumentation,* Frankfurt, 1978 — trad. portuguesa: *Teoria da Argumentação Jurídica. A Teoria do Discurso Racional como Teoria da Justificação Jurídica,* de Z. Schild Silva, São Paulo, 2001, 112 f.

[26] See Karl Popper, *Conjectures and Refutations. The Growth of Scientific Knowledge*, reimpr., New York: Basic Books, 2002, 37. Stating that «[s]cience progresses by subjecting a hypothesis to increasingly stringent tests, until the hypothesis is falsified, so that it may be corrected, improved, or give way to a better hypothesis. Science's increasing approximation to the truth relies crucially on falsifying tests and scientists' responses to them», see Alex Rosenberg, *Philosophy of Science*, 202.

[27] See Norberto Bobbio, "Essere e Dover Essere nella Scienza Giuridica", in *Studi per una Teoria Generale del Diritto,* T. Greco, ed., Torino: Giappichelli, 2012, 119 f.

1.7.3. Legal science is *legal* because such enterprise of scientific cognition and descriptive discourse *falls over* a discourse which in turn is mainly prescriptive [albeit sometimes declarative (*e.g.*, the constitutive dimension of legal concepts and norms of competence)].

1.8. Since, on the one hand, the discourse of science (the *scientific* discourse) is necessarily assertive and, on the other, law is a discourse that is predominantly prescriptive, then legal science is a *descriptive meta-discourse over a predominantly prescriptive discourse*[28].

1.8.1. One thing is the *discourse of law* (a *level*$_1$ *discourse* or *object-language*);

1.8.2. another is the *discourse over law* or the *discourse of jurists* (a *level*$_2$ *discourse* or *second-order language*)[29];

1.8.3. it is still imperative to discern Bentham's concept of *expository jurisprudence* (…):

a. aiming at the *value-free,* neutral description of the law;

1.8.4. (…) from the concept of *censorial jurisprudence*:

a. aiming at the moral or political criticism of the law or;

b. the conception of *lege ferenda* addressed at the normative authorities[30].

1.9. *Censorial jurisprudence*, albeit also a meta-discourse, does not abide by scientific standards as it simply does not relate to any endeavor of *cognition* (neither scientific cognition, nor any other type of cognition), neither is censorial jurisprudence carried out under a descriptive scientific discourse.

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[28] See Ricardo Guastini, *Los Juristas a la Busqueda de la Ciencia*, 267; Pedro Moniz Lopes, *Derrotabilidade Normativa e Normas Administrativas,* Tese de Doutoramento defendida na Faculdade de Direito da Universidade de Lisboa, 2016, inédito, 20 f.

[29] On the difference between language and metalanguage, see Wilfrid Sellars, "Some Reflections on Language Games", in *Science, Perception and Reality,* New York: Humanities Press, 1963, 321 f.

[30] Originally, Jeremy Bentham, "*Deontology Together with a Table of the Springs of Action and the Article on Utilitarianism",* Amnon Goldworth, ed., Oxford: Clarendon Press, 1983, 9. Bentham claims that «[a] book of jurisprudence can have but one or the other of two objects: 1. to ascertain what the law is; 2. to ascertain what it ought to be. In the former case it may be styled a book of expository jurisprudence; in the latter, a book of censorial jurisprudence: or, in other words, a book on the art of legislation» (see Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, J. H. Burns / Herbert L. A. Hart, ed., Oxford: Clarendon Press, 1996, 293 f.

1.10. The distinction between *expository jurisprudence* and *censorial jurisprudence* means "crossing a theoretically significant dividing line: between the legal positivist's insistence on doing theory in a morally neutral way and the Natural Law theorist's assertion that moral evaluation is an integral part of proper description and analysis" [31].

1.11. One cannot perform *science qua tale* if through one's discourse one *affects (or intends to affect) the object* which one is describing in the first place. Therefore:

1.11.1. one cannot *prescribe* over law if one intends to perform legal science and;

1.11.2. one cannot *evaluate* law if one intends to perform legal science…

a. …though *one may scientifically describe evaluative judgments*, which is an entirely different business[32].

1.12. One may, however, perform legal science though a kind of *epistemological constructivism* (Kelsen).

1.12.1. In this sense, legal science may *recreate* its own object (law) through the attempt to understand the law as a unified whole *(sinnvolles Ganzes);*

1.12.2. much like natural sciences transform, through cognitive systematization, the chaos of sensorial experiences into a cosmos *(i.e., the scientific account of nature as a unified system),* so does legal science through cognition and description transform the multitude of norms created by law-creating authorities (the *datum*) into a unified normative system[33].

1.13. The so-called *systematized character* of law is, therefore, a

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[31] See Brian Bix, "Natural Law Theory", in Dennis Patterson, ed., *A Companion to Philosophy of Law and Legal Theory,* Oxford, Wiley-Blackwell, 2010, 218. «[to prescribe as it should be or should not be from the point of view of some specific value judgments] (…) is a problem of politics, and, as such, concerns the art of government, an activity directed at values, not an object of science, directed at reality». See Hans Kelsen, *General Theory of Law and State*, xiv.

[32] One can however describe an evaluation. See Herbert L.A. Hart, *The Concept of Law*, 2nd ed., Oxford: Clarendon Press,1994, 271.

[33] See Hans Kelsen, *Reine Rechtslehre,* 81 f. See also Andrzej Grabowski, *Juristic Concept of the Validity of Statutory Law: A Critique of Contemporary Legal Nonpositivism,* New York: Springer, 2013, 282. As it is well known, Hans Kelsen claimed that legal science should turn law into a contradiction-free system. However, that is not the case. Many conflicts arise within a systematized account of law — some of which are not solvable within the legal system *per se.* Law is man-made, therefore subject to human error.

product of legal science, not an *a priori* datum (*i.e., law is not science* as commonly it is stated: it is the *object of legal science*).

1.14. In this dogmatic dimension, legal science feeds off the continuous *back and forth* between its own meta-language (*meta-language* or *scientific legal discourse*) and the object-language (law's language or the law-creating authorities' language).

1.14.1. Drawing from this *back and forth*, legal science produces its own scientific jargon (*i.e.,* this entails the creation of *normative concepts*)[34];

1.14.2. With the latter, legal science aims at subordinating its object to the descriptive constancy of phenomena.

a. For instance, a proposition according to which $norm_1$ is a principle and not a norm of competence aims at universality;
b. conversely *all norms of the like* should be deemed principles and not norms of competence[35].

1.15. In view of the above, it is said that legal science must abide by these relevant standards:

1.15.1. It should isolate and describe its own object (*law*)[36];

1.15.2. It should be neutral *(wertfrei)*[37];

1.15.3. It should be endowed with an explanatory purpose[38];

1.15.4. It should aim at systematization of operative concepts[39];

1.15.5. It should aim at obtaining universal propositions which are either true or false (under some endorsed criteria for truth)[40];

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[34] On the concept of legal concepts, see Carlos Santiago Nino, *Introducción al Análisis del Derecho*, 165 f.

[35] On this topic, see Pedro Moniz Lopes, "The Syntax of Principles: Genericity as a Logical Distinction between Rules and Principles", *Ratio Juris* 30/4 (2017) 471-490.

[36] «A science has to describe its object as it actually is, not to prescribe as it should be or should not be from the point of view of some specific value judgments.» See Hans Kelsen, *General Theory of Law and State*, xiv.

[37] For instance, Hans Kelsen, *Reine Rechtslehre,* 1 f.

[38] See Bartosz Brożek, "Explanation and Understanding", in Idem / Michael Heller / Mateusz Hohol, *The Concept of Explanation,* Kraków: Copernicus Center Press, 2016, 18 f.

[39] Among other, see Hans Kelsen, *Allgemeinen Theorie der Normen,* Wien, 1979 — trad. francesa: *Théorie Générale des Normes,* de O. Beaudi / F. Malkani, Paris, 1996, 53; David Duarte, *A Norma de Legalidade Procedimental Administrativa — a Teoria da Norma e a Criação de Normas de Decisão na Discricionariedade Instrutória,* Coimbra: Almedina, 2006, 37 f. and 43 f.

[40] Among others, see Guillermo Lariguet, "La Aplicabilidad del Programa Fal-

1.16. Legal scholarship or legal dogmatics, on the other hand, may include many other types of academic investigations and endeavors *over* the discourse arising out of the official sources of law. These include:

1.16.1. the moral or political criticism of the law or;

1.16.2. the conception of *lege ferenda* addressed at the normative authorities.

2. «Descriptive» interpretation and «creative» interpretation

2.1. *Interpretation* is a key concept in both legal science and legal dogmatics.

2.2. At the level of legal science, interpretation is an enterprise that *describes* the possible meanings of words *(semantic approach)* and the theoretical background contexts for the *use* of such words *(pragmatic approach)* which can be *ascribed* to a normative text[41].

2.2.1. A scientific approach to legal interpretation states that *sentence a* has *possible meanings* a_1, a_2, a_3(to a_n).

2.2.2. A scientific approach to legal interpretation relates to the following archetypes: interpretation as *describing the «norm-framework»* (Kelsen) or *cognitive interpretation* (Guastini)[42].

2.2.3. A scientific approach to legal interpretation is two-fold:

a. It may be stated that *sentence a* has, abstractly speaking, *possible meanings* a_1, a_2 or a_3;
b. It may be stated that *sentence a* has, within the context of legal system$_1$ (its enacted interpretative norms and, or, *doctrinal approaches*), *possible meanings* a_1, a_2 or a_3.

2.2.4. Under a scientific approach to legal interpretation, there is no real *cognitivist* approach to the *correct meaning* of a sentence (*i.e.,* there is no *true interpretation,* no *interpretative discovery* and, therefore, there is no *a priori «right answer»* for a case)[43].

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sacionista de Popper a la Ciencia Jurídica", *Iso* 17 (2002) 183 f.

[41] See, among others, Riccardo Guastini, "A Realistic View on Law and Legal Cognition", *Revus* 27 (2015) 45-54; Pierluigi Chiassoni, *Tecnica dell'Interpretazione Giuridica,* Bologna: Il Mulino 2007, 50 f.

[42] See Hans Kelsen, *Reine Rechtslehre,* 382 f.; Riccardo Guastini, *Il Diritto come Linguaggio. Lezione*, 146 f.

[43] See Enrico Diciotti, *L'Ambigua Alternativa tra Cognitivismo e Scepticismo Interpretativo,* Siena: Università degli Studi di Siena 2003, 18 f.; Riccardo Guastini, "Una Teoria Cognoscitiva de la Interpretación", *Iso* (2008) 16 f.; Aulis Aarnio,

2.3. At the level of legal dogmatics (and legal scholarship) or legal practice (*e.g., law* as interpretation performed by courts and administrative agencies), interpretation is an activity that entails *ascribing* meanings to normative sentences.

2.3.1. At the level of legal dogmatics and legal practice, interpretation is not a scientific approach to law, rather a creative and political one («political» *lato sensu,* that is)[44].

2.3.2. Interpretation as it is commonly performed by courts and administrative agencies is, therefore, an *act that shapes law*, not one that describes it[45].

2.3.3. Interpretation may settle, *vis-à-vis* a legal case, one of the possible meanings within the framework that arises out of cognitive interpretation and discard the others *(adjudicative interpretation)*[46];

2.3.4. Adjudicative interpretation is therefore an *interpretative decision* (albeit governed by interpretative legal norms);

a. It may be said that a statement of adjudicative interpretation is a statement of the type «sentence a has meaning a_1»;
b. However, as there is no cognitive approach and *no single right meaning*, a statement of adjudicative interpretation is not a statement of fact rather a normative statement (*ought to,* a *decision*), that is: a statement of adjudicative interpretation not «*sentence a* has *meaning* a_1» but «*sentence a* shall have *meaning* a_1»;
c. The interpretation of an interpretative adjudicative statement is a *norm* (*e.g.,* norm *qua* the outcome of interpretation of normative sentences).

2.4. Interpretation may also *ascribe* a whole new meaning which cannot be drawn from the normative text through shared rules of semantic and syntax *(creative interpretation)*[47];

"Sobre la Ambigüedad Semantica en la Interpretación Jurídica", *Doxa* (1987) 109 f.

[44] See Pierluigi Chiassoni, "Statutory Interpretation and Other Puzzles, 57", *Materiali per una Storia della Cultura Giuridica* 1 (2017) 259.

[45] See Riccardo Guastini, "*Juristenrecht*. Inventando Derechos, Obligaciones y Poderes", in Jordi Ferrer Beltrán / José Juan Moreso / Diego Papayannis, ed., *Neutralidad y Teoria del Derecho,* Madrid: Marcial Pons, 2012, 212-213.

[46] See Pierluigi Chiassoni, *Tecnica dell'Interpretazione Giuridica,* 143 f.; Riccardo Guastini, *Juristenrecht. Inventando Derechos, Obligaciones y Poderes*, 211.

[47] See Pierluigi Chiassoni, *Tecnica dell'Interpretazione Giuridica*, 133 f.; José Oliveira Ascensão, *O Direito — Introdução e Teoria Geral*, 13.ª ed. ref., Coimbra, 2008, 425 f.

2.4.1. A statement of creative interpretation (sometimes referred to as «corrective» interpretation) is also a normative statement: «*sentence a* shall have *meaning* b_1».

a. note that «b_1» is not comprised within the specter of possible meanings that arise out of the cognitive interpretation, *e.g.* a_1, a_2, a_3(to a_n);
b. the one who utters statement «*sentence a* shall have *meaning* b_1» is attempting at making it so that «*sentence a* has *meaning* b_1».

2.4.2. A statement of creative interpretation may also *fill the gaps* arising out of ambiguous concepts used in the *discourse of law* (this is what Guastini calls «interstitial lawmaking»[48]);

2.4.3. An interpretative creative statement is a *norm,* although it does without the norm-sentence (*i.e.,* the *meaning* ascribed has no support in the norm-sentence within applicable rules of language);

2.4.4. Statements of creative interpretation are frequently prohibited under certain legal systems but *that does not mean that they do not exist*.

2.5. Both adjudicative and creative interpretation have a certain *creative* dimension:

2.5.1. «choosing» between one of the possible meanings is *creative* to the extent that it *reduces* the specter of possible meanings);

2.5.2. there seems to be a *distinction of degree* between adjudicative and creative interpretation rather than a *qualitative difference*;

2.5.3. in order to derive meaning from normative sentences that encompass such concepts, legal theorists (and sometimes legal practitioners) *create* or *adhere* to pre-existing theories. These include:

a. *legal theories* (*e.g.,* ethical theories on validity, functionalist civil liability theories or political theories over systems of government);
b. *moral theories* (*e.g.,* objective metaethics, Kantian morals);
c. *economic theories* (*e.g.,* neoclassical economics, public choice);
d. *general philosophical theories* (*e.g.,* emotivism, relativism)
e. *others*[49].

[48] See Riccardo Guastini, *Juristenrecht. Inventando Derechos, Obligaciones y Poderes*, 213.

[49] See Vittorio Villa, "Deep Interpretative Disagreements and Theory of Legal

2.5.4. In view of the above, the aforementioned *background theories* are taken as assumptions *at the moment of interpretation* in order to:

a. ascribe a certain *meaning* to a given normative sentence out of the possible meanings arising out of cognitive interpretation: *e.g. the constitutional concept of human life includes such life as of the conception*.
b. ascribe a certain *meaning* to a given normative sentence, though that meaning (or even that theory) cannot be drawn from the frame of meanings arising out of cognitive interpretation: *e.g. human dignity is a property bestowed upon us by God which cannot be waived.*

3. Limits of legal science and the requirements for legal construction *(Juristenrecht)*

3.1. Legal science has no practical impact *per se*.

3.1.1. The *use* of legal science does not correlate to *practical reason*[50];

3.1.2. Legal science does not solve legal cases;

3.2. Legal construction *(Juristenrecht)* is necessary on a number of cases and for a number of reasons on several moments of the *law-applying process*. Just to name a few:

3.2.1. *At the interpretation («prima facie» applicable norm-selection) stage of «sense»*:

a. Most words used in the *discourse of law* are ambiguous (*e.g.,* polyssemic or open-textured) as to their *meaning*[51];
b. Adjudicative interpretation must therefore be performed in order to decide *what the word means* on account of the *non liquet* prohibition encompassed in most contemporary legal systems.

Interpretation", in A. Capone / F. Poggi, ed., *Pragmatics and Law — Philosophical Perspectives*, New York: Springer, 2016, 95 f.

[50] On the difference between practical reason and theoretical reason, see Aulis Aarnio, *On Legal Reasoning as Practical Reasoning*, in *Separata Facticia de la Revista Theoria* (October 1987 — September 1988) 102 f.

[51] See Timothy Endicott, "Linguistic Indeterminacy", *OJLS* 16/4 (1996) 667 f.; Idem, *Vagueness in Law*, Oxford, 2000 — trad. espanhola: *La Vaguedad en el Derecho*, J. A. del Real Alcalá / J. V. Gómez, Madrid: 2006, 65 f.

3.2.2. *At the interpretation («prima facie» applicable norm-selection) stage of «reference»*:

a. Words used in the *discourse of law* may also be ambiguous (*e.g.,* vague to a certain quantitative or qualitative extent) as to *what they refer to*[52];
b. Adjudicative interpretation must therefore be performed in order to decide *which entities of the world the words «cover»* on account of the *non liquet* prohibition encompassed in most contemporary legal systems.

3.2.3. *At the conflict solving (post-interpretative) stage*:

a. Several norms of a legal system conflict with each other leading to either *invalidity of norms* or (gradual or definitive) *inapplicability of norms* (principles compete and rules conflict in total-total, total-partial or partial-partial schemes[53]);
b. *Adjudicative balancing* must also be performed on account of the *non liquet* prohibition encompassed in most contemporary legal systems;
c. For instance, Alexy's famous *weight formula* is a piece of legal construction (*Juristenrecht*) as it frames the method for *adjudicative balancing*[54]:

$$W_{i,j} = \frac{I_i \cdot W_i \cdot R_i}{I_j \cdot W_j \cdot R_j}$$

i. The formula sets forth that the concrete weight of principle *Pi* in relation with colliding principle *Pj* under certain cases derives from the quotient between, on the one hand, the product of the importance of principle *Pi*, its

[52] See Timothy Endicott, *Vagueness in Law*, 2006, 65 f.

[53] On the taxonomy of normative conflicts, see Alf Ross, *On Law and Justice,* London, 1958 — trad. portuguesa: *Direito e Justiça,* E. Pini, São Paulo: Eudeba, 2000, 158 f.; see also C. Santiago Nino, *Introducción al Análisis del Derecho*, 2003, 274. On the collision of principles, see Robert Alexy, "On the Structure of Legal Principles", *Ratio Juris* 13/3 (2000) 297 f.; David Martinez-Zorrilla, *Conflictos Constitucionales, Ponderación y Indeterminación Normativa,* Madrid: Marcial Pons, 2007, 133.

[54] Cfr. R. Alexy, „Die Gewichtsformel", in J. Jickeli *et al.,* ed., *Gedächtnisschrift für Jürgen Sonnenschein,* Berlin, 2003, 771 f.

abstract weight and the reliability of its empirical suppositions as regards its importance and, on the other, the product of the importance of principle *Pj*, its abstract weight and the reliability of its empirical considerations as regards its importance.

ii. Therefore, $W_{i,j}$ means the concrete weight of *Pi* in relation with the colliding principle *Pj*. The weight formula defines this concrete weight as the quotient of three factors in each side of the balancing: I_i represents the intensity of the interference in *Pi*; I_j represents the importance of fulfilling *Pj*; W_i and W_j represent the abstract weight of principles *Pi* and *Pj*; lastly, R_i and R_j represent the reliability of the empirical and normative suppositions (*epistemic factor*), which relate to the issue of how intense is the interference in *Pi* and how intense the interference in *Pj* would be if the interference in *Pi* was omitted.

iii. Alexy sustains — again, as a piece of legal construction (*Juristenrecht*) — that it is possible to assign, in metaphorical fashion, a numeric value to the variables of the importance of the abstract weight of principles, through a triadic scale: *light* 2^0, that is, 1; *medium* 2^{-1}, that is, 2; and *serious* 2^{-2}, that is, 4. The quantitative expression of the reliability of the empirical suppositions takes the following form: *certain* 2^0, that is, 1; *plausible* 2^{-1}, that is, 1/2; and *not evidently false* 2^{-2}, that is,1/4.

3.3. As seen above, legal construction (*Juristenrecht*) takes place in several steps of the *law-applying process*; however, it is at the stage of interpretation that it becomes more evident.

3.3.1. It becomes clear that some concepts *per se* require a

theoretical background on which they can rely upon on in order *(i)* to be significantly understood and *(ii)* the norms arising out of such normative sentences be applied.

a. It may be the case that this happens with all concepts under a skeptic view of *meaning* (at least one that requires a *contextual* reference point);
b. My claim is simply to state that, for them to be *significantly understood*, some concepts require such *theoretical background* more than others. For instance:
    i. Contrast «court» with «dignity»;
    ii. Contrast «legal agreement» with «justice»;

3.4. Sometimes these concepts are used in such an ambiguous manner that disagreements arise *beyond* the level of interpretation *stricto sensu*[55]. The *discourse of law* gives place to many other disagreements. For instance:

3.4.1. The speech act underlying ambiguous legal sentences (*e.g.* assertive statements with illocutionary *directive force*): *e.g.,* «human life is sacred»;

3.4.2. The ambiguity of deontic modalities (*e.g.* permissive or obligatory norms): *e.g.*, «all citizens are endowed with human dignity »;

3.4.3. The normative structure of legal sentences (*e.g.,* rules or principles): *e.g.*, «all citizens have the right to free speech»;

3.4.4. The theories over pragmatic equivalence between non obligatory and permitted actions: *e.g.*, «if action a is not forbidden under legal system z then action a is permitted under legal system z».

3.5. Frequently, the formulation or adhesion to *theoretical backgrounds* (certain legal, moral, philosophical or economic theories) are a *vehicle* for the creation of *ought sentences* (obligations, prohibitions and permissions) which simply do not pertain to the legal system (*i.e.,* they are a vehicle for the *pure creation* of norms)[56].

3.5.1. This too has to do with *theoretical background assumptions*, *e.g.*:

a. a certain theory of legal sources (*e.g.*, legal positivism

[55] See Vittorio Villa, *Deep Interpretative Disagreements and Theory of Legal Interpretation*, 110 f.; P. Varonesi, "La Dignidad Humana: una Idea aparentemente Clara", in Ricardo Chueca, ed., *Dignidad Humana y Derecho Fundamental*, Madrid: Centro de Estudios Politicos y Constitucionales, 140 f.

[56] See Riccardo Guastini, *Juristenrecht. Inventando Derechos, Obligaciones y Poderes*, 213. For instance, suppose that an academic sustains that the *only* possible constitutional concept of human life in the Portuguese legal system is that of life as of the conception. This is a statement linked with the untenable account of objective metaethics of the type "only one is right and the others are mistaken".

versus «law as integrity»);
b. a certain theory of interpretation (*e.g., originalism, textualism, purposivism*, *etc.*);
c. a certain theory on graduability and expansibility of legal principles (*e.g.,* Alexy's *Optimierungsgebote* or Sieckmann's *reiterated mandates of validity*);
d. *etc.*;

3.6. *Theoretical background assumptions* provide for the implicit creation of legal norms:

3.6.1. Some implicit legal norms are derived from the *conjunction* of the discourse of law together with a *theoretical background assumption*: *e.g., boni mores*; hierarchical superiority of EU Law;

3.6.2. Other implicit legal norms are derived *purely* from *theoretical background assumptions*: *e.g.*, arguments from «Natur der Sache», parliamentary government, human personalism, the principle of *favor laboratoris*;

3.7. These *implicit norms*, necessary as sometimes they may be, are *not a product of legal science*

4. Example: take the concept of *human dignity*

4.1. "Human dignity" is a concept that gives place to a *deep interpretative disagreement* (DID)[57].

4.1.1. DID are *prima facie* genuine disagreements:
a. Within certain *comprehensive reasonable conceptions,* there is a degree of consensus and paradigms that instantiate the concept (*e.g.,* the disagreements arise upon a previous necessary consensus);

4.1.2. DID are *prima facie* deprived of any interpretative errors (*i.e.,* the disagreements are «faultless»):
a. Frequently, adjudicative interpretations diverge but they are *equally legitimate*, *i.e.,* they transcend the semantic and cultural tolerability;

4.1.3. DID are *prima facie* unsolvable:
a. It is impossible (*i.e.,* outside objectivist metaethics and other objectivist theories which are untenable) to come up with an

[57] See Vittorio VILLA, *Deep Interpretative Disagreements and Theory of Legal Interpretation*, 89 f.

a priori right interpretation deprived of a certain contextual reference point;

b. The contextual reference point is a *matter of fact* and not a *product of reason*[58];

4.2. Several *travaux préparatoires* show that, after World War II, constitution-makers *agreed not to agree* on the description of the concept of "human dignity"[59].

4.2.1. These constitution-makers could not agree neither to the *libertarian* account nor to the *communitarian* account of "human dignity" and sometimes they could not agree neither to the secular account nor to the non-secular account of "human dignity")[60];

4.2.2. Such was the price to pay in order to include the concept of "human dignity" in several constitutions;

4.3. The disagreements over the concept of "human dignity" transcend the purely interpretative disagreements[61].

4.3.1. Human dignity may, among others, be envisaged as *(i)* a *background idea* (or a *narrative formula*)[62] *(ii)* a constitutional principle (a state obligation)[63] or *(iii)* a fundamental legal position[64];

a. Human dignity as a *background idea* may further divide into:

i. Human dignity *qua* autonomy, further divided into:

1. Autonomy within the Kantian

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[58] On these properties of DID, see Vittorio VILLA, *Deep Interpretative Disagreements and Theory of Legal Interpretation*, 99 f.

[59] On this, see Ricardo CHUECA, *La Marginalidad Jurídica de la Dignidad Humana* in Ricardo CHUECA, ed., *Dignidad Humana y Derecho Fundamental,* Madrid, 2015, 29 f.

[60] On the differences between the libertarian and communitarian account of human dignity, see Pedro Moniz Lopes, "(…) the appellant's mind and her forceful clarity «is all that Marie has left»". Sobre a dignidade, a autonomia e a moral, a propósito do caso Fleming v Ireland", in Jorge Reis NOVAIS / Tiago Fidalgo de FREITAS, coord., *A Dignidade da Pessoa Humana na Justiça Constitucional,* Coimbra: Almedina, 2018, 319 f. On the differences between the secular and non-secular account of human dignity, see Luís Pereira COUTINHO, *Human Dignity as Background Idea* in Stefan KIRSTE, ed.*, Human Dignity and the Foundation of Law,* Stuttgart, 2013*,* 108 f.

[61] See Cass SUNSTEIN, *Legal Reasoning and Political Conflict,* Oxford: Oxford University Press, 1998, 58-59.

[62] See Luís Pereira COUTINHO, *Human Dignity as Background Idea,* 108 f.

[63] See the Portuguese Constitutional Court decision no. 509/2002.

[64] See Pedro Moniz LOPES, "(…) the appellant's mind and her forceful clarity «is all that Marie has left», p. 300 f. and p. 307 f. See also Jorge REIS NOVAIS, *A Dignidade da Pessoa Humana,* I, — *Dignidade e Direitos Fundamentais,* Coimbra, 2015, 114 f.

account of morality as a system of categorical imperatives[65];

2. *Autonomy* within the account of morality as a system of hypothetical imperatives (Philippa Foot) [66];
3. *Autonomy* as a dispositional property (Joseph Raz)[67];
4. *etc.*

ii. Human dignity *qua* a property of humanity (humans *as such* as beings with dignity)[68];

b. Human dignity as a *constitutional principle* may further divide into:

i. The *duty* impending upon the State to assure certain conditions of dignity for individuals[69];

ii. The *duty* impending upon the State to protect the autonomous dignity of individuals[70];

iii. The *duty* to protect the *holders* or *bearers* of dignity from themselves[71];

c. Human dignity as a *fundamental legal position* may further divide into:

i. Human dignity as the content of a *permissive norm*:

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[65] See Immanuel Kant, *Groundwork for the Metaphysics of Morals,* ed. and transl. by A. W. Wood, Contributors: J. Schneewind / M. Baron / S. Kagan / A. W. Wood, New Haven: Yale University Press, 2002, 4: 429.

[66] See Philippa Foot, "Morality as a System of Hypothetical Imperatives", in *The Philosophical Review,* 81/3 (Jul. 1972) 308 f.

[67] See Joseph Raz, *The Morality of Freedom,* Oxford: Clarendon Paperbacks, 1986, 371.

[68] See Luís Pereira Coutinho, *Human Dignity as a Background Idea*, 111.

[69] See Jorge Reis Novais, *A Dignidade da Pessoa Humana,* i, 186 f.

[70] See Fleming v Ireland [2013], iesc 19, para. 109; Antje Pedain, "The Human Rights Dimension of the Diane Pretty Case", in *The Cambridge Law Journal* 62/1 (2003) 181-206.

[71] Justice Scalia once stated, as regards the *Nancy Cruzan* case, that «the intrinsic value of human life does not depend on any assumption about a patient's rights or interests; states have the power (…) to prevent the suicide of competent people who rightly think they would be better off dead, a power that plainly is not derived from any concern about their rights and interests.» Critically, Ronald Dworkin, *Life's Dominion — an Argument about Abortion, Euthanasia and Individual Freedom,* New York: Alfred A. Knopf, 1993, 13.

1. A liberty to exercise a fundamental legal position *in the manner one wishes to*[72];

ii. Human dignity as a content of an *obligatory norm*:

1. Obligation to exercise a fundamental legal position *in the manner others wish one to*[73];

iii. Human dignity as a content of an *encumbrance*:

1. Liberty to exercise fundamental legal positions *insofar one exercises them in the manner others wish one to*[74];

4.3.2. "Human dignity" is a concept that is frequently used on *both sides* of an argument[75].

a. For instance, in *case law*:

i. The *Fleming v. Ireland* case:

1. Marie Fleming invoked "constitutional values of autonomy, self-determination and dignity" in support of her claim that no constitutional duty existed towards not assisting others in committing suicide[76];
2. The Supreme Court of Ireland decided that "it cannot properly be

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[72] See Pedro Moniz Lopes, *(…) the appellant's mind and her forceful clarity «is all that Marie has left»"*, 323 f.

[73] In this maximized vision of passive dignity, the *right to dignity* is not granted by the State nor created by its holder, rather it "exists", "independently of sex, race and nationality as well as way of life. Each human being was endowed (ausgestattet) with it… Dignity is linked with human subsistency (Mensch-Sein)… even unborn mortally ill life, in the womb of the mother, is endowed with this natural and unavoidable Dignity". H. P. Richter, *Juristische Grundkurse,* Band 20, 2007, *apud* Alfonsas Vaišvila, "Human Dignity and the right to Dignity in terms of Legal Personalism (from Conception of Static Dignity to Conception of Dynamic Dignity", *Jurisprudencija,* 3/117 (2009) 112.

[74] See Jorge Reis Novais, *A Dignidade da Pessoa Humana,* i, 130 f.; Pedro Moniz Lopes, *(…) the appellant's mind and her forceful clarity «is all that Marie has left»*, 325 f.

[75] On this, see See Pedro Moniz Lopes, *(…) the appellant's mind and her forceful clarity «is all that Marie has left»"*, p. 313, Note 70.

[76] Fleming v Ireland [2013], iesc 19, para. 110.

said that such an extensive right or rights [to committing suicide *and* to assist to such end] is fundamental to the personal standing of the individual in question in the context of the social order envisaged by the Constitution" and that "as there is no right to commit suicide so issues, such as discrimination, do not arise; nor do values such as dignity, equality, or any other principle under the Constitution, apply to the situation and application of the appellant, as discussed above"[77].

ii. The «dwarf-tossing» case;

1. Manuel Wackenheim claimed that banning him from working as a *tossed dwarf* represented an affront to his dignity as it violated his right to freedom, employment, respect for private life and an adequate standard of living, and right to non-discrimination[78].
2. The *Conseil d'État* decided that an administrative authority could legally prohibit dwarf-tossing on grounds that the activity did not respect human dignity and was thus contrary to public order.

4.3.3. The norm of human dignity is therefore *shaped* through either *(i)* adjudicative interpretation of normative sentences, *(ii)* presupposed background theoretical assumptions or *(iii)* the conjunction of both.

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[77] Fleming v Ireland [2013], IESC 19, para. 138.

[78] See CE, Ass., 27 Octobre 1995, p. 372 Case Commune de Morsang-sur-Orge in which an appeal was lodged in order to to annul the judgment of 25 February 1992 whereby the Versailles Administrative Tribunal, at the suit of the Fun Production Company and Mr. Wackenheim, had on the one hand annulled the Order of 25 October 1991 whereby its mayor banned the dwarf-tossing show planned for the 25 October 1991 at the Embassy Club discotheque, and on the other hand ordered the mayor to pay the said Company and Mr. Wackenheim the sum of 10,000 francs compensation for the loss caused by the said Order.

5. Conclusions: *Juristenrecht* not as legal science but as the *object of legal science*

5.1. *Legal scholarship* «lato sensu» includes:

5.1.1. descriptive scientific statements over the discourse of law (in force);

5.1.2. adjudicative interpretations ascribing one out of possible meanings to normative sentences;

5.1.3. creative interpretations ascribing unsupported meanings to normative sentences and notably;

5.1.4. adoption of *background theoretical assumptions* that normatively frame the law-applying process.

5.2. *5.1.2., 5.1.3.* and *5.1.4* are, according to the criteria set forth above, *Juristenrecht.*

5.3. It is said that there is a *back and forth* between scientific meta-language and the object language (the law-creating authorities' language) (Kelsen). But this is a matter of *appropriation* of the former by the latter. This is not the case with *Juristenrecht.*

5.4. *Juristenrecht* enriches its own field of study because the second-order language of jurists *descends* to the object language of law (*i.e.,* it *creates* obligations, permissions and prohibitions, be it *ex nihilo,* be it *interstitially*).

5.4.1. It may be so that *Juristenrecht* is formally (officially) accepted in the discourse of law with *membership to the legal system* (*e.g.,* the *bona fides* principle in Portuguese administrative law was primarily — before official recognition in the Portuguese Constitution in 1996 — a product of *Juristenrecht*);

5.4.2. It may be so that *Juristenrecht* is formally (but unofficially) accepted in the discourse of law with *membership to the legal system* (*e.g.,* it becomes customary law);

5.4.3. But it is certainly also so that *Juristenrecht* is purely *presupposed* in the law-applying proceedings in everyday life (*e.g.,* courts and administrative agencies) as a background premise under seldom enthymematic legal conclusions.

5.5. *Juristenrecht* is therefore *in force.*

5.6. An accurate (scientific) description of law must take into account both *(i)* the language of law and *(ii)* the language of *Juristenrecht*[79].

[79] Paradigmatically, see Riccardo Guastini, *Juristenrecht. Inventando Derechos, Obligaciones y Poderes*, 221.

4

AFTER KELSEN AND HART: SOURCES OF LAW, RECOGNITION AND UNITY OF THE LEGAL SYSTEM

José de Sousa e Brito

Kelsen answers the question of which elements or relations are common to all the norms of a legal system, allowing us to think of it as a single system. Only by answering this is it possible to identify the norms that belong to a legal system, which are the constituents of a legal system. According to Kelsen all the norms of a system of law are created through the application of the basic norm or through a norm created by means of the direct or indirect application of the basic norm. This is his answer to the question of the unity of the legal system. Kelsen finds such unity in the same source: the basic norm that is the constitution in a logical (or transcendental-logical) sense of the word, which is the reason for the validity of the first historical constitution and of custom. In Kelsen's words: 'actually, however, only the positive reason for the validity of a legal norm, that is, the higher positive legal norm that regulates its creation, is called 'source.'

In this sense, the constitution is the source of the general legal norms created by legislation or custom.'[1] It happens, however, that the written constitutions do not have usually a general norm that recognizes custom as source of general legal norms. 'if the application of customary law by courts is considered to be legitimate although the written constitution contains no such authorization, then the authorization cannot be considered to proceed from a unwritten custom created constitution but must be *presupposed*, in the same way that it must be presupposed that the written constitution has the character of an objectively binding norm if the statutes and ordinances issued in accordance with it are regarded as binding legal norms. Then the basic norm (the constitution in the transcendental-logical sense) institutes not only the act of the legislator, but also custom as law creating facts.'[2]

Kelsen runs here into some difficulties. To begin with, the quoted passages suggest that the authorization of custom by the constitution is a contingent fact. A legal system without custom as a source of law, with custom authorized by a written constitution or without custom authorized by a written constitution but authorized by a presupposed basic norm could alternatively exist. But Kelsen's theory about derogating custom shows that in any legal system there is derogating custom and such derogating custom prevails not only over the norm to which it applies, but also over any general contrary norm, including a constitutional norm that prohibits derogating custom. According to Kelsen 'statutory law and customary law cancel each other according to the principle of *lex posterior*. However, a constitutional law in the formal sense may not be abolished by an ordinary statute — only again by a constitutional law; but customary law does have a derogating effect in relation to a formal constitutional law, and even in relation to a formal constitutional law that expressly excludes the application of customary law.'[3] This doctrine derives necessarily from the conditions of validity of a legal norm, since, according to Kelsen, a validly created legal norm remains valid as long as it remains effective, and its habitual ineffectiveness has as a consequence its abolition by derogating custom.[4] Kelsen uses here the Latin word *desuetudo*, that he defines as 'negative custom, and its essential function is to abolish the validity of an existing norm' and further characterizes: 'If

[1] Hans Kelsen, *Pure Theory of Law,* translation by Max Knight, Berkeley: University of California Press, 1967, 233.

[2] Hans Kelsen, *Pure Theory of Law,* 223.

[3] Hans Kelsen, *Pure Theory of Law,*226-227.

[4] Hans Kelsen, *Pure Theory of Law,*212-214.

effectiveness in the developed sense.[i. e. "by and large'] is the condition for the validity not only of the legal order as a whole but also of a single legal norm, then the law-creating function of custom cannot be excluded by statutory law, at least not as far as the negative function of *desuetudo* is concerned'.[5]

How can it be understood that effectiveness, which is not a condition of validity of a norm, whose conditions of validity are the acts of its creation, be a condition of its maintenance as a valid norm, so that by lack of effectiveness the norm is abolished by a negative custom, that creates law, in this case creates the legal consequence of derogation? Why not to admit here a positive custom, that maintains the validity of each norm? It has to be recognized that there is no change in the normative universe as a consequence of such custom, which therefore does not create law. There is only the impeachment of a negative custom, which would indeed change the normative universe. There is no new customary norm. We do, however, have a new legal effect upon an already existing norm, without changing it, the effect of validity maintenance. Using the common image in this field, we do not have a source of law in its proper sense, an original source of law, but we have a secondary source of its existence. It is in this sense a secondary legal custom, which is not a 'source of law'.

The validity of each legal norm is conditioned not only by its own effectiveness for remaining valid, but also by the effectiveness of all other norms of the legal system. In this way, according to Kelsen, 'as soon the constitution loses its effectiveness, that is, as soon as the legal order as a whole based on the constitution loses its effectiveness, the legal order and every single norm lose their validity.'[6] In such a case of extinction of the legal system could it still be said to exist a derogating custom? Kelsen does not say it, perhaps because that would imply that the basic norm, which is a presupposed norm, may be

[5] Hans Kelsen, *Pure Theory of Law,* 213. Cf. 'Derogation', *Essays in Jurisprudence in Honour of Roscoe Pound*, Indianapolis: Bobbs Merrill, 1962, 339-361 that looks like an earlier translation of ch. 27 and ch. 29 of the German original (publish posthumously: *Allgemeine Theorie der Normen*, Wien: Manz, 1979) of his *General Theory of Norms,* translated by Michael Hartney, Oxford: Clarendon, 1991. In ch. 27 Kelsen says that 'a derogating norm cannot arise by way of custom" (109) whereas in *The Pure Theory of Law*, 213, he says: 'If custom is a law-creating fact at all, then even the validity of a statutory law can be abolished by customary law [in the German original the last phrase reads 'kann auch gesetzes Recht durch Gewonheitsrecht derogiert werden' (*Reine Rechtslehre*, 2nd ed., Wien: Manz, 1960, 220), literally, 'statutory law may also suffer derogation by customary law']. I take the position of *The Pure Theory* to be more coherent and therefore probably the last one.

[6] Hans Kelsen, *Pure Theory of Law,* 212.

derogated by derogating custom, which is a positive norm. It seems more natural to say that all the norms are then derogated by custom and that in such a case it does not make sense to say that the derogating custom or that the basic norm are valid. However, if the basic norm is composed not only by a norm (or a part of a norm) that authorizes the first historical constitution, but also by a norm (or a part of a norm) that authorizes custom, it is possible for the first historical constitution to fall into desuetude, thereby losing its validity. But the other norms created through the constitution or through custom would remain valid. These other norms would then be recognized by custom until there is a new constitution that can eventually recognize their validity. We would then have, against Kelsen, changes of the basic norm in the same legal system, the same basic norm would no longer be the criterion of unity of a legal system.

The last conclusion coincides with the point of view of international law, according to which the unity of a legal system can be sustained in spite of constitutional change not authorized by a previous constitution.

Other difficulties of Kelsen's theory of custom derive from his thesis that the norm that establishes custom as a source of law, by determining that if men belonging to the same political community behave and think in certain ways they create a legal norm, must be conceived as a presupposed norm, that is a part of the basic norm, and not as a norm of customary law. Kelsen's applies the thesis to the case where the basic norm does not refer to a written constitution, but directly to a legal order created by custom. This is the case of general international law, which is constituted by customs regulating international relations according to the mutual behaviour of states, that is, the mutual behaviour of the individuals qualified by the national legal orders as state organs[7]. One of those customary laws, *pacta sunt servanda*, authorizes states to regulate their mutual relations by treaty[8]. And this is also the case, I would say, in the United Kingdom, where there are no norms superior to those enacted by the Queen in Parliament and where the norms that regulate the legislative power in Parliament are customary law. Kelsen says it in general terms: 'this is so also if the constitution of the legal community is not created by a legislative act but by custom, and if the law-applying organs are considered to apply customary law'[9]. Now, to admit that a norm that regulates the creation of general norms

[7] Hans Kelsen, *Pure Theory of Law,*214-217.
[8] Hans Kelsen, *Pure Theory of Law,*216.
[9] Hans Kelsen, *Pure Theory of Law,*226.

can be created by custom is, says Kelsen, a *petitio principii*, because 'then it must already be presupposed that custom is a law-creating fact. This presupposition can only be the basic norm.' The presupposition does not follow, because it can just be a customary norm that custom is a law-creating fact. Such a norm would not regulate behaviour by imposing a duty on it or permitting it, but would regulate the creation of custom by determining the conditions of such a creation. It is clear that, in Kelsen's view, such a customary norm can only be considered as objectively valid, if there is a basic norm with the same content that authorizes it. But, in any case, there would be only one ultimate criterion of validity of every norm of a legal system.

Kelsen acknowledges that a court, especially one of the highest instance, can be authorized to create general norms, if the rule that it applies by deciding a case is considered as a 'precedent', that is, as binding in future cases like the case decided by the rule[10]. The rule that is *ratio decidendi* of the precedent may be viewed by the court as an interpretation or application of previous law or it may not be predetermined by general norms of legislation or custom. However, according to Kelsen in both cases, there is creation of a new general norm, even if it is in the first case an interpretative one. Judges share then with legislative organs the task of creating general norms. The authorizing norm may be a customary norm, as in most common law systems, or it may be a norm in a written constitution.

Kelsen admits in this way that the basic norm in certain cases is only one norm that authorizes custom. It would be so in every case if it were admitted that the norm that establishes the validity of the first constitution, if its condition of validity — the factual presupposition of the effectiveness of the norms created through it — is verified, is a customary norm. There are strong arguments for admitting such a customary rule. International law makes the international recognition of states and governments dependent on the effectiveness of the respective constitution and this seems difficult to explain other than by admission of a rule of general international law that presupposes the existence of similar national customary norms linking the validity of the constitution with its effectiveness. And what does the phrase "condition of validity of a norm" mean but the antecedent factual presupposition of a legal consequence? It is true that the customary rule linked with the constitution does not purport to create it or to contribute to its creation, but only to recognize it. This is so because of the special content of the *opinio juris* of this type of customary rule. Such a customary norm

[10] Hans Kelsen, *Pure Theory of Law,* 250-252.

would then not be the basic norm or a part of it, but to Kelsen it would still need a presupposed basic norm as a reason for its validity, which would have the same conditions of validity and the same content.

Against such a consequence there is a restrictive concept of custom, which is traditional, and adopted by Kelsen. According to such a concept, the factual presupposition of custom is 'characterized by the circumstance that men belonging to the legal community behave under the same circumstance in the same way; that this behaviour takes place for a sufficiently long time; and that in the individuals whose acts constitute the custom the collective will arises that one *ought* to behave in that way.'[11]Such a concept does not apply to custom which creates constitution or to derogating custom, and therefore we need to differentiate various types of custom with factual presuppositions partially diverse.

A broad concept of custom covering those various types and the whole of common law is traditional in common law countries. It can be found for example in Blackstone[12] and is developed by the practice theory of rules of Hart, a theory I shall examine in due course. Customary law in accordance with such a concept covers the customary institution of precedent and is to be contrasted with statutory law.

A broad concept of custom is also present in the application by the International Military Tribunal of Nuremberg to the Nazi officials of types of war crimes and of crimes against humanity that had not been previously applied. The court interpreted its decision as applying general international law and not as creating new law. The court purported to demonstrate in regard to each type of crime, that in the absence of previous criminal decisions of previous military courts, there were decisions of national courts, both ordinary and military, international treaties and declarations that revealed the 'universal recognition'[13] of the existence in international law of general principles of law and rules that make certain acts not only illegal but also crimes of international law. According to such principles and rules, not only states can be sanctioned, but also 'individuals can be punished for

[11] Hans Kelsen, *Pure Theory of Law,* 225. It is interesting to note that Kelsen, who takes the 'will' of the State (cf. Idem, *Hauptprobleme der Staatsrechtslehre*, 2nd ed., Tübingen: Mohr, 1923, 177), like the 'spirit of the people' (*Pure Theory of Law,* 227), to be fictions, does not hesitate here to speak of a collective will.

[12] William Blackstone, *Commentaries on the Laws of England*, 1785, Book I, Introduction, section 3, 63-74 (ed. W. D. Lewis, Philadelphia, 1900).

[13] *Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg, 1948, XXII, 464.

violations of international law'[14]. So to demonstrate the existence of the crime of 'war of aggression', the court invoked the Pact of Paris or the Kellogg-Briand Pact of 1928[15] , which condemned recourse to war for the solution of international controversies. Against the argument that the pact did not describe as crimes the acts of those who plan and wave war, the court answered that the Pact consecrated a general principle of law and that violations of the Hague convention — such as the inhumane treatment of prisoners, the employment of poisoned weapons, etc. - since 1907 'have certainly been crimes, punishable as offences against the laws *of* war; yet the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders. For many years past, however, military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this Convention. In the opinion of the Tribunal, those who wage aggressive war are doing that which is equally illegal, and of much greater moment than a breach of one of the rules of the Hague Convention.'[16] 'Only by punishing individuals who commit such crimes can the provisions of international law be enforced'.[17] To confirm its interpretation the court referred to explicit declarations of the war of aggression as a crime of international law, which received a wide approval in the League of Nations, by preparing treaties discussed there but never ratified.[18] And to justify what the court designated as 'the construction which the Tribunal placed upon the Pact of Paris, that resort to. a war of aggression is not merely illegal, but is criminal'[19], the following general doctrine was defined: 'The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing.'[20] This doctrine represents the transposition to international law of the methodology of adjudication in the common law. This was clearly stated by the American lawyer

[14] *Trial*, xxii, 466.
[15] *Trial*, xxii, 462.
[16] *Trial*, xxii, 463.
[17] *Trial*, xxii, 466.
[18] *Trial*, xxii, 464-465.
[19] *Trial*, xxii, 465
[20] *Trial*, xxii, 464.

Jackson in the name of the prosecution: international law grows, like common law, by means of decisions that from time to time are passed to adapt established principles to new situations.[21]

The arguments of the International Military Tribunal about the war of aggression have been extensively discussed, but what is noteworthy is its methodology, which is a typical way if judicially recognizing customary law. It is clear that such recognition did not depend in this case on the repetition of acts of the same description or of similar earlier judicial decisions, but instead on an argument based on principles recognized in different cases.

It should be questioned if the kind of jurisprudential 'construction' that characterizes the cases of development of law in common law and more generally in national or international customary law is adequately described by Hart, as the application of a rule of recognition, which would include one rule imposing on judges the duty to fill gaps in the law through recourse to analogy and to general principles of law or otherwise would give them a discretionary power of norm creation. Dworkin thinks that what judges then do is embark on an interpretative process based on a principle of integrity that requires judges to depart from earlier decisions and to extract from them principles that can be applied to construct the rule that better 'fits', that is, that better resolves the actual case in a way coherent with the norms behind those earlier decisions.[22] I think with Waldron[23] that Dworkin's description is preferable, because it corresponds to the internal point of view of the participants in the life of law. The argument that seems to me decisive is based on how a decision of these cases by a lower tribunal is considered in appeal. The question then is never whether the judge's decision lies within or beyond her discretionary powers. The question is whether her decision was the right one. Whatever is the better description, the decision was thought (wrongly to Hart, correctly to Dworkin) as the application of existing customary law by both the lower and the higher courts.

Once a broad concept of custom is accepted, can it be said that all norms of the legal system have a common origin, since they derive their validity directly or indirectly from the norm that institutes custom as a source of law? A broad concept of custom covers diverse

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[21] *Apud* Georg Dahm, *Völkerrecht*, III, Stuttgart: Kohlhammer, 1961, 315.

[22] Ronald Dworkin, *Laws Empire*, London: Fontana, 1986, 130-139, 238-266.

[23] Jeremy Waldron, 'Who Needs Rules of Recognition?', *The Rule of Recognition and the U. S. Constitution*, ed. by Matthew D. Adler / Kenneth Einar Himma, Oxford: Oxford University Press, 337.

types of customary norms, where the always required conviction of legal bindingness depends on different types of factual and normative reasons. In it we should include a strict concept of custom or legal usage, derogating custom, custom of general international law, custom that establishes a unwritten constitution, custom that establishes a new written constitution, judicial custom which creates a rule of precedent and custom newly expressed in the judicial application of customary rules. There are thus not one but several customary norms establishing primary sources of law –sources not derived from other sources — of a legal system, in a variable combination of the different types of customary norms mentioned. In each legal system such a set of customary norms is a part of the constitution in a material sense. In Kelsen's terminology,[24] it is a set of norms which regulate the production of general norms, whose validity does not derive from the written constitution and which ensures the maintenance and unity of the legal system when the constitution changes.

Of all these customary norms Kelsen would repeat what he says about the ones that he accepts: they can only be thought as valid if a basic norm is presupposed as valid, a basic norm which refers to each of them and confers to the subjective acts that constitute custom the objective sense of validly creating a legal norm.

Pace Kelsen the concept of a basic norm is intrinsically contradictory, because it is the concept of the meaning of an act of the will, that does not exist, by an authority that does not exist. Kelsen admits it finally, when he says in his *General Theory of Norms* that the basic norm 'not only contradicts reality, since there exists no such norm as the meaning of an actual act of the will, but is also self-contradictory, since it represents the empowering of an ultimate moral or legal authority, and so emanates from an authority — admittedly a fictitious authority — even higher than this one.'[25]

The formulation that Kelsen gives of the basic norm 'Everyone is to behave as the historically first constitution specifies'[26] expresses only that part of the complex basic norm, that is the reason for the validity of a first written constitution. It is a presupposed norm, which is thought of as being wanted by an authority higher than the authority which approves the constitution. If we are to formulate the basic norm as a hypothetical norm, we have to include in the antecedent

[24] Hans Kelsen, *Pure Theory of Law,* 228.

[25] Kelsen, *General Theory*, 256.

[26] Kelsen, *General Theory,* 256. Cf. *Pure Theory*., 204: 'one ought to obey the prescriptions of the first historical constitution'.

its effectiveness, as the condition of the validity of the basic norm, that finally consists in the effectiveness of the norms created through it. The following formulation would obtain: 'if the norms created through the first historical are effective, then everyone is to behave as the historically first constitution specifies'. If we conceive, as I have suggested, the later norm as a customary norm, then, according to Kelsen, it is necessary to presuppose a basic norm, as the reason for the validity of such a custom, by virtue of which the subjective acts that constitute the antecedent of the customary rule not only want to create it, but also do create it objectively. But again such basic norm would have as condition of validity just the same acts that are the antecedent of the customary rule that the basic norm pretends to validate. A basic norm would have to be thought with the same content of the norm validated by it. The same would apply to the case where an unwritten constitution exists as a customary rule and so there is no further customary rule to validate the constitution. Hart deserves therefore full support when he says: 'If a constitution specifying the various sources of law is a living reality in the sense that the courts and officials of the system actually identify the law in accordance with the criteria it provides, then the constitution is accepted and actually exists. It seems a needless reduplication to suggest that there is a further rule to the effect that the constitution (or those who 'laid it down') is to be obeyed. This is particularly clear where, as in the United Kingdom, there is no written constitution.[27] Kelsen could object that the customary rule presupposed as the basic norm would have the objective meaning of being valid law, whereas the custom based on it could only without it pretend validity. However, if custom in certain circumstances has to be thought as valid, why not admit that in such circumstances the acts that constitute custom have the objective, and not merely subjective, meaning of creating custom? Kelsen does not have a philosophy of language that could explain this.

The norms that link a factual antecedent with the validity of a legal norm as a legal consequence are constitutive norms. Constitutive norms put into being what they are about, whereas regulative norms guide conduct so that it puts into being what they are about. I am following a line of thought initiated by Wittgenstein, who showed that the rules constitute the game. The finest groundwork after Wittgenstein was done by John L. Austin and Paul Grice in their William James lectures in Harvard[28]. Constitutive norms do not allow us to move from an *is*

[27] H. L. A. Hart, *The Concept of Law*, 2nd ed., Oxford: Clarendon, 293

[28] John L. Austin, *How To Do Things With Words*, 2nd ed., Oxford: Clarendon,

to an *ought* against Hume's law, that is, as a logical deduction of ought from is. The facts that constitute the law do not imply logically the law: they are conditions of legal validity: since they exist, the norms exist, i.e., are valid, ought to be followed. So they do not violate Hume's law (no 'ought' from an 'is'). Constitutive legal norms put into being, if certain conditions obtain, what (a norm or a set of norms, a legal consequence or a set of legal consequences) they determine. They guide behaviour in so far as it can realize the conditions under which they put into being or make valid what they determine. Kelsen's conditions of validity are facts linked with the legal consequence of the validity of a norm or of a set of norms (e. g., the first historical constitution, the legal order) by normative and not by logical necessity (in other words, by 'imputation' and not by implication). The basic norm could be formulated as a constitutive norm 'If the norms created through the first historical constitution are effective, then the first historical constitution (and all the norms derived from it) are valid.' It is so a customary constitutive rule that recognizes the first historical constitution as valid law. Norms which establish sources of law are constitutive rules, they can be customary norms or legislated norms, but if they are legislated they have their validity recognized by, directly or indirectly, a constitutive customary norm.

Hart's practice theory of rules, which is applied to social rules (including customary rules), is a theory according to which the social practice which constitutes custom creates it objectively. Hart distinguishes social rules from mere group habits. In both cases there is convergence or identity of behaviour of most members of a group. But, in order for a rule to exist, deviations to it must be generally regarded as lapses or faults open to criticism, threatened deviations must be met with pressure for conformity. It is also necessary that deviation from the standard be generally accepted as a good reason for such criticism or pressure, which are therefore justified. In addition to this, there must be, on the part of at least some members of the group, a critical reflective attitude of acceptance of certain patterns of behaviour as a common standard. All of this finds its characteristic expression in the normative terminology of 'ought', 'must', and 'should, 'right' and 'wrong'.[29] This analysis also applies as well to a tribal society and to the legal custom of modern states. Hart observes: 'in what sense, then, are we to think of the continuity of the legislative authority of the Queen in Parliament, preserved throughout the

1975; Paul Grice, *Studies in the Way of Words*, Cambridge — Massachusetts, 1989.

[29] H. L. A. Hart, *The Concept of Law*, 55-57.

changes of successive legislators, as resting on some fundamental rule or rules generally accepted? Plainly, general acceptance is here a complex phenomenon, in a sense divided between officials and ordinary citizens, who contribute to it and so to the *existence* of a legal system in different ways, The officials of the system may be said to acknowledge explicitly such fundamental rules conferring legislative authority: the legislators do this when they make laws in accordance with the rules which empower them to do so: the courts when they identify, as laws to be applied by them, the laws made by those so qualified, and the experts when they guide the ordinary citizens by reference to the laws so made, The ordinary citizen manifests his acceptance largely by acquiescence in the results of these official operations. He keeps the law which is made and qualified in this way, and also makes claims and exercises powers conferred by it. But he may know little of its origins and its makers: some may know nothing more about the laws than that they are 'the law'. It forbids things ordinary citizens want to do, and they know that they may be arrested by a policeman and sentenced to prison by a judge if they disobey.'[30] This theory of the social practice of customary rules, developed by Hart in *The Concept of Law* is completed in the posthumous 'Postscript' by the characterization of such a practice as a convention: 'Rules are conventional social practices if the general conformity of a group to them is part of the reasons which its individual members have for acceptance.'[31]

The words 'recognition' and 'acceptance' should be taken as equivalent. It is true that Hart prefers to speak of recognition by legal officials (legislators and judges) and also by jurists and practising lawyers, and of acceptance by ordinary citizen. But the aim is to analyse the

[30] H. L. A. Hart, *The Concept of Law*, 60-61.

[31] H. L. A. Hart, *The Concept of Law*, 255. Hart's concept of recognition is identical in substance with John S. Searle's "collective recognition" (*Making the Social World*, Oxford: Oxford University Press, 2009, 56-58). It diverges from the concept of convention of David Lewis, *Convention: A Philosophical Study*, Cambridge, Massachusetts: Harvard University Press, 1968, 58, 78 in so far as the regularity in behaviour of a population is to Hart only one of the reasons for accepting the convention and not the single or the decisive reason, and therefore the convention does not intend essentially to solve a coordination problem even if it solves one anyway. Lewis thesis that 'we have a convention only after the force of our promises has faded to the point were it is both true and common knowledge that each would conform to some alternative regularity *R'* instead of *R* if the others did' (84) would be certainly unacceptable to Hart and inapplicable in the law. The difference between Hart's and Lewis concepts has been stressed by Andrei Marmor, *Social Conventions,* Princeton: Princeton University Press, 2009, 166; and Idem, *Philosophy of Law,* Princeton: Princeton University Press, 2011, 80.

different forms in which the general acceptance of a rule of custom — traditionally designated the *opinio iuris* — is revealed. It is important to observe that a custom is at the same time constituted — and that is why it can be considered as a convention — and applied by the same acts of its recognition and application. It is also relevant to note that recognition can be both indirect and unconscious. Recognition of a tribunal or of another authority implies the indirect recognition of the norms that it applies and of the system of these norms. Moreover, recognition can be involuntary, not only because it can be unconscious of the norm content, but also because it can coexist with moral disapproval or with the will to disobey from the citizen, if such will to disobey is accompanied by an awareness of the existence of the norm. In spite of recognition, racist laws of Nazi Germany were not approved of by many Germans and laws which prohibited to listening of enemy radio stations were violated by the majority, even though violations were punished, if brought to the knowledge of the police.[32]

By using a broad concept of custom as a conventional practice and by rejecting the need of another norm, such as the basic norm, to validate it, Hart implies that general recognition or acceptance of a customary rule, together with the practice that accompanies it, are sufficient conditions of validity. However, Hart's practice theory of rules has a limited field of application. It is 'a faithful account of conventional social rules which include, besides ordinary social customs (which may or may not be recognized as having legal force), certain important legal rules including the rule of recognition, which is in effect a form of judicial customary rule existing only if it is accepted and practised in the law-identifying and law-applying operations of the courts. Enacted legal rules by contrast, though they are identified as valid legal rules by the criteria provided by the rule of recognition, may exist as legal rules from the moment of their enactment before any reason for their practice has arisen and the practice theory is not applicable to them.'[33] If instead, as was demonstrated by the study of the validity conditions of written constitutions, they derive their validity from a customary rule based on recognition, then recognition is an essential element, directly or indirectly, of the normative foundation of every legal norm. It is certainly true that statutory law made in the exercise of the legislative powers conferred by the constitution bases its validity upon the constitutional norm which

[32] So Karl Engisch, *Auf der Suche der Gerechtigkeit. Hauptprobleme der Rechtsphilosophie*, München: Piper, 1971, 73.

[33] H. L. A. Hart, *The Concept of Law*, 256.

confers such powers and upon the acts done in accordance with it. This is because validity depends on efficiency and on the absence of derogation. Similar links of direct norm derivation are established by means of subordinate legislative authorizations. The last foundation of the enacted legal rules is however the customary convention that validates the constitution. A rule of recognition for that purpose is as dispensable as the basic norm.

The rule of recognition is not just the ultimate source of criteria of validity for other norms by determining the conditions of their creation, change or derogation, as a norm constitutive of other norms, a function where it is dispensable. It also has the function of guiding judges in identifying the norms of the legal system. It is a duty norm which imposes on judges the duty of identifying the norms of the legal system in accordance with the criteria it establishes. Is this function exclusive to the rule of recognition? To answer this question, we must look at the relation between the content of a norm and its recognition. Norms are meant to guide those at whom they are addressed by means of their recognition of that very intention. In addition to guiding their addressees, they also guide the behaviour of law-applying organs, particularly judges whose functions are exercised by means of recognition of the validity and the content of norms they have to apply. So primary duty-imposing norms imply secondary recognition normsand secondary duty-imposing norms about the application of norms by judges and other law applying organs. James Goldschmidt[34] hold that there is a "material judicial law", which replicates each legal norm with a norm directing the behaviour of judges by imposing on them the duty to apply it. Against Goldschmidt it has been rightly objected that it is better to speak of only one constitutional norm imposing on judges the duty to apply every legal norm with the respective criteria of identification.[35] A similar idea lies behind Hart's rule of recognition, which is a judicial customary duty-imposing rule directed to the judges, imposing on them the duty to identify the rules they are to apply in accordance with the general criteria determined by the same rule of recognition. These criteria are set out in rules that are recognized by the rule of recognition and are criteria of validity

[34] James Goldschmidt, „Materielles Justizrecht. Rechtsschutzanspruch und Strafrecht", in *Festgabe für Hübler*, Berlin 1905, 85 f.; *Der Prozeß als Rechtslage*, Berlin, 1925 (reimp. Aalen: Scientia,1962), 146, n. 807, 228 ss., 243, n. 1327 and „Normativer Schuldbegriff", *Festgabe für Reinhard von Frank*, I, Tübingen: Mohr, 1930, 428 ff..

[35] Eberhard Schmidt, *Lehrkommentar zur Strafprozeßordnung und zum Gerichtsverfassungsgesetz*, I, 2nd ed., 1964, Nr. 40.

that most often refer to the manner and form in which the rules are created or adopted and to the consequent hierarchical and derogating relations between them. Sometimes they supply tests relating to the conformity of norms to substantive moral values or principles.[36] The difficulty of such a construction is that each norm has the criteria of validity set out by the norms that are the reason for its validity and its application presupposes the application also of these norms. So, validity conferring norms are simultaneously applied with the norms they validate. Therefore, the rule of recognition applies to and is itself applicable with every norm of the legal system, but it has no criteria of recognition which do not already result from other rules.

The difficulty does not disappear, but takes another form, if the rule of recognition is interpreted as the conjunction of a primary rule of obligation directed to judges with a set of rules constitutive of other rules. Such a set, to be a system of rules capable of solving problems of hierarchy and derogation, would have to include constitutional rules and other enacted legislation. The rule of recognition would then have a mixed customary and enacted nature. But then the argument made against the rule of recognition as an ultimate reason for validity returns, now in respect to that part of it which encompasses a set of constitutive rules. This part of the rule of recognition would add nothing to the separate existence of these constitutive rules, which would have to be recognized separately any way. It would be again a bad construction, because it would be dispensable.

Do we have so to conclude that the rule of recognition, conceived by Hart as a duty-imposing rule directed at judges, is dispensable, being preferably substituted by a simple rule of obligation, imposing to the judges the duty of applying the law? I think so. However, this does not mean that recognition is dispensable as a reason for the validity of law. On the contrary, a broad concept of custom implies that recognition is a necessary condition of the validity of every norm of the legal system.

Finally, the rule of recognition - like Kelsen's basic norm - beyond its norm-validating and norm-identifying functions, also grounds the unity of the legal system. To the same legal system would every norm belong that is recognized by the rule of recognition, as equally to Kelsen the basic norm would be the ultimate reason for the validity of every norm of the legal system. According to Hart, since the constitution does not authorize custom and custom does not authorize the constitution, there is no unity of origin, but instead unity of re-

[36] Cf. H. L. A. Hart, *The Concept of Law*, 256-258.

cognition as unity of the set of rules of recognition in the "one" rule of recognition. Pace Kelsen, who identifies state and legal system, and admits only one legal system - be it the state legal order, including international law as authorized by the state, or alternatively the international legal order, including in it the many state legal orders — it is important to distinguish the different legal systems of the different States, both from each other and from the legal system of international law. It matters also to distinguish the national law system of a state, constituted by the norms of statute law enacted by the organs of the state and by the customary norms of the legal customs of the citizens, and the legal system of every general or individual norm that may be applied by the courts of the state, including the norms of foreign law, of international law and of the law of other institutions (churches, for example). These two points have been clearly established, the first by Santi Romano[37] and the second by Wengler.[38] It matters equally to distinguish recognition as a norm of the state from recognition of the norms that may be applied in the legal system of the state. Recognition as a norm of the state is made by its nationals. In general, in any law community — i. g. in a religious community in respect to its religious law — the recognition constitutive of norms as community norms is made by the community members. Recognition of the norms to be applied in the legal system of the state is made by the addressees of the norms, i. e., the people to whom these norms are to be applied, considering the space-temporal limits

[37] Santi Romano, *L'ordinamento giuridico*, Firenze: Sansoni, 1977, 1st ed. 1918 / 2nd ed. 1945.

[38] Wilhelm Wengler, „Betrachtungen über den Zusammenhang der Rechtsnormen in der Rechtsordnung und die Verschiedenheit der Rechtsordnungen", in *Festschrift für Rudolf Laun*, Hamburg: Girardet, 1953, 719-743, and *Völkerrecht*, I, Berlin: Springer, 1964, 44-68. According to Wengler, „positive law presupposes in various ways the factual existence of different legal systems in the earlier described sense of *chains of norms*, which are made up of the legal goods produced by positive law and by the prescribed subtractions of such legal goods. Only this concept of legal order, which again should not be confound with the concept of system of law creation, enables us — together with the figure of relative illegality — to understand the complex relations between international law and state law and between different state laws' ('Betrachtungen', 743). The identification of each legal system by the legal goods reveals the value structure of the legal order as a system made explicit by jurisprudence. The legal community can be so understood as a interpretative and integrity seeking community. Since the legal goods are always goods of individuals or of legal persons, the identification of the norms belonging to the same legal system by means of the legal goods they constitute coincides with the identification that results from the identification of their addressees by the content of the norms, including in it the definition of the space and temporal limits of their application.

of their application. State courts apply these norms to nationals and foreigners, irrespective of being national or foreign or international or religious law, although the non-national norms only in so far as there is a *renvoi* to them by the national law of the court. The community of the addressees is larger than the national community and its recognition reinforces the recognition of the national law of the court. It is incorrect to say with Kelsen 'the norm of a foreign law applied by the organ of a state is 'foreign only with respect to its content. With respect to the reason for its validity it is a norm of the law of the state whose organ is bound to apply it,'[39] Hart makes here a distinction between 'original' and 'derivative' recognition, the later 'where part of the court's reasons for recognizing a law is that it has been or would be originally recognized by the courts of another country' and he leaves open the question 'whether in such cases we should say the court applies the law that is thus derivatively recognized or only he applies a law with similar content.' [40] However, a decisive advantage of the doctrines that base the unity of the legal system on the common recognition of its norms over the doctrines which base it on their common origin is exactly to avoid the need to convert norms that are not of the state of the court into norms of that state, to justify their application by the court.

Recognition doctrines identify a legal system by reference to the people to whom it purports to apply and who recognize it by convention. Law in this way is not identified by the state which produces the law, defined by a coercive apparatus of collective force or by a system of effective sanctions. This does not mean that the state is not characterized by the existence of such an apparatus or that there is law without sanctions. Norms are reasons for action and those reasons are in most cases reinforced by other reasons for action created by norms sanctioning the first ones and these reasons may be the threat of using force. Besides, there is non-state law having sanctions that are nor applied by an apparatus of collective force, as it is the case of today's canon law or of international sports law. In any case however sanctions purport to reinforce the effectiveness of the norm by preventing its violation, in so far as they motivate for obedience. Sanctions exist for the law and not the law for sanctions.

A doctrine of recognition that is arrived at by means of criticism and rational reconstruction of the doctrines of Kelsen and Hart regains

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[39] Hans Kelsen, *Principles of International Law*, New York: Ryenart, 1952, 255.

[40] H. L. A. Hart, 'Kelsen's Doctrine of the Unity of Law' (1968), *Essays in Jurisprudence and Philosophy*', Oxford: Clarendon, 1983, 342.

the essential theses of the traditional recognition theory of Bierling[41] and Engisch[42], although I keep my distance from them for the same reason I distance myself from Kelsen and Hart. According to Bierling's definition 'legal norms are different from all other kinds of norms of human social life because — and only because — they are recognized as a norm and rule of the external social life within a determined circle of people, those who belong to this circle as members of the same community.'[43] The remaining differences between the explanations Bierling gives of the terms of his definition and the doctrine I have been arguing for result from theoretical developments posterior to Bierling, as are the theories of the legal system of Kelsen, the practice theory of rules of Hart, the constitutive rules and the institutional facts of Wittgenstein and Searle. So Bierling does not develop a theory of the legal system. I could however accept Bierling's definition if only rightly interpreted, and this should be enough for now.

However, all the authors I have been discussing are legal positivists,[44] and so they develop only doctrines of the formal conditions of validity of the legal norms. Here I keep my distance, because there are conditions of validity related to the norm content and this is so by conceptual necessity and not by contingency. Law is a convention based on recognition, but it makes the validity of norms depend on some kind of relation with an idea of law or justice. According to rule of law requirements it is a convention rationally based and therefore also limited by public reason, which is the reason accepted by convention. This is a matter that I have addressed elsewhere.[45]

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[41] Ernst Rudolf Bierling, *Juristische Prinzipienlehre*, I, Tübingen: Mohr, 1894 / reimpr. Aalen: Scientia, 1961, 40-53.

[42] Karl Engisch, *Auf der Suche der Gerechtigkeit*, 69-81.

[43] Ernst Rudolf Bierling, *Juristische Prinzipienlehre*, I, 40.

[44] The same cannot be said of Karl Theodor Welcker, who is considered the founder of the recognition theory, because of his book *Die letzten Gründen von Recht, Staat und Strafe*, 1813, reprint Aalen: Scientia, 1964, to whom "only the objective law, made real by the acceptance of all, by means of the cultural level of the citizens and of the idea of law, is the only valid, and from its nature every one consequence has to be derived and by so doing to be always based on the recognition and acceptance of all.' (*ibid.,* 82). Through his reference to the culture and to the idea of law Welcker escapes the psychological positivism of Bierling, who does not refer to him. About Welcker and other authors representing the theory of recognition, see Hans Kelsen, *Hauptprobleme*, 346-378; Hans Welzel, *An den Grenzen des Rechts. Die Frage nach der Rechtsgeltung*, Köln / Opladen: Westdeutscher Verlag, 1966, 8 s.; and Hans-Ludwig Schreiber, *Der Begriff der Rechtspflicht*, Berlin: de Gruyter, 1966, 84 s. (cf. the conclusion about Welcker at p. 90).

[45] Cf. José de Sousa e Brito, "Public Reason between Ethics and Law", *International Journal for the Semiotics of Law*, 25/4 (2012) 465–472.

5

JURISTENRECHT, THE RATIONAL LAWGIVER AND LEGAL POLICY IN THE POLISH TRADITION

TOWARDS A DISCURSIVE MODEL OF POWER[1]

Karolina M. Cern

Introduction

The term *Juristenrecht* appears in Georg Beseler's work *Volksrecht und Juristenrecht*. Recalling ancient Roman tradition,[2] Beseler indicates the *communis Doctorum opinio*,[3] as a kind of *ius respondendi* of "Juristenfakultäten".[4] He considers this *communis Doctorum opinio*

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[2] Georg Beseler, *Volksrecht und Juristenrecht*, Leipzig, 1843, 303.

[3] Georg Beseler, *Volksrecht und Juristenrecht*, 299.

[4] Georg Beseler, *Volksrecht und Juristenrecht*, 300.

to be a stimulus for the development of the laws of particular Lands in Germany. Actually, this development consists in an elaboration (in the faculties of law) of the common general terms of German law. This elaboration enables the transformation of these laws of Lands into the law of the whole Reich. Thus, he identifies the process of elaborating these common general terms as the rise of what he names the *Juristenrecht*,[5] that is, the jurists' law. Further, as a result of the first phase of this process (in the 17th century),[6] the meaning of *Juristenrecht* transformed from the *communis opinio* of the faculties of law into *usus fori*, that is, into the 'public usage' of jurists' interpretations of legal concepts and terms, which laid down foundations for the theory of German law. This turn influenced the rise of 'positive law', namely, it initiated the process of introducing the "legal building of requirements of modern conditions of life" *(Rechtsbildung den Anforderungen der modernen Lebensverhältnisse)*.[7]

It may be argued that Beseler created the concept of *Jurustenrecht* in order to describe and, most importantly, to justify the unification of German law. When it comes to the nature of this unification, for Beseler the *Juristenrecht* presumes a certain kind of reflection—its essence is 'gelehrte',[8] that is, educated. In other words, the *Juristenrecht* is a reflexive concept.

Nevertheless, the kind of knowledge that characterizes *Juristenrecht* may be twofold.[9] A) When the validity of the norm under scrutiny raises no doubts, then the direct seeing *(unmittelbare Anschauung)* without any kind of representative mediation is possible and allowed. This direct seeing characterises dealing with the *Volksrecht*—it comprises a natural and original grasping of the validity of the norm that has nothing to do with the scientific method.[10] B) When the meaning and therefore the validity of the norm give cause for doubts, then gaining knowledge is based rather on a necessary critical examination of the meaning and validity of the norm. In such a situation the mere existence of the norm becomes secondary, because its grounding is of paramount importance here.[11] And the critical examination provided, one may say, in the 'legal environment' of diverse faculties of law, is for Beseler the characteristic method of the *Juristenrecht*.

[5] Georg Beseler, *Volksrecht und Juristenrecht*, 301.
[6] Georg Beseler, *Volksrecht und Juristenrecht*, 302.
[7] Georg Beseler, *Volksrecht und Juristenrecht*, 304.
[8] Georg Beseler, *Volksrecht und Juristenrecht*, 304.
[9] Georg Beseler, *Volksrecht und Juristenrecht*, 305.
[10] Georg Beseler, *Volksrecht und Juristenrecht*, 305.
[11] Georg Beseler, *Volksrecht und Juristenrecht*, 306.

The consequence stemming from the abovementioned methodological considerations is crucial. Namely, Beseler states that the jurists employing the specific scientific tool kit are authorized to influence three areas of law that may be distinguished: the area of theory, the area of practical application of law, and the area of lawgiving.[12]

The influence of jurists on the first area has already been explained and partly justified in the above two paragraphs. Suffice to say, the main objective of theoretical activity is to develop the law and, therefore, to strengthen the force *(Kraft)* of legal standpoints. It is worth noticing, however, that Beseler excludes neither history nor philosophy from this project since he sees the possibility of their valuable contribution to this theoretical activity.

In the area of the practical application of law, Beseler emphasises the Leadership *(Herrshaft)* of jurists. For him it should be positively interpreted as justified in their knowledge and scientific method.[13] The acknowledgement and recognition of diverse legal professions, as grounded in both the specific kind of knowledge and the scientific method of its acquisition, constitute his fundamental claim in this area. The claim results in a direct support of the idea of *doctrine,* which binds theory and praxis and excludes those who do not have a legal education (and who are not allowed to apply the law in any way).[14]

The activity of jurists in the second area also refers to the third area. There is at stake a justification of jurists' influence on law making. Equipped with both the knowledge and scientific method which they develop, jurists do not only deserve recognition for their professional performance and thus recognition of their leadership position in society, wherein 'law builds requirements of modern conditions of life', but they are also particularly justified to influence law making due to their accumulated knowledge, the scientific method they employ, and the doctrine they follow, build and develop.[15]

The concept of *Juristenrecht*, created by Beseler, was brought about in the times when legal positivism flourished. Such prominent and extremely influential figures as Hans Kelsen or John Austin, regarded as the 'founding-fathers' of legal positivism, made it come true. The concept of *Juristenrecht* once again came on the scene with Eugen

[12] Georg Beseler, *Volksrecht und Juristenrecht*, 307-308.
[13] Georg Beseler, *Volksrecht und Juristenrecht*, 309.
[14] Georg Beseler, *Volksrecht und Juristenrecht*, 309.
[15] Georg Beseler, *Volksrecht und Juristenrecht*, 313-314.

Ehrlich and his *Fundamental Principles of the Sociology of Law*. For my further investigation, however, one consequence of legal positivism would be especially instructive. Namely, Massimo La Torre notes that the well-known attachment to the conception of the state and thus to state law that is characteristic for legal positivism, results in the following: "The addressees of legal rules (…) are only judges and State officials. Law is considered as an autonomous social sphere also because it is such with regard to the rest of society and to individuals. Law is only addressed to, and concerned with, law officers. Normal citizens with their needs and their inclination to break the law or to protest can conveniently remain out of the picture".[16] The addressees of law are 'only judges and state officials' because, drawing originally on Beseler (and the concept of the *Rechtsstaat* developed in the meantime), they are *the* social group possessing knowledge of law, the scientific method that justifies this knowledge and thus its application and, moreover, they are justified in establishing (creating) the law according to both their knowledge and the scientific method—shaping in this way the 'requirements of modern conditions of life'.

In the case of the European Union, and the processes of Europeanisation which are basically driven by law,[17] it may be said that to a great extent, and at least in formal terms, the Union is a legal construction erected on the basis of *Juristenrecht*, that is, created by jurists. This was one of the factors that raised the problem of the democratic legitimacy of the EU.[18] Moreover, as some say, the 'leading role', to recall Beseler's term, the role cast by jurists, will not diminish in the near future, because such an ambitious enterprise as the EU needs 'doctrinal scholarship with its focus on interpretation and

[16] Massimo La Torre, *Constitutionalism and Legal Reasoning*, Dordrecht: Springer, 2007, 13.

[17] Karolina M. Cern, *The Counterfactual Yardstick. Normativity, Self-Constitutionalisation and the Public Sphere*, Frankfurt am Main: Peter Lang, 2014, Chapter II.

[18] Miriam Aziz, *The Impact of European Rights on National Legal Cultures*, Oxford / Portland — Oregon: Hart, 2004, 17. "It can be argued that the citizen formally creates the law but only through case law. However, the citizen provides the origin of the legal dispute and does not participate in the production of norms. To this extent, EC law is *Juristenrecht*, which is to say, EC lawyers are making EC law. *Juristenrecht*, however, raises problems of democratic legitimacy if one accepts that judges and lawyers alike are supposed to be beneath the law and not, as the *praxis* of EC law testifies, before it. According to a judicial model, the citizen is never the originator of the norms. In political terms, however, the citizen is able to informally determine the content by way of Non-Governmental Organisations (NGOs) and lobbyists who operate within and without the boundaries of comitology. The normative order which constitutes EC law is not only the product of legal pluralism (…)."

systematisation and comparative law, (…) extremely important for the evolution of European law'.[19] Perhaps the legal traditions of the Member States, strongly influenced by legal positivism, contribute to maintaining the privileged role of the *Juristenrecht* in the EU and its legal culture.

The main objective of this paper, however, is to provide an in-depth analysis of two basic concepts: that of the politics of law and the rational lawgiver. They were developed in the Polish theory and philosophy of law at the end of the 1960s. These concepts were, and still are, to a certain extent, very influential in Poland in the areas of the theory of law, the application of law, and legislation. Importantly, these concepts undoubtedly belong to the tradition of the *Juristenrecht*.

1. A reconstruction of Kazimierz Opałek and Jerzy Wróblewski's concept of legal policy

The concept of legal policy was developed in Poland by Opałek and Wróblewski in *Zagadnienia teorii prawa* [*Issues in Legal Theory*] (1969)[20]. A slightly modified approach to the concept of legal policy can be found in the work of Wiesław Lang, Jerzy Wróblewski, and Sylwester Zawadzki, which appeared ten years later in *Teoria państwa i prawa* [*A Theory of the State and Law*] (1979).[21] In this chapter, these two works will be my basic reference points.

According to these authors, the notion of legal policy applies to law-making, the application of the law, and the use of the powers (competences) conferred,[22] thus the above-mentioned works focus primarily on the creation of law and this aspect is the most important for the purposes of this article.

Opałek and Wróblewski write that:

> Generally speaking, we can say that the law-making process will be rational when legal norms are legitimately treated as means to achieve the objectives posited, on the basis of knowledge concerning the operation of appropriate motivational mechanisms in specific

[19] Rob van Gestel / Hans-Wolfgang Micklitz, "Why Methods Matter in European Legal Scholarship?", *European Law Journal* 20/3 (2014) 292-316, 294.

[20] Kazimierz Opałek / Jerzy Wróblewski, *Zagadnienia teorii prawa* [*Issues in Legal Theory*], Warszawa: PWN, 1969.

[21] Wiesław Lang / Jerzy Wróblewski / Sylwester Zawadzki, *Teoria państwa i prawa* [*A Theory of the Law and State*], Warszawa: PWN, 1979.

[22] Wiesław Lang / Jerzy Wróblewski / Sylwester Zawadzki, *Teoria państwa i prawa* [*A Theory of the Law and State*], 383.

> types of social situations. In this way, the model of the rational law making can be reduced to understanding this process from the point of view of legal policy, or more precisely, certain versions of this legal policy. The point here is to use legal norms as a means for achieving the objectives posited.[23]

Therefore, the notion of the politics of law is inextricable from the notion of rational law-making, which presupposes the concept of rationality as a purposive rational action[24] taken in accordance with the preferences of the person who takes the action and determined by his/her knowledge. The notion of such action was investigated on the basis of the work of the Poznań methodological school, in particular in the context of Jerzy Kmita's humanistic interpretation, and left its mark on Polish legal theory studies.[25]

The first important issue that arises here is that legal norms (the law) are understood as *tools* for achieving the objectives established by the lawgiver.

The second issue concerns the rational law-making process. The selection of tools (legal norms) *for achieving goals* should optimally lead to *the state of affairs preferred by the lawgiver being attained*.[26] The model of the rational law-making process has five components: (a) "establishing an objective"; "(b) determining possible measures" which will lead to its implementation; (c) "indicating which of these measures are legal"; (d) "choosing [...] a legal remedy" [...]; and (e) law-making.[27]

The third, decisive issue concerns the selection of objectives which are to be rationally implemented by the legislator. "The establishment of objectives (...) can be reduced, from the point of view of the model, to the formulation of fundamental evaluations, rather than instrumental ones".[28] In other words, the choice made by the

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[23] Kazimierz Opałek / Jerzy Wróblewski, *Zagadnienia teorii prawa,* 190.

[24] Wiesław Lang / Jerzy Wróblewski / Sylwester Zawadzki, *Teoria państwa i prawa* [*A Theory of the Law and State*], 377.

[25] Cf. Mateusz Bonecki, (2012), „Jerzy Kmita — interpretacja humanistyczna i społeczno-regulacyjna koncepcja kultury", *Filozofia Publiczna i Edukacja Demokratyczna* 1/2 (2005) 178-198; Stanisław Czepita / Sławomira Wronkowska / Maciej Zieliński (2013), „Założenia szkoły poznańsko-szczecińskiej", *Państwo i Prawo* 2 (2013) 3-16; 6,8 f.

[26] Wiesław Lang / Jerzy Wróblewski / Sylwester Zawadzki, *Teoria państwa i prawa* [*A Theory of the Law and State*], 380.

[27] Wiesław Lang / Jerzy Wróblewski / Sylwester Zawadzki, *Teoria państwa i prawa* [*A Theory of the Law and State*], 377-378.

[28] Kazimierz Opałek / Jerzy Wróblewski, *Zagadnienia teorii prawa* [*Issues in Legal Theory*], 193.

lawgiver is axiological (moral, ideological, political). The *evaluation of the selection of means* (legal norms) for the purpose determined by the lawgiver *is of a secondary nature*, relative to a given legal system *and* is, *in this sense, instrumental*. Opałek and Wróblewski explain this as follows:

> In the light of the assumptions adopted in this work, the use of primary evaluation goes beyond the scope of cognitive activity and therefore we postulate a limitation to secondary evaluation, relativized to the assumed evaluative system. Establishing such a system is a decision of a political, ethical and ideological nature. Hence, law-making activity is indeed of a mixed nature, i.e. cognitive-evaluative, but ultimately its starting point is the acceptance of a certain system of evaluations which, in relation to the binding law, have, at least in part, a political character.[29]

On the one hand, it is assumed here that *law-making activity has as its starting point the acceptance of a certain system of evaluations which have a political character*. This is obviously rather surprising, and I will return to this issue at the end of this subsection. On the other hand, it is assumed that the lawgiver acts purposefully-rationally, in the sense that the states of affairs he/she prefers (they may be of different types, e.g. political, social, economic, etc.)[30] are implemented by means of tools — legal norms. More precisely, according to the authors, the *lawgiver pursues various objectives* using various tools, *not necessarily only through legal norms*,[31] so consideration of what objectives can be optimally achieved through legal norms, and by what other means is the third element of the rational law-making process. This entails that it is necessary to consider the "relation between legal means and other social policy measures",[32] and leads to the question of whether legal policy is part of a certain social policy. The authors' response is affirmative.[33] "The factor that favours linking legal policy and social policy are the integrative tendencies of jurisprudence which are expressed in the multidimensional approach to legal phenomena. This

[29] Kazimierz Opałek / Jerzy Wróblewski, *Zagadnienia teorii prawa* [*Issues in Legal Theory*], 169.

[30] Cf Wiesław Lang / Jerzy Wróblewski / Sylwester Zawadzki, *Teoria państwa i prawa* [*A Theory of the Law and State*], 379.

[31] Wiesław Lang / Jerzy Wróblewski / Sylwester Zawadzki, *Teoria państwa i prawa* [*A Theory of the Law and State*], 381.

[32] Wiesław Lang / Jerzy Wróblewski / Sylwester Zawadzki, *Teoria państwa i prawa* [*A Theory of the Law and State*], 382.

[33] Wiesław Lang / Jerzy Wróblewski / Sylwester Zawadzki, *Teoria państwa i prawa* [*A Theory of the Law and State*], 384.

favours the overcoming of a narrow legal approach to the problems of law-making in the area that concerns us".[34]

It should be emphasized that according to the authors, "the use of primary evaluation goes beyond the scope of cognitive activity" and this is why *reflection on the lawgiver's preferences* — that is, political, ethical and ideological evaluations that justify the goals set by the lawgiver for the implementation of tools, including legal ones, goes beyond the scope of the authors' reflection on legal policy. In other words, because law-making is an activity of "a mixed nature, i.e. cognitive-evaluative", theoretical-legal reflection alone is insufficient for conceptualizing this activity. It follows from this that, according to the authors, *theoretical-legal* reflection is *only descriptive* and not evaluative. This implies that either research is conducted in the field of legal theory — and then it must be simply accepted that the lawgiver has such and such preferences and no others (the goal being to establish a certain constellation of values as justification for the choice of objectives, and to develop tools according to his/her will and the hierarchy of his political, ideological, moral preferences, etc.) — or research is conducted in accordance with the postulate of the external integration of jurisprudence, which entails that research must be extended to reflect other scientific fields, in particular those which involve reflection on political, ideological and moral evaluations and their justifications. Only on the basis of such extended research will it be possible to justify the selection of legal and/or non-legal measures (or justify the lack of justification), because this will be implied by reflection on the lawgiver's goals and preferences, which is intended to justify the choice of goals and the means of achieving them. Therefore, in my opinion, *taking a stance on the postulate of the external integration of law with regard to the perception of legislative problems determines, in principle, the content of the conception of law* in the approach presented above: it will either be social engineering implemented by legal tools, or it will be understood from the perspective of a broader social policy, which will allow reference to the issue of the evaluation and legitimization of legal-political decisions.

Moreover, if legal policy is understood as a kind of social engineering implemented by legal means, although on the one hand law is understood instrumentally, on the other hand, jurists — as experts on the application of this "engineering apparatus" — gain a privileged position in society. After all, the lawgiver can achieve the objectives that he/she has set, provided that jurists with specialist

[34] Kazimierz Opałek / Jerzy Wróblewski, *Zagadnienia teorii prawa* [*Issues in Legal Theory*], 202.

knowledge provide him/her with the necessary tools (i.e. those that have been conceptually developed) to achieve these objectives. Legal policy as social engineering implemented with the use of legal tools is a component of the vision of *Juristenrecht* (cf. Georg Beseler, 1843; Miriam Aziz, 2004).[35] In my view, this means that reconceptualising the instrumental role of law implies reconceptualising the role of jurists in society. Such a reconceptualization of law must break with the vision of *Juristenrecht* and — perhaps paradoxically for some — with the privileged role of jurists. That is why the postulate of the external integration of jurisprudence has remained nothing more than a postulate for years (at least in Poland). It is one thing to argue that research on law should be inter- and perhaps also transdisciplinary, and it is another thing entirely to actually share a research field with experts from other disciplines.

This also seems to be how Opałek and Wróblewski understand the issue of legal policy. They consider various concepts of legal policy, which in their opinion can essentially be summarized in two variants: technicist (instrumental) and evaluative.[36] And then they propose their own — and, in my opinion, extremely original –formulation of the concept of legal policy on the basis of which:

> it would be necessary to somehow distinguish between two levels of legal policy — long and short-term. On the long-term level, we would have a purely evaluative approach, in which, based on establishing general laws of social development and acceptance of this development, postulates would be formulated, prescribing activities consistent with the direction of this development, preparing the transformation of the state and law towards a new organization of social life. On the short-term level, we would be dealing with a scientistic approach, since in different conditions the lawgiver pursues various short-term objectives, which are ideologically linked with the implementation of long-term ones. At the same time, the business of legal policy is to develop various alternatives for a variety of objectives, the choice of which is determined by the political factors directing the state's activity. If, however, this long-term policy is included directly in the worldview, then this second level of legal policy would be a *tout court* policy,

[35] Cf. Georg Beseler, *Volksrecht und Juristenrecht*; Miriam Aziz, *The Impact of European Rights on National Legal Cultures*.

[36] Kazimierz Opałek / Jerzy Wróblewski, *Zagadnienia teorii prawa* [*Issues in Legal Theory*], 200.

> in which secondary evaluation would be carried out in accordance with this worldview. Of course, these are very controversial issues.[37]

There are at least two issues to be noted at this point. Opałek and Wróblewski — later followed by Lang, Wróblewski and Zawadzki — made a distinction in the above quotation between legal policy relating to the basic principles, values and laws of a given polity, which falls under a broader understanding of the concept of policy, and policy dealing with the formulation of alternative ways of achieving the objectives established by the lawgiver. Today, however, three "dimensions of the concept of policy" are distinguished.[38] At this point, synthetically speaking, one can say that the first dimension of the concept of policy refers to a polity, that is, to the "institutional structure of a given polity, both the constitutionally defined separation of powers [...] and the legitimated administrative structure. [...] Institutions therefore constitute a framework outlining the possibilities of action, but citizens co-create them with their participation in them".[39] The second dimension of the concept of policy (politics, politics-making) refers to "the sphere of current politics [...] based on the pursuit of specific political objectives and interests".[40] The third dimension of the concept of policy (public policy) refers to "long-term public policy programs and forms of their ongoing implementation".[41]

If, therefore, we apply this quotation to the conceptualization of modern democratic societies, we can see that Opałek and Wróblewski presented a very innovative way of conceptualizing legal policy, despite the real political limitations they had to contend with their era (communism). In my opinion, they drew attention to, on the one hand, the fundamental issues that somehow weigh heavily on the first understanding of the conception of policy (as polity), and, on the other hand, the issues associated with building alternative, real ways of achieving political objectives that seem to be close to the third dimension of the understanding of policy (as public policy).

It should be stressed, however, that the distinction between long-term and short-term legal policy, which could be interpreted through the prism of the first and third dimensions of the contemporary

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[37] Kazimierz Opałek / Jerzy Wróblewski, *Zagadnienia teorii prawa* [*Issues in Legal Theory*], 201.

[38] Cf. Piotr W. Juchacz, *Deliberatywna filozofia publiczna. Analiza instytucji wysłuchania publicznego w Sejmie Rzeczpospolitej Polskiej z perspektywy systemowego podejścia do demokracji deliberatywnej*, Poznań: Instytut Filozofii uam, 2015, 37-38.

[39] Piotr W. Juchacz, *Deliberatywna filozofia publiczna,* 37-38.

[40] Piotr W. Juchacz, *Deliberatywna filozofia publiczna,* 38.

[41] Piotr W. Juchacz, *Deliberatywna filozofia publiczna,* 38.

understanding of the concept of legal policy (polity and public policy), is also entailed in Opałek and Wróblewski's distinction between the political and legal levels of this concept. Hence, issues pertaining to polity are for them political in nature, and those belonging to public policy pertain to 'legal-engineering'. In my opinion, however, the issue of the relationship between law and politics is not only a problem that belongs to jurisprudence, but is also a problem of practical philosophy, in its broadest sense. Firstly, in the research context analysed here, the relation between law and politics concerns the issue of setting and justifying objectives designated for implementation by the lawgiver, i.e. — as Opałek and Wróblewski wrote — making fundamental evaluations of a political, philosophical and moral nature — as well as justifying these evaluations. This is a classic problem of practical philosophy, broadly understood.

Secondly, the sticking point here is — i.e. for the philosophy of law and philosophy of politics — the doctrine of the *sovereign,* and whether it will be understood in legal or political terms,[42] and how exactly this sovereign will be conceptualized. For example, in the excerpts on legal policy cited from Opałek and Wróblewski, it is assumed that the legislator can pursue objectives by means other than legal ones, which of course is surprising until we recall that the term lawgiver is equivalent to the term 'sovereign', now used in the legal sense, now in the political sense.

This is why — I repeat — the meaning of legal policy is determined by the assumption of a relationship, or lack thereof, between the reflections of both legal philosophy and practical philosophy, and to be more precise, the understanding of the philosophy of law as an integral element of *practical philosophy*, together with ethics, political philosophy and social philosophy; or the perception of the philosophy of law in isolation from the corpus of practical philosophy. The consequence of this assumption is either a non-instrumental or instrumental understanding of law, respectively. This, in my opinion, is the sense of the postulate of the external integration of jurisprudence.

2. The reinterpretation of the rational lawgiver in terms of communicative action

The above model of legal policy was the subject of much heated discussion in the Polish scholarly literature, with particular attention

[42] See Neil MacCormick on the concept of the sovereign in Austin and Dicey: Neil MacCormick, "Beyond the Sovereign State", *The Modern Law Review* 56/1 (1993) 1-18: 11-14.

paid to the instrumental understanding of law.[43] However, here I am interested in how Marek Zirk-Sadowski reformulated some basic assumptions concerning legal rationality, by introducing the notion of the communicative competence of lawyers, and in what follows from this reformulation.

In the article "Konstrukcja racjonalnego prawodawcy a kompetencja komunikacyjna" [The construct of the rational lawgiver and communicative competence] (1990), Marek Zirk-Sadowski critiqued the conception of the rational lawgiver proposed by Leszek Nowak, who was both a lawyer and philosopher, and one of the leading representatives of the Poznań methodological school. Zirk-Sadowski's critique was constructive in the sense that it aimed to reconceptualize the construct of a rational lawgiver in terms of communicative action. Nowak's construct of the rational lawgiver is not directly assumed in the notion of a rational law-making process, if only due to methodological differences related to the development of relevant concepts by Nowak on the one hand, and by Opałek and Wróblewski on the other. However, it should be stressed that the notion of purposeful-rationality is adopted in both cases and is methodologically adjusted to both proposals (rational law-making and the rational lawgiver)[44] such that, as a result, the element of designating and justifying the objective to be achieved by law (legal norms) is separated from law itself (law-making in the case of legal policy and the application of legal norms in the case of the construct of the rational lawgiver). In addition, it can be assumed that only the rational lawgiver can rationally establish the law.

The critique of the construct of rational lawgiver carried out by Zirk-Sadowski concerns instrumental rationality and therefore is also relevant for this argument. However, at the outset it should be emphasized that despite referring to the concept of communicative action, it is a critique of only instrumental rationality and not purposeful (or teleological) rationality — an issue which will be raised later in this work.

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[43] Detailed acknowledgement all the work published on this subject would require a separate publication. Therefore, I will briefly note that legal policy received attention in, *inter alia, Ruch Prawniczy, Ekonomiczny i Socjologiczny* (LVI/4/1994) and the project directed by Tadeusz Biernat, which resulted in, inter alia, two published books: Tadeusz Biernat, *Polityka prawa a model edukacji prawniczej*, Kraków, 2007; Idem / Marek Zirk-Sadowski, ed., *Politics of Law and Legal Policy. Between Modern and Post-Modern Jurisprudence*, Warszawa: Oficyna a Wolters Kluwer business, 2008.

[44] Leszek Nowak, *Interpretacja prawnicza. Studium z metodologii prawoznawstwa*, Warszawa: pwn, 1973, 13-14, 25-28, 32-34.

Firstly, Zirk-Sadowski emphasizes the importance of justifying decisions for contemporary jurisprudence. Even the focus on theoretical description, which is characteristic of epistemologically-oriented legal positivism, seems to emphasize the importance of the practice of applying and justifying law by rationalizing these practices.[45] Secondly, he observes that the rationalization of decision-making processes which characterize any legal activities must distinguish between instrumental rationality and communicative rationality. Zirk-Sadowski follows Jürgen Habermas in this regard, assuming that "legal rationality is an aspect of communicative action".[46] Thirdly, in Zirk-Sadowski's view, the counterfactual nature of the construct of the rational lawgiver (developed by Nowak by means of idealization) is reinterpreted as a being counterfactual to the ideal communicative situation, which is always anticipated by the real participants of communicative action. As a result of the above research procedure, it transpires that "the construct of the rational lawgiver is a pragmatic assumption of legal discourse".[47]

The key implication of Zirk-Sadowski's reconceptualization of the rational lawgiver — a construct that, like the model of rational law-making, which is based on the concept of legal policy, assumes the assumption of teleological (purposeful) rationality, as a consequence of which law is characterized by instrumental rationality — is that "therefore, there is the possibility of a procedural assessment of the legitimacy of the social order, which does not concern the norms and values inherent in the given order, but rather their final procedural justification".[48] The discourse procedure is a factor which tests the legitimacy of the social order, i.e. enables the assessment of that order.[49] It should be borne in mind that Habermas only elaborated the application of the principle of discourse to a democratic state of law in *Between Facts and Norms*, a work that appeared in German in 1992, in English in 1996 (and in Polish as late as 2005). In the

[45] Marek Zirk-Sadowski, „Konstrukcja racjonalnego prawodawcy a kompetencja komunikacyjna", in Sławomira Wronkowska / Maciej Zieliński, ed., *Szkice z teorii prawa i szczegółowych nauk prawnych*, Poznań: Wydawnictwo uam, 1990, 435.

[46] Marek Zirk-Sadowski, „Konstrukcja racjonalnego prawodawcy a kompetencja komunikacyjna", 441.

[47] Marek Zirk-Sadowski, „Konstrukcja racjonalnego prawodawcy a kompetencja komunikacyjna", 441.

[48] Marek Zirk-Sadowski, „Konstrukcja racjonalnego prawodawcy a kompetencja komunikacyjna", 440-441.

[49] Marek Zirk-Sadowski, „Konstrukcja racjonalnego prawodawcy a kompetencja komunikacyjna", 440.

period from 1981 (the year in which the German-language edition of *The Theory of Communicative Action*, Vol. 1 was published, while an English-language edition appeared in 1984, in Polish in 1999), Habermas worked mainly with Karl-Otto Apel, Robert Alexy and Robert Brandom on discourse ethics and discourse theory,[50] which as a reflective form of communication makes possible the *justification* of norms, *vide* moral norms. The problem that emerged with regard to the theory of communicative action was that communicative action facilitated the problematization of claims regarding the rightness of norms, but they did not allow impartial justification, because communicative action takes the form of interaction, yet discourse involves adopting a distance to interaction and the assumptions implicit in it, for the purpose of impartially discussing the reasons that justify norms (Strydom, 2006).[51] Besides, in *The Theory of Communicative Action* Habermas had not yet clearly distinguished between norms and values, hence he wrote at the time that: "Acting in a norm-conformative attitude requires an intuitive understanding of normative validity; and this concept presupposes *some* possibility or other of normative grounding".[52]

What does all this entail?

First, the reconceptualization of the construct of the rational lawgiver proposed by Zirk-Sadowski, through the prism of communicative action, which is based on replacing the assumption of instrumental rationality with that of communicative rationality,[53] despite being extremely important and innovative, proved unable to cope with the problem of the moment of purposive rationality, that is, with the fact that the objectives designated by the sovereign for implementation by means of legal norms are arbitrary from the perspective of law. This is clearly evident when Zirk-Sadowski writes about communicatively competent jurists testing the procedural

[50] Karolina M. Cern / Bartosz Wojciechowski, "Postmetaphysical Approach to Moral Autonomy and Justification of the Thesis of the Necessary Relations between the Legal and Moral Discourse", in Bartosz Wojciechowski / Piotr W. Juchacz / Karolina M. Cern, ed., *Legal Rules, Moral Norms and Democratic Principles*, Frankfurt am Main: Peter Lang, 2013.

[51] Piet Strydom, "Intersubjectivity — interactionist or discursive? Reflections on Habermas' critique of Brandom", *Philosophy & Social Criticism* 32/2 (2006) 155-172.

[52] Jürgen Habermas, *The Theory of Communicative Action*, vol. I, transl. Thomas McCarthy, Boston — Massachusetts: Beacon Press, 1984, 420, ref. 25, italics used in the original.

[53] Marek Zirk-Sadowski, „Konstrukcja racjonalnego prawodawcy a kompetencja komunikacyjna", 439.

legitimacy of law, or rather judges testing this when they apply the law. Thus, the original examination of the coherence of the legal system is replaced by the necessity of examining the procedural legitimacy of law (and this is undoubtedly Zirk-Sadowski's theoretical breakthrough), but the concept of sovereignty itself is not reconceptualized in terms of communicative action, and thus the division between the sovereign/lawgiver and the law is still evident. In addition, citizens are not even mentioned in these considerations. This entails that although "juristic communicative competences", which constitute "a fragment of communicative competence in general",[54] do indeed locate jurists in society as participants of culture, they turn out to be the expert competences of jurists, because they enable them to make a "procedural evaluations of the ultimate justification of norms and values inherent in the social order".[55] This is confirmed by the concept of the community of judges developed by Zirk-Sadowski[56] as an example of a communicative community, but evidently one of experts, although they are indeed participants of culture. In other words, the vision of *Juristenrecht* is not completely broken with, and this means that neither did the final break with the instrumental understanding of law take place.

This issue is also reflected in Zirk-Sadowski's recent works. On the one hand, he emphasizes that jurists are beginning to understand law as a communicative phenomenon,[57] in the sense that the essence of this phenomenon is communication between powers — therefore including jurists — and various social entities or society in general.[58] On the other hand, he notes that law is still understood as "the command of the sovereign".[59] It follows from this that communication, and more precisely communicative rationality, has replaced *instrumental* rationality, but purposive rationality (and therefore not communicative) still continues to dominate in the

[54] Marek Zirk-Sadowski, „Konstrukcja racjonalnego prawodawcy a kompetencja komunikacyjna", 442.

[55] Marek Zirk-Sadowski, „Konstrukcja racjonalnego prawodawcy a kompetencja komunikacyjna", 440-441.

[56] Marek Zirk-Sadowski, Interpretation of Law and Judges Communities", *International Journal for the Semiotics of Law* 25/4 (2012) 473-487.

[57] Leszek Leszczyński / Marek Zirk-Sadowski / Bartosz Wojciechowski, *Wykładnia w prawie administracyjnym*, Warszawa: C. H. Beck, 2012, 128.

[58] Leszek Leszczyński / Marek Zirk-Sadowski / Bartosz Wojciechowski, *Wykładnia w prawie administracyjnym*, 138.

[59] Leszek Leszczyński / Marek Zirk-Sadowski / Bartosz Wojciechowski, *Wykładnia w prawie administracyjnym*, 133.

approach to understanding law. How is this possible, if communicative action is focused on arriving at an understanding? Well, it is possible that communicative action (characterized by interaction, that is, the peaceful coordination of action) is always referred to the so-called objective world in order to verify the agreement reached, and requires a Yes or No response (reaction) to the claims made (e.g. with regard to the objectives to be achieved), but as such it lacks the necessary instruments for engaging in discourse on the legitimacy of the claims made.

In other words, there is no model for interpreting power itself as being constituted through communication. In such a model, law would not play an instrumental role, but would rather be a medium of communication between citizens. In this model, the task of jurists — as experts on the law — would be to enable citizens to reach agreement in a peaceful manner, through the medium of law, rather than to explain to citizens what the sovereign commanded them to do.

3. Habermas' postulate — the application of discourse theory to democratic society

Habermas' work on the concept of communicative action, in particular the question of justifying norms, led to the development of discourse ethics and discourse theory in general. In *Between Facts and Norms*, Habermas applied discourse theory as a reflective form of communicative action to (re)conceptualize democratic society and propose a second model of the public sphere.[60] The most important theoretical findings and conclusions are as follows.

Firstly, Habermas develops Kant's principle of autonomy, according to which the addressee of law must always also be able to regard himself as an author of law. The concept of moral lawgiving presupposes the principle of the autonomy of will; whereas positive lawgiving presupposes the principle of political autonomy. This is why in *Between Facts and Norms* Habermas seeks such an abstract notion of autonomy that it can be the basis for both moral and political lawgiving.[61] He applies discourse theory to this abstract concept of autonomy, which does not predetermine the adoption of a republican

[60] Karolina M. Cern, „Refleksyjność w koncepcji sfer publicznych Jürgena Habermasa", in Krzysztof J. Kaleta, Paweł Skuczyński, ed., *Refleksyjność w prawie. Konteksty i zastosowania*, Warszawa: wuw, 2015, 53-85.

[61] Jürgen Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg, Cambridge — Massachusetts: The mit Press, 1999, 104-118.

or liberal political stance. This is a key moment for understanding that, from this perspective, law is a medium of communication between citizens. As Habermas says, "Law joins forces *from the outset* with a communicative power that engenders legitimate law".[62] In other words, law as a medium of communication institutionalizes and thus stabilizes — albeit always only temporarily — mutual expectations as to the behaviour of the addressees of law, who should always be able to understand each other as authors of law.

Taking the principle of autonomy seriously (when it is understood in a suitably abstract way), Habermas *redefines the concept of sovereign* in discursive and communicative categories. In short: the concept of communication refers to the shaping of citizens' opinions in the so-called 'wild circles', which refers to the lifeworlds of citizens, *as* individual people. The concept of discourse, on the other hand, refers to the processes and procedures for justifying these opinions based on reasons that are developed through reflection. The development of these reasons entails adopting an increasingly reflexive, and in this sense distanced, attitude towards what is obvious or problematic in lifeworlds; in the worlds of communicative action. The institutionalisation of communication implies its transformation into discourse. Thus, the private, public and political spheres become open to each other. Thanks to these tools, Habermas develops the democratic legitimization of power. Power can only be democratically legitimized if it is understood, from the outset, following Hannah Arendt, as being at its source a communicative power. This means that political decisions and the political system must be not only 'open to', but also 'rooted in' lifeworlds; in the worlds of communicative action. The realization of this task is facilitated by the opening up of the private and public spheres by demonstrating their communicative fluidity and mutual interpenetration, which enables the emancipation of claims (from the private sphere to the public sphere) and legal-institutional transformation (thanks to the influence of the reasons developed in the public sphere on the political sphere).

To sum up, in this conception, 'the sovereign' is the non-subjective communicative structures — or more precisely discursive-communicative structures, i.e. both institutionalised and non-institutionalised structures — in which the opinions and wills of citizens are shaped. It follows from this that the sovereign is not he/she who emerges every few years in elections (parliamentary, presidential or local government elections) and announces his/her will, but 'the

[62] Jürgen Habermas, *Between Facts and Norms,* 149; italics in the original.

sovereign' is the opinion and will that continually comment on and discuss what has and/or should have meaning for a given polity, and therefore demands a decision or a change of decision. More specifically, as Habermas says:

> Because popular sovereignty no longer concentrates in a collectivity, or in physically tangible presence of the united citizens or their assembled representatives, but only takes effect in the circulation of reasonably (*vernünftig*) structured deliberations and decisions, one can attribute a harmless (*unferfänglichen*) meaning to the proposition that there cannot be a sovereign in the constitutional state. But this interpretation must be carefully defined so as not to divest popular sovereignty of its radical-democratic content.[63]

If we are looking for answers to the questions of what it means to say that law is a communicative phenomenon (Zirk-Sadowski), or of what it means to say that that law is a medium of communication (Habermas), or of how can we redefine the concept of purposive rationality in order to obtain an intersubjective model of law — we must seriously rethink Habermas' redefinition of sovereign, and crucially, give serious consideration to his warning that care must be taken "so as not to divest popular sovereignty of its radical-democratic content". It is only after we have taken this step that we will be able to ask ourselves once again about legal policy. And thus, how to understand it in discursive terms and whether — within this discursive model of legal policy — the objectives and their justification can/should be 'detached' from law itself, and from the institutions of law.

4. Implications — a further reconceptualization of the communicative model of the lawgiver

Therefore, the point is to reconceptualize the construct of the rational lawgiver — and at the same time the associated concept of rational law-making — in terms of discourse theory applied to a democratic society. The aim is to bolster the non-instrumental understanding of law, an understanding that will not make law simply a tool for controlling citizens, a tool used by expert lawyers to realize the vision of a sovereign who only cares about citizens to the extent that consideration of their views helps with the selection of the best tools for making these citizens realize his/her will.

Habermas' reconceptualization of the notion of sovereignty — as

[63] Jürgen Habermas, *Between Facts and Norms*, 136.

subjectless communicative structures which shape the opinion and will of citizens — enabled him to play a key role in the current discussion on the idea of the self-constitutionalisation of democratic polities. This self-constitutionalisation has three dimensions: legal and political (related to the constitution and the institutional system of a given polity founded by it); institutional (related to public institutions); and horizontal (social).[64] The idea of self-constitutionalisation, which posits that the sovereignty of the people and the rule of law are co-original principles,[65] refers to the discursive-communicative lawgiving of citizens, who should always also be able to understand themselves not only as the addressees of law, but also as its authors. Law as a medium of communication, peacefully reaching an agreement on the basis of jointly developed reasons and the decisions taken on their basis (e.g. on the form and content of the constitution, laws, and also legal regulations, legal-political decisions or decisions made by the public administration), is supposed to enable the transformation of convictions and the joint creation of solutions by the addressees of these decisions, who, according to the principle of discourse, should participate in debates on this subject.

These dimensions of self-constitutionalisation enable us to reconceptualize, from a discursive-communicative perspective, the fundamental issues associated with long-term and short-term legal policy, based on the assumption of the external integration of jurisprudence, in the sense that it, together with other areas of practical reflection, constitutes an area of transdisciplinary research.

4.1 The basic problems of long-term legal policy

The idea of the self-constitutionalisation of a given polity, rooted in the notion of autonomy — both moral autonomy and the autonomy of the political citizenry — assumes that power, understood in discursive-communicative terms, is exercised in the medium of law. This implies that the existing concept of the separation of power[66] requires reconceptualising, precisely in discursive-communicative terms. It should be noted that Habermas, being fully aware of

[64] Karolina M. Cern, „Refleksyjność w koncepcji sfer publicznych Jürgena Habermasa", 65 f.

[65] Jürgen Habermas, "Constitutional Democracy. A Paradoxical Union of Contradictory Principles?", *Political Theory* 29/6 (2001) 766-781.

[66] Cf. Ryszard Małajny, *Doktryna podziału władzy "Ojców Konstytucji" USA*, Katowice: Uniwersytet Śląski, 1985.

this research requirement, proposed in *Between Facts and Norms* a discursive justification for the separation of power (which existed in his country). This justification seems unsatisfactory, but for this statement to have any weight, a separate work would have to be devoted to it. Therefore, for the purposes of this paper, I would like to point out that I present my own arguments below, unless I make a clear reference to Habermas, which I do at the end of this subsection.

It follows from the above considerations that, firstly, a separation of power (such as that outlined by Małajny) which does not assume the existence of discourse between the individual elements of this power, contradicts the understanding of law as a medium of communication between citizens, and the idea of self-constitutionalisation consisting in the three dimensions indicated above. If the functionally separate powers — the legislature, the executive and the judiciary — do not signal problems to each other, if they do not formulate certain legitimate expectations and reasons justifying the decisions taken within their competence, then they do not respect the principles of discourse and tend to make these decisions purely through exerting the power invested in their functionally defined position.[67] And yet constitutions are nowadays understood in democratic societies as expressions of civil discourse[68] and, in my opinion, all the separate powers should take part in this discourse; i.e. it should not be the prerogative of the constitutional judiciary. As Krzysztof J. Kaleta proposes, intriguingly, this broader participation would ensure "openness of constitutional discourse"[69] to the sovereign, i.e. its openness to discursive-communicative developments and transformations in the public spheres. The main task here is by no means the "inclusion of politics in law",[70] but rather making law a real medium of communication. The formulation of legitimate expectations refers, for example, to expectations regarding the implementation of regulations in a certain scope, of course in accordance with the competences held, and the lack of such competences necessitates certain decisions (in accordance with the competences held) to be taken by another authority. Such claims and

[67] Adam Sulikowski, „Konstytucjonalizm wobec 'zemsty postmodernizmu'", *Przegląd prawa i administracji* 110 (2017) 95-106.

[68] Karolina M. Cern, „Jak rozumieć rolę konstytucji we współczesnym społeczeństwie demokratycznym?", *Studia Prawno-Ekonomiczne* 101 (2016) 23-39: 34; Massimo La Torre, *Constitutionalism and Legal Reasoning*, 36, 37.

[69] Krzysztof J. Kaleta, „Dialektyka solidarności a państwo prawa", *Filozofia Publiczna i Edukacja Demokratyczna* 5/1 (2016) 37-62: 54.

[70] Tadeusz Biernat, *Polityka prawa a model edukacji prawniczej*, 118.

their justifications, taking into account the three dimensions of self-constitutionalisation, should not only be addressed to an objectively separate authority, but should also be comprehensible to citizens, who should always also be able to consider themselves as law-makers as well. Such a discursive conceptualization of power would introduce an element of self-reflexiveness.

What is more, this discourse requires rethinking, both in the horizontal and vertical (systemic) dimensions. Therefore, the first dimension — horizontal — is a division into the types of discursively-shaped reasons, while the second is a division into a discursive-systemic way of developing these types of reasons, taking into account the reflexive transformation of communication into discourse, and the reciprocal reference of actors exercising power to the claims or reasons formulated in discourse. Neither the functional division of power known to us, nor the understanding of power in terms of checks-and-balances (this is rather an interactive model) postulates a discursive-communicative shaping of power through the medium of law. What needs rethinking is the characteristics of the types reasons that the power should develop. Therefore, the real challenge is to answer the question of whether the current separation of power into the legislature, the executive and the judiciary is justified/sufficient with regard to the types of these reasons.

However, it is possible, through reference to the Constitution of the Republic of Poland, to point out that, according to Article 10, the purpose of the separation of power is to ensure balance, and this presupposes its internal communication, as in the case of the procedure of the presidential veto (cf. Articles 118-122 of the Constitution of the Republic of Poland). Indeed, the literature on the subject emphasises that "the relations between the legislative, executive and judicial power should be based on: mutual balance, mutual restraint, and the supervision of individual power. The guiding principle is that the powers, despite their division, should cooperate with each other"[71]. In other words, by referring to the Constitution and/or the doctrine of constitutional law, we can demonstrate the existence in the Constitution of a number of mechanisms of cooperation between the individual powers (cf. Article 144 on the countersignature). The issue here is that this kind of cooperation, while very valuable and desirable, is based on the interactive model, not a discursive one, and the addition of a discursive dimension is what I am calling

[71] Andrzej Dana, „Istota podziału i równowagi władz w polskim konstytucjonalizmie", *Doctrina. Studia Społeczno-Polityczne* 6 (2009) 53-71: 60.

for. The discursive dimension would make it possible to develop 'public reasons'. Though admittedly writing from a slightly different perspective, Piotr Winczorek seemed to notice this issue. He suggests considering certain constitutional solutions, which, in my opinion, exemplify an increase in, or even an introduction of, a discursive dimension to the separation of powers. This is the first example:

However, it is possible to consider the idea that instead of the suspending veto the president may propose that the Sejm make certain amendments to the statutes submitted to him for signing. The choice — a veto or the amendment proposal — would be the prerogative of the President. If the recommended amendments were not adopted, it would mean taking the road of veto, *ex lege*. Perhaps in this way it would be possible to 'save' some of the laws that are currently being vetoed, not due to their entirely flawed regulations, in the eyes of the President, but rather due to some errors that could be eliminated if the process of parliamentary legislation were prolonged for a further stage.[72]

Winczorek's proposal seems to be perfectly in line with my postulated discursive re-conceptualisation of the concept of power in the horizontal dimension. Instead of simply 'reacting' to a draft law by deciding either Yes or No, the president could adopt an argumentative stance, indicating and justifying why certain regulations need to be amended. The task of a transdisciplinary legal policy would therefore be, among other things, to reconceptualize the horizontal concept of power in discursive-communicative terms, and to propose specific legal and political solutions.

That is not all, however. Secondly, I believe that when Montesquieu proposed the tripartite system of power (which we have been studying for generations), it reflected the distribution of political and social forces that required balancing in late feudal and early industrial societies.[73] In my view, using this system to understand power in the Western democratic societies of the 21st century generally leads to theoretical and doctrinal ignorance of the real subjects of power. With regard to the Constitution of the Republic of Poland, actors who are omitted due to the dogmatic adherence to Montesquieu's tripartite separation of powers are: firstly, the supervisory power, i.e.

[72] Piotr Winczorek, „Konstytucja stała czy zmienna?", in Agnieszka Choduń / Stanisław Czepita, ed., *W poszukiwaniu dobra wspólnego. Księga jubileuszowa Profesora Macieja Zielińskiego*, Szczecin: Uniwersytet Szczeciński, 2010, 455-472: 469-470.

[73] Cf. Christoph Möllers, *The Three Branches. A Comparative Model of Separation of Powers*, Oxford: Oxford University Press, 2015, 16-40.

organs of the state control and for defence of rights (Chapter IX). As Andrzej Dana observes: "The doctrine generally endorses the view that the competences of these organs do not fall within the tripartite separation of power in question. According to some authors, this justifies the separation of a fourth, supervisory power".[74] The second real actor 'ignored' by the current conceptualization and separation of power is local *self-government* (Chapter VII), which may establish acts of local law (Article 94, Article 169, item 1), but which is nevertheless without hesitation included in local public *administration*.[75] In other words, public power in the Republic of Poland is decentralized (Article 15), but the conceptualisation of power, rigidly based on Montesquieu's proposal, is oblivious to this. In my opinion, a certain discursive-communicative structure should be introduced within the framework of power taken as it is under the Constitution of the Republic of Poland. An example of such a solution is proposed, in my opinion, by Winczorek:

I think that we should consider rebuilding the Senate along the lines of a chamber whose purpose is to represent self-government communities, especially local communities. Local self-government is not represented at the national level, but is an extremely important institution of social life. Local self-government communities also have their own specific concerns, which deserve to be listened to and taken into account when legislative decisions are made.[76]

The point behind mentioning Winczorek's proposal is to highlight a certain vertical discursive solution. At present, local self-government may take part in political discourse to the extent that it can take a stance on the issue of financing its own tasks and/or tasks delegated to it. Local bodies of government administration are subordinate to the Council of Ministers, so in this case it is possible to refer to this as systemic discourse; the Council of Ministers supervises the legality of local government activity (Article 148.6, Article 171.1), but this relation does not really have a discursive structure. In my opinion, this is what Winczorek draws attention to.

As follows from the idea of self-constitutionalisation, the lawgiver cannot be reasonable on its own. Discursively structured debates between moments or elements of power may be reasonable. The

[74] Andrzej Dana, „Istota podziału i równowagi władz w polskim konstytucjonalizmie", 68.

[75] Cf. Jan Boć, „Konstytucja a prawo administracyjne", *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 73/2 (2011) 65-76: 75.

[76] Piotr Winczorek, „Konstytucja stała czy zmienna?", 466-467.

discursive separation of power implies that the lawgiver is a discursive moment of power, which at its source is created communicatively, and then reflexively transformed into discourse, i.e. institutionalised. If it is to be a discursive-communicative structure, power should formulate certain expectations and justify them to itself (within the framework of discursive structure) on the basis of good reasons, thanks to which it would gain the aforementioned dimension of self-reflexivity. Thus, it could constitute itself in a reflexive way, responding discursively to claims rooted in lifeworlds without losing contact with them. The concept of the lawgiver is significantly narrower than the concept of sovereign, which already presupposes a certain conception of power. In my opinion, the basic task of a transdisciplinary legal policy would be to conceptualize the notion of power, authority and sovereign in discursive terms, as self-reflexive power which will take into account the historical and institutional context of the Republic of Poland, and which will have the character of a discursive transformation.

Meanwhile, Habermas' interpretation of power (and its functional division)[77] seems to simply legitimize the status quo existing in his own country, with the tools developed in his second model of the public sphere. This model is characterized by, among other things, the identification of three types of public reasons: interests, values and deontologically understood norms, and not solely reasons of the common good. In Habermas' interpretation, the 'power' to self-constitutionalization is power for self-understanding in political and ethical terms (in Habermas' view, parliament represents this ethical and political moment), but also the power of self-determination in normative terms (deontological — the moment represented by the judiciary in Habermas' opinion). In order to be able to exercise both powers, the issue of social justice cannot be forgotten, as it determines both the participation of people (communicative structures) and citizens (the discursive moment) in these discursive-communicative structures, and in return conditions the influence that the decisions taken have on everyday life. According to Habermas, this third moment, referring to reasons that take interests into account, is represented by the public administration. This thereby makes discourse on interests, in the statutory mode, dependent on the ethical-political self-understanding of the members of a given polity, and, in the deontological mode, on judicial control.[78]

In this regard, if we agree with Habermas' interpretation of

[77] Jürgen Habermas, *Between Facts and Norms*, 159-193.
[78] Jürgen Habermas, *Between Facts and Norms*, 173-174.

the separation of power and the resulting attribution of typical reasons to individual powers (within the framework of the tripartite separation of power accepted by Habermas), then we have to accept Jan Boć's assertion that "One can also ask a general question about the participation of the public administration in the implementation of Article 2 of the Constitution, according to which the Republic of Poland is a democratic state ruled by law and implementing the principles of social justice".[79]

4.2 The basic problems of short-term legal policy

As was mentioned, short-term legal policy can be interpreted in terms of what is nowadays called public policy-making. In accordance with Opałek and Wróblewski's intention, short-term policy is to be associated with proposing certain alternatives — legal, public-law, social, etc. — to achieve various objectives that are important for a given polity. It seems that in the case of short-term legal policy, its specific character in the area of law-making and application is more clearly visible. The discussion of this specificity goes far beyond the scope of this paper, however, therefore I will focus below on what seems to be common to them (law-making and application).

The first task of short-term legal policy, resulting from the idea of the self-constitutionalisation of a polity, is to "ensure mechanisms of unrestricted communication in the process of establishing and applying the law".[80] This unrestricted discursive-communicative approach entails that, as Piotr W. Juchacz observes, the contemporary development of public policies is characterized by "empowering, involving [stakeholders] in the processes of [their] preparation processes", in other words, it is characterized by the addition of a horizontal dimension to the vertical dimension.[81] Therefore, when we take Habermas' interpretation of law as a medium of communication seriously, it transpires that the basic task of short-term legal policy is to develop mechanisms — in a transdisciplinary group, in accordance with the postulate of external integration of jurisprudence — for the discursive-communicative empowerment of the addressees of public policies, in order to increase the democratic legitimacy of decisions taken.[82] Since sovereign is understood as discursive-communicative

[79] Jan Boć, „Konstytucja a prawo administracyjne", 69.
[80] Krzysztof J. Kaleta, „Dialektyka solidarności a państwo prawa", 58.
[81] Piotr W. Juchacz, *Deliberatywna filozofia publiczna...*, 38.
[82] Cf. Tadeusz Biernat, *Polityka prawa a model edukacji prawniczej*, 118.

structures, the task of short-term policies is to protect and ensure the functioning of reasonably structured debates, and to develop mechanisms to ensure that these debates (i.e. the reasons formulated in the course of them) have an impact on the functioning of institutions of law or public law institutions. For example, in the area of law-making: how to ensure that the institution of public hearing has a real impact on draft laws?,[83] how can the civic budget institution be transformed so that its participatory dimension is complemented with a deliberative dimension? As regards the application of the law: how to ensure the real participation of citizens in the exercise of justice?[84]

The above task implies locating short-term legal policy in a certain legal-institutional context. The point is not to search for universal tools of short-term law policy to ensure the effective implementation of goals, but rather to increase social inclusion through *deliberation*, and to increase the influence the outcomes of deliberation on the processes of establishing and applying the law. Therefore, solutions functioning well in one polity may not turn out to be optimal in another. The appropriate development of solutions which correspond to the requirements and expectations defined by a given context is a task which is achievable in a transdisciplinary team, which will be able to grasp the context, its specificity, and the general principles of a democratic society, including those related to the discursive model of the lawgiver, which can be applied to this context.

It is also necessary to change how the role of jurists is understood in society, while legal competences need to be viewed as discursive-communicative competences, and the educational model needs to be transformed accordingly. What turns out to be crucial is not so much expert knowledge (knowledge of law), but rather the competence to use this knowledge in such a way that, on the one hand, the opinions and will of citizens articulated in discursive-communicative structures, including during debates, find an adequate expression in the medium of law, and on the other hand, to make the stabilizing reciprocal expectations of the medium of law comprehensible for citizens. This would entail elucidating the law during discussions and debates in such a way that the requirements of law as a medium of reciprocal, peaceful reconciliation can be translated into the language of everyday interactions, motivating their actions with the knowledge of the law. Above all, this would involve training the reflexive power of judgement among jurists.

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[83] Cf. Piotr W. Juchacz, *Deliberatywna filozofia publiczna*.

[84] Piotr W. Juchacz, „Trzy tezy o sędziach społecznych i ich udziale w sprawowaniu wymiaru sprawiedliwości w Polsce", *Filozofia Publiczna i Edukacja Demokratyczna* 5/1 (2016) 155-168.

In other words, it is not so much the coherent system of law (legal norms), it is rather trust in the law — the building of which is equally important for institutions and specific people operating within them[85] — that turns out to be crucial for the democratic development of the rule of law. This imposes requirements on jurists, with regard to competences, the most important of which are the reflexive power of judgement and the ability of jurists to cooperate with both citizens and the representatives of other scientific disciplines.

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[85] Przemysław Kaczmarek, „Społeczna rola prawników: odpowiedzialność, podmiotowość, zaufanie", *Filozofia Publiczna i Edukacja Demokratyczna* 5/1 (2016) 63-86.

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6

THE CLAIM FOR «CONSONANCE» BETWEEN PRINCIPLES AND PROBLEM-SOLVING PRACTICES: THE CHALLENGE OF PLURALITY AND THE INDISPENSABLE MEDIATION OF *JURISTENRECHT*

J. M. Aroso Linhares

> «Are these principles *valid* despite *value pluralism* in modern society?»
>
> [A. Peczenik, *Scientia Juris. Legal Doctrine as Knowledge of Law and as a Source of Law* (vol. 4 of Pattaro, ed., *A Treatise of Legal Philosophy and General Jurisprudence*), Dordrecht: Springer, 2007, 38]

Is it possible to experience principles, in association with their juridically relevant practices and discourses (i.e. practices and discourses which explicitly or implicitly assume a claim to juridical relevance), as

an axiological (not only regulative but also constitutive) *context* and simultaneously and inextricably as a normative *correlate* (inferred from the practices themselves)? This is the key question I would like to explore here, less in order to defend or impose a single answer than to highlight the multiple dimensions involved in its *Erfragte.*

The knotty problem here is undoubtedly the practical circularity which, as an authentic experience of constitutive historicity, interchanges and overlaps the tasks-roles of guiding and guide-following, specifying and transforming, fixing and developing, all involving *on the one hand* the governing normative context offered by principles and *on the other hand* the determining dynamics imposed by problem-solving practices —here as the *novum* introduced by principled realization, i.e. by the practices which follow those principles (whilst they also follow them). The intelligibility of this circularity depends, in fact, on an ensemble of distinct (heterogeneous) elements whose congruence is neither evident nor a-problematical, and their potential to combine therefore demands immediate (albeit very brief) clarification.

The main cluster of elements on which we should focus our attention originates directly from a very specific claim, namely the one which, following Castanheira Neves' *jurisprudentialism*, conceives of principles as *foundational warrants* and incorporated or «objectified» *jus*[1] (Hart would say «parts of the law itself»[2]), whilst simultaneously reflecting on *communitarian validity* and *normative incorporation* (and their methodological implications) as decisive (*necessary*) performative components (or resources) of a certain Law and the *form of life* it institutionalizes (and/or *aspires* to institutionalize). These are

[1] This treatment of principles as *jus* (as specifically juridical warrants which are also autonomous *law in force*) rejects both the concept of principles *as ratio* and *as intentio.* Whereas principles as *ratio* correspond to the normativistic *general principles of law* obtained through a logical operation of *concentration* (as a process of « quantitative simplification», if not as a discovery-*Auffindung* of a plausible logical *centre*), principles as *intentio* correspond to the experience of principles conceived of as pre-juridical moral or communitarian regulative intentions, which become constitutively binding only through authoritarian (statutory or judicial) decisions. I have developed this counterpoint and its different origins and legacies in "Na 'coroa de fumo' da teoria dos princípios: poderá um tratamento dos princípios como normas servir-nos de guia?", in F. Alves Correia / Jónatas Machado / João Loureiro, ed., *Estudos em Homenagem ao Prof. Doutor José Joaquim Gomes Canotilho*, vol. iii, *Direitos e interconstitucionalidade: entre dignidade e cosmopolitismo*, Coimbra: Coimbra Editora, 2012, 395 f.

[2] « For Dworkin, the principles thus identified are not only parts of a theory of the law but are also implicit parts of the law itself.» (Hart, *The Concept of Law,* 2nd ed. with Postscript, Oxford: Clarendon Press, 1994, 241)

components which are significantly *inscribed* in the *possibilities* of the Western text and whose open and radical (metadogmatic) discussion (treating them as practical-cultural artefacts and, as such, questioning their plausible contemporary endurance or congruence) seems absolutely indispensable today as we reflect on European identity, its limits and crises (if not its irreversible decadence)[3].

The simple allusion to the different claims associated with this *normative incorporation* and the growing attention it reflexively deserves makes it clear that preserving this ensemble (with its reciprocal tensions) in a *limit*-situation such as our own is, in fact, a far from easy task, since these tensions (and the corresponding search for plausible, balanced solutions) generate frequent *borderline issues* (disputed in different *idioms*). In highlighting the formulations which accentuate the tensions involved, this essay endeavours precisely to allude (only allude) to some of these issues and to the corresponding answers (all of them as explicit exercises in *demarcation*). This is immediately the case with the reference to the performative indispensability of principles as *jus*, allowing *on one hand* a transparent acknowledgment of the connection between principles and values, as well as a confirmation of the dogmatic intelligibility of their incorporation within the legal system (as a praxis of stabilization of an autonomous *normans*), whilst on the other hand simultaneously demanding meta-dogmatic (*internal*) reflection which treats the practical world of law (with the corresponding artefacts) as a culturally-civilizationally moulded (and, as such, *non-necessary* and *non-universal*) answer to the *universal* (anthropologically *necessary*) problem of the institutionalization of a *social order*[4]. Deliberately insisting on these formulations, with their troubling interweaving of *necessity* and *contingence*, involves more than drawing a pseudo paradox (and fuelling the corresponding *de-paradoxisation* exercise): it primarily involves providing a transparent reflexive (demarcation) resource whose potential will prove resilient precisely in considering the idiom of *foundational conventionalism*

[3] See Linhares, "Law's Cultural Project and the Claim to Universality or the Equivocalities of a Familiar Debate", *International Journal for the Semiotics of Law* 25/4 (2012) 489 f.

[4] This is one of the most fruitful and challenging lessons of Castanheira Neves's philosophy of law. See, in particular, two key essays: Castanheira Neves, "Coordenadas de uma reflexão sobre o problema universal do direito ou as condições da emergência do direito como direito" and "O problema da universalidade do direito ou o direito hoje, na diferença e no encontro humano-dialogante das culturas", both now included in Castanheira Neves, *Digesta*, 3rd vol., Coimbra: Coimbra Editora, 2008, 9 f., 101 f.

in general and *inclusive positivism* in particular, i.e. in reconstituting the neighbouring relations which, given the issue of incorporation of principles, this idiom unavoidably favours[5]. In fact, defending a *conventionalist* (albeit *robust*) incorporation of principles always means admitting a contingent possibility, corroborated by certain legal orders (the orders in which following, determining and fixing the Rule of Recognition validate the effective inclusion of moral tests as plausible criteria for legal validity) but, equally importantly. also involves pursuing Hart's legacy of a *general philosophical enquiry* or a *general theory of law* which (from its *moderate external point of view*)[6] preserves an a-cultural understanding of the concept and /or nature of Law[7], whilst a-problematically presupposing the universality of the features which constitute relevant legal *sociability* (at least within the mature connecting framework which the full institutionalization of primary and secondary rules demands[8], if not directly within the appeal for a *non normative* Rule of Recognition[9]). In contrast, highlighting principles as *jus* means defending the *necessary* experience of incorporation, whilst simultaneously acknowledging the cultural-

[5] See Linhares, "In Defense of a Non-Positivist Separation Thesis Between Law and Morality", *Rechtsphilosophie. Zeitschrift für Grundlagen des Rechts,* Beck, 4 (2016) 425-443.

[6] The text quotes formulations by Postema (in his eloquent reconstitution of «Hart's Hermeneutics»): Gerald Postema, *Legal Philosophy in the Twentieth Century: The Common Law World* (vol. 11 of Pattaro, ed., *A Treatise of Legal Philosophy and General Jurisprudence*), Dordrecht/ Heidelberg: Springer, 2011, 285 f. (7.3. «Social Rules»).

[7] The *nature/concept* counterpoint is presupposed here in the sense developed by Raz in the first three essays included in *Between Authority and Interpretation. On the Theory of Law and Practical Reason,* Oxford: Oxford University Press, 2009, 17-125 [«Can There be a Theory of Law?», «Two Views of the Nature of the Theory of Law…» and «On the Nature of Law»]. «The general theory of law is universal for it consists of claims about the nature of all law, and of all legal systems, and about the nature of adjudication, legislation, and legal reasoning, wherever they may be, and wherever they might be…» (Joseph Raz, *Between Authority and Interpretation*, 91).

[8] «[In] a mature legal system, we have a system of rules which includes a rule of recognition [,] so that the status of a rule as a member of the system now depends on whether it satisfies certain criteria provided by the rule of recognition…» (Hart, *The Concept of Law*, 110).

[9] « In this respect, however, as in others a rule of recognition is unlike other rules of the system. The assertion that it exists can only be an external statement of fact. For whereas a subordinate rule of a system may be valid and in that sense 'exist' even if it is generally disregarded, the rule of recognition exists only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact.» (Hart, *The Concept of Law*, 110).

civilizational identity (*non-universality*) of the *way of life* in which this *necessity* is considered. As a matter of fact, the necessity in question only gains full meaning (a very specific, relative meaning!) when it is explicitly made compatible not only with the experience of the constitutive historicity of principles (as open human acquisitions) but also, and without paradox, with the defence of the *non-necessary* (fully cultural) identity of law itself. The *necessity* in question —considering principles as *practical commitments* and as normative expressions of a project-*proicere*[10]— is, in fact, exclusively related to a certain response to the problem of *common life* — i.e. to a *certain* practice of law which, as a specific way of creating communitarian meanings (following a persistent, albeit permanently reinvented, *claim to autonomy*), is significantly *inscribed* in the deployment of what may be called the *Idea of Europe.* It is as if, in this clash of idioms, we could draw a counterpoint between two unmistakably contrary movements and their unreconcilable accentuations of *necessity* and *possibility*.

Precisely on account of the borderline that is explored (and the alternative idioms laying claim to it), this clarification proves particularly productive when considering the main challenge of our cluster, namely the one which, as we have seen, mobilizes two contrary irreducible constitutive forces, the first irradiating from the axiologically relevant presupposition of principles (and their integrating dogmatic *normans*), the second stemming from the irreducible problematic *novum* introduced by practices (and their plural contexts of stabilization and realization). Unsurprisingly, like many other challenges concerning practical reasoning, this has to do with the

[10] This *proïcere* is neither a *plan* in the onto-teleological pre-modern sense nor a *programme* in terms of its modern finalistic intelligibility, but a historically constitutive (circularly reinvented) *form of life* (presupposing the treatment of *communitas*, in its juridical relevance, as a *self-transcendentally* conceived *artefactus*). In the words of Heidegger, referring to this pre-modern sense, «[d]as Entwerfen hat nichts zu tun mit einem Sichverhalten zu einem ausgedachten Plan, gemäß dem das Dasein sein einrichtet, sondern als Dasein hat es sich je schon entworfen und ist, solange es ist, entwerfend» [Martin Heidegger, *Sein und Zeit*, 18th ed., Tübingen: Max Niemeyer Verlag, 2001, 145]. The knotty point lies in the formulation *projecting* (explicitly borrowed from Heidegger's understanding of *constitutive historicity*) or, alternatively, in the way the signifier *projecting* (mobilizing explicit signifiers justified by an experience of *Geworfenheit-thrownness*) identifies the development of a practical-cultural autonomous *circle* as a simultaneous experience of *throwing* and *being thrown (in his own throw)*, with the coherent refusal of *necessity* and *contingence* [Heidegger, *Sein und Zeit*, 142-148, 310-316]. This means considering *projecting* as a permanent constitutive tension between *continuity* and *change* — involving a communitarian *self-availability* which is simultaneously and inextricably *self-transcendentality.*

permanent quest for a specific point of equilibrium, precisely the one which (as a kind of successful, even though always momentary, situated transcendence) recreates a productive dialectical intertwinement between the poles and the contexts or horizons involved (if not an authentic *point of reversibility* between the corresponding terms)[11]. It is only when this intertwinement occurs that it seems possible to invoke a full «practical consonance» of *content* between the intentions of performance ascribed to principles (considered as foundational warrants and practical commitments) and the acts of adjudication which follow (perform) these intentions, reinventing them in each case[12]. Treating principles methodologically as *foundational warrants* not only means breaking radically with the *continuum* imposed by the category *norm* (even when this continuum, justifying the *norms-rules/ norms-principles* binomial, explores a *qualitative* differentiation)[13], but also freeing them from the impact of an *indetermination thesis* or an *indetermination generating theory*[14]. This is because we renounce any abstract pre-determination of their normative content — arguing that principles provide decisive (argumentative) warrants «*to take up a position* before concrete situations» or situations which are to be determined concretely (surprisingly, the words are by Zagrebelski![15]) — whilst simultaneously acknowledging that precisely due to the axiological judgement this involves (or the *axiological acquisition* that this judgement should reflect), this *taking up of a position* first and foremost claims a *discourse of limits* (the normative limits of *validity*[16]) whose *negative productive impact* Drucilla Cornell (no

[11] The formulation *point of reversibility* explicitly involves Merleau-Ponty's heritage: see, for example, Glenn A. Mazis, "Merleau-Ponty and the 'Backward Flow' of Time. The reversibility of Temporality and the Temporality of Reversibility», in Thomas W. Busch / Shaun Gallagher, ed., *Merleau-Ponty, Hermeneutics, and Postmodernism,* Albany: State University of New York, 1992, 53 f.

[12] Castanheira Neves, *Metodologia Jurídica. Problemas fundamentais*, Coimbra: Coimbra Editora, 1993, 203-204.

[13] See Linhares, *O binómio* casos fáceis/casos difíceis *e a categoria de inteligibilidade sistema jurídico. Um contraponto indispensável no* mapa *do discurso jurídico contemporâneo?*, Coimbra: Imprensa da Universidade, 2017, 92-112, 171 f.

[14] See Linhares, *O binómio* casos fáceis/casos difíceis, 118-142.

[15] The words are by Zagrebelski, but also by Castanheira Neves (who explicitly quotes the former): «Se as normas são auto-suficientes no critério abstracto que hipoteticamente prescrevem, os princípios são fundamentos "para *tomar* posição perante situações, *a priori* indeterminadas, que venham a determinar-se concretamente" (Zagrebelski)…» (Castanheira Neves, *O problema actual do direito. Um curso de filosofia do direito*, 3rd version, Coimbra-Lisboa: policop., 1997, 59-60).

[16] Castanheira Neves, *O instituto dos «Assentos» e a função jurídica dos Supremos Tribunais,* Coimbra: Coimbra Editora, 1983, 197 f.; Idem, "Fontes do direito",

less surprisingly!) helps us to understand by eloquently describing principles as «lights which come from the lighthouse», essentially guiding us whilst preventing us «from going in the wrong direction».[17] All this culminates in the acknowledgement that «the true meaning of principles is only determinable in concrete» (Castanheira Neves[18]), which means arguing that the normative integrity of the *meaning* (and *sense*) of principles demands a well-defined experience which is simultaneously constitution, manifestation and performance (a performance which, in concretizing experiment, always involves a more or less explicit transformation) — and is entirely different from experiences which correspond to statutory, judicial and doctrinal *criteria* (or the corresponding experiences of autonomisation-stabilization). In contrast with principles, all these *criteria* provide plausible *problem-answer schemes* (which is why they should be methodologically treated as *criteria*![19]) and, as such, anticipate possible problems and situations, albeit in different ways (respectively through abstract typification-prevision and programming, concrete exemplification or reflexive reconstitution). Despite this clarification (which frees the jurisprudence of principles from the impact of an *indetermination thesis*), the question nevertheless remains more implacable than ever: is the said *point of equilibrium* (or *reversibility*) attainable when the *contexts of meaning* and *contexts of realization* which frame the practices of adjudication (whilst simultaneously interfering with the practices of *systemic stabilization* which they presuppose) appear increasingly *wounded* by plurality and fragmentation? Do these signs of disintegration not favour, on one hand, the closeness and dogmatic violence of principles, whilst on the other hand condemning concreteness to uncommunicable singularity? In fact, we should not forget that the pathos of these questions (and their critical reflectiveness, more or less naturally inscribed in the routines of a practice) appears significantly accentuated, and we should also note another decisive element in our initial cluster which reminds us

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Digesta, 2nd vol., Coimbra: Coimbra Editora, 1995, 75-79; Fernando José Bronze, *Lições de Introdução ao Direito,* 2nd ed., Coimbra: Coimbra Editora, 2006, 724-743.

[17] Drucilla Cornell, *The philosophy of the limit*, London: Routledge, 1992, 106.

[18] «Em síntese: as normas legais esperam a sua aplicação e em último termo visam-na, mas podem compreender-se e determinar-se sem ela, ou seja, na sua subsistência abstracta; não assim os princípios, já que o seu verdadeiro sentido não é determinável em abstracto, e só em concreto, porque só em concreto logram a sua determinação, e se lhes pode atingir o seu autêntico relevo...» (Castanheira Neves, *O problema actual do direito*, 59-60).

[19] See infra, note 20.

that doubting the integrating unitary intelligibility of principles (and their axiological acquisitions) ultimately means doubting the validity and effectiveness of the comparability (if not *tertialité*) offered by the *form of life* which distinguishes Law — which also wounds one of the major components of our *European* heritage and paves the way for alternative promises of integration (or the questions that make this an option).

We could resist this deconstruction by replying that a tentative response (a positive one, confirming our specific *form of life* capacity to endure) has less to do with the *practices of realization* themselves (notwithstanding their unrenounceable permanently constitutive dynamic) than with the *practices of stabilization* which, in assimilating but also conditioning (limiting) this dynamic (and its capacity to transform) at different paces (or movements), construct the different layers of the legal system, providing the presupposed *validity* (or at least the pursuit of a *principled response*[20]) with a stabilizing objectifying role. This perspective would enable us to discover plausible points of intertwinement between the poles, not only avoiding (or overcoming) the effect of fragmentation (and incommunicability) which the heterogeneity of the contexts imposes on adjudication, but also endowing the latter with the intelligibility of an authentic *judgement* (performing an effective *system/problem* dialectic). Is this a plausible answer? I would say that it is, even though great care must be taken to establish its meaning. This would involve reconstituting the paths (if not levels or platforms) through which, at a time when plurality and difference (and their effective celebration) impose a serious challenge, the pursuit of a claim of consonance between the principles and practices (of adjudication) remains resilient. The tentative sequence which follows briefly explores these paths (and the correlative institutional situations), whilst considering different practices associated with stabilization and the corresponding *strata*, which certainly means exploring (if only allusively) the possibilities of a *multilayered legal system*, as well as claiming that a reflexive (methodological) experience is not only capable, on the one hand, of distinguishing between *foundational warrants* and *criteria*[21]

[20] In order to reconstitute a counterpoint between *the pursuit of a principled response* and *going along with things as they are*, see Stanley Fish, *The Trouble with Principle,* Cambridge — Mass.: Harvard University Press, 211 f., 215-216 (in dialogue with Greenwald).

[21] A foundational warrant (*fundamento*) is a *rationale* which gives specific intelligibility or an autonomous sense to a certain field or domain of practice (mainly identifying the commitments that constitute this field): the *rationale* justifies a plau-

— which, as we have just seen, means disrupting the traditional continuum between *principles* and *norms*! — but also of identifying the presumptions of *bindingness* or normative force which, treated as (explicit or implicit) rebuttable presumptions, characterize the different kinds of *criteria* (statutory, dogmatic or jurisdictional)[22].

1. Let us begin with statutory practices (including the constitutional ones) and their specific way of contingently and conventionally programming integrated contexts. Nobody will contest the importance of this first path and the unmistakable constitutive identity of the permitted authoritarian and prescriptive specification, whilst consecrating and transforming meanings and performative models attributable to principles. Acknowledging this relevance and specificity is one thing: however, defending the exclusivity of the corresponding institutionalization — as a means of giving principles juridical force, in a kind of globalized, necessary (in its narrowest sense) *incorporation by enactment*, if not replacement of *first-order reasons* by *second-order ones*[23] — is another matter. Sustaining the first argument undoubtedly means admitting that it is possible (albeit not necessary) that some specific issues created by the explosion of multiculturalism

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sible conclusion, even though it does not propose a solution or a type of solution (i.e. it does not free us from the discursive effort which is indispensable to reaching the solution). The rule or criterion is an available («technical») device or apparatus which can be immediately mobilized («convened») to resolve a given problem and (or) provides a plausible scheme for finding the corresponding solution (albeit requiring a discursive effort in concretization or realization). The normative principles (extended by some doctrinal models that constitutively specify and reinvent those principles) should be methodologically treated as foundational warrants or rationales. Statutes, judge-made law and all the other dogmatic models are (or should be assumed as) *criteria*.

[22] With principles (as warrants) benefitting from a presumption of *communitarian validity*, statutes (as criteria) from a presumption of *political-constitutional pedigree* or *authority-potestas*, legal dogmatic models (as warrants or criteria) from a presumption of *rationality* or *rational conclusiveness* and, last but not least, precedents-*exempla* (as criteria) from a singularly contextualized presumption of *correctness (justeza)*. See Castanheira Neves, *Metodologia jurídica*, 154 f.; Fernando José Bronze, *Lições de Introdução ao Direito*, 627 f.; and Aroso Linhares, "Validade comunitária e contextos de realização. Anotações em espelho sobre a concepção jurisprudencialista do sistema", *Revista da Faculdade de Direito da Universidade Lusófona do Porto* 1 (2012) 58 f. (also at <http://revistas.ulusofona.pt/index.php/rfdulp/article/view/2966>).

[23] These are formulations which, thanks to Shapiro and Raz respectively, have strong affinities with *exclusive legal positivism*: see, for example Postema, *Legal Philosophy in the Twentieth Century: The Common Law World*, 363 f., 463.

and globalizing *deterritorialization* (Appadurai) — or even simply by the erosion of values and the improbability of consensus[24] — may not find an alternative unitary assimilation without a basic statutory democratic decision (and the distinction between *lawfulness* and *unlawfulness* that this decision conventionally prescribes)[25]. In contrast, sustaining the second argument involves arguing that a juridically relevant integrating function ascribed to principles (as well as the *opening* and *stabilizing* of institutional situations demanding a consonance of content between principles and adjudication) depends *necessarily* on prescriptive, authoritarian, programmed solutions. In treating this conclusion of *exclusivity* as a corollary to a pre-determined a-problematic *conventionalism* (Marmor) or to an explicit *pedigree* or *pre-emption thesis* (Raz), if not a global attitude of *ethical* or *normative positivism* (Campbell), whilst also invoking the political-cultural acquisitions of *democratic constitutionalism* associated either with the pursuit of a post-conventional *discursive project* (Habermas, Alexy) or the celebration of a «satisfactory form of life» (MacCormick)[26], the warrants which sustain this claim for *necessity* may be significantly diversified. There are, however, good reasons to refute it here and to uphold an unequivocal claim for *possibility* (and therefore also a claim for *incompleteness* or *openness* necessarily referring to other contexts of *stabilization* or *realization*). Is it because the *backing* of this argument[27], whilst radicalized (as an ensemble of *statements of fact* composing a diagnosis of heterogeneity and fragmentation), has a kind of self-destructive potential? I would argue that it is not only on account of this, even though we should not forget that the coherent development of the corresponding diagnosis presupposes that we seriously (if not exclusively) consider a *societas project* which, assuming the basic equivalence and commensurability of all the manifested goals, treats them as *preference organizing perspectives*, demanding, as

[24] Some specifications of the principle of equality (namely those which institutionalise same-sex marriage) certainly correspond to this condition of *improbable consensus*.

[25] Concerning this juridical *integrating function (função jurídica de integração)* which only statutory law is able to pursue, see Castanheira Neves, "Fontes do direito", 73-74.

[26] Whereas the previous *labels* dispense with any specific identification, it is perhaps relevant to identify the final one: MacCormick, *Rhetoric and the Rule of Law*, Oxford: Oxford University Press, 2005, 193.

[27] *Backing* in the rigorous sense which Toulmin has taught us to explore: St. Toulmin, *The Uses of Argument* (1958), Cambridge: Cambridge University Press, 1983, 103-107 («The Pattern of an Argument: Backing our Warrants»).

such, the exclusive answer of hierarchizing decisions and the social-political artefact that collectively legitimizes those decisions which, in turn, means renouncing the possibility of a constitutive dualism between *subjective purposes* and *human goods* and between *goals* and *values*, with the consequent suppression of the borders separating *principles* and *policies* (certainly for the benefit of these *policies* and their *final-rational strategic intelligibility*). I repeat, it is not only (or even mainly) on account of this *backing*. Even if only a moderate diagnosis of pluralism is admitted, enabling statutory practices (mainly through their constitutional expressions) to continue to ascribe an integrating function to *principles* (sufficiently distinct from the one which *policies* perform) — with the consequence that, whilst considering the «multicentric nature» of European experience, the core of juridically relevant identity would be treated as a purely constitutional project (whose principles would be encountered as an *inference* from constitutional particular traditions and their prescriptive expressions)[28] — the necessity and exclusivity of the authoritarian mediation would transform the claimed *consonance of content* (between principles and practices of adjudication) into a decidedly *top-down* program (with typified institutional situations and a contingent selective anticipation, but also an authentic *meta-prescriptive* textual form[29]), simultaneously allowing and demanding the self-sufficient abstract thematization which corresponds to statutory criteria. Does this not mean reintroducing, with intensified, irresistible strength, the need for a closed, self-referential *synchronic* recreation of juridical relevance[30] and with it the opposed (but no less implacably convergent) risks of indetermination and violence against singularity?

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[28] In this sense, see Bartosz Wojciechowski / Piotr Juchacz / Karoline M. Cern, «Whose Reason or Reasons Speak Through the Constitution? Introduction to the Problematics», *International Journal for the Semiotics of Law* 25/4 (2012) 455 f.

[29] In the sense which has been developed by Lyotard: see *Le différend*, Paris: Éditions de Minuit, 1983, 145 f., 159 f. I have explored this conception (as a specific reinvention of the category *norm*) in Linhares, *Entre a reescrita pós-moderna da juridicidade e o tratamento narrativo da diferença*, Coimbra: Coimbra Editora, 2001, 354-386 (4.)

[30] *Synchronic* in the very productive sense which Kellogg explores: see Frederic R. Kellogg, «What Precisely is a "Hard" Case? Waldron, Dworkin, Critical Legal Studies, and Judicial Recourse to Principle» (2013), available at <http:// dx.doi.org/10.2139/ssrn.2220839>. I have used the possibilities of this *synchronic/diachronic* counterpoint in *O binómio* casos fáceis/casos difíceis *e a categoria de inteligibilidade* sistema jurídico. *Um contraponto indispensável no* mapa *do discurso jurídico contemporâneo?*, Coimbra: Imprensa da Universidade, 2017, 119 f.

2. In considering *stabilization practices* which are significantly the closest to *adjudication practices* themselves (inscribed in a no-man's land between stabilization and realization), the next step, in contrast, entails a direct, *bottom-up approach* (if not a direct leap to the *bottom* line). Regarding the construction of meaning conditioning the semantic and pragmatic intelligibility of principles —and visiting a *topos* which, under the formulas of *constitutional protestantism* and *popular* or *populist constitutionalism*, is today inseparable from the well-known contributions by Levinson, Tushnet and Larry Kramer — it would be tempting to state that here we face *constitutional reality* and its multiple *protestant practices*, effectively developed outside (away from) the courts[31]. However, it is better to invoke a much broader *legal* reality, which is not reducible to a simple *application field* (where legal normativity should be projected) and which is seriously taken as an authentic specifying *stratum* of the legal system (Castanheira Neves[32]). Thanks to this approach, it is, in fact, possible to pay explicit attention to the assimilation of a *global external context* (developed as a constitutive concurrence between economic, politic and cultural realities)[33], whilst simultaneously considering the specific materiality of *law in action* and its historically evolving institutions (determining the global or partial obsolescence of *law in the books* criteria)[34], as well as the impact which different *internal perspectives* (justifying, in the name of «professional correctness» and their satisfactory performance, the multiplication

[31] «A protestant view of Court's authority (…) [assumes] (…) the legitimacy of individualized (or at least non-hierarchical communal) interpretation» (Levinson, *Constitutional Faith*, Princeton: Princeton University Press, 1988, 29). In this well-known approach, Levinson relates *constitutional Protestantism* to the need to consider the interpretations and practices of the Constitution developed by social movements and individual citizens (in counterpoint to *constitutional Catholicism,* which attributes the task of an authentic unitarian interpretation exclusively to the Supreme Court judicial review).

[32] Castanheira Neves, *Curso de Introdução ao estudo do direito. Lições proferidas a um curso do 1º ano da Faculdade de Direito de Coimbra, no ano lectivo de 1971-72*, Coimbra: policop., 1971-1972, 347-351 [d) A realidade jurídica (as instituições jurídicas)]., Idem, "A unidade do sistema jurídico…", *Digesta*, 2nd vol., 172-174; Idem, "Fontes do direito", 56-58; Id., *Metodologia Jurídica*, 149, 151 f., 157 f., 176 f., 182-184.

[33] Fernando José Bronze, O *corpus iuris lusitani* no hemisfério do sistema jurídico romano-germânico (Considerações introdutórias)», *Boletim da Faculdade de Direito* 74 (1998) 80-82 (e).

[34] Castanheira Neves, "Fontes do direito", 77-78; Idem, *Metodologia Jurídica*, 182-184.

of *interpretative communities*[35] or the stabilisation of differentiated *sociolects*[36]) effectively *have* in determining *principles* today.

The latter determinative *front* (with its «local contexts, that are stabilized, if only temporarily, by assumptions already and invisibly in place»[37]) is particularly interesting, since its *doing what comes naturally*, regarding the internal point of view of differentiated communities of jurists (judges, lawyers, prosecutors, academics, etc), all pursuing *disciplinary identity* in their own way (whilst confronting the coherence issues which this identity demands) seems, for once, directly accessible, both from a *moderate external point of view* considering *interpretive communities* — i.e. giving the stabilized practices the regulative intelligibility of flexible (*non-monolithic*) codes, canons, textualization and re-textualization procedures and standard examples that can be *confidently followed* (and are also *capable of being transformed* coherently, as long as the game is played)[38] — or from a *less moderate* one involving *semiotic groups* — reconstituting those practices less as *rules* or *canons* than as *regularities*, albeit preserving a significant sensitivity to their explicit *narrative configuration* (i.e. giving them the productive shape of falsifiable «narrative typifications of action», operating within their own system of semantic values)[39]. However, the conclusion (overlapping, as we have just seen, with reflexive resources due to Fish's *pragmatic conventionalism* and Jackson's *structural semiotics*) seems parallel to the first premise we have tested, in spite of determining (or precisely because it determines) an opposite dynamic effect. This effect counterposes the unicity of meanings associated with the meta-prescriptive statutory sentence consecrating a principle (or the global context which this sentence violently imposes) to the plurality of meanings that each community or each group, internally and separately constructing the sense of the expressions associated

[35] Naturally in the sense which Stanley Fish's *pragmatic conventionalism* explicitly proposes: see, for example, the exploration of this category developed in «Change», *Doing what Comes Naturally*, Durham/London: Duke University Press, 1989, 141 f.

[36] If not *communications sociales restraints*, as opposed to *communications sociales généralisées.* The formulas are evidently from Greimas, "Sémiotique et communications sociales", in *Sémiotique et sciences sociales*, Paris: Éditions du Seuil, 1976, 45 f., 53-60.

[37] Fish, "Play of Surfaces: Theory and Law", in *There's No Such Thing As Free Speech: And It's a Good Thing, Too*, New York: Oxford University Press, 1994, 190-191.

[38] Fish, «Change», 150-153.

[39] For clarification of concept, see Bernard Jackson, *Making Sense in Law*, Liverpool: Deborah Charles Publications1995, 154 f. (8).

with the same principle (reduced, as such, to a *nomen* or a signifier), inevitably provides (whilst playing the game of local context). In our present circumstances, however, the question is not only a matter of the breach of unity in the reference to principles and other layers of the legal system determined by these groups and communities. In our circumstances, the trouble comes from the internal fragmentation of these groups, to the extent that the increasing number of canons destroys the *naturalness* of their game with the inevitable vulnerability to the seductions of other practices (namely those which, multiplying the contexts, correspond to a plurality of movements and trends in *academic house*[40]). Such numerous (and different) practices of stabilization (legitimizing so many local contexts) expose us, on the borders, to a contextual vertigo (the experience of the «nonclosure», if not instability, of «every context»[41]), bringing with it the threat of pure, unlimited discretion and casuistry, if not the impossibility of distinguishing between juridically relevant *concreteness* and absolute, unrepeatable *singularity*. Moreover, in establishing another unavoidable correspondence, this submits the reconstitution of the meaning of principles (the attribution of signifieds to their signifiers) to another kind of performative violence…

3. It is precisely when faced with these two contrary threats (intensified whenever the possibilities of the second develop within the interstices of the first, generating a kind of irresistible complicity or convergence) that the mediation of legal dogmatics, in accomplishing the discharge function *(die Entlastungsfunktion[42])* which reduces the

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[40] I have developed this argument in *Constelação de discursos ou sobreposição de comunidades interpretativas? A* caixa negra *do pensamento jurídico contemporâneo*, Porto: Edição do Instituto da Conferência, 2007, 48-55 (1.), considering two different examples, the first related to the community of lawyers — and the way in which heterogenous models of rational choice (with the corresponding representations of collective identity) dispute (positively and negatively) the legacy of Holmes' *bad man* (projected in the *lawyer's way of life*) [50] — and the second considering the significant spectrum of *judges' images* which divide us today and make the plausible reconstitution of their common community or group *institutional situations* an impossible task (condemned to frustratingly meagre outcomes)[51].

[41] In the words of Derrida, *Limited Inc.*, Evanston: Northwestern University Press, 152-153.

[42] Esser, "Dogmatik zwischen Theorie und Praxis", in F. Baur *et al.*, Hrsg., *Funktionswandel der Privaterechtsinstitutionen, Festschrift für Ludwig Raiser,* Tübingen:, 1974, 517 ff., 522 ff.; Alexy, *Theorie der juristischen Argumentation. Die Theorie des rationalen Diskurses als Theorie der juristischen Begründung*, Frankfurt am Main: Suhrkamp Verlag, 1978, 307 f., 329-330.

burden of jurisdictional jurisprudence, acquires a very specific urgency. It is certainly not because this doctrine in general and this function in particular appear immune to the challenges of plurality (and the added risks of violent abstract stabilization or problematic pulverisation). On the contrary, considering the illustrious sequence which began in the pre-modern context — if not immediately with the Roman republican «rise» of the secular «jurists» (and its casuistic *respondere*) and the imperial consecration of *Ius publicae respondendi ex auctoritate principis* (attributing an explicit *potestas* to the concrete respondere), at least with the medieval practice of *scientia juris* and its constitutively dialectic *textual hermeneutics* (mobilizing the presumption of *auctoritas* or *rationality* in a *subject/subject* rationalizing structure as indispensable specifications of a *communis opinio doctorum* canon) — the image of doctrine imposed in the nineteenth century by the *Naturhistorische Methode* and its Conceptual Jurisprudence (justifying, in contrast, an intentionally theoretic *dogmatic science of law*) was certainly the last to assure an effective *paradigmatic dominance*, with the corresponding effect of *unity* (a dominance which, notwithstanding the differences of discourse, allows Peczenick to see this Conceptual Jurisprudence as the «peak» of the «Classical legal doctrine»[43]). With the decline of this dominance, the possibility of understanding the *presumption of rationality* or *auctoritas* attributed to legal doctrine (and this presumption as a decisive methodologic resource in the performance of *Entlastungsfunktion*) has developed in disparate directions… and is simultaneously wounded by severe (heterogenous) criticism (and the corresponding diagnoses of insufficiencies or limits). It is as if these diverse diagnoses and alternative paths unfold without any solution in terms of continuity and we are limited to confronting a complex deconstruction/reconstruction cluster, over which (and over whose unavoidable *differend*) the legacy of the *naturhistorische Methode* still looms, both positively and negatively, for better or worse. It is sufficient, in fact, to recall how the direct consideration of plausible critical *topoi* — concerning the scientific or unscientific character and the compatibility or incompatibility of «normative» and «rational» approaches (if not the alleged «irrationality of all normative theories»), as well as the «ontological obscurity», the «unclear relation to political pluralism» or simply the «indeterminacy» of legal dogmatic arguments[44]

[43] Peczenik, *Scientia Juris. Legal Doctrine as Knowledge of Law and as a Source of Law* (vol. 4 of Pattaro, ed., *A Treatise of Legal Philosophy and General Jurisprudence*), Dordrecht: Springer, 2007, 65.

[44] See, for example, Peczenik, *Scientia Juris*, 65-80 («Criticism and Defence

— opens up a spectrum of alternative paths. More precisely, it presents a spectrum of alternatives, which expand whilst preserving their scientific-epistemological *quality* or refuting it, in the certainty that preserving and refuting it *are* (or *open up*) possibilities which themselves multiply in unmistakable (and frequently incompatible) *internal ways*[45]…

Confirming this *quality* means either following the analytical-conceptual trend or rejecting it and these alternatives are, in turn, far from homogeneously conceived. It is possible to follow an analytical-conceptual trend whilst invoking neoformalist orthodox reasons (experiencing law as a system of general rules which «are, in most of their applications, quite determinate»[46]), but it is also possible to follow it whilst defending a contrasting sociological-systemic autopoietic approach (justifying dogmatics as a *Sicherheitsnetz*, involved in the systemic protection of jurisdiction[47]). Rejecting an analytical-conceptual perspective also allows for incompatible assimilations of the common nomological empirical *explicative* basis, which may range from a *Ratio-Begründung* treatment of presumptive *auctoritas* to an explicit defence of *social technology*[48] — the latter (*als praxisorientierte rationale Jurisprudenz*[49]) radically overcoming this presumption (with all the relics of its normative-dogmatic conformation), whilst claiming the «production» of a purely *technological system* (including exclusively *technological propositions*)[50].

What about refuting the scientific (epistemic) identity? In

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of Legal Doctrine»); and also Jan Harenburg, *Die Rechtsdogmatik zwischen Wissenschaft und Praxis,* Stuttgart: Franz Steiner Verlag, 1986, 37-153 («Die Rechtsdogmatik und ihre Krise»).

[45] For a brief reconstitution of four significant contemporary conceptions of legal doctrine, see Linhares, "Rechtsdogmatik, Autonomie und Reduktion der Komplexität. Brauchen die Gerichte eine Sicherheitsnetz ?", in Schweighofer *et al.*, Hg., *Komplexitätsgrenzen der Rechtsinformatik.* Tagungsband des 11. Internationalen Rechtsinformatik Symposions Iris 2008, Stuttgart: Boorberg Verlag, 2008, 463-472.

[46] From Larry Alexandre, "With Me, It's All er Nuthin': Formalism in Law and Morality", *The University of Chicago Law Review* 66 (1999) 550.

[47] Luhmann, *Das Recht der Gesellschaft* (1993), Frankfurt am Main: Suhrkamp-Taschenbuch, 1995, 297-337 (Kapitel 7).

[48] See the three global alternatives reconstituted by Jan Harenburg, *Die Rechtsdogmatik zwischen Wissenschaft und Praxis,* 232-241 [«Diese kann als empirische, als normative und als empirische und normative Disziplin konzipiert warden…» (231)].

[49] Hans Albert, *Rechtwissenschaft als reale Wissenschaft*, Baden-Baden: Nomos, 1993, passim, *Kritischer Rationalismus*, Tübingen: Mohr Siebeck, 2000, 41-91 (ii. Kapitel).

[50] Hans Albert, *Rechtwissenschaft als reale Wissenschaft*, 12.

this case, we should also contemplate two opposed clusters of possibilities: one which, assuming the *reduction of law to politics*, invests in an explicit *ideologization of doctrine* (opposing *core doctrines* with *deviational doctrines* and entrusting to the latter, inscribed in a project of *legal analysis as institutional imagination*, the reflexive task of inverting the *centre/periphery* movement),[51] and one which, defending law and legal thinking's claim to autonomy, restores the full practical intelligibility of legal dogmatics whilst also rethinking its unequivocal normative (simultaneously stabilizing and innovative) character, explicitly compatible with a *presumption of rationality* which is inevitably *practical-prudential rationality* (Esser, Castanheira Neves[52]).

In addition to the diverse solutions which separate (and close off) the paths from each other (revealing a troubling, if not paradoxical, combination of «isolation» and theoretical or even «philosophical fragmentation»[53]), this dizzying array of paths provides us with the cue to return to our main question concerning the claim to *practical-prudential consonance* attributed to (or expected from) principles *in action*. Considered from the perspectives of this *fragmentation* and *isolation*, the contrast between legal doctrine's practices of stabilization and other previously explored practices —attributed to statutes (*supra*, 1.) and interpretive communities or/and semiotic groups (*supra*, 2.) — seems insufficient to justify any privileged specific mediation. We could always say that, whilst presupposing a concept of *principles as jus*, the (serious) exploration of this *consonance claim* alone introduces a plausible filter, favouring a *normative-prudential* understanding of the intentionality of legal dogmatics —which should be central, not only when this doctrine directly explores a *practical-normative dimension*, producing authentic normative statements, but also

[51] R. M. Unger, *The Critical Legal Studies Movement* (1983), Cambridge — Mass. / London: Harvard University Press, 1986, 1 f., 8-14, 43-90 («Two Models of Doctrine»); Idem, *What Should Legal Analysis Become?,* London/New York: Verso, 1996, 119 f., 129-134 («Legal Analysis as Institutional Imagination»).

[52] Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung*, Frankfurt: Athenäum Verlag, 1970, 87 f.; A. Castanheira Neves, "Fontes do Direito", 89-90.

[53] «Another kind of criticism emphasizes internal tension in legal doctrine. Juristic theories show a curious ambiguity vis-à-vis basic theories of practical reason and morality. They are often explicitly or implicitly based on such theories. Philosophical theories are notoriously controversial, however. To deal with this controversialism, legal researchers can split legal doctrine into fragments, some following one philosophical theory, others following another one. Also a way to avoid philosophical fragmentation is by isolating legal doctrine from philosophy…» (Peczenik, *Scientia Juris*, 73).

when the developed «tasks» assume *empirical-descriptive* and *logical-analytical dimensions* (in the sense that Alexy has helped to establish[54]). Moreover, this filter could help us to overcome the tension between description and change in legal research *de lege lata* (answering Svein Eng's perplexities about the "fused descriptive and normative modality" which distinguishes the corresponding statements)[55].

Even if it were possible to defend this *filter*, the main question would still not be convincingly answered. In order to understand the *prime* contribution of legal dogmatics as a mediation of *rationalizing limits* (mitigating, as far as the concrete realization of principles is concerned, the effects of *pulverization* and *abstract violence*), it is not, in fact, sufficient (even though it is certainly necessary) to treat doctrine as a component of the legal system (with the *presumptive bindingness* which comes from its *rationality*). Moreover, it is not sufficient even when this treatment already presupposes *on one hand* the objective incorporation of dogmatic normative criteria as intermediate ones (occupying a level of generality situated between *statutes* and *precedents*), as well as presupposing *on the other hand* an unequivocal *positive* answer to the problem of sources, clarifying doctrine at least as a «should-source»[56] or a «quasi-institutionalised kind of law»[57]. In order to understand the

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[54] Alexy, *Theorie der juristischen Argumentation,* 307-311.

[55] A reconstitution of Svein Eng's theory is proposed by Peczenik, *Scientia Juris*, 100-101

[56] Explicitly considering the distinction between the "must-sources," "should-sources," and "may-sources" of law, Peczenik highlights both the vagueness of the concepts involved and the defeasibility of the corresponding hierarchy: «"Must-sources" are formally binding *de jure*; "should-sources" are not. The consequences of disregarding "should-sources" are usually milder than the consequences of disregarding "must-sources." "Must-sources" are more important than "should-sources," which in turn are more important than "may-sources." (…) If a collision occurs between a more important source and a less important one, the former has priority, provided no overweighing reasons reverse the order of priority. If we assign priority to a less important legal source over a more important one, we will have the burden of arguing this priority. Overweighing reasons are thus required if we are to follow a precedent contrary to the plain meaning of a statute. (…) In sum, the hierarchy of legal sources is defeasible.» (Peczenik, *Scientia Juris*, 16-17).

[57] «The sense of the [distinction which applies] (…) to the expression "sources of law" the qualifiers "strictly institutionalised" and "quasi-institutionalised (…) is that statutory law, customary law, and judge-made law, for example, are each a strictly institutionalised kind of law, however much they are so to different degrees and in different ways; in contrast, legal dogmatics, the general theory of law, and legal logic, for example, are each a quasi-institutionalised kind of law, however much they are so to different degrees and in different ways…» [E. Pattaro, *The Law and the Right. A Reappraisal of the Reality that Ought to Be* (vol. 1 of Pattaro, ed., *A Trea-*

mediation of legal dogmatics as the prime contribution concerning *principled concrete realization*, it is certainly not sufficient to identify a significant (more or less corroborated) *difference of degree* in relation to other available *practices of stabilization* (including those which are attributable to *judge-made law*). It is, in fact, necessary to clarify that the privileged *mediation status* attributed to legal dogmatics has less to do with any pretence to the *claim of immunity* — as we have seen, legal dogmatics is far from immune to the sting of plurality and indetermination and the need for violent simplification! — than with the unique *performative competence* (a competence which only legal dogmatics intrinsically possesses) to treat the corresponding dangers reflexively.

It is this clarification which brings us finally to *jurists' law (Juristenrecht),* although not for the purpose of reproducing what we all know and which directly concerns the way in which doctrinal jurisprudence — through a specific constitutive re-elaboration which is also a heuristic (more or less innovative) anticipation — contributes decisively to giving casuistic *judge-made law* the normative explicitness it needs in order to become authentic *institutionalized law* (at least when it does not benefit from a formally binding case law *stare decisis*). It is rather for the purpose of asking what we should specifically expect today from a successful articulation of jurisdictional and dogmatic jurisprudential practices (whilst performing their *doing what comes naturally*) as a condition for acknowledging (with Castanheira Neves[58]) that the identity of «communitarian conscience» in terms of its juridical relevance and regardless of the national or transnational stages where we may reconstitute it, depends decisively on these practices and their institutional situations.

The answer is not an easy one. We may, however, *risk* stating that, concerning dogmatics, the condition for continuing to play this role successfully demands a deliberate reflexive approach which effectively and manifestly extends beyond the mere *intensification of attention* allowed by the so-called *natural doing* (and its *canonical possibilities*). This means that it is not sufficient to highlight the permanent dynamic between *communis opinio* and *deviant flows*, even when this accentuates the fragility and instability of the actual modes of

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tise of Legal Philosophy and General Jurisprudence), Dordrecht: Springer, 2005, xxii]. See also A. Rotolo, "Sources of Law in the Civil Law", in R. Shiner/Rotolo, *Legal Institutions and the Sources of Law* (vol. 2 of Pattaro, ed., *A Treatise of Legal Philosophy and General Jurisprudence*), Dordrecht: Springer, 2005), 145 f.

[58] Castanheira Neves, "Fontes do Direito", 89 (quoting Betti and Esser).

equilibrium (reconstituting the tensions and circularity between the currents which are situated in the *centrum* or *core* or which dominate the *surface* and the small *peripherical* or *subsurface flows* which irresistibly grow or get stronger). A critically-reflected communication with the plural manifestations of *law in action* (at least through the different *interpretative communities* and/or *semiotic groups* playing the *game*) has become indispensable, not only when the function performed corresponds to the *inventio* of specific practical-normative criteria, but also when the purpose in question has directly to do with the *stabilizing* reconstitution of the legal system itself (in terms of all their different layers and reciprocal complex interrelations). The permanent *specification* of principles, by problematically rethinking their content from the perspective of the actual casuistry (assimilated from *Richterrecht*'s experience), as well as the challenges of a hypothetically recreated cluster of issues (autonomously inferred from the dynamics of *law in action*), whilst deliberately experiencing the polarized trends towards uniformization and fragmentation, is certainly the decisive core of this reconstitution and its *stabilizing* purpose. However, in order to understand this specification (as well as its projection to law's *principled concrete realization*) it is essential to emphasise how significantly the dogmatic reduction of complexity involved (notwithstanding some evident convergences) leads us far away from the «organization of redundancies» claimed by Luhmann (and from the cognitive *safety net* which this organization seeks to ensure)[59]. This emphasis in fact highlights the indispensable role which the incorporation of *meta-dogmatic* components plays (or should play) in contemporary *Juristenrecht*, which means, on the one hand, opening the door to an explicit thematization of *law's claim to autonomy* (considered in its cultural-civilizational aspects) and, on the other hand, allocating a special place to *principled concrete realization* and its specific claims (if not to adjudication as a specific *modus operandi*). In *dogmatically* projecting an expected *legal philosophical* radicality, the first thematization explores the cultural condition of comparability and its relation to *comparability/plurality* (if not directly to the problem of reinventing law's *tertium comparationis* and the argument for continuity which sustains it, in the plausible assimilation-domestication of plurality and fragmentation)[60] — with

[59] See *supra*, note 47.

[60] Linhares, "Jurisprudencialismo: uma resposta possível num tempo de pluralidade e de diferença?", in Nuno Santos Coelho / Antônio Sá da Silva, ed., *Teoria do Direito. Direito interrogado hoje — o Jurisprudencialismo: uma resposta possível?*

the possibility of discussing the persistence or the survival of relevant legal artefacts and their *practical world*, which is also an opportunity for questioning the limits of *jus*[61], if not the possibility-plausibility of an independent *thetic order,* corresponding to a cluster of strategical choices and their tactical execution. The second incorporation, dogmatically projecting an anticipation of methodic issues associated with adjudication, involves the reflexive attitude and spectrum of alternatives which, beyond the *naturalness* of dogmatic practices, only a genuine methodological meta-dogmatic research can provide, in its specific internal way. In fact, this intensified attention to performance and its various possibilities, converting disparately *esoteric* approaches into an integrated *exoteric* testimony of plurality (eventually with recourse to piecemeal narrative)[62], seems indispensable nowadays, not only as legal doctrine constructs its own *novum* (inventing and anticipating authentic criteria) but also as it reconstitutes the dynamics of the legal system in general and the contents of *normative principles* in particular. Concerning the mediation of *Juristenrecht*, it is indeed as if we could distinguish a very specific reflexive burden, as a *contextual* (or *environmental*) condition, which is essential in providing the presumption of *auctoritas* with the sense and success it needs in a limit-situation such as our own: a reflexive burden which does not in itself overcome the violent effects of dogmatic isolation and problematic fragmentation but nevertheless has the advantage of treating the corresponding threats and the intrinsically juridical search for plausible *modes of equilibrium* as explicit and autonomous *thematic cores*. Does this not, therefore, mean offering the expected reflexive outcomes the possibility of successful (plurally and dialogically conceived) *normative incorporation*? I would say that it does, which means attributing to this expectation the sense and productivity of a *promise*.

Estudos em homenagem ao Senhor Doutor António Castanheira Neves, Salvador: JusPodivm/Faculdade Baiana de Direito, 2012, 109-174.

[61] Castanheira Neves, "Pensar o direito num tempo de perplexidade", in João Lopes Alves *et al., Liber Amicorum de José de Sousa e Brito em comemoração do 70º aniversário. Estudos de Direito e Filosofia,* Coimbra: Almedina, 2009, 27-28 (V.2. «Os limites do direito»).

[62] Linhares, *Entre a reescrita pós-moderna da juridicidade e o tratamento narrativo da diferença*, Coimbra: Coimbra Editora, 2001, 863-865 (9.).

PART III

JURISTS' LAW AND EUROPEAN IDENTITY FROM THE PERSPECTIVE OF SPECIFIC DOGMATIC-INSTITUTIONAL PROBLEMS

7

THE «DEPTH GRAMMAR» OF *CRIMINAL LAW*: THE CASE RULE AND THE DISTINCTION BETWEEN NORM AND ASCRIPTION

Bruno de Oliveira Moura

1. Setting out a normological problem

According to a widespread opinion in the Criminal Law Science, the judicial statement saying that a behavior has disrespected a rule enchased in the legal description of a crime firstly and foremost means: the very same conduct is a *duty violation*[1]. In this sense, the judgment always depends on proofing some ascription coefficients related to the position of the suspected or accused person during the perpetration,

[1] Naturally, this does not apply from the perspective of those who simply deny the existence of any duty able to be deduced from the Criminal Law precepts. See Andreas Hoyer, *Strafrechtsdogmatik nach Armin Kaufmann. Lebendiges und Totes in Armin Kaufmanns Normentheorie*, Berlin: Duncker & Humblot, 1997, 40 f., 79 f.

such as their physical capacity to act and their knowledge about the factual circumstances[2].

Behind this idea is a well-known theoretical approach in the field of philosophy of action, the so-called *Ascriptivism*. In very simple and generic words, this account reads as follows: talking about an *action* implies using statements which not only describe something that has occurred in past, but *also and first of all* ascribe this event to someone else as an expression of their freedom[3] (we can say: as «opus sua»).

However, this general plea seems to involve a kind of category mistake[4]: if we look more closely, we can see that, in its ambition to universality, such a claim ends up disregarding the logical and

[2] Recently, with quite emphatic terms: Georg Freund / Frauke Rostalski, «Normkonkretisierung und Normbefolgung. Zu den Entstehungsbedingungen context- und adressatenspezifischer Ver- und Gebote sowie von konkreten Sanktionsanordnungen», *Goltdammer's Archiv für Strafrecht* 165 (2018), 268 f. In the same line, before, although with some differences in details: Wolfgang Frisch, *Tatbestandsmäßiges Verhalten und Zurechnung des Erfolges*, Heidelberg: Müller, 1988, 33 f., 71 f.; Lothar Kuhlen, «Rezension zu Urs Kindhäuser, Gefährdung als Straftat», *Goltdammer's Archiv für Strafrecht* 137 (1990) 479 f.; Georg Freund, *Erfolgsdelikt und Unterlassen. Zu den Legitimationsbedingungen von Schuldspruch und Strafe*, Köln: Heymanns, 1992, 56, 122 f.; Joachim Renzikowski, *Restriktiver Täterbegriff und fahrlässige Beteiligung*, Tübingen: Mohr Siebeck, 1997, 256 f.; Volker Haas, *Kausalität und Rechtsverletzung. Ein Beitrag zu den Grundlagen strafrechtlicher Erfolgshaftung am Beispiel des Abbruchs rettender Kausalverläufe*, Berlin: Duncker & Humblot, 2002, 107 f.; Stephan Ast, *Normentheorie und Strafrechtsdogmatik. Eine Systematisierung von Normarten und deren Nutzen für Fragen der Erfolgszurechnung, insbesondere die Abgrenzung des Begehungs- vom Unterlassungsdelikt*, Berlin: Duncker & Humblot, 2010, 62 f. and 187; Frederico da Costa Pinto, *A categoria da punibilidade na teoria do crime*, Vol. ii, Coimbra: Almedina, 2013, 1041 f.; Javier Wilenmann, *Freiheitsdistribution und Verantwortungsbegriff. Die Dogmatik des Defensivnotstands im Strafrecht*, Tübingen: Mohr Siebeck, 2014, 265 f.; Rainer Zaczyk, «Kritische Bemerkungen zum Begriff der Verhaltensnorm», *Goltdammer's Archiv für Strafrecht* 161 (2014), 86 f.; Francisco Aguilar, *Dos comportamentos ditos neutros na cumplicidade*, Lisboa: aafdl, 2014, 739 f., 852 f.

[3] Thus H. L. A. Hart, «The Ascription of Responsibilities and Rights», *Proceedings of the Aristotelian Society* 49 (1948-49) 171 f.

[4] For the classical objections raised on this context see Peter Geach, «Ascriptivism», *The Philosophical Review* 69 (1960) 221 f.; George Pitcher, «Hart on action and responsibility», *The Philosophical Review* 69 (1960) 226 f.; Joel Feinberg, «Action and responsibility», Max Black, ed., *Philosophy in America*, Ithaca: Cornell University Press, 1965, 134 f. With discussion overviews: Urs Kindhäuser, *Intentionale Handlung. Sprachphilosophische Untersuchungen zum Verständnis von Handlung im Strafrecht*, Berlin: Duncker & Humblot, 1980, 164 f.; Heinz Koriath, *Grundlagen strafrechtlicher Zurechnung*, Berlin: Duncker & Humblot, 1994, 379 f.; Luís Duarte D'Almeida, «Description, Ascription, and Action in the Criminal Law», *Ratio Juris* 20 (2007) 170 f.

practical contrast between rules of behavior and rules of imputation. Taking this contrast seriously means to recognize that no behavior rule can bring on itself the criteria from which the judge will measure the connection degree between the norm addressee and its semantic content.

2. The Criminal Law folklore and the grammatical holism

Thus it is not by chance that the first and main sponsor for the Ascriptivism has explicitly abandoned his previous account[5]. This change is often associated to an increasingly positivist approach to juridical problems (the so-called *legal positivism*)[6], whose farthest theoretical foundations are linked to empiricism. Here I am not in a position to discuss such a link in details. My interest is humbler: I just intend to stress the *grammatical holism*[7] implicit in the understanding of Criminal Law rules (also) as linguistic rules.

In fact, the distinction between *descriptive* and *prescriptive* statements already belongs to the "Criminal Law folklore": however, the same can not be said about the contrast between prescriptive and *ascriptive* utterances[8]. In general, such an opposition is simply neglected. And even where the difference between prescription and ascription receives some theoretical recognition, often it is not consistently and convincingly developed in its more stringent and newsworthy consequences.

Once the rules for the law enforcement (application, realization)

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[5] H. L. A. Hart, *Punishment and responsibility. Essays in the Philosophy of Law*, Oxford: Oxford University Press, 2009 (reprinted), with this quotation in the preface: "I have not reprinted here, in spite of some requests, my earliest venture into this field: 'The Ascription of Responsability and Rights', published in the *Proceedings of the Aristotelian Society* (1948-9). My reason for excluding it is simply that its main contentions no longer seem to me defensible, and that the main criticisms of it made in recent years are justified".

[6] *Pars pro toto* see Paulo de Sousa Mendes, *Causalidade complexa e prova penal,* Coimbra: Almedina, 2018, 23 (note 9), although by choosing to rescue the adversarial, rhetorical and procedural dimension of the old tradition of the classic *imputationes* doctrine (59 f., 91 f.).

[7] For its outcomes in the specific field of the interpretation of incriminating precepts: José de Faria Costa / Bruno de Oliveira Moura, «L'interpretazione nel diritto penale: un multi verso», in Adelmo Manna, org., *Il problema dell'interpretazione nella giustizia penale*, Pisa: Pisa University Press, 2016, 221-222.

[8] Already pointing out this deficit: Joachim Hruschka, *Strafrecht nach logisch-analytischer Methode. Systematisch entwickelte Fälle mit Lösungen zum Allgemeinen Teil*, 2. Aufl., Berlin: Walter de Gruyter, 1988, 424-425.

are (also) rules of language[9], the concepts of prescription (norm) and ascription (attribution) constitute the "depth grammar" of Criminal Law[10]. Instead of "surface grammar", which is restricted to *syntax*, the "depth grammar" refers to the modes — identified by reference to language games — of *use* a particular linguistic expression or a sentence[11], and therefore invokes a dimension which can *not* be accessed by hearing[12].

Such a capture has its locus classicus in Wittgenstein's *Philosophical Investigations*[13] (§ 664):

> In the use of words one might distinguish 'surface grammar' from 'depth grammar'. What immediately impresses itself upon us about the use of a word is the way it is used in the construction of the sentence, the part of its use — one might say — that can be taken in by the ear. And now compare the depth grammar, say of the word 'to mean', with what its surface grammar would lead us to suspect. No wonder we find it difficult to know our way about.

From this account, considering the logical chance of asymmetry opened by this approach (below 6), to know if such an opposition should lead to a strictly objective concept (without any kind of ascriptive elements) of criminal wrongdoing — provisionally detached

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[9] Fritjof Haft, «Die „Regeln" der Rechtsanwendung», in Lothar Philipps / Heinrich Scholler, Hrsg., *Jenseits des Funktionalismus*, Heidelberg: Decker & Müller, 1989, 30.

[10] Juan Pablo Mañalich, *Nötigung und Verantwortung. Rechtstheoretische Untersuchungen zum präskriptiven und askriptiven Nötigungsbegriff im Strafrecht*, Baden-Baden: Nomos, 2009, 75 and 179; Bruno de Oliveira Moura, *Ilicitude penal e justificação. Reflexões a partir do ontologismo de Faria Costa*, Coimbra: Coimbra Editora, 2015, 126, 127 and 421.

[11] With emphasis on the fluctuations between the functional differents employments of linguistic expressions and sentences, although referring only to the *descriptive* and *normative* uses: Hans-Johann Glock, «Necessity and normativity», Hans Sluga / David G. Stern, ed., *The Cambridge Companion to Wittgenstein*, Cambridge: Cambridge University Press, 1996, 208 f. Also with respect to that pragmatic turn: Luís do Vale, «O realismo normativista de Enrico Pattaro (subsídios para uma análise), Jorge de Figueiredo Dias / Joaquim Gomes Canotilho / José de Faria Costa, org., *Estudos em homenagem ao Prof. Doutor António Castanheira Neves*, Vol. I, Coimbra: Coimbra Editora, 2008, 1243 f.

[12] Francesco Bellucci, «Wittgenstein's Grammar of Emotions», *Rivista Italiana di Filosofia del Linguaggio* 7 (2013) 5: "Surface grammar concerns the syntactic construction of a sentence and the syntactic role of a componente word therein. Its is, to use Wittgenstein's phrase, what ‹can be taken in by the ear›. Depth grammar, on the contrary, concerns the *use* of a sentence, that is, is the description and the clarification of the circumstances and the consequences of its use".

[13] Ludwig Wittgenstein, *Philosophical Investigations*, transl. G. E. M. Anscombe, 3rd ed., Oxford: Basil Blackwell, 1986.

from culpability[14] — is a question that still remains open. For this purpose it is convenient to distinguish between *condemnatory* and *non-condemnatory* verbs (infra 7).

3. Behavior rules and imputation rules

Since the end of the nineteenth century, the Criminal Law Theory constantly distinguishes between *norm* and *law*: the offender performs the conduct described by the legislator in the incriminating prescription and therefore violates the norm underlying the legal description. This idea finds expression in a famous conclusion: the offender actually does not infringe the incriminating law, but behaves accordingly to it[15].

This account usually appears in association with the analytical tendency to decompose the incriminating law into two pieces, each of them conceived from its different recipient. The *primary precepts* contains a *behavior (conduct) rule*: an order given to the citizens for the purpose of coordinating social interaction. Diversely, the *secondary precept* contains a *sanction (decision) rule*: an order given to the officials in charge of the criminal prosecution, namely the judge, concerning to what they must do to ensure the legal system efficiency. Despite terminological disagreements, the essence of such a matrix differentiation remains undisputed not only in the specific field of Criminal Law Theory, but also in the broader area of Legal Theory (General Jurisprudence; Science of Law)[16].

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[14] My reasoning assumes the definition of crime as an *(i)* unlawful *and (ii)* culpable event. On the difference between wrongdoing (the wrongfulness of the *act*) and culpability (the blameworthiness of the *actor*) as both elements os criminal liability: Heidi M. Hurd, «Justification and Excuse, Wrongdoing and Culpability», *Notre Dame Law Review* 74 (1999) 1551 f.; Jeroen Blomsma / David Roef, «Justifications and excuses», aa.vv., ed., *Comparative Concepts of Criminal Law*, 2nd ed., Cambridge: Intersentia, 2016, 157 f., 200 f. This analytical has become a victim of growing criticism. For some report: Bruno de Oliveira Moura, «Sobre o sentido da delimitação entre ilícito e culpa no Direito Penal», *Revista Brasileira de Ciências Criminais* 87 (2010) 7 f.

[15] Karl Binding, *Die Normen und ihre Übertretung*, Band i, 4. Aufl., 1922, 3 f. Also going on this line: Ioannis Giannidis, *Theorie der Rechtsnorm auf der Grundlage der Strafrechtsdogmatik*, Ebelsbach: Gremer, 1979, 18 f.; Karl Heinz Gössel, «Die normwidrige strafbare Unterlassung als ontischer Sachverhalt», Martin Heger / Brigitte Kelker / Edward Schramm, Hrsg., *Festschrift für Kristian Kühl*, München: Beck, 2014, 225 f.

[16] With historical references: Meir Dan-Cohen, «Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law», *Harvard Law Review* 97 (1983) 625

This aproach generally appears together with another distinction, which brings some influences from the *Jurisprudentia Universalis*, currently rediscovered by a particular segment of analytical philosophy. Indeed, an important sector of the general theory of norms has been doing a valuable effort to rehabilitate the traditional difference between *rules of behavior* and *rules of ascription*, which, in turn, is the deepest root of the distinction between *wrongdoing* (related to the *fact* itself) and *attribution* (related to its *offender*)[17].

Present in a more or less explicit way in authors like Samuel Pufendorf (1632-1694) and Joachim Georg Daries (1714-1791), such an scheme points out that, by definition, the rules which draws the universe of illicit conducts are different from the rules which draws the conditions by which a certain behavior can be ascribed to somebody else as something that expresses their freedom exercise[18].

Behavior rules (or simply «norms») work both in prospective and retrospective dimensions: (*i*) as standards which guide the citizens in their interaction in society, by indicating what they can (or can not) do in the future; (*ii*) as measurement parameters according to which the judge evaluates the social damage content associated with the perpetration, applying the norm to a specific act performed in a specific situation occurred in the past (*applicatio legis ad factum*). On the other hand, as a type of hypothetical imperative, ascription rules work only in retrospective and are addressed only to the judges[19].

It is interesting to underline that such a scheme evokes a *perspective matter*. The distinction is formulated in relation to the concerned person: the rules which are imputation rules from the point of view of *the person to whom the behavior was ascribed* (offender), are behavior

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f.; Joachim Renzikowski, «Normentheorie und Strafrechtsdogmatik», Robert Alexy, Hrsg., *Juristische Grundlagenforschung, ARSP* 104, Stuttgart: Franz Steiner Verlag, 2005, 115 f. For a more systematic concern: Bernhard Haffke, «Die Bedeutung der Differenz von Verhaltens- und Sanktionsnorm für die strafrechtliche Zurechnung», Bernd Schünemann / Jorge de Figueiredo Dias, Hrsg., *Bausteine des europäischen Strafrechts. Coimbra-Symposium für Claus Roxin*, Köln: Heymanns, 1995, 89 f.

[17] George Fletcher, *Basic Concepts of Criminal Law*, New York: Oxford University Press, 1998, 77 f.

[18] On the evolution of this frame: Joachim Hruschka, «Zurechnung seit Pufendorf. Insbesondere die Unterscheidungen des 18. Jahrhunderts», Matthias Kaufmann / Joachim Renzikowski, Hrsg., *Zurechnung als Operationalisierung von Verantwortung*, Frankfurt am Main: Peter Lang, 2004, 17 f.

[19] Jan C. Joerden, *Strukturen des strafrechtlichen Verantwortlichkeitsbegriffs. Relationen und ihre Verkettungen*, Berlin: Duncker & Humblot, 1988, 13 f.; Tobias Rudolph, *Das Korrespondenzprinzip im Strafrecht. Der Vorrang von ex-ante-Betrachtungen gegenüber ex-post-Betrachtungen bei der strafrechtlichen Zurechnung*, Berlin: Duncker & Humblot, 2006, 26-32.

rules from the point of view of *the person who ascribes* (judge), because they tell them if a concrete behavior should be assigned as an action or as individual culpability[20].

In this framework, imputation rules operate on two levels: (*i*) the *imputatio facti* checks the conditions to ascribe a behavior as *actio libera* (capacity to act otherwise); (*ii*) the *imputatio iuris* approaches the conditions to assigning a behavior already qualified as unlawful act to offender's demerit (capacity to priority motivation).

At first level the judge evaluates the agent's bodily and intellectual abilities regarding to some alternative behavior: here arises, for instance, the problem of physical (absolute) coercion and the mens rea (dolus) announcement. At second level the judge examines the agent's volitional abilities regarding to the possibility to prefer a particular intention at the expense of another competing (rival in those particular circumstances) intention. Here comes up, for example, the assessment of the knowledge about the wrongfulness of the act (the mistake of law) and the account of psychological (relative) coercion[21].

Because they are exclusively addressed to the judge, the imputation rules tend to occupy a prominent place in *Juristenrecht* topics, mainly in the discussion about *Richterrecht*[22]. Indeed, ascription rules easily become the flash point for those who, starting from the *ante casum* (at the moment of creation of the legal precept) norm, are engaged in defining the criteria which could guide the judicial task of searching for or building the so-called «case rule» not as a *post casum* (at the moment of the judicial decision about the fact) norm but rather as the norm *in tempore casus*, that is, as a criteria which would have been available for the judge at the moment of the behavior whose ascription is approached[23].

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[20] Joachim Hruschka, «Verhaltensregeln und Zurechnungsregeln», *Rechtstheorie* 22 (1991) 451 (note 7). In the same horizon, distinguishing the «ascribed subject» and the «ascribing subject»: Gunther Biewald, *Regelgemäßes Verhalten und Verantwortlichkeit. Eine Untersuchung der Retterfälle und verwandter Konstellationen*, Berlin: Duncker & Humblot, 2003, 32-34.

[21] See the references in the two previous notes.

[22] Both with their distinctive practical reasoning (*phonesis/prudentia*). On this aspect, inside the jurisprudentialism of the Coimbra legal philosophy scholars, see the conclusive remarks of Aroso Linhares, *Entre a reescrita pós-moderna da modernidade e o tratamento narrativo da diferença ou a prova como um exercício de ‹passagem› nos limites da juridicidade (imagens e reflexos pré-metodológicos deste percurso)*, Coimbra: Coimbra Editora, 2001, 858 f. Detailed about the analogical feature of the realization of law: Fernando Pinto Bronze, *Analogias*, Coimbra: Coimbra Editora, 2012, 20 f., 164 f.

[23] Apparently in this way: Francisco Aguilar, «A norma jurídica *in tempore casus*: o caso como fundamento dos (e limite aos) poderes legislativo e jurisdicional»,

4. The sequence issue

So far we have a provisional image of the different structure and content of the rules which take part in the elaboration of criminal responsibility. Now it is necessary to define how different normative species might be articulated in such a way as to provide not only an understandable final result (a correct decision of conviction or discharge), but also a consistent grounding in its presuppositions.

Here opinions fall into two streams. On the one side are those who propose a subjectivist norm conception, sustaining that *imputatio facti* always precedes *applicatio legis*, which is succeeded by *imputatio iuris*[24]. On the other side are those who support an objectivist norm conception, defending that *applicatio legis* is always the first moment of analysis, which is succeeded by *imputatio facti* and *imputatio iuris*[25]. From my standpoint, this question should be decided, for pragmatic reasons, in favor of that second option.

To achieve a minimal consistency in its operation, a Criminal Law really concerned with the protection of the most important individual and collective goods in face of the most serious forms of attack must give priority — as a starting line for its intervention, including the judicial action — for a type of reasoning which begins by analyzing the criminal event from the perspective of its outcome, with regard to its social devaluation.

However, the priority announcement does not prevent the transposition of something which has been recognized in the hermeneutic field, engraved in a famous image[26]: a kind of *go-and-come-back-in-the-point-of-view* among the relevant elements. But in this case is no longer a go-and-come-back between normative and factual circumstances reciprocally viewed in the light of a *tertium comparationis*, but rather a go-and-come-back between different judgments made on the basis of different types of rules[27].

Anyway, such an articulation scheme does not predetermine the

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O Direito 148 (2016) 825 f., proposing (883) a retrospective "reconstitution" or "mimicking" of "the norm in the case" by the "norm of the case".

[24] Vide again the mentions above, in notes 19 and 20.

[25] See the references in notes below, in note 38.

[26] Karl Engisch, *Logische Studien zur Gesetzesanwendung*, 3. Aufl., Heidelberg: Winter, 1963, 15. With some methodological details: Marijan Pavčnik, «Das „Hin- und Herwandern des Blickes". Zur Natur der Gesetzanwendung», *Rechtstheorie* 39 (2008) 557 f.

[27] Bruno de Oliveira Moura, *A não-punibilidade do excesso na legítima defesa*, Coimbra: Coimbra Editora, 2013, 112-119.

answer to the question about if the behavior unlawfulness presupposes — at least in the Criminal Law field — some ascription stage. Because, in principle, it is still possible to allocate that imputation moment only in the offender's culpability, *i. e.*, in their personal blameworthiness. I will return to this topic below.

5. Accordion effect: not only for actions but also for norms

In the field of philosophy of action — especially in the discussion on the criteria for identifying one singular action — the *accordion effect* is an expression used to represent metaphorically the language property that allows a given human action to be submit to different descriptions, some more complex, some simpler, but all equally valid[28].

In fact, within certain assumptions, we can inflate or deflate — freely and without loss of semantic content — the statements applied to describe the same behavior considered as a whole. It is always possible to stretch or contract the formulation to include or exclude therein some causal sequence of changes in a given state of affairs[29].

We might say: «Jones opened the door and thereby caused Smith to be startled, who therefore suffered a heart attack and died»; or we also could say, in a less expensive manner, that «Jones killed Smith». As well as the complex statement «Peter threw a stone and thereby shattered a glass window, whose fragments have reached Paul's body, who was sitting behind the destroyed object, and therefore has suffered some harms in his physical integrity» can be replaced by the simpler enunciation «Peter injured Paul». And vice versa.

In this context, the theoretical controversy is whether and in what extent the transition between those utterances — which at the same time implies the transition from an causality announcement to an authorship or agency announcement[30] — requires a specific causal

[28] Joel Feinberg, «Action and responsibility», Max Black, ed., *Philosophy in America*, London: George Allen & Unwin Ltd., 1965, 146.

[29] Bruno de Oliveira Moura, «Tipos de tipos, estrutura do delito e nexo causal. Considerações sobre o pensamento classificatório no Direito Penal», *Revista Portuguesa de Ciência Criminal* 27 (2017) 484 f.

[30] Donald Davidson, *Essays on Actions and Events*, New York: Oxford University Press, 1980, 53: "A man moves his finger, let us say intentionally, thus flicking the switch, causing a light to come on, the room to be illuminated, and a prowler to be alerted. This statement has the following entailments: the man flicked the switch, turned on the light, illuminated the room, and alerted the prowler. Some of these things he did intentionally, some not; beyond the finger movement, intention is

verb (similar to «kill» or «injury») eventually available in the regional language or if such move could be warranted by a generic causal verb («to cause» something)[31].

Once the law creation (by legislator) and the norm application (by judge) are likewise actions in itself, seems natural to conclude that such juridical activities are also submitted to an accordion effect. So any prohibition object may be put under more or less extended prescriptive statements, as long as it could be interesting (hermeneutically useful) for understanding the rule's specific purpose.

For instance, the homicide prohibition admits several equally valid formulations, like these: (*i*) «do not kill somebody else!»; (*ii*) «do not perform any behavior capable of causing somebody else's death!»; (*iii*) «do not shoot a gun causing somebody else's death!»; (*iv*) «do not load a gun, aim it against a human being and pull the trigger causing their death!». The limits to this normative reformulation are given by textual frame mapped in the incriminating law, *i. e.*, in the borders of natural language outlined in the *ante casum* textual norm by the legislative power[32].

The next question is to know if the ascription conditions — mainly the capacity to act (physical ability to do so and knowledge about the factual circumstances) — might be inserted in the judicial

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irrelevant to the inferences, and even there it is required only in the sense that the movement must be intentional under some description. In brief, once he has done one thing (move a finger), each consequence present us with a deed; an agent causes what his action cause". In this analytical account, that piece of behavior which can no longer be formally decomposed (or whose decomposition, praxiologically, does not make much sense) — in the former example the act of moving a finger — is the so-called «basis-action». About that and on the relativity of intentional description of events: Urs Kindhäuser, «Zum strafrechtlichen Handlungsbegriff», Hans-Ullrich Paeffgen *el al.*, Hrsg., *Festschrift für Ingeborg Puppe*, Berlin: Duncker & Humblot, 2011, 44 f.

[31] For a picture of the whole discussion in this frame: Michael E. Bratman, «What is the Accordion Effect?», *The Journal of Ethics* 10 (2006) 5 f.

[32] Bruno de Oliveira Moura, «O lugar da analogia no Direito Penal», M. P. Queiroz Macêdo / Wagner Marteleto, org., *Temas avançados do Ministério Público*, Salvador: Juspodivm, 2015, 223 f. On the controversies about the existence of a previous literal enclosure made by the words used in the law: Mathias Klatt, *Theorie der Wortlautgrenze. Semantische Normativität in der juristischen Argumentation*, Baden-Baden: Nomos, 2004, 40 f.; Hans Kudlich / Ralph Christensen, «Wortlautgrenze: Spekulativ oder pragmatisch?», *Archiv für Rechts- und Sozialphilosophie* 93 (2007) 128 f. In the specific field of Criminal Law see A. Castanheira Neves, «O princípio da legalidade criminal: o seu problema jurídico e o seu critério dogmático», *Boletim da Faculdade de Direito de Coimbra*. *Número Especial. Estudos em homenagem ao Prof. Doutor Eduardo Correia*, Vol. I (1984) 307 f.

reworking of the norm *in tempore casus*, in a way to provide a kind of statement like this: «if you have the physical ability to do so and the knowledge about the factual circumstances, do not kill someone else!».

6. The private language argument and the potential asymmetry principle

In my opinion, the answer should be negative. By connecting the determination of the behavior rule content to the capabilities of their addressee, a subjectivist norm conception makes impossible, in general and abstract terms, to distinguish between right and wrong behavior. When the rule's meaning becomes to depend on the perspective of those to whom it is addressed, the normative utterance simply can not anymore defines or distinguish any form of behavior.

Both the judgment of agreement (conformity) and the judgment of contradiction (nonconformity) have no more sense when any type of behavior may be (subjectively) considered to be suitable or mismatched to the normative utterance. To talk about rules presupposes that the determination of its propositional content can not depends on the personal aptitudes (especially the perceptions) of their possible recipients. The norm only can be a criterion of legally (in)correct behavior if what it orders could be identified or recognized independently from the perspective of their addressee.

Behind this sentence[33] is the plea against the possibility of a private language[34]. In his *Philosophical Investigations*, Wittgenstein points out (§ 201):

> This was our paradox: no course of action could be determined by a rule, because every course of action can be made out to accord with the rule. The answer was: if everything can be made out to accord with the rule, then it can also be made out to conflict with it. And so there would be neither accord nor conflict here. It can be seen that there is a misunderstanding here from the mere fact that in the course of our argument we give one interpretation after another; as if each one contented us at least for a moment, until we thought of yet another standing behind it. What this shews is that there is a way of grasping a rule which is *not* an *interpretation*, but which is

[33] See Juan Pablo Mañalich, *Nötigung und Verantwortung*, 44 f.; Bruno de Oliveira Moura, *Ilicitude penal e justificação*, 127 f.

[34] On this argument: Walter Grasnick, *Über Schuld, Strafe und Sprache. Systematische Studien zu den Grundlagen der Punktstrafen- und Spielraumtheorie*, Tübingen: Mohr Siebeck, 1987, 90 f.; Manfred Herbert, *Rechtstheorie als Sprachkritik. Zum Einfluß Wittgensteins auf die Rechtstheorie*, Baden-Baden: Nomos, 1995, 79 f., 95 f., 158 f.

> exhibited in what we call 'obeying the rule' and 'going against it' in actual cases. Hence there is an inclination to say: every action according to the rule is an interpretation. But we ought to restrict the term 'interpretation' to the substitution of one expression of the rule for another.

So Wittgenstein concludes (§ 202):

> And hence also 'obeying a rule' is a practice. And to think one is obeying a rule is not to obey a rule. Hence it is not possible to obey a rule 'privately': otherwise thinking one was obeying a rule would be the same thing as obeying it.

Things get even clearer in Wittgenstein's final notebook, published posthumously as *On Certainty*[35]. With regard to his epistemological remark about mental states and its differentiation from another concepts as well as on the ability to offer compelling grounds (reasons, justifications and evidences) for some belief inside the language-game of making knowledge-claims, we can read that (§ 308):

> 'Knowledge' and 'certainty' belong to different *categories*. They are not two 'mental states' like, say, 'surmising' and 'being sure'. (…) What interests us now is not being sure but knowledge. That is, we are interested in the fact that about certain propositions no doubt can exist if making judgments is to be possible at all. Or again: I am inclined to believe that not everything that has the form of an empirical proposition *is* one.

Here appears the general parameter *rejoinder which does make no sense*: a proposition makes sense if and only if its negation (the doubt about the statement) makes sense[36]. In this account, to make sense,

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[35] Ludwig Wittgenstein, *On Certainty*, G. E. M. Anscombe / G. H. von Wright, ed., Oxford: Basil Blackwell, 1969.

[36] Stressing this aspect under the interpretation of that last quotation: Newton Garver, «Philosophy as grammar», Hans Sluga / David G. Stern, ed., *The Cambridge Companion to Wittgenstein*, Cambridge: Cambridge University Press, 1996, 140-150: "Being sure (elsewhere called 'subjective certainty') is a mental state in the sense that I can say when I am sure, and I can be sure quite apart from any objective certainty or from anyone else being sure. Thought it is a mental state rather than a sensation, being sure has all the apparent privacy of sensation. Certainty, on the other hand, seems presented in this passage as a transcendental requirement for the practice of making judgments. There are no *particular* propositions about which one must be certain, but some propositions must be certain. Since making judgments is a public practice (even though individual judgments are private), the certainty presupposed by it must be in a different category from 'mental states'. 'Certainty' and 'knowledge' are both social rather than private, but what is certain 'lies beyond being justified or unjustified' (OC 359), whereas a knowledge-claim is subject to doubt and confirmation. All three of these categories are identified by reference to language-games, and are distinguished by different discourse conditions (circumstances in which expressions of that category fit into the stream of life) and different discourse possibilities (appropriate discourse continuations). The catego-

a rule is only a rule for someone as long this person is not allowed to determine for themself what is ruled[37]. The norm propositional content must be available in our public language. Norms do not say — even because they are not able to do so — to what extent its addressee is tied to its command. They do not offer any information about the conditions which enable us to say that somebody else is responsible for failing to recognize the behavior standard in an effective way for action.

This question can only be decided in the light of another rule, which enunciates the liability criteria for the noncompliance (nonfulfillment) of the behavior rule, ascribing the nonconformity as a duty violation. The offender's capabilities are important to make de transition between norm and duty. That is why they must be considered for the judgment about if a behavior follows or not follows the norm. But those capacities are irrelevant to the judgment about the behavior suitability (conformity) to the normative statement.

Since the conditions of personal attachment to the prescriptive utterance can not be determined by behavior rule itself, the (intentional) avoidance capacity does not represent a moment of the behavior antinormativeness, but only a requirement for the subsequent ascription of the antinormative behavior as a duty violation. Not all behavior in conformity (adjustment) with the norm content can be assigned as a behavior which follows the norm. Conversely, not all misconduct (mismatch) with the norm implies the noncompliance (nonfulfillment or unfollow) of the norm.

Let's get a pretty simple picture of everyday life. Just like the behavior of who reads the newspaper while having breakfast can not be understood as a «following» (observance or obedience) of homicide prohibition, the behavior of who shoots at a big box without knowing or even without be able to know that there was a person in there can not be understood as a «unfollowing» (nonobservance or nonobedience) regarding this interdiction. Therefore, the denial of rule self-reference has a crucial heuristic-explanatory meaning: it opens space to recognize that contrariness to the norm and contrariness to the duty

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ries are therefore grammatical categories, though the grammar in question has to do with discourse and with *uses* of language rather than with word-forms or phrase structures. 'Right' and 'wrong' are descriptive in this context. They signify being in accord or not in accord with constitutive rather than regulative rules".

[37] Again with Ludwig Wittgenstein, *Philosophical Investigations*, p. 222: "I can know what someone else is thinking, not what I am thinking. It is correct to say 'I know what you are thinking', and wrong to say 'I know what I am thinking'. (A whole cloud of philosophy condensed into a drop of grammar.)".

are potentially divergent or asymmetric attributes[38].

Actually, this possibility of divergence is only a special form to express the general possibility of asymmetry between those two species of grammar: the «surface» and «depth» ones[39]. In this framework, a behavior can be antinormative without a breach of duty: for example, in the typical case of offensive performance without dolus (intention *lato sensu*). And in another hand, inversely, a behavior may violate a duty without being antinormative: for instance, in the typical case of the criminal attempt (inchoate offence).

To confirm this relation, we can mention the *subjective elements of the justification causes* (self-defence, necessity, etc.) and the so-called *inversion principle*: the perpetration of the wrong act under a mistake of factual circumstances (complete *actus reus* without intention) is the inverse hypothesis to the beginning of execution which is not consummated due to reasons beyond the agent's control (intention without complete *actus reus*)[40].

7. Final remarks

As far as I can see, in the above outlined framework the conclusion is always the same: the personal capabilities of rule's addressee do

[38] Urs Kindhäuser, *Gefährdung als Straftat. Rechtstheoretische Untersuchungen zur Dogmatik der abstrakten und konkreten Gefährdungsdelikte*, Frankfurt am Main: Vittorio Klostermann, 1989, 18 f., 58 f.; Friedrich Toepel, *Kausalität und Pflichtwidrigkeitszusammenhang beim fahrlässigen Erfolgsdelikt*, Berlin: Duncker & Humblot, 1992, 16 f., 31 f.; Joachim Vogel, *Norm und Pflicht bei den unechten Unterlassungsdelikten*, Berlin: Duncker & Humblot, 1993, 41 f., 72 f.

[39] Pointing out this particular feature: Francesco Bellucci, "Wittgenstein's Grammar of Emotions", 5: "Two sentences may well 'sound alike' (pi: § 134) and may nonetheless differ markedly in the circumstances of their use. For instance, the surface grammar of 'Bachelors are unmarried men' is akin to that of 'Bachelors are unhappy men'; yet, they differ in depth grammar: the latter says something factual about bachelors, while the former teaches us how to use 'bachelor'. What appears alike in surface grammar might be not in depth grammar, and expressions collected with regard to their superficial similarity might result dissimilar in the way they are used. Surface grammar is deceptive, for it distorts our view und misleads us in conceptual analysis. What is needed is a method that might enable us to have an overview over the different uses an expression has in our language, over and above its surface syntax, and to tabulate these uses in *surveyable representation*".

[40] For this inversion, also considering that potential asymmetry: José de Faria Costa, *Direito Penal*, Lisboa: Imprensa Nacional, 2017, 517, 518 and 554. With some skepticism: Tonio Walter, *Der Kern des Strafrechts. Die allgemeine Lehre vom Verbrechen und die Lehre vom Irrtum*, Tübingen: Mohr Siebeck, 2006, 368 f.

not influence the determination of its proposional content. Whereas the contrariness to the norm constitutes the *object (substratum),* the offender's intentional aptitudes provides the *reason (criterion)* for imputation. That is why the so-called «personal wrongdoing theory» *(personale Unrechtslehre)* fails.

The criticism raised here could be faced with the plea arguing that the capabilities of the conduct rules addressees are also objectively defined by norms, according to standards of normal power or abilities of the average man, occasionally enriched by the specific social role which should be played by the agent (*v. g.* businessman). This is the proposal of the so-called «objective ascription» *(objektive Zurechnung)*[41]. *Brevitatis causa*, I just want to point out that this approach simply reinforces the mixture between the object and the criterion of imputation, this time by mixing the subject of ascription itself[42].

Only to summarize my account: we have seen that, at least in its generality or universality claim, the Ascriptivism raises serious doubts. But things change when we look to some excepcional cases where the action described by the incriminating law simply can not be understood without the specific grammar of ascription. For this effect, we could distinguish between condemnatory and non-condemnatory verbs[43].

So at least in crimes whose legal configuration uses a *non-condemnatory verb*, there is no compelling reason to restrict the *applicatio legis* to conducts ascribed at first level, *i. e.*, to a behavior performed in a situation in which another one was possible. Let's think about the homicide prohibition: who, under physical constraint or without knowledge about factual circumstances, shoots another person and thereby takes their life, does not «kill» less than who does

[41] With a great influence in the development of this theory: Claus Roxin, "Gedanken zur Problematik der Zurechnung im Strafrecht", in Eberhard Barth, Hrsg., *Festschrift für Richard Honig*, Göttingen: Schwartz, 1970, 133 f. Recently, proposing a reinterpretation based on the normative setting (abstract standardization) of some competences or tasks which belongs to the concept of person: Michael Pawlik, *Das Unrecht des Bürgers. Grundlinien der Allgemeinen Verbrechenslehre*, Tübingen: Mohr Siebeck, 2012, 160 f., 295 f. Investing the same effort, before: Heiko Hartmut Lesch, *Der Verbrechensbegriff. Grundlinien einer funktionalen Revision*, Köln: Heymanns, 1999, 12 f., 210 f., 255 f.

[42] For a critical review with regard to the grounds of that doctrine: Volker Haas, "Die strafrechtliche Lehre von der objektiven Zurechnung. Eine Grundsatzkritik", Matthias Kaufmann / Joachim Renzikowski, Hrsg., *Zurechnung als Operationalisierung von Verantwortung*, Frankfurt am Main: Peter Lang, 2004, 202 f.

[43] So George Pitcher, "Hart on action and responsibility", 230 f.

it intentionally. In both cases the opposition against the norm will be the same.

However, this does not exclude that a different conclusion may arises in other criminality fields, especially where the prohibition object is described by a *condemnatory verb*. It is enough to remember that some legislations autonomises a description for the murder crime (usually under the form of malicious or premeditated homicide), where makes perfect sense to say that the antinormativeness judgment presupposes that the behavior — at least in some degree — must be ascribed at first level (*imputatio iuris*): there is no sense in talking about «murder» if the suspect has acted under physical duress or if he has acted without knowledge about the factual circumstances.

The same will happen in other types of crimes, as perjury, false statements, illegal appropriation, trust abuse, patrimonial reception and stellionate. But in all these cases imputation rules exceptionally plays an improper function: it works to define the ascription's *object*, the very specific behavior form which, by the nature of things (ontologically), can go against the norm. Anyway, incriminating precepts involving condemnatory verbs represent only a tiny sector of the whole legal system[44].

[44] On the issues rased here, although without invoking that verbal distinction, with some examples: Stephan Stübinger, "„Subjektiv-objektive" Tatbestandsmerkmale", Hans-Ullrich Paeffgen *et al.*, Hrsg., *Festschrift für Ingeborg Puppe*, Berlin: Duncker & Humblot, 2011, 270 f.

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JURISTENRECHT AND CRIMINAL LAW: EUROPEAN IDENTITY AS A LIMIT TO THE MISTAKE ON THE PROHIBITION

Inês Fernandes Godinho

Introduction

Female Genital Mutilation (FGM) is a serious problem of multiculturalism with regard to criminal law having as its fundamental principle the principle of legality. Considering the mobility of people, culture has become a circumstance which can avoid the reproachability of an offender when there is a mistake of law.

Notwithstanding, FGM is a practice that has been object of a continuous movement of censorship by the European community as a violation of human rights.

Thus, we aim to assert to which extent the European identity revealed by the human rights principle and values' system can be as-

sumed by jurists' law as a limit to the irreproachability of an offender carrying out FGM.

1. The principle of legality in criminal law

The principle of legality (*NPL*) regarding criminal law is stated in article 29 of the Portuguese Constitution (*Constituição da República Portuguesa*, CRP), where all the main elements of the principle are considered.

In domestic substantive criminal law, the principle of legality is foreseen in article 1 of the Criminal Code (*Código Penal*, CP). This article encompasses both the *nullum crimen sine lege* and the *nullum poena sine lege* maxims.

This broad provision addresses several aspects of the legality principle. First, there is no criminal offence without a law. Second, there can be no penalty without a law. In short, these two aspects reflect *Feuerbach's* Latin maxim *nullum crimen, nulla poena sine lege*[1]. Third, this principle has a specific rule regarding interpretation (prohibition of analogy).

The formal element of the principle of legality requiring criminal provisions to be based on a law is stated in art. 1 (1) CP, together with the previously mentioned art. 29 (1) CRP. As for the requirement of reasonable clarity, this requirement is not explicitly foreseen in either the Criminal Code or in the Constitution; rather, it is inferred from the general principle of legality. In regard to the limits on interpretation (specifically the prohibition of analogy), this aspect of the principle of legality is expressly regulated in art. 1 (3) CP. Finally, the *nullum crimen sine lege praevia* element is defined, together with the *lex mitior* principle, both in the Constitution (art. 29 (4)) and in the Criminal Code (art. 2 (1, 2 and 4)).

Considering the teleology of the principle, it is important to emphasise that it applies to all situations involving the punishment of the offender, including the requirements (objective and subjective) of criminal liability, such as the definitional elements of a particular crime and its penalties. In this sense, the principle has different significance as to situations relating to the liberty or freedom of the offender, such as justification or excuse defences[2]. This has consequences

[1] José de Faria COSTA, *Direito Penal,* Lisboa: INCM, 2017, 243.

[2] Jorge de Figueiredo DIAS, *Direito Penal. Parte Geral, Tomo I,* Coimbra: Coimbra Editora, 2007, 183; Teresa Pizarro BELEZA, *Direito Penal,* vol. I, 2.ª ed., Lisboa: AAFDL, 1998, 48.

for all elements of the principle of legality[3].

Therefore, all dogmatic phrases have to respect the principle of legality as a fundamental principle in criminal law[4].

2. Jurists' law and criminal law in the context of the mistake of law

The term Jurists' law, taking its name from the secular Roman jurists of the classical era[5], reflects the importance of *interpretatio* as peg for the frame of a legal doctrine[6].

Legal science or dogmatic can have three dimensions, namely describing law (the descriptive-empirical dimension), systematizing law (the logical-analytical dimension) and criticising law (the normative-practical dimension)[7].

The normative-practical dimension is particularly relevant in criminal law, since aiming at proposing solutions for problematical cases[8], it reaches the core of a normative area which has as its main purpose the resolution of the most serious conflicts in society[9].

A dogmatic phrase, to be acceptable, must be verified. The main criterion of the systematic verification is if said phrase is not in contradiction with the accepted dogmatic phrases and with the legal norms in force[10]. Moreover, it should be possible to recourse to said phrase in a (judicial) decision.

As a rule, the ignorance of the law does not exclude punishment *(ignorantia legis non excusat).* But the relevance given to culpability in modern criminal law lead to a development in denying the perception that error of law and ignorance of law where the same thing,

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[3] Inês Godinho, "Principle of legality — Portugal", in Sieber / Jarvers / Silverman, ed., *National Criminal Law in a Comparative Legal Context,* Vol. 2.2, 53-67.

[4] Except when there is an express exception in the normative system.

[5] Roughly from 150 b.c. to 250 a.d. See A. Arthur Schiller, "Jurists' Law", *Columbia Law Review* 58, 1226-1238, p. 1226.

[6] A. Arthur Schiller, "Jurists' Law", 1227; A. Castanheira Neves, *Metodologia Jurídica. Problemas Fundamentais,* Coimbra, 1993, 142 f.; 184 f.

[7] Robert Alexy, *Theorie der juristischen Argumentation,* Frankfurt: Suhrkamp, 1996, 308.

[8] Robert Alexy, *Theorie der juristischen Argumentation,* 308.

[9] On purpose and function in criminal law, see Ast, Stephan, "Überlegungen zum Verhältnis von Zweck und Funktion im Strafrecht", *zis-Online* 4 (2018) 115-118, 115 f.

[10] Robert Alexy, *Theorie der juristischen Argumentation,* 322.

so that the Criminal Code of 1982, differently to the one of 1886[11], takes into account the crescent mobility of persons together with the expansion of criminal law, and establishes a rule regarding the mistake of law.

In the context of the mistake of law, more specifically of the mistake on the prohibition, there are two possible dogmatic phrases, P_1 and P_2.

P_1 is the recognized dogmatic phrase regarding the legal norm N_1. For a dogmatic phrase to be included as an acceptable dogmatic phrase in the context of the legal norms in force, it is paramount that neither this dogmatic phrase nor it together with the accepted phrases and formulations of the legal norms in force contradict this dogmatic phrase[12].

P_2 is the new dogmatic phrase. So, for P_2 to be recognized and accepted as a dogmatic phrase, it must be compatible with the accepted dogmatic phrases and with the legal norms in force, in our case, N_1. N_1 is art. 17 (1) of the Portuguese Criminal Code (CP). P_1 is the dogmatic phrase under which the mistake on the prohibition is to be asserted as censurable or not under a personal-objective criterion of censurability[13].

P_2 is the dogmatic phrase under which the criterion is the one of the vencibility (avoidability) of the mistake, but adding a limit — a "definitional stop" — to the criterion on the censurability of the mistake of law[14]. Under P_2, when the non-censurability signifies the erosion of the deepest values of the legal community where the mistake occurred, there must be set a limit and said mistake must be deemed censurable[15]. P_2 thus sets a limit to the manifestation of tolerance N_1 represents.

FGM is a very relevant case on the impact — regarding the punishability of the offender — of the different dogmatic solutions represented by P_1 and P_2, since, as a problem of multiculturalism, it is inscribed in the core thematic that the mistake of law represents.

Some situations of FGM, especially those conducted by a person

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[11] Jorge de Figueiredo Dias, *Direito Penal,* 532.

[12] Robert Alexy, *Theorie der juristischen Argumentation,* 322.

[13] Jorge de Figueiredo Dias, *Direito Penal,* 640, requiring a general attitude of fidelity to the demands of the law. This general formulation of the criterion encompasses other similar ones expressing the same idea. See, however, José de Faria Costa, *Direito Penal,* 446-447; Maria Fernanda Palma, *O Princípio da Desculpa em Direito Penal,* Coimbra: Almedina, 2005, 210 f.

[14] Limit proposed by José de Faria Costa, *Direito Penal,* 450.

[15] José de Faria Costa, *Direito Penal,* 450-451.

who has just arrived from his or her country of origin, where FGM is a strong tradition, can be cases of mistake of law[16]. It is thus important to attain if this mistake should be deemed censurable or not censurable. Under the above mentioned criterion, represented by P_1, this mistake should be deemed as non-censurable[17], which would mean that the offender would not be punished for FGM. The problem under analysis, with reference to FGM, is weather P_1 and N_1 could lead to a different decision regarding the punishability of the offender in a specific case *X* than P_2 and N_1.

Before proceeding with said analysis it is important to note that the P_1 phrase enables a proposition considering a case-based censurability, based upon the indifference (coldness of character) of the offender towards the legal system of prohibitions (P_{1a}). Amongst the relevant cases for P_{1a} is FGM [18]. Reporting to the dogmatic phrase P_1 with the coldness of character element (P_{1a}), an offender having committed FGM would be punished. However said use of the phrase P_1 — as P_{1a} — is not compatible with the principle of legality (*NPL*) nor with the criminal law legal system (*NS*), because it presumes coldness of character of the offender who carries out FGM. Secondly, P_{1a} does not respect *NPL* since it enlarges the cases of punishability of the offender beyond the scope of art. 17 (1) CP (N_1). Furthermore, P_{1a} does not have in consideration that *NS* does not allow for presumptions of censurability (under the principle of culpability) and *NS* is based upon a system of a criminal law of the act and not of the offender[19]. Therefore, not to excuse the offender for FGM based on P_{1a} is not possible, since it is in contradiction with legal norms in force.

Bearing in mind that dogmatic can re-elaborate the jurisdictional realization of law[20], P_2 , by adding a limit, is both compatible with N_1 and with *NS*, though re-elaborating N_1 to include a limit therein.

P_2 does not presume a certain personality of the offender and works with the system of values of *NS*. In fact, under art. 29 (2) CRP *[t]he provisions of the previous paragraph do not preclude the punishment up to the limits laid down by domestic Portuguese law of an action or omission which was deemed criminal under the general principles of international law that were commonly recognized at the moment of its*

[16] Augusto Silva Dias, "Faz sentido punir o ritual do fanado?", *RPCC* 16 (2006) 187-238, p. 219.

[17] Augusto Silva Dias, "Faz sentido punir o ritual do fanado?", 227.

[18] Jorge de Figueiredo Dias, *Direito Penal,* 610-611 [note 21].

[19] José de Faria Costa, *Direito Penal,* 450-451.

[20] Castanheira Neves, "Fontes do Direito. Contributo para a revisão do seu problema", *BFD* 80 (1982) 169-285, p. 278.

commission. This means that this provision aims at safeguarding the possibility of punishment of offenders committing *delicta juris gentium*[21], *i.e.*, crimes against international law, as are crimes against peace or against human rights. But the statute itself only allows punishment within the limits of domestic law, safeguarding the principle of legality both on an international[22] and on a national level.

On the other hand, art. 17 (1) CP (N_1) only excludes culpability when the mistake is not censurable. This means that limiting the scope of the criterion of censurability is not against the possibility of the interpretation of the legal rule N_1 represents.

The reasons for P_2 have to be good enough to justify breaking the tradition of P_1 and P_{1a}[23].

The consistency of P_2 with *NS* and with N_1 has been indicated.

As such it is imperative to assert the reasons[24] of P_2, so that the burden of argumentation can be fulfilled.

This burden, subject to *disputatio* as in the long tradition of Jurists' Law[25] — thus hoping that the dogmatic phrase offered here becomes true jurists' law — is preceded by a brief overview on the legal regimen of the mistake of law in Portugal, so that the acceptability of P_2 is attained in its domestic legal system.

3. Mistakes of law

In order to analyse the acceptability of P_2 as a dogmatic phrase, it is important to make some general considerations on the mistakes of law.

The rule regarding the mistake of law, which is a manifestation of tolerance[26], is regulated under the already mentioned art. 17 CP.

Art. 17 CP *(Mistake about unlawfulness)*

1. Acts without culpability who acts without consciousness of unlawfulness of the act, if the mistake is not censurable.

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[21] G. Canotilho / V. Moreira, *CRP Anotada,* Vol. I, 4.ª ed., Coimbra: Coimbra Editora, 2007, 496.

[22] Considering the several Conventions and the Universal Declaration of Human Rights itself.

[23] Robert Alexy, *Theorie der juristischen Argumentation,* 327.

[24] Or the "values and reasons which unconditionally govern [the] thought" of the dogmatic phrase P2. See Joseph Raz, "On the Autonomy of Legal Reasoning", *Ratio Juris* 6 (1993) 1-15, p. 5.

[25] A. Arthur Schiller, "Jurists' Law", 1232.

[26] Augusto Silva Dias, "Faz sentido punir o ritual do fanado?", 226-7.

2. If the mistake is censurable, the offender is punished with the penalty applicable to the intended crime, which can be mitigated.

The mistake of law of art. 17 CP includes different types of mistakes. The first type is the case when the offender knowingly fulfils the definitional elements of the offence, however considers the act to be lawful.

Art. 17 CP also includes the so-called indirect mistake of law, i.e., when the offender, although knowing his conduct fulfils an offence description, is mistaken on the existence of a justification for his conduct which would render it lawful.

However, not all mistakes of law are comprised in art. 17 CP. In fact, art. 16 (1) includes an extension of the rule for the mistake of fact for some cases of the mistake of law[27].

In Portuguese criminal law, regarding the mistake of law, a distinction is made between a mistake on the prohibition *(erro sobre a proibição)* and a mistake on prohibitions *(erro sobre as proibições)*. This mistake on the prohibition, ruled under art. 17 (1) CP, entails the mistakes on those prohibitions punishing conducts worthless in themselves (*delicta in se*). The mistake on prohibitions comprises the prohibitions punishing conducts which are worthless only due to the prohibition (*delicta mere prohibita*), and is ruled under art. 16 (1) (3) CP [28].

For art. 17 CP to apply, the offender must not have had consciousness of unlawfulness. For that to be the case, the offender cannot be aware, even if slightly, that his conduct could be unlawful.

However, the exclusion of culpability as a favourable consequence to the offender does not take place if the mistake is considered censurable. Under P_2 it is considered that the mistake is censurable if there was a possibility of avoiding said mistake. In other words, if applying the required duty of care, the offender could have acquired the necessary knowledge of the unlawfulness of his conduct (art. 17 (1) CP).

The standard for the required duty of care is that of the average citizen placed in the offender's (social and existential) context and situation[29].

If the mistake is considered censurable, culpability will not be excluded, and the offender will be punished with the penalty applicable to the offence committed with intent. However, this penalty can be

[27] José António VELOSO, *Erro em Direito Penal,* 2.ª ed., Lisboa: AAFDL, 1999, 24.
[28] José de Faria COSTA, *Direito Penal,* 452; Ac. TRP, 25 June 2014.
[29] Ac. TRP, 25 Feb. 2015.

mitigated (art. 17 (2) CP).

The characteristic trait of P_2 is the fact that if the mistake is against core values, such as human rights, the mistake cannot be tolerated and is deemed to be censurable, because not possible to enshrine a tolerable act. Regarding art. 17 (1) CP, we dare say, with Forst, "[t]he demand is to tolerate those beliefs and practices with which one disagrees but which themselves do not violate the criteria or the 'threshold' of reciprocity and generality, i.e., practices of individuals and groups who do not deny basic of respect to others (…)"[30].

The question under analysis is, then, if FGM is included in the concept of an offence against the deepest values of the legal order, and consequently if a mistake of law thereon is to be deemed censurable.

4. Mistake of law and female genital mutilation (FGM)

1. *The identity of Europe through its instruments: FGM as a violation of human rights*

i. *European Instruments*

Female Genital Mutilation (FGM) has been a concern of Europe for over 15 years.

In 2001, the European Parliament Resolution A5-0285/2001 on FGM[31] condemned it as "an act of violence against women, which constitutes a violation of their fundamental rights, particularly the right to personal integrity and physical and mental health, and of their sexual and reproductive rights; whereas such violations can under no circumstance be justified by respect for cultural traditions of various kinds of initiation ceremonies". This Resolution moreover urged the Member States to enact legislation specifically banning this practice. It also called on the Commission for the drawing up of a strategy to eliminate this practice in the European Union.

In 2004, the European Parliament Resolution on the Current Situation in Combating Violence against Women and Any Future Action (2004/2220(INI))[32] urged, once again, the European Commis-

[30] Rainer FORST, "The Limits of Toleration", *Constellations*, 11/3 (2004) 312-325, p. 317.

[31] <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2002:077E:0126:01-33:EN:PDF>.

[32] <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2006-0038+0+DOC+XML+V0//EN>.

sion to create "a comprehensive strategic approach at EU level, with the aim of putting an end to the FGM in the EU." Five years thereafter, the European Parliament Resolution of 24 March 2009 on combating female genital mutilation in the EU (2008/2071(INI))[33] continued condemning any form or degree of FGM and reiterated that "such violations can under no circumstances be justified by respect for cultural traditions". This was reinforced in the European Parliament Resolution of 26 November 2009 on the elimination of violence against women[34] *which* urged Member States to "reject any reference to cultural, traditional or religious practices or traditions as a mitigating factor in cases of violence against women, including so-called 'crimes of honour' and female genital mutilation."

In June 2012, the European Parliament Resolution of 14 June 2012 on ending female genital mutilation (2012/2684(RSP)[35] called on "Member States to continue to ratify international instruments and implement them through comprehensive legislation that prohibits all forms of female genital mutilation and provides effective sanctions against the perpetrators of this practice." In addition to legislation, the Resolution also called on "the relevant UN entities and civil society, through the allocation of appropriate financial resources, actively to support targeted, innovative programmes and to disseminate best practices that address the needs and priorities of girls in vulnerable situations, including those subjected to female genital mutilation, who have difficulty accessing services and programmes."

Finally, the Council of Europe Parliamentary Assembly Recommendation 1903 (2010) Fifteen years since the International Conference on Population and Development Programme of Action[36] acknowledged that "harmful practices meant to control women's sexuality lead to great suffering. Among them is the practice of female genital mutilation, which is a violation of basic rights and a major lifelong risk to women's health."

More recently was adopted a fundamental instrument on this subject, namely the Convention of Istanbul (Convention on preven-

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[33] <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0161+0+DOC+XML+V0//EN>.

[34] <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2009-0098+0+DOC+XML+V0//EN>.

[35] <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-20120261&langua-ge=EN&ring=B7-2012-0304>.

[36] <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?document-Id=090000168046064a#search=Council%20of%20Europe%20Parliamentary%20Assembly%20Recommendation%201903%20>.

ting and combating violence against women and domestic violence[37]), adopted by the Council of Europe and opened for signature in May 2011. Under this Convention, States must involve all relevant actors in the implementation of the Istanbul Convention, including national parliaments and institutions and non-governmental and civil society organizations.

The Convention, recognising, with grave concern, that women and girls are often exposed to serious forms of violence such as domestic violence, sexual harassment, rape, forced marriage, crimes committed in the name of so-called "honour" and genital mutilation, which constitute a serious violation of the human rights of women and girls and a major obstacle to the achievement of equality between women and men, establishes in its art. 38 that Parties shall take the necessary legislative or other measures to ensure that conducts consisting in FGM are criminalised.

ii. *The ECHR*

Regarding the jurisprudence of the European Court of Human Rights, there have been mainly five relevant decisions regarding Feminine Genital Mutilation (FGM)[38].

Three of them, although be it ruled as decisions on the admissibility (Collins and Akaziebie v. Sweden [2007], Izevbekhai v. Ireland [2011] and Omeredo v. Austria [2011]), recognized FGM was contrary to the European Convention on Human Rights. In Collins and Akaziebie v. Sweden, the Court declared that subjecting a woman to FGM amounted to ill-treatment contrary to Article 3 (prohibition of inhuman or degrading treatment) of the Convention. This was also the understanding of the Court in Izevbekhai v. Ireland and Omeredo v. Austria, to which "subjecting any person, child or adult, to FGM would amount to ill-treatment contrary to Article 3 of the Convention".

The case Sow v. Belgium refers to an asylum claim of a national of Guinea on the grounds of risking a re-excision upon return to Guinea. Having failed to substantiate a real risk, the Court held there would be no violation of Article 3.

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[37] <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210>.

[38] *Collins and Akaziebie v. Sweden,* 8 March 2007 (decision on the admissibility); *Izevbekhai v. Ireland,* 17 May 2011 (decision on the admissibility); *Omeredo v. Austria,* 20 September 2011 (decision on the admissibility); *Sow v. Belgium,* 19 January 2016; *Bangura v. Belgium,* 14 June 2016 (strike-out decision).

Finally, the case Bengura v. Belgium, since the applicant had received a residence permit, the Court decided to strike out the case of the list, since there was no more risk for the applicant of FGM if returned to Sierra Leone.

From this case list, it is unquestionable that the Court considers FGM to be a violation (at least) of Article 3 of the Convention.

The ECHR can also be considered to contributing, though its decisions, to the construction of a European dogmatic on human rights[39].

In this sense, both the European Instruments and the ECHR consider FGM offensive of human rights, which should not be considered justified under no circumstance by the respect for cultural traditions.

2. *and human rights as the European identity heritage*

The importance of human rights in Europe, notwithstanding its long development, is patent in the European Convention for the Protection of Human Rights and Fundamental Freedoms[40] and, more recently, in the EU Charter of Fundamental Rights[41].

The principle of legality is also foreseen in this Convention, namely in art. 7, under which number 1 states that *no one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense under national or international law at the time when it was committed.* However, the ECHR limits this principle in number 2 of article 7 [42], in the sense that the punishment of the offender can exist without previous law if the *act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilised nations*. The importance of this rule is that it recognizes a conflict of interests, namely between the prohibition of retroactive application of criminal law and the impunity of offenses against core values recognized as such by the international community.

The specific European identity, especially after WW II, has as its core values human rights, democracy and the rule of law (which translates onto the principle of legality in criminal law). Particularly regarding human rights, this is shown by instruments such as the European

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[39] Regarding the methodological interest of the European Courts, from the perspective of the European Court of Justice, see Karl-Heinz LADEUR, "Richterrecht und Dogmatik — eine verfehlte Konfrontation?", *KritV* 79 (1996) 77-98, p. 81.

[40] Signed in Rome on November 4th, 1950.

[41] Entered into force by the signature of the Treaty of Lisbon, in 2009.

[42] G. DANNEKER, *Das intertemporale Strafrecht*, Tübingen: Mohr Siebeck, 1993, 180.

Instrument for Democracy and Human Rights (EIDHR), which is the "concrete expression of the EU commitment to support and promote democracy and human rights"[43], and the external action of the EU, whereas "the EU views all human rights as universal, indivisible and interdependent. It actively promotes and defends them both within its borders and when engaging in relation with non-EU countries"[44].

As such, at a European level, offenses against core values can constitute an exception to the principle of legality.

Thus, human rights are part of the core values of the European identity.

3. *FGM as non punishable mistake on the prohibition (Augusto Silva Dias)*

Considering N_1 and P_1, Silva Dias argues that it is not easy to consider censurable the lack of consciousness of wrongfulness of the offender in the situation of having just arrived from a country where FGM is culturally accepted and practiced[45]. In fact, the criterion P_1 recognizes does not seem to allow for another dogmatic solution.

However, the problem is that this solution means the overstretching of tolerance. In other words, the exclusion of culpability deriving from N_1 would regard the non punishability of an offense against human rights which mirror the core values of European identity.

5. European identity as a limit to the mistake on the prohibition

As far as known, in Portugal only Faria Costa adds a limit to N_1, giving as an example the case of female genital mutilation as a case where limit P_2 adds to N_1 results in a different solution of censurability, punishing an offender of FGM. In fact, if one would apply said standard to a person who had just arrived from a country where such practice is legal, the mistake could be considered as not being censurable, as, in coherence with N_1, Silva Dias does.

However, under Faria Costa, the dismissal of censure cannot signify the denial of the deepest values of the community where the mistake takes place. As such, one must admit a "definitional stop" and, in those

[43] <http://www.eidhr.eu/whatis-eidhr>.

[44] <https://eeas.europa.eu/headquarters/headquarters-homepage/414/human-rights-democracy_en>.

[45] Augusto Silva DIAS, "Faz sentido punir o ritual do fanado?", 227.

cases where said denial occurs, the favourable consequence to the offender does not take place and, therefore, the mistake is to be deemed as censurable [46]. Said deepest values, enshrined in the European legal instruments referred to above, are also aligned with the Universal Declaration of Human Rights (UDHR). This Declaration, available today in several hundred languages[47], is a global testament to the value of human dignity, or, as in the Preamble, "the inherent dignity and (…) the equal and inalienable rights of all members of the human family". Article 5 of the Declaration foresees the prohibition of inhuman or degrading treatment, regarding all members of the "human family". This global principle, embodied in Article 3 of the ECHR, is thus applicable to the identity of dignity Europe is based on, notwithstanding being it of a global reach[48].

Consisting in an objective limit to the scope of art. 17 CP (N_1), P_2 respects the principle of legality (*NPL*) and is consistent with the criminal law legal system (*NS*). P_2 brings forth an argument deriving from the European identity, limiting the scope of the mistake on the prohibition when it affronts that identity. In fact, even if accepting the view of the relative autonomy of doctrine in law, that should give way when conflicting with moral reasoning, the limit P_2 imposes is also morally justified, since it aims at protecting the core values that human rights represent. As Raz puts it, "[l]egal doctrines are justified only if they are morally justified, and they should be followed only if it is morally right to follow them"[49].

P_2 is then a dogmatic phrase supported by the European identity, fulfilling the conditions to breaking the tradition of P_1.

Conclusions

Human rights are a most significant part of the European identity and both the European legal instruments and the decisions of the ECHR establish FGM as an offense against human rights.

Accepting FGM as a non censurable mistake of law is accepting that an offense against human rights can be irreproachable. This conception, though dogmatically sustainable, leads to an oversized understanding of tolerance.

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[46] José de Faria Costa, *Direito Penal,* 450-451.

[47] <http://www.un.org/en/universal-declaration-human-rights/>.

[48] Which means that an offender of FGM could not claim an absolute ignorance of said principle or even cultural reasons against the mentioned principle. Such a claim, under P_2 would always be censurable.

[49] Joseph Raz, "On the Autonomy of Legal Reasoning", 15.

As such, the respect for the core values of European identity — aligned with the global values of human dignity — should implicate a limit to the mistake of law, as by P_2, being considered as an acceptable dogmatic phrase, as we have tried to show.

9

FISCAL POLICY AND LEGAL POLICY

Marek Zirk-Sadowski

Fiscal (budgetary) policy is concerned with the ways in which public goods and expenditures are used in order to execute the tasks belonging to the state. Juristic concepts of fiscal policy are dominated by an instrumental approach. The mechanism for drawing up a fiscal policy tends to follow that described in the theory of interest groups (pressure groups) created in the 1960s, the main representatives of which were A. Downs and R. A. Dahl.

Anthropology based on the concept of *homo oeconomicus* suggests that the essence of economic development boils down to the struggle between atomized groups of subjects guided solely by instrumental rationality and their own interests, without the idea of the common good. The emergence of the common good occurs thanks to a mysterious mechanism, an invisible hand which operates automatically in the market economy. These atomized groups clash and compete with each other on the political market, and as a result of the clash of conflicting interests an optimal situation emerges, in which the best decisions are made for all the members of the

community. A formally good democratic mechanism is sufficient for achieving an optimal conception of fiscal policy. In the deep structure of this conception lies the idea of *homo oeconomicus*, a participant in the market game played in accordance with the rules of instrumental rationality.

In fact, this is how most contemporary textbooks on fiscal policy present their philosophical assumptions. Fiscal policy is most often presented as an instrumental policy.Now we shall present the basic categories of analysis that have been developed in the theories related to the model of fiscal policy, which play a significant role in juristic analyses of this problem[1].

The basic category of fiscal policy is the budget. It can be treated as a set of accounts that compile, for a period of one calendar year, all the revenues and expenditure of a state. From a political point of view, the budget is a kind of presentation of the government's action plan, wherein the general political and socio-economic objectives are presented as financial objectives.

From the functional point of view, the budget can be understood as a set of tools and means for the implementation of the specific social-economic tasks of the state. Such an approach prompts us to consider the functions of budgetary policy. The scholarly literature identifies the following functions of the budget:

a) allocation — shaping the division of factors of production between the private sector (indirectly, by correcting prices, subsidies and taxes) and the public sector (directly, by transferring funds for specific tasks) and their further allocation within these sectors;

b) redistributive — the state's impact on the final distribution of individual income through: the direct redistribution of monetary income (taxes and social transfers); the free (or partially paid) satisfaction of specific needs by social services (education, health care); the impact on the conditions under which the primary distribution of income is shaped (e.g. vocational training);

c) stabilization — using the budget to achieve macroeconomic objectives (high employment, low inflation, sustainable economic growth, balance of payments stability) through: budget deficit or surplus, taxes, public debt.

[1] They are presented in every standard textbook on fiscal policy and therefore there is no need to refer to the positions of specific monographs. However, we can recommend the best example: *Finanse publiczne i prawo finansowe* [Public Finances and Financial Law], ed. C. Kosikowski / E. Ruśkowski, Warszawa: Dom Wydawniczy ABC, 2006, Chapter I, point 13.

The state thus influences the economy by means of the budget, through public revenue and public expenditure. In the scholarly literature in the field of economics it is assumed that public revenues are obtained through: the impact on economic growth, direct and indirect taxation, revenues from the exploitation of state resources, loan operations, tax policy (special economic zones, protection duties), revenues from public assets, and the release of loans. On the other hand, the basic public expenditures are: the impact on economic growth, expenditure on wages and salaries in the public sector, social benefits, expenditure on public works, military expenditure, the impact on economic structures, expenditure on civil investments.

The basic problem of budget policy when viewed from an instrumental perspective is the issue of effectiveness. We can only talk about effectiveness (defined as a relation) if we are able to precisely define and quantify expenditures and effects. In the case of determining the effectiveness of private investment, this problem does not arise, since it always results in revenues which will be realized through the finalization of a given project.

In the case of public expenditure, there is a major obstacle. While it is possible to determine the amount of expenditure, it is very difficult and even impossible to measure the effects of the expenditure of the public authorities. In general, we can say that the objectives set for public institutions (for example, an increase in social welfare) are qualitative, and therefore they cannot be quantified. Moreover, there are also a number of factors related to public expenditure, which further complicate the description and measurement of the effects resulting from the use of public funds. These factors are[2]:

1. Identifying the effects of public expenditure. Certain areas of administrative activity cannot be considered at all in terms of the relation between revenue and expenditure. There are particular problems with measuring the effects of public expenditure when it comes to the expenditure incurred on tasks performed as part of the 'classic' functions of the state. Although no one questions the necessity of state activity (public expenditure) in these areas, there is also no way of objectively assessing the effective use of these funds.

2. The problem in identifying the effects of public expenditure concerns the external effects of such expenditure. A particular problem is caused by positive externality. Positive externality occurs when the beneficial activity of a given institution is felt by

[2] See. J. Tomkiewicz, *Jak mierzyć efektywność wydatków publicznych* [How to Measure the Effectiveness of Public Expenditure], *MBA* 1 (2003) 36-38.

a subject who is not involved in a transaction with this institution[3]. For example, an analysis of the issue of education provided by the state will immediately reveal that the parties here are the state as the provider of education (spending public funds on it) and a pupil who attends a public school. We must not forget, however, that the fact of gaining knowledge is not the only effect of education. Education has a positive impact on social life. The educated subject can pass on acquired knowledge to others, use it in their activities, which will have an impact on other people, and so on.

3. Temporal distribution. Conducting a reliable analysis of the effectiveness of a particular project must take into account not only the amount of expenditures and effects, but also their distribution over time. Only by knowing the periods of particular expenditure can we compare them using a discount account and learn about the relationship between them. At the same time, some effects may appear after many years, and sometimes they will only be felt by future generations. This state of affairs does not allow the use of a discount account.

4. Free of charge. Another difference between public and private goods is the free use of the former. Even if the use of certain public goods is paid for (e.g. public transport), this fee certainly does not reflect the cost of producing the good or providing the service. There is a cash flow associated with expenditures, but there is no cash flow in the case of the effects that accompany public expenditures (or, if it does occur, it is a very small amount in relation to expenditures)[4]. Such a state of affairs makes it impossible to apply project profitability to public expenditures, i.e. to compare the monetary dimension of expenditure and effects.

In view of the impossibility of applying criteria which would allow the effects of state activity to be quantified, various models are being constructed which attempt to measure the effectiveness of public expenditure[5]. Such analysis must cover two aspects.

The first is the macroeconomic analysis of public expenditure, which tries to establish the relationships that exist between the amount and structure of expenditure and the basic macroeconomic data. The effects of public spending are sought among such indicators as economic growth, inflation and the balance of trade.

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[3] J. Tomkiewicz, *Jak mierzyć efektywność wydatków publicznych*, 37.
[4] J. Tomkiewicz, *Jak mierzyć efektywność wydatków publicznych,* 37.
[5] J. Tomkiewicz, *Jak mierzyć efektywność wydatków publicznych*, 38 f.

The second is the microeconomic analysis of public expenditure, and studies in this field refer to the following issues: how public funds are spent by particular institutions; whether specific objectives have been achieved by a given administrator, and, if so, at what cost this has been achieved; and whether the objective has been achieved to the maximum extent with the funds granted to institutions.

Macroeconomic analysis therefore examines what the amount of public expenditure is, and its structure (the distribution of public funds), whereas microeconomic analysis checks whether the granted funds have been effectively used by a specific institution.

Nowadays, the effectiveness of public expenditure is assessed by means of the profitability indicators that are used to analyze commercial investment[6]. This is the rate of return on investment — which is the ratio of revenues (most often annual) that is possible after the completion of investments — to the expenditures that have been incurred for the implementation of this project.

The aforementioned problem of the lack of cash flow on the revenue side is solved by taking into account the changes brought about by public investment in the economic environment. These changes include, first and foremost, an increase in the productivity of private companies, which is brought about thanks to the use of public infrastructure, the savings in time and resources which accompany improvements in transportation and communication infrastructure, and improvements in work efficiency associated with the use of this infrastructure. They result in an increase in gross domestic product (GDP), which can be related to the public expenditure incurred in the implementation of various investments.

It should be borne in mind that one cannot speak of a universal structure of public finance, as it is particular to each country. Countries have their own specificity related to many exogenous factors which should be taken into account when analysing public expenditure[7].

In all likelihood, it is no longer possible to determine objectively the structure of public expenditure that would correspond to the most rapid economic growth. We are dealing with methodological pluralism, and differences in the results of studies by various authors are due to the use of different econometric models for analysing public expenditure. J. Tomkiewicz believes that the key methodological problems are here[8]:

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[6] J. Tomkiewicz, *Jak mierzyć efektywność wydatków publicznych*, 40.
[7] J. Tomkiewicz, *Jak mierzyć efektywność wydatków publicznych*, 40
[8] J. Tomkiewicz, *Jak mierzyć efektywność wydatków publicznych*, 41.

- how to take into account the impact of external shocks on the rate of economic growth;
- taking into account the place in the economic cycle;
- differences in the classification of public expenditure for individual fields;
- the microeconomic effectiveness of public spending;
- regional specificity.

It is correct to note that the main problem in analyzing the impact of public spending on economic growth is the methodology employed in these studies. We can thus expect that in the future more perfect econometric models will be created, which will allow the analysis of the structure of public expenditure to become more objective, and this will undoubtedly help in the conduct of fiscal policy.

5. However, until such models are developed, the most important instrument of budgetary policy is the tax system. It meets the following objectives: providing financial resources to cover public spending, enabling macro-economic demand to be shaped, and enabling the realization of social objectives.

In order to achieve the declared fiscal policy objectives at the political level, it is necessary to develop efficient tax techniques and improve the organisation of tax administration. Tax techniques involve constructing the tax system as a set of devices for the collection of public revenue of from taxes, and constructing individual tax benefits within the system. It resolves two basic dilemmas:

1. Whether to introduce one or more taxes that draw on the same source.

2. Whether to tax every entity or to exclude entities that do not meet the established minimum.

As to the first dilemma, it should be noted that only one tax can be applied to each source of tax. The tax system should cover only two types of taxes, namely income tax and property tax.

The second dilemma is usually solved by determining the level of tax-free income.

In our tradition, the construction of the tax system requires the following basic issues to be resolved: directing one or more taxes to the same source, which may be income or assets; stopping at direct taxes, or combining them with indirect taxes, or finally abandoning direct taxation; choosing between the taxation of income and taxation of expenditure (or combining both tax objects in the tax system);

considering merging general and special purpose taxes in the tax system; recognizing the autonomy of local communities and creating a separate local government tax system alongside the central tax system.

It is also assumed that the structure of each tax must include the definition of such elements as: the taxpayer, the object of taxation, the time when the tax obligation arises, the tax base, tax rates and scales, tax exemptions and reductions, and the timing and the way in which tax payments are to be regulated.

Moreover, the tax principles which must be observed during the construction of the tax system are also highlighted. The basic group consists of the following fiscal rules:

a) efficiency — taxation is treated as an efficient source of revenue for public authorities (the state should rely on the kind of taxpayers that will provide the revenue necessary to perform the functions and tasks of the state and local authorities);

b) flexibility — taxation should respond to changing economic and social processes and events; the response of tax scales (in income tax) to the course of the economic cycle;

c) stability — the need for changes to the tax system to be limited.

The second group is the principles of tax justice:

a) universality — the tax burden should be of a universal nature (each citizen should be subject to tax if the conditions for tax eligibility are met);

b) equality — the equal distribution of the tax burden among all taxpayers (in proportion to their income, which is incompatible with the principle of income capacity);

c) income (tax capacity) — the tax system should correct the proportions of the original distribution of national income if it is considered unfair.

Finally, technical rules are elaborated, such as:

a) certainty — taxes should be such that they are a reliable source of state revenue, and the taxpayer should know in advance what tax will be paid in relation to the business and/or income attained;

b) convenience — tax collection should take into account the financial circumstances of the taxpayer, the cycle and nature of his/her activities, etc.;

c) cost-effectiveness — the costs of implementing taxes should not unduly reduce the state's revenue.

The constructions referred to above are accepted on the basis of tradition and have been developed by public discourse. However, as was the case with public expenditure, an economic theory of tax effectiveness does not exist, as yet. We have a number of partial models

that do not provide complete solutions, and do not allow the creation of a scientific, formalized conception of tax policy, which would be essential from the point of view of an instrumental version of fiscal policy. The basic issues that are now being subjected to analysis are: the impact of tax policy on the level of savings, the ways in which the tax system affects the labour supply, the importance of corporate income tax for businesses activity, tax coordination by international organisations, and the role of taxes in maintaining global balance[9]. It should be stressed, however, that economic theories of tax policy are characterised by methodological pluralism, which often makes it impossible to compare the results obtained.

Furthermore, there are no holistic conceptions of fiscal policy. In principle, the theories of fiscal policy contained in the scholarly literature in the field of economics highlight two basic types of budgetary policy:

a) passive — based on the assumption that certain elements of budget revenue and expenditure tend to respond automatically to changes in the economic situation (the so-called "automatic stabilizers"); on the revenue side, this concerns taxes which depend on the level of economic activity (progressive taxes on income, indirect taxes on sales), while on the expenditure side it concerns transfers which depend on the material situation of individuals (unemployment benefits, social assistance, subsidies for agriculture); automatic stabilizers tend to create a budget surplus during periods of economic recovery and a deficit during recessions; however, automatic stabilizers are not able to affect the structure of the economy and provide incentives to change the economic situation;

b) active (discretionary) — requiring the state to adjust fiscal policy determinants to changes in the economic cycle through: changes in tax rates and structure, changes in payments of transfers (e.g. to local governments), changes in expenditure on works and public investment.

However, the choice between these types of fiscal policy is made mainly on the basis of social discourse conducted within democratic institutions, and theories of economic efficiency only provide partial solutions.

The dispute over the essence of fiscal policy very quickly leads us to the key problem of philosophy and legal theory, namely the

[9] A description of these theories can be found in: M. P. Devereux, ed., *Efektywność polityki podatkowej* [The Effectiveness of Tax Policy], Warszawa: Wydawnictwo Sejmowe, 2007.

question concerning the possibility of influencing and controlling social reality, and, in our case, of influencing fiscal phenomena by means of a legal norm. Traditionally, this issue is called the dispute over legal policy.

The tradition of using the term 'legal policy' in legal theory was initiated in the works of L. Petrażycki. In contemporary jurisprudence, the influence of Petrażycki is 'filtered' through the works of K. Opałek and J. Wróblewski. The notion of 'legal policy' is broadly understood by both these authors to mean the use of law to achieve established objectives[10]. In this approach, there are three divisions of legal policy[11]. The policy of creating norms involves the creation of norms at a sufficient level of abstraction and generality, which are then used to achieve the objectives set by the legislator[12]. The essence of the policy of law implementation is to make decisions in such a way that they realistically achieve the established objectives, while legal norms leave a certain amount of discretionary leeway[13]. Ultimately, the policy of law implementation entails using the powers and competences granted to achieve certain social outcomes[14]. Despite a certain inaccuracy in the terms used, there is no doubt that the basic research intuitions are clear. The purpose of considering legal policy is to provide the sovereign — broadly understood — with a tool for achieving the objectives set, through the use of legal norms and the legal institutions that "serve" them.

Thanks to the work on the concept of competence, carried out mainly by the school of Professor Ziembiński, it is clear that the terms used to define the implementation of legal policy allow it to be reduced to the broader policy of the implementation of law. It seems that from the point of view of current legal theory, the first two dimensions of legal policy have become important. The need to clearly identify problems related to punishment and enforcement occurs at the level of some legal dogmatics, but these issues still fall within the scope of problems associated with the implementation of the law, or are expressed as *de lege ferenda* postulates addressed to the legislator.

The main achievement of K. Opałek and J. Wróblewski was to describe the basic assumptions on which, in their opinion, the

[10] Cf. J. Wróblewski, *Teoria racjonalnego tworzenia prawa* [The Theory of Rational Law-making], Wrocław etc.: Ossolineum, 1985, 50.

[11] J. Wróblewski, *Teoria racjonalnego tworzenia prawa,* 50.

[12] J. Wróblewski, *Teoria racjonalnego tworzenia prawa,* 50.

[13] J. Wróblewski, *Teoria racjonalnego tworzenia prawa,* 50.

[14] J. Wróblewski, *Teoria racjonalnego tworzenia prawa,* 51.

dispute over the possibility of building a theory of legal policy is based. These assumptions constitute a kind of legal doctrine which is hidden behind all conceptions of legal policy. The most important element of this doctrine is the notion of 'moderate voluntarism', i.e. the assumption that the legislator, through the normative content of his/her acts of will, can effectively influence social reality, although at the same time the legislator's acts of will must be preceded by an analysis of knowledge of society, and demonstrate respect for the values recognized by society, in order to have any effective influence. The role of the legislator is therefore not passive — it does not only discover rules that should be expressed in positive law, but is also moderately active: on the basis of knowledge of facts and values, he/she can determine the field in which there is freedom to decide on the content of the law.

The second assumption which is hidden in the construction of legal policy is of an epistemological nature, being the thesis that there are certain areas in which human beings who behave rationally should act, thereby modifying the 'natural' course of events, and thus we are not condemned to await passively the effects of the self-regulating mechanisms of social life. This conception of legal policy is therefore founded on the conviction normative acts may lead to the optimization of social reality by bringing it closer to the theoretical model of the social world.

Both of these assumptions of legal policy are an expression of a certain juristic optimism. Jurists, using scientific knowledge and respecting the basic values upheld by society, hope to optimize social life within certain limits, directing it towards the realization of a specific model of social reality. Thus, they act in accordance with the scheme of instrumental rationality: on the basis of their knowledge, they select the optimal means for achieving the established social objectives and are consistent in their actions, i.e. their preferences are temporary and asymmetric.

An outline of a model for rational law-making is thus formulated, which can be described as instrumentally rational. In J. Wróblewski's work, there are five stages of rational law-making: establishing the objectives of the legislator's actions, selecting the optimal means for achieving them, determining whether these means include those that can be classed as legal, choosing the legal form, and finally establishing a legal provision.

This scheme can be analogously applied to the process of implementing the law, although the source of knowledge used in this

instance by the body applying the law is — to a much greater extent — legal expertise.

The conception of legal policy, thus understood, combines a positivist attitude with instrumental rationality[15]. Law is a collection of the acts of will of the sovereign, but it posits objectives and uses the means selected on the basis of scientific knowledge and knowledge about the values maintained by the addressees of law to achieve these objectives. It is therefore necessary to create an optimal model of social life which we should aim for and, on the basis of scientific knowledge, to select the best means for its implementation, in the spheres of both law-making and the implementation of law.

The concept of legal policy therefore supports a certain conception of power which was best expressed by M. Weber. According to Weber's thinking, power is substantial in nature, consisting in the situation of realizing one's own will within a social relationship, even if there is resistance. Power is understood as a person's ability to realize his or her own will, to defend his or her own interests. It involves the use of force to bring about changes in the external world in accordance with one's own intentions. Such a conception of power can also be found in political literature, which on the basis of Weber's theory defines power as the ability to make political decisions that are important to society, while at the same time being able to use organized violence to enforce certain forms of conduct. From this point of view, the enduring nature of power depends on how long a crisis situation, i.e. a threat, endures.

The rival to this approach is the concept of power based on communication within society, on communication that takes place between different social subjects. In the last century, we saw that the source of this concept of power can primarily be traced back to the reflection of H. Arendt's, for whom power consisted not in imposing one's will on others, but rather in people's ability to unite in action, without the use of coercion. The essence of power lies solely in its potential character. In this conception, power is not something ready, filled with necessary properties, some kind of existing entity. It is rather a type of interpersonal relation that can be realized, but can never fully materialize, since it exists solely as a process of realization[16].

[15] For more detailed discussion of this problem, see: M. Zirk-Sadowski, "Dwie wersje polityki prawa" [Two Linds of Legal Policy], [in:] J. Góral, ed., *Ratio est anima legis. Ksiega pamiątkowa ku czci prof. Janusza Trzcińskiego, Naczelny Sąd Administracyjny*, Warszawa, 2007, 127–142.

[16] This problem is explained in this way by J. P. Hudzik, *Wykłady z filozofii polityki* [Lectures on Political Philosophy], Lublin: Wydawnictwo umcs, 2002, 86 f.

Arendt refers to cases where a relatively small but well-organized group of people exerted almost unlimited power over huge empires. Thus, while force is a natural feature of individuals viewed separately, power is born between people when they act together[17]. It demands consent, the conformity of many wills and intentions, which can only exist in public space[18].

What is important here is the concept of the public sphere, that is, the place where power is legitimised, which necessarily entails a pluralism of views. According to Arendt, the plurality of views is inextricable from the human condition. Violence can only lead to its concealment. What is more, and this is crucial from the point of view of legal policy, human experience does not provide grounds for concluding that if human minds engage in discussion this can lead them to a single truth. We can only start a discussion on public affairs and thus express our views as interests and, as it were, make concessions in the process of balancing these interests[19]. However, this does not lead everyone to a common view, a single truth. The public sphere is therefore a kind of obligation to reach an acceptable compromise, which is only required because people hold different views. Thus university discussion will not replace politics, just as theoretical reason will not replace practical reason and the ability to judge.

Arendt discovered the best model for reaching such a compromise in the Greek *polis*, that is, in the ideal from which the aforementioned formula of political life derives. By carrying out an even more in-depth analysis of her theory, we can see it as a vision of politics that opposes the Machiavellian or Leninist understanding of power. It is a power that perceives itself not in violence, but in a certain way of discussing, in a certain way of communicating, which gives rise to intentions and a common will. It could be said that in this understanding the public sphere becomes an intersubjective field for creating meaning and shared symbols. This view can also be clearly seen in the work of the Frankfurt School and, above all, in the thought of J. Habermas[20].

From the communicative point of view, power leads to the adoption of a discursive (communicative) legal policy. In this approach, legal policy is no longer based on goal-oriented thinking,

[17] H. Arendt, *Kondycja ludzka* [The Human Condition], Warszawa: Wydawnictwo Fundacja Aletheia, 2000, 219.

[18] Cf. J. P. Hudzik, *Wykłady z filozofii polityki,* 87.

[19] M. Canovan, "Arendt, Rousseau and Human Plurality in Politics", *Journal of Politics* 45 (1983) 296–297.

[20] Cf. J. Habermas, *Faktyczność i obowiązywanie* [Between Facts and Norms], Warszawa: Wydawnictwo Naukowe Scholar, 2005, 166 f.

but makes the validity of all norms dependent on "the approval of those potentially affected, insofar as the latter participate in rational discourses"[21].

In this conception, research on legal policy does not consist in applying a theoretical model of the world to law and constructing guidelines on how to make this model a reality, but rather in seeking discursive legitimacy for existing social ties and relationships, thus making the ontology of social life dependent on an axiological-pragmatic dimension[22].

The competition between these two policy models is also reflected in legal policy, or to be more precise in the competition between the two models of rationality, i.e. instrumental and communicative, which lies at the core of the policy models. A perfect example of this is fiscal policy, which, despite its apparent objectivity, conceals distinct philosophical foundations; two different epistemologies of law and power. The achievements which resulted from using the notion of fiscal policy presented above are clearly based on the instrumental, naturalistic view of law and social reality. The collapse of this model was visible during the last financial crisis of 2007. Since 'mainstream economics' failed, and the emergence of a new general theory in the near future is unlikely, the attention of many researchers has turned to non-orthodox trends in economics. A large number of researchers felt that it was impossible to build a fiscal policy if economics lacks moral foundations. This is not a new approach, but a consequence of the discursive-communicative approach to social phenomena, which is currently attempting to give a new character to fiscal policy. Its most distinctive feature is the abandonment of the sharp distinction between cognition and ethics in the research of the social sciences.

In contrast to the instrumental version of fiscal policy, a discursive position is represented by theorists who equip the mechanism for building fiscal policy with moral values, the subjects of which can only be human beings. This primarily applies to the American school of public choice, which is associated with Hayek. As J. Miklaszewska notes, when distinguishing between law and law-making, Hayek claimed that law stems from rules that limit the spontaneous order of market phenomena, while law-making is the result of the direct

[21] J. Habermas, *Faktyczność i obowiązywanie,* 173.

[22] A. Jabłoński, *Filozoficzna interpretacja życia społecznego w ujęciu Petera Wincha* [A Philosophical Interpretation of Social Life according to Peter Winch], Lublin: Redakcja Wydawnictw kul, 1998, 118.

actions of a government[23]. According to Hayek, the introduction of constitutional restrictions on government action is necessary to prevent the extension of legislative power to areas where the knowledge of those in power is insufficient to achieve the intended objectives[24]. In his research, James M. Buchanan tried to apply microeconomic analysis to resolve the issue of the provision of public goods[25]. In his opinion, this is how one of the key problems related to the market of public goods, i.e. price, can be solved. Public goods are supplied free of charge, or at a price that does not reflect the cost of producing them, nor is it a result of the mechanisms of supply and demand, as can be seen on the private goods market. According to Buchanan, the price of a public good can be regarded as the burden borne by the consumer for the benefit of the state, i.e. taxes. Thus in Buchanan's view it is possible to use a microeconomic analysis of the public goods market in such a situation. A public good will be effectively supplied only if its price (tax burden) does not exceed the utility associated with the consumption of the good. The theory of public choice asserts that a democratic system is a way of verifying the effectiveness of delivering public goods. Those goods that are supplied inefficiently (the utility of their consumption is exceeded by their price, which is tax) will not be accepted in a democratic society.

Buchanan believes that Adam Smith's principle of the invisible hand does not apply in policy, because the common good is not produced automatically. It requires the conscious activity of individuals in the political-social field. It should be emphasized that it is necessary for individuals to act on their own behalf, and not for individuals to act in organized groups, such as trade unions, which often act against the interests of society as a whole when defending their own interests[26].

As Buchanan states, "we are all constitutionalists". Of course, there is no dispute over the need to introduce fundamental constitutional constraints such as submission to elections, upholding voting rules, requirements to be met in order to apply for offices, etc. The difficulty arises when we ask what restrictions should be imposed on the exercise of a power that has been democratically established,

[23] J. Miklaszewska, *Hayek o wolnej konkurencji* [Hayek on Free Competition], <www.calculemus.org/hayek/miklasz.doc> (accessed on: 10.08.2007), 1.

[24] J. Miklaszewska, *Hayek o wolnej konkurencji*, 1.

[25] J. M. Buchanan, *Finanse publiczne w warunkach demokracji* [Public Finance in Democratic Process], Warszawa: Wydawnictwo Naukowe pwn, 1997.

[26] M. Olson, *The Logic of Collective Action*, Cambridge — Massachusetts / London: Harvard University Press, 1965.

and when its actions are taken in accordance with the procedures in force. The problem, therefore, involves imposing restrictions on free choice and making a choice between restrictions[27].

The search for budgets with the right proportions can be done in two ways[28]. Firstly, one can try to include collective actions that lead to the establishment of the scale and proportion of the budget as an amount determined by objective circumstances (consumer preferences, resources, etc.). This is how this problem is approached by supporters of the instrumental view of fiscal policy. Secondly, it is possible to study the principles of the process leading to collective action, including, first and foremost, the issue of choice by voting[29]. Examining the "constitution" of collective actions, providing precise economic explanations of their functions and effects on the institutions based on them is characteristic of the theory of public choice. When analysing these principles, one cannot disregard the concept of the moral subject that is implicit in it.

Of course, it is very difficult to bring this type of research to a stage where its results can be used to construct new institutional solutions. So far, the prevailing trend has been to criticize these principles and to attempt to reveal the paradoxes latent in their composition. However, where formal economic studies have been conducted, the economic effectiveness of solutions obtained through discourse on moral subjects has been demonstrated. Therefore, if there is such discourse, economically effective solutions are achieved, despite the fact that it does not use economic categories[30].

When policy was treated instrumentally, the problem of choice was limited to maximizing social welfare, as a criterion for evaluating public institutions. Theories of public choice explain the principles to which these institutions are subjected and show that many of them lead to paradoxes. Positing the concept of *homo oeconomicus* at their foundations, equipped with the mathematical theory of rational choice, they assume that social choice must be based on the preferences of individuals.

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[27] Cf. J. M. Buchanan, [in:] Idem / R. A. Musgrave, *Finanse publiczne a wybór publiczny* [Public Finance and Public Choice], Warszawa: Wydawnictwo Sejmowe, 2005, 92.

[28] These two ways are presented by R. A. Musgrave in: J. M. Buchanan / R. A. Musgrave, *Finanse publiczne a wybór publiczny*, 107.

[29] J. M. Buchanan / R. A. Musgrave, *Finanse publiczne a wybór publiczny*, 107.

[30] Cf. T. Stawecki, „Sędziowie w procesie reformowania prawa" [Judges in the Process of Legal Reform], [in:] J. Stelmach / M. Soniewicka, red., *Analiza ekonomiczna w zastosowaniach prawniczych*, Warszawa: Wolters Kluwer, 2007, 170–175.

Already at this stage of the research into public choice, it is no longer possible to accept the thesis that every citizen is obliged to participate in decisions that are only of fundamental importance for the political system of the state, and that the current policy should be left to democratically elected representatives of the authorities. The theory of public choice reveals the weakness of the instrumental approach to fiscal policy.

Since democratic power is realized through institutions based on paradoxes, governments have very limited knowledge which would enable them to achieve effectiveness and to make decisions that are rational in the instrumental sense. Buchanan indirectly proves that if there is a lack of knowledge, we are left with recourse to moral subjects and their discourse. Therefore, there are no grounds for leaving even current decisions to politicians and their experts. Public opinion must supervise the democratically elected authorities and evaluate whether they exceed their powers and act to the detriment of the community.

In conclusion, it is important to recall and draw attention to an opinion that often appears in the scholarly literature, namely that, as moral subjects, individuals should express values that, in their opinion are good for the whole community, but which are not sufficiently realized or appear to be at risk in the society in question. Therefore, the formal act of voting in an election as the basic form of participation in politics is not sufficient. If democracy can be supported by science only to a small extent, then in fiscal policy we are also forced to accept a pluralism of views. This means that we have no choice but to discuss and participate fully in decisions through participation in public debates. As Miklaszewska points out, what emerges here is the notion of democracy as a type of culture, which encompasses the human behavioural patterns and institutions created within civil society, and the constant and discursive participation of individuals turns out to be the main political value and a condition for the effectiveness of public choice made within the framework of fiscal policy[31].

[31] J. Miklaszewska, *Hayek o wolnej konkurencji*.

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PART IV

JURISTS' LAW AND ADJUDICATION: METHOD(NOMO)LOGICAL APPROACHES

10

‘A METODOLOGIA DA REALIZAÇÃO DO DIREITO’. OS PÓLOS NOEMÁTICOS DO EXERCÍCIO[1]

Fernando José Bronze

Distinguished Guests,
Dear Colleagues and Friends,
Dear Students,

I will commit the indelicacy — at least apparently, as you’ll soon realize … — to begin with a very brief personal statement, to salute, firstly, as I should, our distinguished guests.

I arrived to a phase of the existence (very soon we’ll be in June…), where there’s not so much left to me than looking back (after all, I must consider a blessing the life that’s still being offered to me…). I

[1] As páginas que se seguem vão despojadas de notas. As indispensáveis referências bibliográficas colher-se-ão numa obra de próxima publicação, de que este texto é um fragmento recomposto.

was already a Faculty's lecturer, on the seventies of the past century. The period after the twenty-fifth of April nineteen seventy-four was my first relevant experience in this Faculty, as a lecturer. A whole world had just collapsed and with it, important layers of the Portuguese legal system — those most strongly influenced by the prevalent political trend until then. In times of ruptures and unrests, not only people strive themselves looking for a new path, able to replace the one that in front of them is blocked. The institutions too.

In both Law Schools at the time in Portugal — Coimbra and Lisboa — and due to the aforementioned reason, a (re)creation of studies on Comparative Law was implemented (as happened after the Republic implementation, although with different prerequisites; but not, *et pour cause,* after the twenty-eight of May nineteen twenty-six…): legal experiences done with good results elsewhere could have claimed for adequate answers to the current reality — it was the principle of inertia coupling with its opposite, the principle of innovation…

As one of the youngest, and due to the fact of being linked as assistant lecturer of Doctor Ferrer Correia to Private International Law — which claims, surely with enlarged visibility in comparison with other legal matters, intense incursions into foreign legal systems — I was designated as lecturer of the practical classes of "Compared Law Systems" (which was the formal name of the discipline). The master Professor of that discipline was Doctor Carlos Alberto da Mota Pinto, who soon afterwards left us to assume utmost relevant govern undertakings. And then I was, only a couple of months after, also in charge of the theoretical classes, driven by an enthusiasm as big as my ingenuity.

It was within this context and while concluding my Post-Graduate thesis (in that Jurassic time, there wasn't yet Master degrees…) that the School, upon suggestion of my Professor at the time — the beloved Doctor Ferrer Correia, I repeat — urged me to attend the "Faculté Internationale pour l'Enseignement du Droit Comparé". This course comprised three cycles and in the third one, mostly monographic, one of the disciplines was called Administrative Contracts. In this discipline, I was thought by three unforgiven Professors: first, our Doctor Afonso Queiró; second, the German Prof. Münch; third, Professor Madame Gayl, from Łódź — at the time (I'm not by now completely sure…) Rector of the University of Director of its Law School.

I remember her as a kind and sensitive person, utterly meticulous on her reflections which were always delivered with extreme delicacy and elegance (only ten years after the Berlin Wall would fall…), using

a catchphrase, often repeated, in a perfect French (while in teaching and during examination, either in written form or orally, French was the common language of the "Faculté Internationale…" — as time goes by… —, look at our meeting…): this catchphrase was "qu'en même …"

And then, while never have followed my dear friend and colleague, Doctor Aroso Linhares on his journeys to Łódź (as far as Poland is concerned, I've only been to Warsaw, which I actually loved to visit…), in the end I can also fairly declare that one particle connects me — which is something that I personally owe — to the University from where some of our estimated Guests came.

I pay my personal tribute to all of you, with my truthful wishes that you are feeling well among us and that you can take with you, from Coimbra and from our University, a very kind memory.

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1. Do que se trata?

Numa daquelas sínteses iluminantes, que todos lhe devemos, o meu querido Professor de Coimbra, Castanheira Neves, não se tem cansado de advertir que o direito deve ser visto, irredutivelmente, como um regulativo específico tendente a resolver o problema prático ("o problema do encontro [tantas vezes cheio de desencontros] do homem com os outros homens e do modo desse [seu] encontro […] no mundo […]"), por mediação de um sentido (de um acervo de devenientes exigências axiológicas de que, sem contradição, somos demiurgos e que se nos impõe assumir para realizar historicamente). E o meu saudoso Professor de Munique, Wolfgang Fikentscher, em como que telepática articulação com o seu eminente Colega português e atentas as alternativas que vão sendo inventariadas, sentenciou que o direito ou é isso, ou não precisamos dele para nada (se privilegiarmos outros pontos de vista, teremos, talvez, ao nosso dispor, ferramentas instrumentalmente mais eficientes, mas humanamente menos conformes…).

Pois bem. Da pragmaticamente interessada perspectiva do jurista — que tenho vindo a caracterizar como aquele sujeito que pressupõe a normatividade jurídica, compreendida tal-qualmente a recortei, para pôr (pense-se no advogado) e para solucionar (atente-se no juiz) problemas que devam ser qualificados como juridicamente relevantes —, iniciarei a (tentativa de) resposta à pergunta de há pouco (do que se trata?) com uma… nova pergunta, desta feita colhida em Wittgenstein, e tendente a demarcar o caminho que me proponho

percorrer: "Wovon muß man […] ausgehen […]?" (donde temos que partir?). Atento o meu propósito, o que pretendo — assumindo a máxima segundo a qual no princípio se manifesta já o fim — é bordar algumas considerações pressuponentes relacionadas com os pólos do exercício metodonomológico, que no-lo apresentem em síntese como que antecipante e se nos revelem consonantes com uma impostação do referido exercício "for dark times" — isto é, para "tempos em que o nosso entendimento sobre o que [o direito] realmente significa tem vindo a ser [ou obnubilado por um ideário de pendor normativisticamente formal, que deverá considerar-se perimido, ou] submergido [… por um outro que o funcionaliza, sem resto, às] forças dominantes na sociedade".

São esses pólos, se não erro, o sistema fundamento e o problema judicando, pois o mencionado exercício não é mais do que o *pas de deux* em que um e outro se enredam até (metodonomologicamente, que não fenomenicamente…) ser fundirem no resultado em mira: no juízo decisório ou no critério judicativamente apurado. Note-se, porém: esboçarei apenas a coreografia, mas não será neste ensejo que me empenharei em executá-la…

2. Da perspectiva de intelecção das coisas em que me re-vejo, o sistema e o problema são as dimensões noematicamente irredutíveis da racionalidade metodológico-juridicamente adequada, o que vale por dizer os pólos do exercício judicativo-decisório. E abrem-se a uma dialéctica entre eles (que não é mais do que o exercício que nos preocupa…), bem compreensível se lembrarmos que os problemas, para serem esclarecidamente postos e adequadamente solucionados, exigem a pressuposição do sistema; e que este se redensifica continuamente por mediação daqueles.

O sistema e o problema são pólos contrários (se fossem contraditórios a referida dialéctica seria impossível…), e, quando considerados em abstracto, parecem excluir-se reciprocamente. Com efeito, o sistema, na sua ideia pura, exclui a contingente interrogação desintegrante, como que dominada pela entropia de uma força centrífuga, que se associa ao problema; e este úiltimo, reduzido a si mesmo, exclui a unitária racionalização integrante, como que dominada pela homeostasia de uma força centrípeta, que se associa ao sistema. Ou seja: estes dois pólos contrários estão colimados à síntese implicada pela realização judicativo-decisória do direito, pelo que constituem como que um "paradoxo de oponentes indissoluvelmente conjugados"… Ainda por outras palavras: quando absolutizados, sistema e problema parecem opor-se. Todavia, de um esclarecido

ponto de vista metodonomológico, um e outro enredam-se numa exemplar "relação [com] reciprocidade", numa paradigmática *dialectica oppositorum* — a teia judicativo-decisória. Se na teia de aranha é importante não esquecer o … aracnídeo, naqueloutra que mencionámos importa não ignorar os fios que a tecem, o fiador de serviço e o que dele se espera: a afirmação da dialéctica em que se enredam os referentes circunstancialmente em causa (o problema judicando e a juridicidade fundamento) e as operações reflexivas que essa mesma dialéctica impõe ao jurista circunstancialmente encarregado da tarefa ("[…] ocultar a sua pessoa" e o múnus que se lhe comete pode ter ressonâncias filosóficas exaltantes, mas é um erro…). E para mencionar o tipo de raciocínio articulador dos pólos do exercício judicativo-decisório, di-lo-emos perpassado por uma como que lógica analógica.

No referido exercício tudo vai gravitar à volta da aludida dialéctica problema/sistema. Mais do que simples objecto, o caso/problema perfila-se aí como autêntico "prius" discursivo: o exercício metodonomológico é como que antecedido de uma experiência epifânica — da emergência do caso; e as perguntas que esse exercício postula são determinadas por esse mesmo caso — que é, portanto, a perspectiva relevante nesse perguntar. Ora o caso irrompe no contexto do sistema, e as perguntas que o caso determina são feitas ao sistema. Se quisermos, os casos-problemas "[actuam] como catalisadores ou 'reagentes significantes'" dos diversos estratos do sistema jurídico, instituindo/concretizando o seu significado prático-normativo. Ou ainda: também aqui se pode afirmar "que o molecular *[i.e.,* o problema] tem a capacidade de fazer comunicar *o elementar* [a partícula molecular — o aludido problema] e *o cósmico* [o todo — o mencionado sistema —, garantindo] um continuum [entre ambos]".

Basta dizer isto para de imediato se compreender que estamos num contraste evidente com a visão normativística do direito (fiquemo-nos apenas por este contraponto…), da perspectiva metódica (a circunstancialmente relevante) centrada na simples aplicação lógico-dedutiva das normas legais. A concepção das coisas que o normativismo privilegiava era redutivamente linear (só das normas para os factos), meramente dedutiva (pois que falaciosamente se pretendia cumprida no silogismo subsuntivo) e estritamente unidireccional (porque não atendia à possibilidade de qualquer dialéctica de recíproca explicitação entre os dois mencionados pólos). Os factos, a que acabámos de aludir, são diferentes dos casos-problemas acima considerados. Os primeiros são apenas situações empírico-sociais em coerência apofântica com

normas legais, como que correlatos/extensões lógico-objectivos da hipótese de prescrições legislativas — "os factos só são factos quando não são postos em questão", *i. e.*, quando os não referimos a qualquer… referente. Ao invés, os casos jurídicos são problemas práticos *ab origine* cunhados pelo direito, infungíveis na identidade singular que os predica e irredutíveis à prescritiva normatividade geral de qualquer critério pré-objectivado.

A mencionada centralidade do caso no exercício judicativo-decisório é imediatamente compreendida se nos dispusermos a recuperar algumas ideias fortes da proposta metodonomológica que propugnamos. Lembremos, em primeiro lugar, a índole do juízo decisório: a ponderação prudencial que ele implica não é determinada pelo caso concreto? Pensemos, a seguir, na problemática — relevantíssima, no horizonte de um sistema de legislação, como o nosso — da selecção da norma adequada: não é a pergunta que o caso sempre traduz que suscita a procura, no âmbito do sistema, de um critério jurídico *(maxime,* de uma norma legal) susceptível de lhe dar a resposta normativo-juridicamente devida atenta a respectiva intencionalidade problemática? Mencionemos, em terceiro lugar, a experimentação a que o exercício metodonomológico submete o critério hipoteticamente tido por adequado, e que há-de permitir ultrapassar os mais ou menos patentes limites intencionais que o aludido critério apresentará: porventura será pensável essa experimentação sem a atenta consideração do caso? Finalmente, olhemos aquelas que temos vindo a designar as situações ornitorrinco: em vista da inconcludência do princípio universal negativo (que garantia uma total tranquilidade de alma ao normativismo, mas implica a inaceitável inconsideração do sentido predicativo da juridicidade), não reconhecemos também nós que a tensão que nelas se manifesta entre os (intercambiáveis) "limites da juridicidade" e "espaço livre do direito" só poderá ser concludentemente superada se nos centrarmos no caso?

Com o intuito de realizar a justeza judicativa (a síntese e uma estrita justeza problemática e de uma estrita justeza sistemática), o exercício metodonomológico, polarizado no caso, "expande [o sistema jurídico] como uma nascente": aproveita a sua abertura, explora a sua dinâmica e disciplina o seu desenvolvimento. E sendo o caso concretamente judicando, já o acentuámos, o ponto de partida daquele exercício, poderemos dizer que o problema que como tal o constitui submete o também mencionado contra-pólo a uma flexão, que (por isso mesmo…) deixa formular-se num heterodoxo, mas significativo, *twist the system!*

Ou, sintetizando de outro modo as mais importantes notas até agora sublinhadas: um problema jurídico advém, em dialéctica complementaridade, da rigorosa pressuposição do *corpus iuris,* das pragmaticamente interessadas perguntas que lhe dirigimos atento o mencionado problema, e da inquietação do jurista consciente da responsabilidade da sua tarefa institucional — já que o sistema é o horizonte de emergência do problema, este último polariza as perguntas atinentes às respectivas posição e solução, e um e outro são os referentes do e concorrem para densificar o múnus do jurista. O problema e o sistema são, por isso, os pólos "enganchados" do exercício judicativo-decisório, que se entrecruzam e entretecem "nos reticulados do corpo total da [juridicidade]" — o "sentido experimentado" pelos problemas vai-se depositando no sistema enquanto experiência feita, e assim sucessivamente, num sem-fim a que só se porá termo quando o sector da humanidade que se empenhou em criar o direito desistir dele.

3. Estas foram como que imagens captadas pelo sobrevoo cometido a um *drone* mal equipado. Aterremos agora, na tentativa de apreender um pouco melhor os dois pólos do exercício judicativo-decisório. Começaremos pelo sistema (afinal, se o caso/problema é o "prius" do exercício, ele não vem à epifania sem a pressuposição de um mais ou menos explicitamente recortado referente… que já que integra o sistema, pelo que um e outro — o caso/problema e o necessário referente sistemático — co-instituem uma unidade de sentido, comparável, como em outro ensejo nos atrevemos a sustentar, ao paradoxo… do ovo e da galinha) — em relação ao qual me limitarei a acentuar alguns pontos, que se me afiguram nucleares.

Assim como deveremos sempre lembrar-nos que "uma selva […] infinita […] é] de árvores", e que "uma nação […] forte […] é de homens [– de] homens de humana condição", importa nunca esquecer que o sistema jurídico é feito de problemas juridicamente relevantes — "[o problema] é […] uma dimensão do sistema e até mesmo o seu horizonte, o seu foco" —, pelo que também aqui se pode dizer que a "complexidade organizada" radica na "simplicidade primordial". Etimologicamente (com frequência, as palavras não enganam, antes desvelam…), *syn-istemi* designa um com-posto, um todo constituído por partes que se articulam. "[U]m sistema não é outra coisa senão a subordinação de todos os aspectos [de certo] universo a um qualquer deles" — tratando-se do *corpus iuris,* esse aspecto polarizador é, evidentemente, o identificante do sentido do direito… que, por isso mesmo, nunca deverá perder-se de vista. Também aqui vale a afirmação de que "um todo sistematicamente organizado não pode ser

'reduzido' às suas partes elementares, mas apenas 'dissecado' nas partes que o compõem"… e daí que o jurista que não pressuponha uma adequada compreensão do sistema jurídico — de modo particular, a esclarecidamente recortada unidade de sentido que o predica — esteja "em situação paralela [à daquele] que conhece o alfabeto mas que, quando escreve, ignora as palavras formadas pelas letras".

Nestas considerações introdutórias, diremos ainda o sistema jurídico um conjunto móvel em agitação permanente, uma "caosplexidade" (pedindo o neologismo de empréstimo à teoria da ciência), um "caleidoscópio instável" (se optarmos por parafrasear José Saramago) e uma "rede rizomática de possibilidades" experiencialmente radicadas, problematicamente inucleadas, juridicamente intencionadas e analogicamente dinamizandas — respectivamente (é no horizonte do "mundo da vida" que essas possibilidades emergem), porque elas manifestam-se sempre como problemas que interpelam (prescritivamente) o legislador, (judicativamente) os tribunais, (discricionariamente) a administração, (racionalmente) a doutrina, e (pragmaticamente) os particulares, porque todas as mencionadas possibilidades assumem como seu referente o sentido nuclear da juridicidade, e porque todas vão surgindo como réplicas que, com semelhanças e diferenças e em dialéctica correlatividade, afinam (em graus diversos, da redensificação pontual à ruptura superadora) o *statu quo ante*. Na acepção acabada de explicitar e relevada a actuação articulada dos aludidos actores/autores, também nós poderemos dizer — recorrendo a uma inspirada alegoria (de Dworkin), hoje clássica — que o sistema jurídico se vai re-constituindo em permanência como uma *chain novel,* identificando como que *the chain of law*.

Por outro lado, acentuámo-lo repetidas vezes, o sistema jurídico (não o sistema unicitariamente unidimensional, fechado e constituído apenas por normas legais, do normativismo, nem o autopoieticamente concebido subsistema — jurídico — exposto a um relacionamento permanente com os — demais — subsistemas práticos contíguos, do funcionalismo, mas o sistema unitariamente pluridimensional, aberto — pelos problemas que o inervam —, material — porque o sentido do direito e os princípios normativos incluem-se entre os seus estratos —, e de "histórica reconstituição regressiva" — atento o seu carácter prático, em que o novo se vai incrustando no velho, em que cada situação emergente concorre para redensificar a tradição subjacente —, do jurisprudencialismo) é uma das instâncias decisivas (a outra é o pensamento jurídico, enquanto auditório enquadrante) para que o jurista consiga intersubjectivizar a sua ineliminável subjectividade

("subjectividade" e "não objectividade" são coisas diferentes…), na medida em que lhe disponibiliza o que deve pressupor tanto para a posição como para a solução dos problemas que *ex officio* o interpelam (o pensamento jurídico diz-lhe como deve proceder para se desincumbir dessas suas tarefas…).

Observação esta última que reclama um esclarecimento complementar em que de há muito nos habituámos a insistir, de um modo formalmente paradoxal mas intencionalmente inequívoco. O de que o sistema jurídico pode não ser suficiente (na sua pré-disponível objectivação, entenda-se) para permitir solucionar o problema judicando, mas tem que ser suficiente (na sua relevância material, esclareça-se) para se conseguir pôr esse mesmo problema: o critério reclamado pelo problema do caso pode ter que ser inovadoramente constituído pelo julgador (se for possível reconhecer-lhe legitimidade para tanto…), mas sem a devidamente esclarecida e circunstancialmente pertinente pressuposição de referenciais fundamentos normativo-jurídicos mínimos, ainda que acabados de irromper no sistema, não será seguramente concebível a posição do aludido problema. Por outras palavras: se para esta posição podemos admitir a máxima rarefacção (dada a natural indeterminação dos mencionados fundamentos nascentes), para aquela solução exige-se a máxima densificação (uma vez que o indispensável critério terá que mostrar-se apto a ser "trazido-à-correspondência" com o problema judicando, fundindo-se estes dois pólos, por mediação do exercício metodonomológico, na norma judicativamente apurada).

Sobre a relevância metodonomológica do sistema jurídico, limitar-nos-emos neste ensejo a recordar que o mencionado exercício visa fundamentar a semelhança que aproxima, *sub specie iuris,* dois pólos fenomenicamente diferentes: o mérito problemático do caso judicando e a relevância problemática do constituído e/ou do constituendo estrato do sistema jurídico que se lhe adequa. O *locus communis* dos dois referidos pólos — intencionalmente semelhantes na sua ôntica diferença — é a própria juridicidade. O que — aproveitando parcialmente (muito parcialmente…) uma inspiradora formulação de G. Deleuze… — nos autoriza a dizer a normatividade jurídica vigente "o sistema em que o diferente se refere ao diferente por meio [de um *fundamentum relationis* — de um *tertium comparationis* — circunstancialmente adequado]": não afirmou Arthur Kaufmann, com a concordância de Castanheira Neves, que "o direito implica […] sempre […] uma 'igualação de não-iguais segundo o critério de um ponto de vista tido por essencial'"?... E acrescentemos ainda

que o sistema jurídico se projecta na (concorre para a) modelação da "judícia" que vamos sendo capazes de fazer intervir no cumprimento do nosso *officium,* quer dizer, na conformação da constituenda memória da juridicidade com que vamos operando na esfera do exercício metodonomológico. Memória essa em que cada um tem (e de que cada um tira) a sua parte, e que (alegoricamente) é como que "o rasto da baba do caracol da história" do pensamento jurídico, quer porque (subjectivamente) vai sendo depositada pelos demiurgos deste particular domínio do saber (pelos juristas), com o empenhamento de quem se dispõe a deixar um sinal visível do seu labor durante um tempo côngruo, quer porque (objectivamente) tem a consistência bastante para não ser removida por um aguaceiro mais denso ou por um vento mais forte.

Por seu turno, os estratos do sistema jurídico não me merecerão mais do que três brevíssimas referências preambulares.

1.ª) O *corpus iuris* integra problemas, fundamentos e critérios. O confronto com interpelações problemáticas, dotadas de hipotética relevância jurídica, estimula (acorda e põe em funcionamento) a capacidade reflexiva que temos vindo a afinar ao longo do processo de hominização, levando assim à excogitação de fundamentos que intencionalmente lhe co-respondam (note-se, porém; *a)* por muito radicalmente novo que seja o problema interpelante, sem a pressuposição de um referente pertinentemente intencionado nem sequer teria sido possível pôr esse problema; e, por isso, *b)* por muito radicalmente novo que seja o problema interpelante, ele não institui, só por si, uma realidade jurídica outra). A rarefacção (o carácter indeterminado e a labilidade) dos mencionados fundamentos (tabuletas indicativas da direcção a seguir, que não itinerários minuciosos dos passos a dar) e a pragmática da vida impõem, por natural (e saudável) economia de esforço (para nos desonerarmos do que for possível e nos pouparmos a consumições evitáveis), a progressiva sedimentação dos mencionados fundamentos em critérios mais imediatamente operatórios (pensemos, exemplificativamente, na disjuntiva projecção dos princípios normativos em normas jurídicas legais). À sedimentação a que deste modo se alude, subjaz, portanto, uma relação semelhante àquela que articula os termos da tríade a que inicialmente nos referimos: se é sempre por mediação dos problemas concretamente emergentes que se vão, excogitando primeiro, e mobilizando depois, princípios (-fundamentos) com uma intencionalidade axiológico--problemática que lhes co-responda, são aqueles problemas e estes princípios que vão paulatinamente concorrendo, e pelas apontadas

razões de economia de esforço e de operatividade, para a elaboração de normas (-critérios) com uma intencionalidade problemático-axiológica que igualmente co-responda aos referentes que essas normas (-critérios) assumem (em dialéctica correlatividade, a jusante, os problemas que elas pragmaticamente visam, e, a montante, os fundamentos que normativamente as legitimam). Tudo o que sintetizaremos nas afirmações conclusivas de que o sistema jurídico se vai constituindo (experiencialmente) *bottom up,* não congeminando (nefelibaticamente) *top down,* e segundo uma dinâmica de matriz analógica.

2.ª) Sob o ponto de vista metodonomológico, todos os estratos do sistema actuam complementarmente e em dialéctica correlatividade, por mediação dos e atentos os problemas que pertinentemente os convoquem: não se perfilam, uns perante os outros, como mónadas sem quaisquer janelas, mas como parâmetros conjuntamente indispensáveis à reflexão implicada pelo juízo a proferir.

3.ª) Dos aludidos estratos, só dedicarei algumas palavras ao primeiro deles — o sentido do direito —, atento o carácter axial que, já se percebeu, entendo que lhe deverá ser reconhecido. Permita-se-me começar por uma *blague* (perdoe-se-me o desvio…): é-nos, seguramente muito mais acessível o sentido do que podemos dizer, do que aquilo que podemos dizer do sentido. Sem surpresa, porque "[o] sentido […] é o verdadeiro *loquendum,* aquilo que não pode ser dito no uso empírico e só pode ser dito no uso transcendente", razão pela qual, por outro lado, "[n]ão é de admirar que seja mais fácil dizer o que o sentido não é do que dizer aquilo que ele é" (como não lembrar a atitude de Santo Agostinho perante o tempo?!...).

Centrando-nos no que importa e pressupondo tudo quanto escrevemos a este propósito, julgamos dever acentuar, muito sinteticamente (na tentativa de escaparmos à crítica de que estamos a incorrer em censurável *aquas in mare fundere…),* o seguinte: se os "sentidos" identificam rigorosamente "as referências espiritualmente culturais que convocam o transcender da realização humana" e se o "direito é justamente um dos modos [o predicativo do nosso universo civilizacional] do transcender-se o homem a si próprio", o sentido do direito poderá dizer-se o caminho sempre aberto da deveniência da normatividade jurídica, a compasso do também irreprimível dever-de-vir-a-ser do próprio homem. Algo mais pormenorizadamente: o sentido do direito é o problematicamente radicado referente predicativo, enquanto regulativo intencional, da normatividade

jurídica, o conjunto das constituendas *archai* irredutivelmente constitutivas da juridicidade. Olhando esta questão tal-qualmente pensamos que ela deve hoje ser vista — também do mencionado sentido podemos dizer que ele "não se impõe, mas propõe-se"… —, identificámo-lo já, repetidas vezes, com o rosto jurídico da pessoa… que também nos não temos cansado de reconhecer modelado, em dialéctica correlatividade, por uma face de liberdade (autonomia) — suporte dos direitos que podemos opor aos outros — e por uma outra de responsabilidade (tradutora da inserção comunitária de cada um) — suporte dos deveres que temos para com os outros: o homem-pessoa é como que no intervalo entre ele só e tudo o resto (os outros, o mundo e o que mais houver…) — e essa fronteira não separa mas une, não divide mas multiplica, não contrapõe mas funde… Assim entendido como o *pneuma* do sistema jurídico, como o sopro/energia que o anima, como a arquitrave que o sustenta, percebe-se que o sentido do direito perpassa todos os seus demais estratos, permitindo as sinapses entre eles e fazendo do *corpus iuris* "um imenso *continuum* coesivo"; e que seja ainda esse mesmo sentido que, em última análise, cunha a unidade de carácter intencional *(scilicet,* os historicamente devenientes pólos axiológico-práticos — portanto, já com uma consonância problemática… — que a vão constituindo) dadora de identidade ao mencionado sistema. Aproveitando (transliteralmente…) uma proposta defendida na esfera da teoria da linguagem, diremos que se os princípios normativos (aquele outro dos seus estratos que traduz uma primeira tentativa de densificar a rarefacção ínsita ao sentido) identificam as *deep structures* do sistema jurídico — os apoios mais próximos dos critérios que o integram —, o sentido específico do direito remete às respectivas *deep deep structures* — ao fundamento último quer destes critérios, quer daqueles apoios. Note-se, porém: o carácter experiencialmente radicado (que não nefelibaticamente postulado) que temos insistido em apontar ao mencionado sentido significa que ele se não dilui numa rarefacção sem densidade. Essas estruturas de maior profundidade manifestam-se (esbatidas mas não ausentes…) nos planos mais acessíveis — sem surpresa, porque sabe-se bem haver uma "profundidade escondida na superfície"…

Sob o ponto de vista metodonomológico, o sentido do direito é o último apoio susceptível de permitir arriscar a posição como juridicamente relevante, e a solução juridicamente adequada, de um problema que irrompa na (irremissivelmente mal traçada) fronteira — no limite mesmo — da juridicidade, naquele *campus* por onde ela se vai, ainda muito hesitantemente, espraiando. Recorrendo ao

exemplo de sempre, e olhando o passado que já foi futuro — no horizonte da prática, a tendencialmente irrefutável comprovação empírica, intencionalmente demonstrativa, cede o lugar à meramente eventual confirmação da hipótese, intencionalmente argumentativa… —, atente-se nos primeiros confrontos, ainda muito nebulosos, por parte dos tribunais (nomeadamente, franceses e belgas), com situações problemáticas que vieram a ser exactamente recortadas e identificadas como de abuso do direito. Não deixemos de acrescentar que se nestas situações-limite o sentido do direito é chamado a intervir explícita e imediatamente na posição e solução de problemas radicalmente novos, naquelas em que estejam em causa casos-problemas rotineiros (afinal, as mais frequentes) ele intervém, também a esses dois níveis, em termos apenas implícitos e mediatos. E, como é óbvio, entre um e outro destes dois extremos há uma infinidade de situações intermédias, em que a intervenção do sentido do direito se aproxima ora mais do primeiro, ora mais do segundo.

4. Como nos condenámos a discorrer muito *per saltum,* voltemos de pronto a nossa atenção para o outro pólo do exercício judicativo-decisório.

O caso jurídico concretamente judicando é (aprendemo-lo todos nesta Escola) o "ponto de partida" e a "perspectiva" da reflexão metodonomológica — e esta está longe de ser uma afirmação anódina. Mas não capitulemos ao "distúrbio" da "satisfação prematura [de toda a] curiosidade" — tentemos avançar, para maior segurança, passo a passo…

A categoria problema recortar-se-á mais exactamente se a confrontarmos com outras a que por vezes aparece associada: mistério, enigma, aporia…

O mistério é não só o apofático *quoad nos* (o inefável, mas inteligível), mas o apofático *quoad se* (o inefável, não meramente para nós, mas como tal) — "[o mistério] apenas [tem] significado", sentenciou em certa ocasião, com a sua heterodoxa lucidez, o já convocado E. E. Cummings… e é esse significado que não raro suscita um nosso profundamente convicto *credo quia absurdum:* ante o *mysterium tremendum* a linguagem emudece e as tentativas de uma formulação verbal não passam de analogias frustes… o linguista Noam Chomsky dividiu as questões que intrigam a humanidade em "problemas", que podem ser resolvidos, e "mistérios", que não é possível resolver. Para o filósofo Gabriel Marcel, se eu estou imerso no mistério, tenho, ao invés, a possibilidade de olhar de fora qualquer problema. Nesta linha, poderá ainda afirmar-se que o mistério é

como que "uma 'última pele' […] do si-próprio que não podemos descrever porque não podemos sair dela" — por isso se disse já o mistério uma das possíveis expressões do indizível para o ser falante que é o homem. Por seu turno, a aporia (G. Marcel falaria em enigma…) é como que um problema insolúvel: sabemos que teríamos que caminhar (reflexivamente) para o resolver, mas na procura do caminho enredamo-nos numa teia que no-lo esconde. Insistindo na articulação acabada de sublinhar, reconheceremos, também nós, que os problemas são simultaneamente aporéticos e euporéticos: se a sua emergência "nos mostra onde o caminho se interrompe," o esfoço implicado pela respectiva solução "[indica-nos] igualmente […] onde procurar o novo caminho a seguir".

Mas deixemos estas subtilezas. (Con)centremo-nos, doravante, nos problemas.

Falar de problemas é considerar dificuldades circunscritas, objectivadas, recortadas, para as quais há, mais ou menos acessível, uma solução. Numa acepção dialéctica (originariamente aristotélica), os problemas identificam aquelas questões que se apresentam como "alternativas abertas" — havendo, portanto, sempre argumentos a favor de qualquer um dos seus termos. Todavia — insistimos —, com maior ou menor dificuldade e mais ou menos controvérsia, é possível pensar para eles uma resposta adequada.

Um problema (tanto em geral, como, *v. gr.,* um problema jurídico) radica na perplexidade suscitada por uma experiência concreta que se faz. Perplexidade para a qual não divisamos imediatamente uma resposta. Mas essa resposta é possível — conseguiremos encontrá-la mediatamente, se dispusermos da capacidade necessária e nos empenharmos o suficiente. Quando uma certa experiência nos resiste, dando origem àquilo que Aristóteles designou um "nó do espírito", estamos diante de um problema. O problema é, assim, a experiência de uma resistência — da resistência posta pela experiência às exigências que pertinentemente se pressupõem: quando as referidas exigências (mandamentos irrenunciáveis, princípios norteadores da opção preferível, critérios orientadores da acção concreta, expectativas acalentadas…) chocam com a realidade — quando nesta se não mostram transparentemente cumpridas aquelas pressuposições, quando a realidade as contesta ou recusa — deparamo-nos com uma questão, que nos leva a formular uma pergunta para enunciar a dúvida que nos assalta, e temos um problema, que é a perplexidade de carácter constitutivamente cultural que experienciamos. "[S]ó a resistência objectiva da realidade nos alerta para" a emergência de

um problema. E daí que — sublinhava-o já Platão — um problema manifeste um saber do não-saber: se tudo nos fosse transparente (como para os deuses), ou se tudo se nos apresentasse opaco (como para os ignorantes), não teríamos problemas. O que se sabe (ou conhece) é a pressuposição que se mobiliza, a exigência que se assume; o que se não sabe (ou ignora) origina a interrogação que se formula atenta a desafiante experiência que se faz e que pertinentemente remete àquela pressuposição. Notas estas duas (cumulativamente necessárias para a posição de um problema) que confirmam a ideia forte segundo a qual "o saber implica um risco [o risco inerente a uma sempre possível correcção das respostas arquivadas] e o não-saber uma possibilidade [a possibilidade aberta por qualquer pergunta que esclarecidamente se arrisque]".

Compreende-se, por isso, que quem mais sabe *(scilicet,* aquele que é capaz de mobilizar mais pressuposições) consiga formular mais (e novas) perguntas e pôr mais (e novos) problemas. E, na esfera do direito, é também assim. O jurista mais bem preparado (aquele que dispuser de uma "judícia" mais alargada) consegue recortar (por vezes, de modo surpreendente porque com enorme subtileza — pense-se nos lampejos característicos de um grande advogado), no todo indiferenciado das situações-acontecimentos com que se depara, muitos mais problemas juridicamente relevantes do que um seu homólogo menos bem preparado.

A emergência e a tematização de um problema pode determinar — ou, no mínimo, concorrer para viabilizar — uma mudança de perspectiva, um rasgo inovador (que, quando concludentemente protagonizado por um juiz, em oposição ao pensamento dominante — se há pouco privilegiámos os advogados, olhemos agora os juízes… — poderá até implicar uma sua mais rápida promoção aos tribunais superiores), uma alteração no modo como, em certo sector da realidade culturalmente significativa, se passa a compreender "a coisa" de que aí se cuida (exemplo: a autonomização do problema do abuso do direito, a que ainda há pouco se aludiu, originou uma recompreensão da categoria dogmática direito subjectivo). Há, decerto, uma tipificação de problemas, que vai oferecendo precedentes (a regra é aqui o parátipo, não o holótipo…), ao disponibilizar um saber de experiência feito (o saber é, no fundo, o conjunto dos problemas postos e resolvidos…), que nos poupa à fadiga de um esgotante sem-fim interrogativo (com efeito, "nós não podemos estar sempre a repensar ininterruptamente tudo o que pensamos e o que os outros pensam"). Lembre-se, a título exemplificativo, o acervo de experiências arquivado no (e

disponibilizado pelo) Registo Nacional de Cláusulas Abusivas, no âmbito das chamadas cláusulas contratuais gerais e segundo o direito português vigente. Ou, paralelamente, as críticas que se fazem ouvir quando, sem um fundamento suficiente (ou, quando menos, com um fundamento de duvidosa concludência…), se rompe com uma prática jurisprudencial testada, afinada e estabilizada e se "dá *um passo de gigante* na […]" abordagem do problema concretamente em causa.

Mas se os problemas postos e resolvidos se vão tipificando ou seriando, o certo é que a experiência concreta é sempre mais rica, na medida em que lhe inere uma mais ou menos alargada (e ineliminável!) margem de novidade: a vida não se desenrola em circuito fechado, "[o] novo acontece sempre à revelia da esmagadora força das leis estatísticas e da sua probabilidade", "é 'o infinitamente improvável que ocorre regularmente'", pelo que "[n]ão *podemos* inferir os acontecimentos futuros dos acontecimento presentes" — *"[the] future will not copy fair [the] past";* ao invés, está cheio de *"unknown unknowns"*. As mencionadas novidades, mesmo as mais inesperadas, não serão, talvez, os "abismos do improvável" *(Abgründe des Unwahrscheinlichen)* que tanto atraem os matemáticos, porque têm que emergir em linha com um sentido, decerto deveniente, mas susceptível de ser verosimilmente pressuposto. De qualquer modo, constituirão sempre interpelações mais ou menos surpreendentes, porque as novidades são isso mesmo. E daí que se possa afirmar que, não obstante as por vezes notórias semelhanças com os até à data conhecidos, os novos problemas, predicados como são pela sua radical concretude, apresentam sempre um mais ou menos alargado conjunto de nervuras que os distinguem dos precedentes — eles são… "vastamente [o]s mesm[o]s diferentissimamente", pois emergem em termos antropocairostopicamente balizados, *i. e.,* entre determinadas pessoas, num certo momento histórico, num dado lugar onde e modo assim. Ou, por outras palavras: a emergência dos problemas é sempre co-determinada por um acaso ineliminável, por uma constelação de circunstâncias *en avance* imprevisível — eles têm uma dimensão como que estocástica… —, que, por exemplo, concorre para os contrapor aos conceitos (… se limita a concorrer, note-se bem, porque a mencionada contraposição radica nuclearmente na identidade singular apenas predicativa dos problemas).

Não obstante a importância desoneradora dos vários apoios estabilizados e disponíveis (e das inércias que eles correlativamente viabilizam…), nunca deveremos abdicar, como juristas, de tentar pôr sempre cada problema na sua autonomia. Não deveremos receá-

-lo, porque se assumirmos, em termos esclarecidos, a tarefa que é institucionalmente a nossa, impõe-se-nos, por um lado, reconhecer que "a rotina do […] pensamento […] é insuportável" — afinal, "[…] o pensamento só pensa com a diferença […]", pelo que procurar um "refúgio e [um] repouso do pensar no já pensado" é uma ingenuidade muito de lastimar… —, e, por outro e consonantemente, assumir a lucidez e a responsabilidade de um permanente *"Hindenken zum Anfang"* (de um "pensamento que caminh[e sempre] em direcção ao começo" — *i. e.,* em direcção ao caso) — e, neste sentido, também nós poderemos dizer que "[…] cada jurista deve ser um anarquista"… Tal como o cientista (sublinhou-o Thomas Kuhn) tem que "ver a natureza de maneira diferente [para que] o novo facto [surja como] um facto científico", também o jurista tem que dispor-se, em permanência, a relevar noutros termos a pertinentemente pressuposta normatividade jurídica vigente, ou a recortar diferentemente o mérito das experiências concretas que o interpelam (lembrem-se os expedientes ingleses da *overruling* e da *distinguishing,* entretanto volvidos em lugares comuns para as mais arejadas impostações metodonomológicas europeias continentais), para ser capaz de dar efectivos saltos em frente — para conseguir captar, com a sua lupa específica (a da juridicidade) novos problemas que devam considerar-se (afirmemo-lo com o esperanto do nosso tempo) *new judicial sprouts…* Só uma … *swing jurisprudence,* como esta que assim se propõe (ao relativizar o princípio da inércia e ao implicar, como que compensatoriamente, a assunção do — bem pesado! — ónus da contra-argumentação…), pode abalar a rotina e ilidir a suspeita da redução do direito a uma construção anafórica — numa palavra, contestar, em termos concludentes, o conservadorismo que tantas vezes (impertinentemente!) se censura ao pensamento jurídico. Ou, sintetizando tudo isso (por mediação de uma paráfrase ousada…) na pergunta clássica: "[Iurisprudentes], quae causa subegit / Ignotas temptare vias"? E a resposta não tem que ver (como na citada obra-prima co-fundadora da nossa cultura multi-milenar) com a execução de uma estratégia bélica e de um desígnio civilizacional, mas com a realização da normatividade jurídica — ou seja, e em dialéctica correlatividade, com a historicidade que a dinamiza, as exigências que a inervam e os problemas que a densificam… problemas estes que, na sua ineliminável *"diferença",* podem, ou não, *"justificar"* uma *"diferente consequência jurídica".*

Tinha inteira razão São Tomás de Aquino quando asseverou que "[q]uanto mais se desce ao particular, tanto mais aumenta a indeterminação". Ao problema — a expressão emblemática do

particular, em virtude da identidade singular que o predica — inere, portanto, uma irremissível margem de indeterminação. Que não deverá nunca perder-se de vista, sob pena de o não recortarmos na sua especificidade, diluindo antes esta última marca, mais ou menos notoriamente, na estrutura de padrões pré-disponíveis *(v. gr.,* na hipótese de critérios legais) e, no limite, de a recusarmos mesmo quando ela resiste a essa diluição e, não obstante, apresenta ainda um mérito que intenciona, com surpreendente originalidade, com ruptora novidade, a normatividade jurídica. Sintética e parafrasticamente: os casos/problemas não são "como aqueles 'corpos de pobre' […] 'que cabem bem na roupa de toda a gente'", antes implicam, isso sim, a cuidadosa atenção à sua identidade singular, determinante — sempre! — de uma norma judicativamente apurada.

Em suma, e sem obsessões nem maniqueísmos: tal-qualmente a compreendemos, a metodonomologia perfila-se diante de nós — permita-se-me mais esta paráfrase… — como um "projecto de responsabilidade", entretecido, em dialéctica correlatividade, por experiências problemáticas que intencionam um sentido, e por exigências de sentido problematicamente radicadas. A judícia — o normativo-juridicamente polarizado saber de experiência feito — a que vamos acedendo, vê-se constantemente interpelada por novos problemas, que vão reconstituindo esse experiencialmente sedimentado pano de fundo. Ora é "à luz" da mencionada judícia — mas "também à luz daquilo que nos parece" inerente a cada nova experiência — que nos vamos afoitando a recortar, nas situações-acontecimentos com que somos confrontados, os "casos jurídicos concretos"… que importará solucionar por mediação de um exercício judicativo-decisório muito dependente dos dois apontados bordões — do disponibilizado pela judícia e do excogitado em directa referência a cada problema circunstancialmente judicando.

Como é óbvio, os problemas caracterizam-se pelos domínios em que emergem e cujas dimensões estruturantes intencionam. A nós interessam-nos não aqueles que implicam a pressuposição das leis da física ou da matemática, mas os que intencionam pertinentemente a normatividade jurídica. O que significa que os problemas jurídicos não são apenas (como sustentam os normativismos) os factos-espécies subsumíveis à hipótese das normas-géneros — de que, portanto, se possam dizer correlatos lógico-objectivos —, mas, muito mais amplamente, todos os "nós de espírito" que têm como referente o direito.

Recorrendo, também nós e de novo, à conhecida tríade proposta por Heidegger, lembraremos que o perguntar identificativo de um problema é, conjuntamente, um *Gefragte,* um *Befragte* e um *Erfragte*.

Ou seja (e respectivamente): um problema implica sempre um "perguntar algo" ("aquilo que se pergunta" — nos problemas de que cuidamos, importa esclarecer a sua relevância jurídica), "a algo" ("aquilo a que se pergunta" — a situação-acontecimento que é mister interrogar por ser nela que o problema irrompe), "por algo" ("aquilo por que se pergunta" — o referente de sentido circunstancialmente pressuposto, que permitirá qualificar o problema concretamente em causa como, por exemplo, um problema de física, ou de matemática, ou de… direito). Sem esta pressuposição que se intenciona, não estaremos em condições de recortar (de primeiro entrever para depois identificar…), numa determinada situação-acontecimento histórico, um problema (por exemplo) juridicamente relevante. E é assim porque "a vida nada constrói sem arrancar de outro lugar qualquer as pedras de que precisa". Por outras palavras: um problema juridicamente relevante só poderá emergir como tal atenta a juridicidade que se vai (problematicamente) constituindo — *i.e.*, e sempre sem contradição prática, na pressuposição do (por sua mediação…) constituindo sistema da normatividade jurídica vigente. Inspiradamente (e aproveitando para reafirmar notas várias vezes sublinhadas): para o jurista, o problema é "a chave do domínio do" exercício metodonomológico; "[faltar-lhe-á, todavia,] a porta" que se lhe adequa — ou aquela não passará "[d]a chave de uma porta desconhecida"… —, se não tiver acedido a uma suficientemente acurada tematização do sistema jurídico (dos estratos que o compõem e da dialéctica que os enreda, dos problemas que o dinamizam e do sentido que os predica…).

Acabámos de o acentuar uma vez mais: também aqui, no *Alpha* (no problema) está o *Omega* (o sistema) — "[i]n my beginning is my end […]", e "[t]he end is where we start from […]". O jurista parte da situação, que começa por se lhe apresentar em termos ainda difusos. Pressupõe a juridicidade — o referente circunstancialmente relevante, enquanto ponto de vista pertinentemente privilegiado —, volta à situação de que partira e, neste espiralado ir e vir prático-normativo (que não hermenêutico-narrativo…), vai a pouco e pouco recortando o *(i. e.,* arriscando a posição do) problema jurídico nela (eventualmente…) existente — "[é] o facto de ser 'posto' (e, então, de ser referido às suas condições, de ser plenamente determinado) que constitui a positividade do problema". A posição do problema é assim o primeiro passo da sua exacta qualificação dogmática como, *v. gr.,* um problema de causa de exclusão da ilicitude penal, de responsabilidade civil extracontratual… e, posteriormente (e o advérbio, na medida em que sugere um depois cronológico, não traduz a dialéctica

complementaridade deste momento com aqueloutro que já a seguir mencionaremos…), da sua precisa identificação concreta *(A* que mata *B* em legítima defesa, *C* que causou culposamente um dano a *D…)*. Teremos, só então, um "[…] *caso jurídico concreto* [nas palavras de Castanheira Neves: é] um 'caso' porque nele se põe um *problema;* é 'concreto' porque esse problema se põe numa certa *situação* e para ela; é 'jurídico' porque desta emerge um *sentido jurídico,* o problemático sentido jurídico que o problema lhe refere e que nela ou através dela se assume e para o qual ela se individualiza como situação […]".

Dissemos já o direito, hoje, na sua expressão irredutível, o rosto jurídico da pessoa e compreendemo-lo como o (problematicamente radicado e problematicamente realizando) conjunto de fundamentos / critérios que, neste nosso hemisfério cultural, as pessoas (assumindo a liberdade e a responsabilidade que, em dialéctica correlatividade, irredutivelmente as predicam, e recorrendo às mediações indispensáveis e admissíveis) têm vindo a instituir para tentarem dar resposta lograda à pergunta prática que, sob várias formas, as circunstâncias continuamente lhes vão dirigindo (como repartir o mundo que se tem que com-partilhar em termos humanamente consonantes?). Poderemos agora, também nós, ousar a conclusão de que estaremos perante um problema de direito quando se nos impuser reconhecer que todos os pressupostos acabados de mencionar se manifestam presentes (a afirmação, em societária interacção, de pessoas; o efectivo exercício, por sua parte, da liberdade e da responsabilidade que lhes modelam o rosto jurídico; uma concreta controvérsia prática, atinente à partilha do mundo, que as interpela), sendo então mister "trazer-à-correspondência", de modo metodologicamente irrepreensível, o mérito do problema que assim se nos depara com a intencionalidade problemática do(s) constituído(s) ou constituendo(s) e pertinente(s) fundamento(s)/critério(s) a que igualmente aludimos — é este, afinal, o *officium specificum* do jurista.

É centrando-o no caso (que emerge no quadro do sistema e implica a respectiva reconstituição…) que o exercício metodonomológico deverá ser pensado. E se, como se nos impõe enquanto juristas, formos capazes de o fazer — *i. e.,* se conseguirmos assumir, com inteireza, as exigências do nosso múnus —, não no sentiremos reduzidos a "espectros de equidade e justiça", que se limitam a iludir-se com "a reminiscência" de uma esfiadíssima "ideia" de direito, antes nos reconheceremos em condições de realizar histórico-concretamente a constituenda normatividade jurídica vigente… ou, quando menos, de o tentar seriamente, sem nos auto-condenarmos, logo no início, ao fracasso. Para decidir judicativamente importa partir do "caso

jurídico concreto", recortando-o em termos precisos e relevando, com o máximo rigor, o seu mérito singular.

5. Não me deveria eximir ao esforço analítico de "anatomizar o pensamento em fatias fininhas", em ordem a esclarecer — como tantas vezes acentuei — os passos que o jurista de serviço deve dar, desde o seu confronto inicial com o caso até à respectiva solução normativo-juridicamente adequada. O que me autorizaria a reclamar a comprovação de uma nota que nunca me cansarei de repetir: a de que a equação metodonomológica, na sua dinâmica básica (a *hodos* constituída pelos passos a que aludi…) — e sem qualquer redutivismo algébrico à mistura… (porque será que "a decomposição matemática de um texto literário [… desemboca] em conclusões banais — ou inúteis pelo seu esoterismo"?...) —, é como que a expressão algorítmica do exercício judicativo-decisório. Recorrendo a uma conhecida expressão de K. Marx, direi que a esclarecida tematização e o domínio do mencionado algoritmo podem, decerto, "abreviar ou mitigar as […] dores de parto" da tarefa cometida ao mencionado jurista. Todavia, não o desonera de qualquer segmento da responsabilidade implicada pela normativamente constitutiva mediação judicativa, que lhe está institucionalmente confiada.

Mas do universo temático que deste modo se nos abriria já não me ocuparei em pormenor, para não correr o risco de transformar esta nótula numa ainda maior maçadoria. Pressuposta sempre a impostação das coisas que disse privilegiar, que estou eu a deixar assim entre parêntesis? Se não erro, em termos irredutíveis e elementares, os três pontos seguintes.

Em primeiro lugar, o atinente à procura, no *corpus iuris* vigente — tal como ele deve ser hoje compreendido, *cela va de soi*… — de um critério e/ou fundamento susceptível de vir a ser "trazido-à--correspondência" com o caso judicando. Co-respondência essa que se dará por confirmada quando a intencionalidade problemática do bordão se reconhecer suficientemente semelhante à relevância problemática do caso. E intencionalidade e mérito esses que deverão ser acuradamente apurados, pois nem aquele apoio é um leito de Procusto, nem o problema do caso é equiparável à vítima propiciatória dos desígnios da sinistra criatura. Se aquele primeiro pólo, atento o propósito em vista, nos remete para a disquisição, em dialéctica correlatividade, das suas *rationes legis* e *iuris*, o segundo determina a fusão de ambas na *ratio iudicis,* que porá termo ao exercício.

Se, porém — e é este o segundo ponto que gostaria, sempre esquematicamente, de sublinhar —, a procura a que aludi não conduzir ao resultado pretendido e nos depararmos com uma daquelas

situações configuradoras de (assim me habituei a designá-los, repito…) um caso ornitorrinco *(scilicet:* um caso em que se põe um "problema jurídico concreto" sem co-respondência com qualquer arrimo pré--disponível mas que interpela pertinentemente a juridicidade. Por outras palavras: um caso que irrompe na inevitavelmente mal traçada fronteira que separa os intercambiáveis espaços contíguos do ainda, pelo menos por agora, enquadrado pelo direito, e daqueloutro já, também pelo menos por agora, situado para além dele…), impor--se-nos-á (se não se interpuserem impedimentos normativo-jurídicos que no-lo proíbam...) assumir a responsabilidade da constituição do exigível e adequado critério/fundamento.

O que significa que, em qualquer destas duas situações (mais extensamente na segunda do que na primeira), a instância judicativo--decisória (paradigmaticamente, o tribunal) constitui normatividade jurídica vigente. Mas, no horizonte de um Estado de Direito, com que legitimidade é que o faz? — uma questão de inequívoco carácter constitucional, que é o terceiro e último ponto que mencionarei. Com aquela que deriva da assunção, por sua parte, do direito rigorosamente recortado, que não é um genitivo predicativo mas um nominativo constitutivo do referido tipo de Estado — Estado de Direito é só aquele que reconhece a autonomia do sentido do direito e a autonomia do pensamento que o pensa para o realizar judicativo-decisoriamente. Ora, a decisão judicativa exprime um oximoro, porque com-posto por dois segmentos contrários. O referido em primeiro lugar (a decisão) remete a um poder (não se esqueça que a decisão é, rigorosamente, *causa sui)* e, portanto, há-de ser legitimado em termos de … poder (não, claro, do poder da força bruta, mas daqueloutro normativo-juridicamente consonante — as inspecções judiciais, o sistema de recursos, mais amplamente os diversos ordenamentos processuais com os seus princípios transpositivamente caracterizadores…). O segundo (o juízo) — uma "ponderação prudencial, de realização concreta, orientada por uma fundamentação" circunstancialmente adequada, argumentativamente convincente e normativo-juridicamente intencionada — remete directamente ao direito, e, portanto, só poderá ser (e, portanto, terá que ser) legitimado por uma metodonomologia que não ponha em causa o (e antes radique no) quadro esboçado com todas as exigências que o modelam e que muito sinteticamente considerámos.

11

THE APPLICATION OF TAX LAW BY ADMINISTRATIVE COURTS IN THE SITUATION OF INTERPRETATIVE INSTITUTIONAL PLURALISM AND THE OPEN TEXTUALITY OF LAW[1]

Bartosz Wojciechowski

1. The process of applying the law, especially public law, is an extremely sophisticated process, which takes place on many relatively interdependent levels, including at least the economic, political, social, cultural and — last but not least — legal levels. This means that lawyers, and in particular judges, do not apply the law as "gatekeepers" who are expected to protect and maintain cohesion — understood as a classic, hierarchical ordering of the system. This is due to the fact that, instead of this, a plurality of legal systems has clearly developed, wherein hierarchy plays a much less significant role than in a traditionally diverse system[2]. It is impossible not to notice that at

[1] The article was prepared as part of the grant of the National Science Center no. DEC-2015/19/B/HS5/03114.

[2] Cf. R. van Gestel / H.W. Micklitz, "Why Methods Matter in Europe-

present the law is not predominantly conceptualized as a system of norms, but is rather viewed through the prism of the interpretative work of pluralistic legal institutions[3].

One of the main generators of these changes is the specific way that laws are constructed, meaning the argumentation involved in their creation and their application to specific situations, taking into account tradition or current claims to validity pertaining to national legislation and its national addressees, and their confrontation with the different legal orders created by other countries and transnational or international institutions. As a consequence, we are witnessing a progressive synthesis of the constitutional law of the Member States and the institutional structure (or infrastructure) of the European Union[4]. This entails that not only does the hierarchy of the legal system no longer play a prominent role in contemporary legal research, as was the case at the end of the 20th century, but also reflections on

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an Legal Scholarship", *European Law Journal* 20/3 (2014) 311-312; E. Fahey, *The Global Reach of EU Law*, London / New York, 2017, 24 f. The legal and institutional functioning of the European Union has generated a globally unique phenomenon of multicentricity, or the multi-faceted polycentrism of the legal system. Multicentricity, understood as the division of *quo ad usum* competences between national and EU authorities, results from the adoption of the principle of supremacy of EU law and the primacy of the principle of effectiveness *(éffet utile)* of this law in relation to national legal orders. Thus, as W. Lang aptly pointed out, the case of multicentricity concerns the occurrence of "many equal sources of law in one legal order not forming a hierarchical system (hierarchy of norms)"-W. Lang, *Wokół problemu „multicentryczności systemu prawa*" [On the problem of "the multicentricity of the legal system"], *PiP* 7 (2005) 95. It is not possible to comprehensively elaborate this important but broad issue and maintain the right proportions in this paper, which is why in this regard I refer to representative literature. See E. Łętowska, *Multicentryczność współczesnego systemu prawa i jej konsekwencje* [The multicentricity of the modern legal system and its consequences], *PiP* 4 (2005) 3-10; Idem, *Między Scyllą a Charybdą — sędzia polski między Strasburgiem i Luksemburgiem* [Between Scylla and Charybdis - Polish judges caught between Strasbourg and Luxembourg], *EPS* 1 (2005) 3-10; N. MacCormick, *Questioning Sovereignty. Law, State, and Nation in the European Commonwealth*, New York, 2001, 94, 115; *Multicentrism as an Emerging Paradigm in Legal Theory*, Zirk — Sadowski / M. Golecki / B. Wojciechowski, ed., Frankfurt am Main 2009, *passim*.

[3] Cf. N. Kirsch, "The case for pluralism in postnational law", [in:] *The Worlds of European Constitutionalism*, ed. G. de Búrca / J.H.H. Weiler, Cambridge / New York, 2012; D. Halberstarm, "Systems Pluralism and Institutional Pluralism in Constitutional Law: National, Supranational and Global Governance", [in:] M. Avbelj / J. Komárek, ed., *Constitutional Pluralism in the European Union and Beyond*, *Oxford 2012.*

[4] Cf. K. M. Cern, *The Counterfactual Yardstick. Normativity, Self Constitutionalisation and the Public Sphere*, Frankfurt am Main 2014, 67-86.

the legal system are now channeled towards the investigation of legal institutions and towards cooperation in the sphere of pluralist legal institutions, for which multidisciplinary — or even transdisciplinary — research cooperation turns out to be key. The scope of the competences of individual "institutional actors", including, above all, courts and tribunals, is shaped in their interactions with other "actors", e.g. the legislature. Hence the emergence of cooperative institutional work, and the development of soft law (which actually does not legally exist as law).

This relationship is clearly visible in the way that the case-law of the Court of Justice of the European Union (CJEU) and the activities of the courts of the highest member states reciprocally influence each other[5], which may take the form of cooperation, but jurisdictional competition is also not uncommon. Adjudication by means of *general principles* has been presented by the Court of Justice of the European Union as a pre-eminently legitimate way of fulfilling the principle of the rule of law when applying EU law, since it is the Court's intention that it be based on normative unity, and that it should harmonize the axiological pluralism of EU law with international law and the domestic law of the Member States. In this context, normative unity should therefore be understood deontologically, as a kind of barrier to the plurality of values, which are harmonized in the sense that the plurality never overwhelms the unity.

2. These remarks necessitate an additional reservation with regard to tax law, which, due to its specificity, requires that in the process of its application the general rules of interpretation and legal principles be contextualized and updated in line with those that are characteristic for this area of law and the social relations covered by tax law. In the scholarly literature and judicature, it is emphasized that tax law should be created in a particularly precise and relatively specific manner, and furthermore that the so-called autonomous model should characterize its creation. In this model, the most important values include legality and legal security, including guarantees of basic human rights. It is dominated by the argumentative procedure for discussing law and the idea of formal justice. Inherent in such a procedure are conditions which allow arguments to be weighed up, and provide the right to compare a judge's own validity claims with others. In turn, the open textuality of tax law norms undoubtedly hinders clear and consistent construal of their content, entailing that in the process of

[5] G. de BÚRCA, "The ECJ and the International Legal Order: A Re-evaluation", [in:] *The Worlds of European Constitutionalism*, 131 f.

interpretation it is necessary to consider the issue from a broad perspective, and therefore not only from a linguistic perspective but also, and perhaps above all, social and functional perspectives. At the same time, however, the representatives of this branch of legal science demonstrate, with unusual clarity, the practical relevance of there being limits on the scope of interpretation[6]. This derives from the conviction that tax law, since it imposes certain financial obligations on citizens and other entities, should to the greatest extent be closed in nature, so as not to facilitate the increase of these obligations.

On the one hand these postulates are praiseworthy, but on the other they have an almost mythical status, and could even be criticized for naivety in terms of their feasibility. The aforementioned European context of the application of tax law is rendered yet more complicated by the increasing role of functional interpretation. Here, the law is treated as an interpretative fact. This, in turn, raises many

[6] In particular, R. Mastalski emphasizes that "linguistic interpretation (...) sets its limits within the possible meaning of the words contained in the legal text" — R. Mastalski, *Stosowanie prawa podatkowego* [The application of tax law], Warszawa, 2008, 102. B. Brzezinski adopts a similar standpoint, writing that "(...) the meaning of a legal text is the absolute limit of interpretation". B. Brzeziński, *Podstawy wykładni prawa podatkowego* [The basics of tax law interpretation], Gdańsk, 2008, 60. On the limits of interpretation, see also, *inter alii,* T. Spyra, *Granice wykładni prawa* [The limits of the interpretation of the law], Kraków 2006; A. Choduń / M. Zieliński, *Aspekty granic wykładni prawa* [Aspects of the limits of the interpretation of law], [in:] W. Miemiec, ed., *Stanowienie i stosowanie prawa podatkowego. Księga jubileuszowa Profesora Ryszarda Mastalskiego* [The establishment and application of tax law. The jubilee book of Professor Ryszard Mastalski], Wrocław, 2009, 84 - 95. Cf. also the judgments of the Constitutional Tribunal: of 13 September 2011, Ref. P 33/09 (otk zu no. 7/A/2011, item 71); 18 July 2013, Ref. sk 18/09 (otk zu no. 6/A/2013, item 80) and 13 December 2017, Ref. 48/15 (otk zu 2/A/2018). As set out in the judgment Ref. P 33/09, the Constitutional Tribunal's finding a discrepancy between a specific regulation and the Constitution, due to its ambiguity or imprecision, will be justified only if interpretative doubts are qualified, which is the case if: 1) it is not possible to resolve the doubts discussed on the basis of the exegetical rules for legal text adopted in the legal culture; 2) the application of the indicated rules does not allow the doubts under consideration to be eliminated without the need for public authorities to make decisions which are essentially arbitrary (in this case we may not only be dealing with a violation of the principle of proper legislation, but also the principle of the separation of power, as expressed in Article 10 of the Constitution of the Republic of Poland, since ultimately the content of the regulations in force are not decided by the bodies authorized to create law, but the bodies appointed to apply it); or 3) difficulties in removing them, especially from the point of view of the addressees of a given regulation, or if they appear to be flagrantly excessive, which cannot be justified by the complexity of the normatively regulated matter.

doubts and fears, because invoking the process of interpretation for general purposes may, in a significant and justified way, modify (correct or change) the meaning of the applied norm which results from its linguistic understanding.

It is worth noting that while the idea that textual meaning derives from the immanent characteristics of the text itself is generally rejected, such an impression only arises in the first place because the text evokes elements of social and cultural context that are replicable for a given interpretive community. This means that although interpretation is dependent solely on this context, and in this sense there is a great deal of freedom for discretionary interpretation, it cannot be said that such interpretation is subjective and arbitrary. This reservation is particularly significant when we consider the principle *in dubio pro tributario*, when expressed as an interpretative rule[7].

3. The issue of freedom of interpretation, broadly understood, has classically been associated with vague legal concepts and general clauses. The necessity of using imprecise terms in legal texts means that the legislator, who often establishes law which will be applicable in the distant future, must navigate a path between Scylla's legal certainty and Charybdis' flexibility. Underdetermined (otherwise indeterminate, undefined, vague) legal concepts can be encountered in all areas of law. The term "underdetermined concept" is taken to mean a concept whose content and scope are uncertain; it does not directly and comprehensively define all the elements of its hypotheses and dispositions, as opposed to a definite term, whose hypotheses and dispositions determine all the elements of a factual situation in an exhaustive and certain way[8]. As follows from an analysis of the

[7] Its application was confirmed by the introduction to the Polish Tax Ordinance Act as of January 1, 2016, Art. 2a, which reads: "The irresolvable doubts concerning the content of tax law provisions are settled in favor of the taxpayer" (Article 2a of August 29, 1997 of the Tax Ordinance Act, Journal of Laws of 2015, item 613 with amendments.).

[8] In the theory of natural language, it is claimed that: "all, almost all, or some words are vague, or that all are precise in some respects, and vague in others." Cf. T. Gizbert-Studnicki, *Wieloznaczność leksykalna w interpretacji prawniczej* [Lexical ambiguity in legal interpretation], Kraków 1978, 54 f.; T. Kubiński, *Nazwy nieostre* [Vague names], „Studia Logica", 1958, vol. viii, 18. See also M. Zieliński, *Wykładnia prawa, Zasady. Reguły. Wskazówki* [The interpretation of law, Principles. Rules. Guidelines], Warszawa, 2002, 163-171 - the author points out that, *inter alia*, "indeterminacy" and "vagueness" are connected with each other, but refer to other aspects of linguistic properties. And thus "indeterminacy" refers to the meaning of phrases, and "vagueness" to their scope. M. Zieliński emphasizes that since these two terms are interrelated, sometimes vagueness is treated as "indeterminacy (scope)

structure of concepts, every abstract regulation is more or less underdetermined, and therefore requires fulfilment and interpretation. Furthermore, interpretation and subsumption are also required in the case of "defined" terms, i.e. filled in terms of content, imbued with clarity, and distinguishable from other norms and legal institutions.

The use of terms in legal texts that are underdetermined, evaluative or typological, and the use of general clauses, is associated with the "growing extent of the semantic openness of contemporary legal systems"[9]. An imprecisely formulated legal concept is conditioned by the whole set of grammatically uniform languages. The expression "significant reasons for termination" is defined by a specific set of grammatically homogeneous languages, but it differs due to the meaning of the imprecise concept in question (in each of these languages the concept has particular meanings, each of which is different) [10].

General clauses are similar to these underdetermined legal concepts, and it will suffice to mention here only the clauses "abuse of the law" and "the principles of community life", which, due to their generality and the fundamental nature of the provision in which they appear, should be taken into account by courts when each case is decided on. At the same time, however, they make the process of applying the law more flexible than other clauses, in accordance with the assumption that *summum ius summa iniuria*[11].

The use of a general clause in a specific legal regulation leads to an increase of freedom in the process of applying the law, or even to creation of such freedom, by referring to non-legal elements of

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distinguished alongside indeterminacy (conceptual)". Such a strict distinction between indeterminacy and vague terms is not necessary from the point of view of this article. We therefore employ a broad understanding of underdetermined terms that also includes concepts that are vague.

[9] L. Morawski, *Główne problemy współczesnej filozofii prawa. Prawo w toku przemian* [The central problems of contemporary legal philosophy. The law in the process of change], Warszawa 2000, 157; M. Paroussis, *Theorie des juristischen Diskurses: eine institutionelle Epistemologie des Rechts* [The theory of legal discourse: an institutional epistemology of law], Berlin 1995, Chapter iv *Rechtsbegriffe als diskursive Begriffe* [Legal terms as discursive concepts] (91-108); H.L.A. Hart, *Pojęcie prawa* [The Concept of Law], Warszawa 1998, 171 f.

[10] W. Patryas, *Definiowanie pojęć prawnych* [Defining legal concepts], Poznań, 1997, 110.

[11] See the ruling of the Constitutional Tribunal of October 17, 2000, sk 5/99 (otk zu 7/200, item 254); L. Leszczyński, *Klauzule generalne uelastyczniają stosowanie prawa* [General clauses make the application of law more flexible], Rzeczpospolita of 12 April 2001; M. Sala, *Klauzula generalna zasad współżycia społecznego* [The general clause of the principles of social coexistence], [in:] J. Stelmach, ed., *Studia z filozofii prawa* [Studies in the philosophy of law], Kraków 2001, 199 — 206.

the axiological environment. In contrast to vague names (which refer to the non-linguistic sphere, and which results from the nature of language), general clauses are linguistic phrases with an evaluative element, referring to valued and generally non-legal criteria, thereby introducing a certain freedom for the entity applying the law. This freedom consists in the entity determining the contents of the clause only at the stage when the law is applied, by referring to customs, individual evaluative estimates or systemic assessments[12].

4. The perspectives outlined above suggest that, on the basis of tax law, the model of comprehensive interpretation of this legal field should be adopted, which would enable consideration of the factors which clearly affect the application of law in the context of multicentricity, as an alternative to the view, which prevailed for many years, that prioritizes linguistic interpretation over other types of interpretation. Analysis of the case-law of the CJEU reveals the hegemony of linguistic arguments, which is however lower than in the application of national law, and which is also emphasized in the literature on the subject. This is due to many factors.

Firstly, the multilingualism of European Union law is significant, as it entails there is a multiplicity of authentic versions of created and published sources of EU law. From the point of view of linguistic interpretation, the key issue is one of semantics, and thus of assigning specific meanings to individual linguistic phrases, taking into account the differences between legal and colloquial language. Furthermore, at the level of legal language, there may be differences in meanings across legal acts, or differences resulting from varying degrees of precision in the applicable regulations. Hence, operative interpretation often refers to decoding the meaning of an interpreted expression only as it is used in a specific legal text[13]. In this sense, linguistic interpretation is the basic type of interpretation, because it is used first, in terms of chronology. It should be stressed, however, that determining the meanings of the phrases used in a legal text is in this case only a prelude to carrying out a complete and proper process of interpretation.

[12] L. Leszczyński, *Klauzule generalne w stosowaniu prawa* [General clauses in the application of law], Lublin 1986, Chapter I; Z. Ziembiński, *Stan dyskusji nad problematyką klauzul generalnych* [The state of the discussion on the issues of general clauses], *PiP* 3 (1989) 14 f.

[13] J. Wróblewski, *Sądowe stosowanie prawa* [The judicial application of law], Warszawa 1972, 124-125.

In practice, as Agnieszka Bielska-Brodziak has shown[14], in such situations the courts most often: try to reconstruct the correct meaning of an expression from various meanings assigned by dictionaries; they assign one meaning, following the indicated non-linguistic considerations; and they assign one meaning based on linguistic considerations.

A cursory analysis of such reconstruction leads to the conclusion that in the current state of affairs the courts are trying to cling to the dogma of the primacy of linguistic interpretation. In particular, arguments based solely or predominantly on linguistic considerations seem to be particularly prone to error. It unacceptable that when choosing a dictionary definition of a given phrase, a court selects only one of the assigned meanings, and then argues its interpretation from the perspective of linguistic considerations. It should be emphasized that dictionaries do not have a hierarchical structure which would enable permissible meanings to be ranked in terms of their relevance. In addition, the meaning of a word may differ in the dictionaries available, and the content of these dictionaries varies due to the time of their publication and the evolution of the language itself, as well as due to the fact that different authors contributed to them.

Returning to the main topic of these considerations, it is worth recalling that differences in natural languages are reflected in different legal cultures, legal practices and ways of understanding a given concept. Translational difficulties derive from the obligation to publish the acts of EU law in the language of their addressees. As the Court of Justice stated, "legal certainty requires that Community legislation must allow those concerned to acquaint themselves with the precise extent of the obligations it imposes upon them, which may be guaranteed only by the proper publication of that legislation in the official language of those to whom it applies"[15]. A feature of Polish legal discourse is that priority is given to the so-called colloquial meaning of words, before their specifically legal meaning, without prior verification of the legal text[16]. Due to the borrowing of EU terms from many languages of the Member States, such a directive cannot be maintained before the Court of Justice of the European Union.

[14] A. Bielska-Brodziak, *Interpretacja tekstu prawnego na podstawie orzecznictwa podatkowego* [The interpretation of legal texts on the basis of the tax law], Warszawa, 2009, 23 ff.

[15] The judgment of 11 December 2007, in the case of Skoma-lux SRO, C-161/06, ECR 2007, I-10841.

[16] I discuss the problematic nature of this thesis in more detail at the end of this article.

Secondly, despite acts being published in all EU languages, there may be a need for a comparative interpretation, involving several language versions. The simultaneous requirement to use the literal wording of a legal norm and the requirement to recognize the equality of different language versions of EU law is one of the reasons for a specific and cautious approach to linguistic directives in the interpretation of EU law. It is necessary to point out here that comparative interpretation does not consist in simply comparing the content of legal texts, but also in searching for the content of EU law in the regulations contained in the provisions of national law. Therefore, proper interpretation cannot be confined to one language version, since this could lead to erroneous conclusions. In order to arrive at a proper understanding of the legal norm it would be necessary to analyze and contrast different language versions of the same legal act. This thesis was confirmed by the CJEU in its judgment of 6 October 1982, in Case C-283/81 (in CILFIT, ECLI:EU:C:1982:335), in which it stated that: "To begin with, it must be borne in mind that Community legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions". In practice, such a comparison may pose many problems, resulting from the specific terminology of EU law or differences in meaning between the legal terminology employed within the EU legal system and the legal systems of the Member States. In addition, an expression that is clear in one language can be rendered in another language by an expression which is, for example, ambiguous. This has led to an ongoing discussion in the theory of the interpretation of EU law concerning the relation of the category *sens clair* to the category *sens littéral*. At the same time, in the Kozłowski case[17], the CJEU stressed that the requirements of both the principle of the uniform application of EU law and the principle of equality indicate that the content of a provision of EU law which does not explicitly refer to the law of the Member States in order for its meaning and scope to be determined should normally be assigned an autonomous and uniform interpretation throughout the EU. The procedure for communication between national courts and the CJEU described above serves this purpose.

Such interpretation is all the more necessary because the obligation to publish in national languages does not apply to the case-law of the CJEU, which is an important complementary source for the reconstruction of the normative grounds. In this regard, the Court

[17] The judgment of 17 July 2008 in the case of Kozłowski, C-66/08 ECR 2008 6041.

of Justice stated that "the English text should be interpreted in the light of the other versions. The elimination of linguistic discrepancies by way of interpretation may in certain circumstances run counter to the concern for legal certainty, inasmuch as one or more of the texts involved may have to be interpreted in a manner at variance with the natural and usual meaning of the words. Consequently, it is preferable to explore the possibilities of solving the points at issue without giving preference to any one of the texts involved"[18]. As a result, in the event of there being discrepancies in the meanings in different language versions of legal acts, the Tribunal uses other methods of interpretation, such as systemic and functional interpretation. Therefore, it seems correct to say that European Union law cannot be interpreted in a strictly literal way, based purely on the wording of a legal text, and should always take into account its functions and context[19]. In another case, the Court notes that "The need for a uniform interpretation of Community regulations prevents the text of a provision from being considered in isolation, but in cases of doubt requires it to be interpreted and applied in the light of the versions existing in the other three languages"[20].

The Polish Supreme Administrative Court also perceives there to be problems associated with multilingualism and strives to meet the recommendations of the CJEU regarding comparative interpretation, noting in one of its judgments that "all the language versions of a given legal act have the same binding force — they are equally authentic (...). The need for a uniform interpretation of Community directives precludes consideration of a given provision in an isolated manner in case of doubt, but rather requires that it be interpreted and applied in the light of the versions drawn up in other official languages (see the judgments of the CJEU: of 26 May 2005 in the case C 498/03 Kingscrest Associates and Montecello, ECR, 2005, 4427,

[18] The judgment of March 3, 1977 in the case North Kerry Milk Products v. Minister for Agriculture, 80/76, ECR 1977, 0425.

[19] Cf. A. Kalisz, *Wykładnia prawa Unii Europejskiej* [The interpretation of European Union law], [in:] Idem / L. Leszczyński / B. Liżewski, *Wykładnia prawa. Model ogólny a perspektywa Europejskiej Konwencji Praw Człowieka i prawa Unii Europejskiej* [The interpretation of law. A general model and the perspective of the European Convention on Human Rights and European Union law], Lublin, 2011, 198 f.; I. Andrzejewska-Czernek, *Wykładnia prawa podatkowego w Unii Europejskiej* [The interpretation of tax law in the European Union], Warszawa 2013, 75 f.

[20] The judgment of December 5, 1967 in the case Soziale Verzekeringsbank v. Van Der Vecht, 19/67, ECR 1967, 0445. Similarly, in the judgment of 12 July 1979 in the case Koschniske v. Raad van Arbeid, 9/79, ECLI:EU:C:1979:201.

paragraph 26; of 10 September 2009 in the case 199/08 Eschig, ECR, I 8295, paragraph 54)"[21].

In particular, the Van Duyn ruling[22], while satisfying the requirement of flexibility, allows modifications to the understanding of these concepts, depending on the country. The judgment states that "the concept of public policy may vary from one country to another and from one period to another, and it is therefore necessary in this matter to allow the competent national authorities an area of discretion within the limits imposed by the Treaty)."

5. A characteristic example in this regard is the case-law of the Court of Justice regarding business activity, the provision of services or the abuse of law[23] in a normative context regarding tax on goods and services. It should be emphasized that these concepts, in particular

[21] See the judgment of the Supreme Administrative Court of 30 November 2017, I FSK 307/16 — the court notes that "due to the significant differences in the wording in the different language versions, Article 136, letter a, Directive 2006/112 / EC of the Council on the common system of value added tax (Journal of Laws of 2006, L 347 p. 1, as amended), provision of Art. 43 par. 1, point 2 of the Act of 11 March 2004 on Value Added Tax (ie: Journal of Laws of 2011 No. 177, item 1054, as amended) should be interpreted taking into account the purpose of this regulation. This means that the exemption provided for in the above provisions is covered by the sale of goods that were previously acquired, imported or manufactured for tax-exempt purposes, without the right to deduct, regardless of whether the actual use of these goods took place". In the justification to the thesis formulated in this way, the Supreme Administrative Court noted that as part of the implementation of Art. 136 letter a, Directive 112, the Member States employed different phrases: "used exclusively for" (in the Polish and English language versions), "intended exclusively for" (in the French, Spanish, Italian and Portuguese versions), the same provision in up to 9 language versions uses the term "used" (this applies to Bulgarian, Czech, Danish, Estonian, Lithuanian, Dutch, Romanian, Finnish and Swedish), while the term "employed" is used in 5 language versions (Greek, Croatian, Latvian, Maltese and Slovak), "having application" has been used in the Slovenian language version, two language versions do not use any of these terms explicitly (German language and Hungarian). The Supreme Administrative Court thus aptly indicates that "the lack of an instantiation ('intended', 'used', 'employed' or 'having application') leads to a wide scope of interpretation and does not limit the content of the norm to the meaning of any of the abovementioned terms".

[22] The judgment of December 4, 1974 in the case Yvonne Van Duyn v. Home Office, 41/74, ECR. 1974, 1337.

[23] For more detailed discussion of this issue, see. R. Wiatrowski / B. Wojciechowski, "Koncepcja nadużycia prawa w orzecznictwie Trybunału Sprawiedliwości Unii Europejskiej jako przykład elastyczności prawa podatkowego" [The concept of the abuse of law in the case-law of the Court of Justice of the European Union, as an example of the flexibility of tax law], [in:] D. Gajewski, ed., *Międzynarodowe unikanie opodatkowania* [International tax avoidance], Warszawa 2017, 329-343.

"business activities", on the basis of provisions on the tax on goods and services, are understood in an autonomous manner in relation to other acts. The autonomy of tax law is a kind of compromise between the principles of coherence and the completeness of the system of law to which tax law belongs, and its independence within this system, mainly in relation to other areas of law, which also belong to the public law system *sensu largo*[24].

The Value-Added Tax Act[25] defines economic activity in relatively broad terms, designating it as any activity of producers, traders and service providers, including the use of tangible property or intangible assets on an ongoing basis, in order to obtain income by this means. Economic activities also include those involving the use of intangible goods or assets on a continuous basis in order to make profit. The regulation of Article 15 (2), sentence 2 of this law coincides with the regulation contained in Article 4 (2), sentence 2 of Directive VI (Article 9 (2) of Directive 2006/112 / EC), in accordance with which the use of tangible and intangible assets for the purpose of obtaining a regular income is also considered to be economic activity. This provision is an implementation of Article 9 (1) of the VAT Directive 112, (Article 4 (1) and (2) of the VI Directive). In other words, the cited norms demonstrate that economic activity is considered to be the use of tangible property or intangible assets, on a continuing basis, for the purpose of obtaining income by this means.

The scholarly literature emphasizes that the definition of economic activity from the Value-Added Tax Act is universal, because it allows the term "taxpayer" to encompass all entities that conduct specific activities in order to participate in professional trade[26], which of course does not mean that the scope of this concept does not ever give any cause for doubt. It should be stressed that, in accordance with the current wording, the Act does not require the entity to conduct business activity on its own account and in its own name.

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[24] Cf. M. Zirk-Sadowski, „Problem autonomii prawa podatkowego w świetle orzecznictwa NSA" [The problem of the autonomy of tax law in the light of the judicature of the Supreme Administrative Court], *Kwartalnik Prawa Podatkowego* 2 (2001) 39-58; R. Mastalski, „Autonomia prawa podatkowego a spójność i zupełność systemu prawa" [The autonomy of tax law and the cohesion and completeness of the legal system], *Przegląd Podatkowy* 10 (2003) 12; A. Gomułowicz [in:] A. Gomułowicz / J. Małecki, *Podatki i prawo podatkowe* [Taxes and tax law], Warszawa 2002, 136 f.; see also the resolution of the Supreme Administrative Court 2 April 2012, files no. II FPS 3/11.

[25] The Value-Added Tax Act of 11 March 2004 (JL 2011, No. 177, item. 1054 as amended).

[26] Cf. A. Bartosiewicz / R. Kubacki, *VAT. Komentarz* [VAT. A commentary], Warszawa 2011, 223.

At this point, attention should be drawn to the understanding of the concept of economic activity on the basis of the Council Directive 2006/112 /EC of November 28 2006, on the common system of value added tax[27] and the previously binding Directive VI[28]. To clarify this legal issue, it is necessary to analyze the case-law of the Court of Justice of the European Union. First of all, the Court emphasizes that on the basis of Directive 112 (similarly to the case of VI Directive) it is important that such activity is carried out on the entity's own account (independently), and therefore not primarily in a relationship of employment, and that it is carried out at the entity's own risk. For example, such a position is entailed in the judgment of the Court of Justice of the European Union in Case C-23/98, J. Heerma v Staatssecretaris van Financiën[29]. The exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis shall also be considered an economic activity.

In its judgment of 26 March 1987 in the case of 235/85 the Commission of the European Communities v Kingdom of the Netherlands (EU:C:1987:161), the Court of Justice explicitly referred to the issue of independence with regard to persons that provide services to third parties (e.g. bailiffs and notaries), even if the services were carried out in accordance with a legal regulation or on the orders of a public authority, stating that such independence does not render the services exempt from being classed as economic activity. The Court reiterated that in the context of a directive a taxpayer should be considered to be any person who on their own account and independently is engaged in activity, regardless of the purpose or results of such activity (paragraphs 6 and 7 of the judgment) [30].

In the judgment of 29 October 2015, Saudaçor — Sociedade Gestora de Recursos e Equipamentos da Saúde dos Açores SA v Fazenda Pública. (C-174/14, ECLI:EU:C:2015: 733), the Court held that: "The possibility of classifying a supply of services as a transaction for consideration requires only that there be a direct link between that supply and the consideration actually received by the taxable person.

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[27] OJ UE L 347 of December 11, 2006, paragraph 1, as amended.

[28] Directive VI 77/388 / EEC of the EC Council of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment (OJ L 145 of 13 June 1977, p. 1).

[29] The judgment of 27 January 2000, ECLI:EU:C:2000:46.

[30] Similarly, in the judgments of December 4, 1990, van Tiem, C-186/89, ECR p. I-4363, paragraph 17; of 12 September 2000, Commission/Greece C-260/98, ECR p. I-6537, paragraph 24, and also of 16 September 2008, Isle of Wight Council et al., C-288/07, ECR p. I-7203, paragraphs 27 and 28.

Such a direct link is established if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the actual consideration for the service supplied to the recipient[31]" (paragraph 32). The court also argued that it not relevant that the remuneration was determined not on the basis of individualised services, but on a flat rate, because it does not affect the direct relationship existing between the provision of services and the remuneration received, which is determined in advance according to established criteria[32]. That connection, as the Court observed, is not undermined by the fact that "its activity is intended to fulfil a constitutional obligation exclusively and directly incumbent upon the State under the Portuguese constitution, namely the obligation to implement a national health service which is universal and potentially free, to be financed, in essence, by public resources" (paragraph 39). The Court also clarified that the status of a "bodies governed by public law" cannot arise solely from the fact that the activity in question falls within the powers conferred by public law. It referred in particular to the order in *Mihal*[33] and the case-law cited therein, as well as to the Saudaçor judgment (paragraph 57).

In the judgment of 12 May 2016 in the case C-520/14, Gemeente Borsele (ECLI: EU:C:2016:334), the CJEU indicated that the existence of a service for remuneration is not sufficient to establish economic activity within the meaning of Article 9 (1) of the VAT Directive, because in order to determine whether a particular provision of services is performed for remuneration, and that such activity should be regarded as economic activity (see, to that effect, judgment of 26 March 1987, Commission of the European Communities v Kingdom of the Netherlands, 235/85, EU:C:1987:161, paragraph 15), all the circumstances in which that the service is provided must be examined (see, to that effect, Judgment of 26 September 1996, Enkler, C 230/94, EU:C:1996:352, paragraph 27). The methods indicating the performance of business activity include: "Comparing the circumstances in which the person concerned supplies the services in question with the circumstances in which that type of service is usually provided" (see, by analogy, Enkler, paragraph 28). Other factors, including the number of clients or the

[31] See the similar judgment of 26 September 2013 in the case of Serebrjannyj, C283/12, EU:C:2013:599, paragraph 37 and the case-law cited therein.

[32] The Court referred in this respect to the judgment of 27 March 2014 in the case of Le Rayon d'Or, C151/13, EU:C:2014:185, paragraphs 36 and 37); paragraph 36 of cited judgment C-174/14.

[33] C-456/07, EU:C:2008:293, paragraph 17.

amount of income, may also be taken into account, when such a question is considered (see, by analogy, the judgment of 26 September 1996, Enkler, C 230/94, EU:C:1996:352, paragraph 29).

On the other hand, in the judgment of 3 September 2015, C-463/14, in the case of Asparuhovo Lake Investment Company OOD (ECLI:EU:C:2015:542), the Court of Justice held that the provision of services is taxable only if there exists a legal relationship between the service provider and the recipient, in which there is reciprocal performance, and the remuneration received by the service provider equals the value of the service provided to the recipient[34]. The Court ruled that: if the services in question are characterized in particular by the service provider's continuing readiness to provide the services required by the recipient at the appropriate time, it is not necessary to determine that there is a direct link between the said service and the remuneration received in return: and that the payment refers to an individualized and strictly defined performance provided at the request of the recipient.

Both these cases and judgments concerned a taxable supply of services involving the payment of a flat rate, regardless of the number of services provided and obtained, such as the number of times a golf course was used or the number of health services provided. The fact that the performance was neither defined in advance nor individualized, and that the remuneration was paid in the form of a flat rate, does not affect the direct link between the provision of services and the benefit received in exchange, the amount of which was determined in advance and in accordance with the stipulated criteria laid down (the judgment of Le Rayon d'Or, paragraph 37).

6. This perhaps overly long presentation of the case-law of the Court of Justice reveals some very important issues in the application of tax law. Firstly, it is impossible to correctly interpret certain terms without knowing the case-law, and not only of national courts (in particular the Supreme Administrative Court), but also that of European courts. Nor is it possible for the courts to adopt an opportunistic attitude which merely repeats the arguments of case-law, since its richness and diversity offer a wide margin of interpretation when it is invoked and, consequently, does not allow for a simple subsumption

[34] See also similar judgments: Tolsma, C-16/93, EU:C:1994:80, paragraphs 13 and 14; Kennemer Golf, C-174/00, EU:C:2002:200, paragraph 39). In paragraph 40 of Kennemer Golf (C-174/00, EU:C:2002:200) and in paragraph 36 of the judgment on Le Rayon d'Or (C-151/13, EU:C:2014:185).

(if it can justifiably be claimed that this has ever been the case) based on the *acte éclairé* principle. The cited case-law illustrates the numerous contexts and multidimensional nature of the analyzed basic institutions of economic activity and the provision of service from the point of view of the Value-Added Tax Act. It shows how complex it has become to adjudicate on matters which, considering the subject of regulation, should be quite unambiguous and predictable.

A typical case is the judgment of the CJEU of 9 November 2017, issued in the AZ case[35]. In its judgment, the Tribunal formulated certain types of recommendations and instructions for the referring court (Poland's Supreme Administrative Court) with regard to assessing and establishing the similarity of the goods or services concerned. Paragraph 33 of the judgment rules that the referring court should assess whether pastry and cakes whose shelf life does not exceed 45 days are present on the Polish market, but which in the eyes of the consumer are similar to pastries and cakes with a best-before date exceeding 45 days, and which are mutually interchangeable. The Court held that, while the assessment of the similarity of the goods or services concerned ultimately belongs to the national court, it follows from the case-law of the Court that, in principle, the point of view of the average consumer should be taken into account. According to the Court, goods or services are similar when they exhibit analogous properties and satisfy the same needs of the consumer, according to criterion of whether their use is comparable or not, and when the existing differences do not significantly affect the average consumer's decision to use one or the other of the goods or services (paragraph 31 of the judgment). *A contrario*, it can be said that goods and services are not similar when they exhibit different properties and satisfy different consumer needs.

At the same time, in accordance with the position expressed in the judgment of the Supreme Administrative Court of 25 January 2018, in Case No. I FSK 1155/15, it is considered that, due to the procedural autonomy of the Member States, the CJEU's recommendation that referring court assess consumer preferences in the purchase of pastry goods does not mean that such examination is to be carried out by the Supreme Administrative Court or the provincial administrative court,

[35] C-499/16, EU:C:2017:846. In the judgment cited, it is held that: "Article 98 of the VAT Directive must be interpreted as meaning that it does not preclude — provided that the principle of fiscal neutrality is complied with, which is for the referring court to ascertain — national legislation, such as that at issue in the main proceedings, which makes the application of the reduced VAT rate to fresh pastry goods and cakes depend solely on the criterion of their 'best-before date' or their 'use-by date'".

which basically do not conduct evidentiary proceedings, especially when it concerns — as in the case in question — a decision regarding the individual interpretation of tax law. Consumer preferences when buying pastry goods and cakes do not concern doubts with regard to the law; they rather require an answer to the question about the fulfillment of factual conditions that are essential for the proper implementation of subsumption[36].

7. This confirms that a positivist approach to the law, based on the formalistic application of the law, should be employed with extreme caution, or rather the *summum ius summa iniuria* principle

[36] This position is sometimes questioned, because — according to the opponents as to the Supreme Administrative Court's case-law — it is impossible to subject the essential premises concerning the possible existence of a breach of EU law due to a breach of competition rules to the assessment of the national court, and thus the sense and substance of the ruling of the CJEU is distorted, and the legal assessment of the CJEU in the matter under examination cannot be fully implemented. This position is undoubtedly justified when it comes to legally binding general-abstract rules and principles that are formulated in the CJEU jurisprudence. However, all kinds of guidelines or recommendations for a particular study or assessment by a national court can hardly be considered binding, since the application of EU law is based on the principle of the procedural autonomy of the Member States. As a result, the Court's judgment should be applied if the facts of the case and the procedure allow it. In the case of Polish proceedings regarding individual tax interpretations, which in administrative courts are related to the facts or description of a future event presented by the applicant, the application of the judgment in Case C-499/16 with regard to assessing the similarity of goods would only be possible if the party in the application addressed to the authority stated that these goods are similar or not. There are also no grounds for considering that such assessment of the similarity of the given goods or services, with respect for the principle of neutrality, falls within the legal interpretation (see the similar judgment of the Supreme Administrative Court of 19 June 2018 in Case No. I FSK 2078/14). Undoubtedly, making such an assessment from the point of view of the average consumer requires facts to be ascertained, and does not fall under the sphere of which validate conclusions regarding the legal basis. According to the national procedural regulations, the assessment of the factual state of affairs is made by administrative (tax/interpretative) authorities, not courts; the court-administrative proceedings are not used to collect evidence and to determine the facts of a case. The position presented, among others, in the judgment of the Supreme Administrative Court of 7 February 2018, I FSK 1662/15 should also be concurred with, according to which there is no doubt that in the light of the judgment in Case C-499/16, Polish provisions on the issue of the application of reduced rates for foodstuffs (fresh pastry and cakes) with different shelf-life dates do indeed comply with EU regulations. However, the obligation deriving from the CJEU judgment to examine the competitiveness of goods should be transferred to the tax authorities. The Supreme Administrative Court confirmed that administrative courts do not conduct evidentiary proceedings, and only supervise public administration bodies in terms of compliance with the law.

should be applied. It is impossible to require the average addressee to have a thorough knowledge of this case-law, since the sophisticated lawyers sitting in the supreme courts or tribunals have problems with understanding such important terms as "economic activity" or "provision of services". Secondly, the question arises about a new paradigm in the application of this law. Namely, is classical reference to the decision-making model of applying the law sufficient? The legal process of applying the law distinguishes four basic stages:

1. determining what provision is applicable and determining its meaning in a sufficiently precise manner for the purpose of arriving at a decision;
2. recognition of certain facts as established, on the basis of the evidence obtained and the accepted theory of evidence;
3. the inclusion of established facts in the language of the applicable provision; the subsumption of such facts "under" the applicable legal provision;
4. binding determination of the legal consequences of a fact recognized as established on the basis of the applicable legal provision[37].

The consequence of such a diverse process in the judicial application of the law is that it distinguishes three categories of activities from the point of view of cognitive issues:

a. cognitive activities aimed at determining the basis of the actual decision (establishing the relationship between certain sentences about reality and the actual reality);
b. cognitive activities aiming to determine what norms should be considered as binding in the legal system (which norms are *explicite* and *implicite* included in the legal text);
c. cognitive activities that aim to establish appropriate relations between the individual state of affairs and applicable legal norms[38].

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[37] J. Wróblewski, *Sądowe stosowanie prawa* [The judicial application of law], op.cit., *Część druga. Teoretyczna analiza sądowego stosowania prawa* [Part two. Theoretical analysis of the judicial application of law]; Idem, *Wartości a decyzja sądowa* [Values and judicial decisions], Wrocław, 1973, 9 f.; Idem, "Stosowanie prawa przez organy administracji" [The application of law by administrative bodies], *Organizacja -Metody — Technika* 12 (1972) 16-18.

[38] M. Zieliński, "Obiektywność ustalenia faktów jako element praworządności stosowania prawa" [The objectivity of ascertaining facts as an element of the law-abiding application of law], *RPEiS* 1 (1979) 31; Idem, *Poznanie sądowe a poznanie naukowe* [Judicial cognition and scientific cognition], Poznań 1979, 58 f.; M.

The previously mentioned model of interpretative institutional pluralism requires supplementation, which would involve taking into account the interpretation embodied in the case-law of the Court of Justice of the European Union, which is not only a norm-issuing authority, but also provides extremely relevant interpretive guidelines, which are additionally subjected to refined reflection, thus constituting a higher-level interpretation of earlier interpretation (though it cannot be classed as meta-interpretation). Therefore, it cannot be said that the Court's rulings are only applied at one stage; it is rather a dispersed process (albeit non-fragmentary), taking place in all the stages of the decision-making process[39]. In this regard, it is important to emphasize the principle of *interpretatio cessat in claris*, which entails interpreting in a way that is pluralistic, dispersed and multifaceted.

The institutionalization of judicial power thus understood is associated with the development of moral and discursive competences. In other words, the indeterminacy of power, and its dispersion and decentralization, are the effects of communicative authority gaining in significance, which is, after all, without a subject. There has been an increase in the degree of reflexivity in Habermasian lifeworlds[40], public institutions and the legal-political sphere. In situations where the entity applying the law invokes moral rules in the decision-making process, this should be based on interpretative directives which indicate the need to determine the meaning of the norms in force, so that they remain in accordance with (or at least do not contradict) the generally accepted moral principles of society[41], and are close to

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Zieliński / Z. Ziembiński, *Uzasadnianie twierdzeń, ocen i norm w prawoznawstwie* [The justification of theorems, assessments and standards in jurisprudence], Warszawa, 1988, 231 f.

[39] A similar reservation of 30 August 2002 on The Law of the Administrative Courts Procedure (JL.2018.0.1302) or even the established case-law of this court.

[40] The term "lifeworld" refers to the idea of Edmund Husserl and concerns the pre-interpretative and pre-reflective backdrop against which everyday life runs its course. It includes a set of everyday social activities, treated axiomatically, referring simultaneously to tradition and established ways of thinking and acting. The law is one of the manifestations of lifeworld (Lebenswelt), and its basic function is constitutive. According to Habermas, the legitimacy of law is guaranteed by the "circulation of reasonably structured deliberations", J. Habermas, *Between Facts and Norms*, transl. William Rehg, MIT 1996, p. 136 and p. 428. Habermas writes in this context: "With the growth and qualitative transformation of governmental tasks, the need for legitimation changes; the more the law is enlisted as a means of political steering and social planning, the greater is the burden of legitimation that must be borne by the democratic genesis of law" (p. 450).

[41] J. Wróblewski, *Zagadnienia teorii wykładnia prawa ludowego* [Issues in the theory of interpreting the people's law], Warszawa, 1959, 95 f., 392 f.

those held by the specified reference group. As a consequence, clearer and stronger discourse structures are created (discourse is, after all, a reflective form of communication). We are then dealing with the process of "non-binding constitutionalization", which means the transfer of constitutional principles, norms and procedures to public institutions (and the expressions of their activities, such as court judgments) in the absence of a link to a state or territoriality. In this sense, one can also speak of institutional constitutionalization[42], which denotes the process of quasi-autonomously (reflectively) shaping these institutions (normatively, but also procedurally shaping democratic qualifications), which is related to them re-defining or self-defining their competences, which, however, must be democratically legitimized.

It follows from this that increasing the extent of the communicative participation of the judicature in the life of a given political community (in particular within the European Union) results in the dispersion of power understood in the classic, centralized sense. However, this increase cannot be equated with the emergence of structures and governmental centers. What is more, when it comes to the question of democratic legitimacy, in such a functioning community legitimacy is shifted from its sole instantiation in the tripartite separation of powers (which has so far been associated with the broad and universal legitimacy of the state legislature) towards the legitimacy of an existing legal system denoting a community of interpreters[43].

This democratic legitimacy is based on the belief that in democratic societies it is possible for citizens with different worldviews to reach agreement. This is due to the fact that — as John Rawls argues — only in a society where fundamental rights and free institutions are guaranteed can there be a partial consensus when differing comprehensive and

[42] The concept of institutional constitutionalization, directly related to administrative law, is normative (it formulates prescriptive recommendations based on the assessment of reality and changes occurring in it) and entails that citizens, cooperating with each other through exchange and developing public arguments, can (or should be able to) both legitimate, delegitimate and confront public institutions. T. Hitzel-Cassagnes, *Are We Beyond Sovereignty? The Sovereignty of Process and Democratic Legitimacy of the European Union*, [in:] J. Menéndez / J. E. Fossum, ed., *Law and Democracy in Neil MacCormick's Legal and Political Philosophy, The Post-Sovereign Constellation*, Dordrecht, 2011, 154; K. M. Cern, *The Counterfactual Yardstick*, 67-86.

[43] Cf. K. M. Cern, *Filozofia prawa administracyjnego. Zarys i podstawy* [The philosophy of administrative law. An outline and the basics], [in:] T. Bojar-Fijałkowskie, ed., *Administrowanie i zarządzanie w sektorze publicznym. Teoria i praktyka* [Administration and management in the public sector. Theory and practice], Bydgoszcz, 2018, *passim*.

reasonable doctrines clash over their conceptions of the good. Society therefore benefits from the political conception of justice when citizens who support rational but disparate doctrines reach an overlapping consensus, that is, when they adhere to the same political conception of justice as a component of public reason. Thus, the institution of overlapping consensus is normative rather than descriptive. As part of such a consensus, each reasonable comprehensive doctrine endorses a political conception of justice — though each from their own point of view — which holds that the demands of justice cannot contradict the fundamental interests of citizens that have been shaped and supported by their social practices [44]. This concept is based on the assumption that this overlapping of the rational views of citizens occurs in the area of "basic political rights, (...) the interpretation of fundamental freedoms and (...) and other rights and freedoms chosen by a given community", and not only in relation to the constitution but also "ordinary legislation guided by universally accepted justice"[45].

8. To sum up, with tax law we are confronted with "all-pervasive" hard cases. In the most general terms, a hard case describes the situation when a judge cannot identify an unambiguous norm created by a particular authority, and situations when decision-making difficulties result from a lack of consent among lawyers[46]. In other words, the applicable legal provision is underdetermined and the rules of the legal methodology do not lead directly (in a necessary, binding manner) to an unambiguous result. It can be argued that every positive law has an "open structure", and therefore that legal concepts are characterized by an uncertain semantic scope, which thus introduces a certain decision-making leeway into the application of law. This

[44] J. Rawls, *Liberalizm polityczny* [Political Liberalism], Warszawa, 1998, 195. The outline of the idea of the "overlapping consensus" was formulated by Rawls in *Teorii sprawiedliwości* [A Theory of Justice], Warszawa, 1994, 533-535.

[45] M. Rupniewski, *Prawo jako narzędzie sprawiedliwej kooperacji w społeczeństwie demokratycznym. Filozofia polityczna Johna Rawlsa z perspektywy prawniczej* [The law as a tool for just cooperation in a democratic society. The political philosophy of John Rawls from a legal perspective], Łódź, 2015, 67.

[46] Cf. R. Dworkin, *Biorąc prawa poważnie* [Taking Rights Seriously], Warszawa, 1998, 155 f.; Idem, *A Matter of Principle*, Cambridge, 1985, 13; Idem, *Law's Empire*, London, 1986, 351. See also M. Król, *Koncepcje trudnych przypadków a prawomocność* [Conceptions of difficult cases and legitimacy], [in:] *Teoria prawa. Filozofia prawa. Współczesne prawo i prawoznawstwo* [The theory of law. Philosophy of law. Contemporary law and jurisprudence], Toruń, 1998, 97 f.; R. Alexy, *Begriff und Geltung des Rechts* [The concept and validity of the law], Freiburg / München, 1992, 25; J. Zajadło, "Wprowadzenie" [Introduction], [in:] J. Zajadło, ed., *Fascynujące ścieżki filozofii prawa* [The fascinating paths of legal philosophy], Warszawa, 2008.

entails that we must exercise great caution when invoking meanings deriving from colloquial language, which is a specific legacy of the unquestioned conviction that legal language is a variant of colloquial language. At the same time "colloquial language" itself, just like the "colloquiality" itself, is defined a variety of inconsistent ways[47]. In this regard, J. Bartmiński argues that the adjective "colloquial" specifies neither the user of the language, nor when, where and in what field such language is used[48]. Furthermore, legal language is distinguished from colloquial language by "specific vocabulary, or terminology, and a certain set of separate language rules"[49]. The meaning of words or phrases formulated in legal language thus differs from the colloquial meaning.

In this context, let us return to the aforementioned principle of *in dubio pro tributario* and the way it should be understood on the basis of the application of tax law. The Supreme Administrative Court has repeatedly indicated the need to refer to this principle in its case law, claiming that it was derived from the constitutional principle of the democratic state ruled by law (Article 2 of the Constitution of the Republic of Poland), and from the principle of the statutory regulation of tax law (Articles 84 and 217 of the Constitution). From the Supreme Administrative Court's case-law it follows that the application of this principle requires that, if necessary, in order to resolve the different interpretative options, the authorities should select the one most advantageous to the taxpayer[50]. The need to respect this principle in the interpretation of tax law was also highlighted by the Constitutional Tribunal, which stated in the justification of the judgment of 18 July 2013, file No. SK 18/09 (OTK-A 2013/6/80), that, according to constitutional requirements, unclear tax regulations cannot be interpreted to the disadvantage of taxpayers, and consequently that if such regulations prove to be ultimately ambiguous, then in

[47] A. Choduń, *Słownictwo tekstów aktów prawnych w zasobie leksykalnym współczesnej polszczyzny* [The vocabulary of the texts of legal acts in the lexical resource of contemporary Polish], Warszawa, 2007, 59 f.

[48] J. Bartmiński, „Styl potoczny" [Colloquial style], [in:] J. Bartmiński, ed., *Encyklopedia kultury polskiej XX wieku* [An encyclopedia of 20th century Polish culture], vol. 2, Wrocław, 1993, 118.

[49] J. Woleński, „Język prawny w świetle współczesnych metod analizy semantycznej" [Legal language in the light of modern methods of semantic analysis], *Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace Prawnicze* 31 (1967) 142; W. Patryas, *Definiowanie pojęć prawnych* [Defining legal concepts], Poznań, 1997, 108.

[50] See e.g. the resolutions of the Supreme Administrative Court of November 17 2014, in the cases: II FPS 3/14 & II FPS 4/14, the judgment of 25 May 2018, II FSK 1292/16.

accordance with the principle *in dubio pro tributario*, it is necessary to adopt a solution that takes into account the interest of the entity obliged to pay taxes.

In view of the considerations presented in this paper, it would seem that this principle should be understood in such a way so as to indicate that if there are doubts concerning the meaning of a provision in a specific factual situation that cannot be eliminated as a result of a correct interpretation of tax law, then, applying Article 2a of the Tax Ordinance Act[51], the meaning of the provision which is more favorable to the taxpayer should be adopted. This entails that in the event of hard cases, in other words when there is open textuality or interpretative pluralism, it is only after employing all the interpretative directives, and thus by applying a linguistic interpretation, assessed and corrected by rules and guidelines characteristic for functional or systemic interpretation, that the ultimate impossibility of eliminating doubts must result in a decision in favor of the taxpayer. At the same time, the application of these non-linguistic contexts may reveal the real content of the interpreted provision desired by the legislator[52], and that attributing primacy to the linguistic context is erroneous. The situation of *interpretatio cessat in claris* does not mean the various interpretative contexts compete with each other, but only that comprehensive interpretation is obligatory, involving all the available types of arguments and interpretative rules. The alternative to this would entail assuming *a priori* that one of the available contexts (primarily the linguistic one) is more important than the others. For obvious reasons, such as the need to take into account the rulings of the CJEU, this would be unacceptable, for the reasons set out above[53]. The classification of legal concepts

[51] Cf. the judgment of the Supreme Administrative Court of 11 May 2018, II FSK 1126/16.

[52] Cf. A. Bielska-Brodziak, *Śladami prawodawcy faktycznego. Materiały legislacyjne jako narzędzie wykładni prawa* [In the footsteps of the factual legislator. Legislative materials as a tool for the interpretation of law], Warszawa, 2017, 304 f.

[53] In the same way, it is necessary to adopt a critical stance towards the judgment of the Constitutional Tribunal of 13 December 2017, Ref. SK 48/15 (OTK ZU 2/A/2018), in which it was indicated that: "if after careful application of the directives of linguistic interpretation and — if necessary — the rejection of interpretative options that do not meet the requirements of the system, the interpreter: 1) has arrived at an unambiguous interpretation of the tax regulation, he or she may not modify the interpretative result obtained on the basis of functional arguments, including teleological reasoning, if it would lead to a worsening of the legal status of a taxpayer or other entity obliged to provide public-law contributions; 2) has not obtained an unambiguous interpretation of the tax regulation from among the possible interpretative results, he or she must select the most favorable result from the point

(such as the concepts of economic activity, the provision of services, the abuse of law, or the supply of goods under the Value-Added Tax Act) as ambiguous or imprecise is by no means a consequence of the poor legislative quality of specific legal regulations, but is rather due to the open textuality of the law or interpretative institutional pluralism. Additionally, it should also be borne in mind that the meaning of an interpreted legal regulation not only depends on the linguistic context, but also on the systemic and functional contexts, which in many cases undergo dynamic changes. This reservation is based on the assumption that the clarity of the interpreted concept (phrase) may depend on many factors and change over time[54]. In other words, very often, if not always, it will be necessary to revise the linguistic meaning by referring it to other contexts, including the intentions of the legislator, previous decisions, variable conventions, structures or social practices[55]. Thanks to this approach, we can avoid the accusation of following extreme formalism and a semantically-oriented legal approach (stinged-stung — as R. Dworkin writes), and move to an interpretive approach (argumentative-discursive).

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of view of the legal situation of the taxpayer or another entity obliged to provide public-law contributions". At the same time, the Court noted in this judgment that "it is not possible *in abstracto* to determine the boundary between the ordinary and qualified ambiguity of a legal situation, all the more so since it proceeds in a slightly different way depending on the branch of law and the matter to be regulated. Generally speaking, doubts concerning interpretation may be more tolerated in private law (civil law, family law, commercial law) and to a lesser extent in public law, and in the latter case a distinction must be made between administrative law, tax law and criminal law, because the level of precision required increases in each subsequent area of law mentioned. This circumstance is a consequence of the different scope of freedom of interpretation in particular branches of law, which results from, *inter alia*, various degrees of admissibility for using functional rules of interpretation in order to resolve doubts"

[54] Cf. E. Łętowska, „Kilka uwag o praktyce wykładni" [Some comments on the practice of interpretation], *Kwartalnik Prawa Prywatnego* 1 (2002) 54; L. Morawski, *Wykładnia w orzecznictwie sądów. Komentarz* [Interpretation in court decisions. A commentary], Toruń, 2002, 64-65. Therefore, the view of the Constitutional Tribunal expressed in the judgment of Ref. No SK 48/15 is incomprehensible, according to which "the view that the principle *in dubio pro tributario* applies only after all types of interpretative directives have been considered leads to obvious absurdity, thus preventing the principle from fulfilling any real function and, in particular, the role prescribed by the basic statute".

[55] A. Choduń / M. Zieliński, *Aspekty granic wykładni prawa* [Aspects of the limits of the interpretation of law], 84-95.

12

CROSSING THE FUNDAMENTAL STATES OF LAW: CONTEMPORARY *AESTHETIC* APPROACHES TO *JURIDICAL* INTERPRETATION AND *JURIDICITY*[1]

Brisa Paim Duarte

Preliminary questions

If the interpretation problem has received a great deal of attention from different perspectives in contemporary juridical thinking, namely those especially focused on issues of language and meaning (whether from a scientific, analytic, and/or pragmatic, or from a more philosophical, hermeneutic, or post-hermeneutic linguistically-inspi-

[1] The narrative structure and content of this essay corresponds, with some changes, to that of the paper presented on April 27, 2017 at the First Luso-Polish Conference on Legal Theory and Methodology, at the Faculty of Law of the University of Coimbra.

red point of view), it is normally to highlight, if not as an explicit assertion, at least in the form of a presupposition, common arguments of lack of *clarity* or impossibility of *referentiality* associated to law's "immediate" (i.e. pre-given) verbal expressions (simply recognized as *texts*), mostly the ones lying at the bare surface of norms, contracts, precedents, doctrinaire categories, concepts and opinions…, in order to address such diagnosis in two basic ways, not necessarily self-exclusive:

1. as an exception that would lead to an *omission*, *defect* or *insufficiency* attributable to the moment of creation of *certain* "texts", in their proclaimed ambiguity, inconsistency, vagueness[2]…, or of *the* text, in its unremovable porosity[3], as if, at the end, it was confirmed and preserved, directly or indirectly, the fundamental basis of the mindset of modernity (by which the necessity of an isolated methodic moment of interpretation was ultimately linked to a fault in the formulation of legal precepts);
2. as a reassessment of this mindset and a reversion of *in claris non fit interpretatio/ interpretatio cessat in claris* dogma[4], and then an inherent quality of textuality in general, and, so, of law's in particular: as if more than surrendering both to polysemy and porosity as bare semantic features, this reassessment could take the whole surface of language to another level, assuming textuality itself as a device essentially grounded on an ontological problem of *reference and excess* and then linked to the (im)possibility of stablishing the discursive basis of communication and interpretation — consequently, of ethics —, in a dismissal or rupture of the referential capacity of specific texts (refusing to assert them a fixed *identity*) and in the moment of *Unentscheidbarkeit* in which the judge-

[2] See António Castanheira Neves (2003). *O Actual Problema Metodológico da Interpretação Jurídica,* vol. I, Coimbra: Coimbra Editora, 173-184.

[3] Since it has the future (future experiences) as an irremovable constitutive dimension, and since this constitutive dimension cannot be approached («objectified») in advance in order to clarify-secure the practical scope (the extension) of application-utterance of a pre-given textual expression (assumed as the determining *prius* of interpretation process), porosity announces itself as an «insuperable methodological limit» of linguistic-semantic analyses. See António Castanheira Neves, *O Actual Problema Metodológico,* 181.

[4] About the medieval origins of this dogma, its surprising survival nowadays (even after a number of important objections have been made, such as Savigny's), and the normative, semantic and linguistic inconsistencies that can be ascribed to it, see, for all, António Castanheira Neves, *O Actual Problema Metodológico,* 14-29.

> ment based on texts would be entailed, a permanently contradictory, inherently falsifiable[5], and, so, interpretively open state of affairs[6], making the relation «between event and its significant reworking [...] one of suspicion and conjecture, a structure of indeterminacy which can offer only a framework of narrative possibilities rather than a clearly specifiable plot»[7]... exposing the «phantasmatic structure of legal practice»[8].

In any case, the clarity-obscurity/referential-non-referential assumptions function as bridges to orient a necessary or accidental, absolute or relative, *indeterminacy/undecidability*[9] diagnosis which

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[5] «[F]or the apocrypha, crucially, undecidability and contradiction provide the conditions of possibility of discourse, of language, and above all, of ethics, exactly because they provide the possibility of their betrayal.». See Desmond Manderson (2001), "Apocryphal Jurisprudence", *Australian Journal of Legal Philosophy* 26, 27-60, 44.

[6] To be understood *neither* as a refusal to ascertain meaning, nor as an *unconstrained/unconstrainable* state (a state of «freeplay»), but as a moment of deferral, not of «hopelessness», regarding the first, a call for judgement *despite* indecision («[i]t calls for decision in the order of ethical-political responsibility. It is even its necessary condition»), and, regarding the second, as the absolute impossibility of fixing a stable, definite meaning to a given signifier-text circumstantially subjected to interpretation — of stating, in the absence of doubt, a necessary closure in interpretation processes by reference to an objective final meaning the signifier in question are claimed to be inserted in. See Jacques Derrida (1988). *Limited Inc*., transl. Samuel Weber, Illinois: Northwestern University Press, 115-116. Also, see Jacques Derrida's reading of Walter Benjamin's «*Unentscheidbarkeit aller Rechtsprobleme*» in Jacques Derrida (1992 [1990]). «Force of Law: The "Mystical Foundation of Authority"», in David Gray Carlson / Drucilla Cornell / Michel Rosenfeld, ed., *Deconstruction and the Possibility of Justice*, London: Routledge, 3-67, 50-51 (esp.); Walter Benjamin (2002 [1921]), "Critique of Violence [Zur Kritik der Gewalt]", in Marcus Bullock / Michael W. Jennings, ed., *Selected Writings,* vol. I, transl. Edmund Jephcott, Cambridge / London: The Belknap Press of Harvard University Press, 236-252.

[7] See Peter Brooks (1984), «Fictions of the Wolf Man: Freud and Narrative Understanding», *Reading from the Plot — design and intention in narrative*, New York: Alfred A. Knopf, 264-285, 275.

[8] Tracing a «path of the law from the imaginary to the symbolic, from the icon to the body and from community to exile». Here in explicit paraphrase of Peter Goodrich's reference to the role performed by the Critical Legal Studies Movement in legal critique. See Peter Goodrich (2003 [1996]). *Law in the Courts of Love - Literature and other minor jurisprudences*. London and New York: Routledge, 8.

[9] J. Derrida mobilizes the term *undecidability* (also) as a way to dismiss the bare semantic reference to «some vague "indeterminacy"», since the first always deals with strictly determined pragmatically defined options and situations: «from the point of view of semantics, but also of ethics and politics, "deconstruction" should never lead either to relativism or to any sort of indeterminism». See Jacques Derri-

respectively touches either the texts themselves or the very nature of judgment directly, this not exactly as a moment of *formation-equilibrium* of "typical" or *centripetal* underlying *rationes decidendi,* but as the act of *decision* it ends with, an act that calls for different *rationes* and *justifications*. That diagnosis, in a way or another, ends up leading to a multiform defense of the desirable attitude to be adopted by an interpreter who plays in *ius*-methodological arena.

Regarding a number of perspectives closer to the second strand, that of undecidability, and as the result of an expansion from law's hermeneutic and semiotic analyses to other post-structuralist (anti--foundationalist) critical galaxies, the interpretation quest has been particularly relevant to those who seek to explore possible connections between juridicity and the various "macro" and "micro" subjects related to aesthetics (without dismissing here, as we shall see soon, the various meanings this word, far from been unproblematic, can circumstantially take on). In such a context, one might at least wonder: what does it mean to interpret the law — and to understand the interpretation problem in law — aesthetically?

In fact, such questions, despite of being intricate, are not necessarily equal nor equivalent, since they turn to two different main issues, one regarding a fundamental problem (touching law's normative-cultural meaning) and the other a complementary, but derivative problem (touching law's methodology), whose particular answer depends on the way the first query is responded to.

That said, more than a remark about the different forms of treatment a *textual indeterminacy* diagnosis has deserved in the realm of specific *ius*-aesthetic approaches (in the dialectics of tensions in which this diagnosis becomes entangled with that of *undecidability*), and thus a commentary on the specific ways juridical (*centripetal*) materials are thought of to be treated throughout interpretation process and the particular methodic/methodological cannons thought of to coordinate such process according to an *ius*-aesthetic outlook[10], any possible answer to those questions requires first a preliminary reflection on aesthetic interpretation itself: the conception of which differs from common understandings on the same subject, mainly because, here, interpretation can only be properly understood when the intelligibility

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DA, *Limited Inc,* 148.

[10] Moreover, the *ius*-aesthetic non-linear treatment of an indeterminacy thesis was the subject of the sequel of this paper, the one presented on May 11, 2018 at the Second Luso-Polish Conference on Legal Theory and Methodology, at the Supreme Administrative Court of the Republic of Poland, in Warsaw.

of the universe to be interpreted is expanded to non-paradigmatic comprehensions about law's system's material limits and intentionality and the contents the same system includes. In a way that, in addition to a reflection about interpretation as the activity of constituting meaning in law's practical and dogmatic world, those answers require also a fundamental look on the aesthetic comprehensions of juridicity that give themselves meaning to such an activity. In fact, what notion(s) could be implied in an aesthetic comprehension of juridicity? What does it mean to look at the law — not simply at law*s* — aesthetically?

Not pretending to give in to the easy temptation of offering partial single answers to what are primarily *moving* issues, the aim of this essay is, instead, to address the subjects of an aesthetic interpretation of law and of an aesthetic interpretation of juridicity through the intertwining of *some* critical contemporary voices, either European or connected in their core to a strong European (both Classical *and* "postmodern") philosophical heritage, and, in doing so, to touch transversely some of the traditional tensions and boundaries between ethics, law, art and politics, objectivity and subjectivity, reality and fiction, the symbolic and the real, imagination and authority.

Setting the terms: juridical interpretation and aesthetics

Furthermore, the options announced behind the very title chosen for this essay conceal a twofold demand: first, they lead to the necessity of clarifying what is meant by *juridical* interpretation, since the adjective applied implies a previous departure from the familiar references to both *interpretação da lei/interprétation de la loi*, especially meaningful in the context of civil law systems, and *statutory interpretation*, mainly resonant in common law systems. The second demand was already introduced: it is linked to the use of *aesthetic* as an adjective specially uttered as a determinant attribute of specific contemporary legal discourses, to the point all these discourses could be reasonably agglutinated over that same quality, and so correspondingly recognized under it.

Regarding the *first* demand, and somewhat predictably, the adjective *juridical*, then claimed to mark a distinction against *legal*, clearly appeals to something *else,* and, simultaneously, implies an underlying rejection of legalistic mindset and its constitutive implications on juridical discourse and practice — and so a rejection of the multiple constraints imposed by the assumption of a traditional, narrowing type of *textualism* normally based on a fundamental normative pro-

position or statement: ultimately, the law is a sort of underlying voice or entity who manifests itself while it directly speaks, although more or less silently, through certain kinds of *authoritative texts*.

The endorsement of this normative statement entails a specific posture, since it determines not just what interpretation *already is* and what *it can possibly be* as a pre-conceived activity taking place *within* the ontological, discursive and normative constraints identified in a so-called "legal universe" (one typically commanded top-down by specific laws or statutes), but, foremost, it *locks* interpretation, by bare force of words, into a pre-given box, since the activity itself (not an ongoing process, but a routine) can only make sense as such — both in grammatical and in logical level — when the association to a pre-determined *object* is fulfilled — a "law" or "statute" and their well-known counterparts, a "norm" or a "rule".

If to be contained by more or less flexible "linguistic boxes" can be seen as something inherent to all sorts of predicates, being just a necessary feature of the qualifying acts continually played in the games of language and discourse, the boxes on the legalistic side just add more stiffness to the formula. They constrain the limits of *that* interpretation within constellations of words and sentences put together in specific steps by authorized agents who act as permanent legitimate sources, reflectively structuring in deliberate, non-arbitrary ways the textual contents they consciously created and in this way preserving their integrity. As a result, an already-there, albeit somewhat distant, meaningful cosmos is brought to the fore, one which needs to be discovered by a compromised interpreter/reader, who must fulfil the obligation to act accordingly to pre-assumed normative expectations — owning *maximum* fidelity to the *object*, the *phantom*, *the text* — «speak, God!»[11] —, and, desirably, remain attached to *reasonable* (centripetal) interpretive choices, whatever that means. The reference to *legal* interpretation already specifies in advance, in sum, its own center of gravity; the lexical, the logical, and the restricting normative cosmos it belongs to.

Even in the contexts of systems of law built in legalist traditions, the attachment between the *lawful* and *the legal* (as immediate sy-

[11] In reference to Roberto Mangabeira Unger's "Benjaminian" apparent appeal to mysticism, which was exposed by Desmond Manderson to a critical standpoint insofar as it was taken by him as a «combination of nihilistic despair and need rooted in legal romanticism». See Roberto Mangabeira Unger, *Knowledge and Politics*, New York: Free Press, 1975, 295; Desmond Manderson, "Modernism, Polarity, and the Rule of Law", *Yale Journal of Law & the Humanities* 24 (2012) 475-505, 487; Idem, "Apocryphal Jurisprudence", 33.

nonyms), and, accordingly, between the *law* and the *letter*, however, cannot be taken unproblematically, and, in the same way, the direct association between a given *text* and a necessary *message* (especially in law's field) cannot be taken easily, whether due to hermeneutic, linguistic, or (foremost) to normative reasons, as juridical thinking keeps accentuating in many ways, already summarized at large in *1* and *2* (*supra*)[12] (contemporary thinking especially, but *not* exclusively[13]).

In order to make sense of the *aesthetic* outlook on juridical interpretation to be referred, which rely on critically composed artistic *inputs* to re-read law's institutional culture and expand its limits beyond orthodoxy, it will be necessary — at least — trying to rethink and surpass that boxes. Consequently, paying attention to such a context and its implications, the word *juridical*, as an intentionally

[12] Regarding the relations between law and letter, text and message, in different routes that cover several conceptions of that *indeterminacy thesis*, generically linked to the trends in contemporary methodological thinking that attribute to the problem of interpretation in law, after all, a hermeneutic nature (focusing on the issues of *reading* and *comprehension* of legal texts); the *undecidability* trend; besides the relocation of the interpretation problem's core to practical-normative comprehensions centered on the issue of validly constituting normative, and not barely semantic, practical meanings in *response* to specific juridical *questions* or, simply, problematic *cases* (for instance, António Castanheira Neves' *Jurisprudentialism*). See António Castanheira Neves, *Metodologia Jurídica — Problemas Fundamentais*, Coimbra: Coimbra Editora, 2011 [1993]; Idem, "Matéria de facto — matéria de direito", in Idem, *Digesta — Escritos acerca do Direito, do Pensamento Jurídico, da sua Metodologia e Outros*, Coimbra: Coimbra Editora, 2008, vol. 3, 321-336; Idem, *O Actual Problema Metodológico da Interpretação Jurídica — I,* Coimbra: Coimbra Editora, 2003; Idem, "Jurisprudencialismo: Proposta de uma Reconstituição Crítica do Sentido do Direito", in António Sá da Silva / Nuno Morgadinho dos Santos Coelho, ed., *Teoria do direito: direito interrogado hoje - o jurisprudencialismo: uma resposta possível?: estudos em Homenagem ao Doutor António Castanheira Neves,* Salvador: Podium, Faculdade Baiana de Direito, 2012, 9-79; José Manuel Aroso Linhares, "Jurisprudencialismo: uma resposta possível em tempo(s) de pluralidade e de diferença?", 109-174.

[13] In effect, even the Enlightenment-inspired cognitive/declarative theoretical paradigm molded by traditional normativist conceptions of 19th century *(École de l'Exégèse, Begriffsjurisprudenz*) had already shown, in their anxious to contain extrapolations of pre-given law through a complex (although generally oversimplified *a posteriori*) interpretation theory (planned to be put in play in a specifically hermeneutical methodic moment/stage that was assumed as a presupposition for a posterior «merely technical» moment of *application*), a restless effort (overcame by 20th century's practical conceptions) to sustain the absolute relevance of an intra-textual universe of meaning, the normative limits of which were to be *a priori* determined by the letter of law. And, in this effort, they ended up showing also the difficulties and final impossibility of such a contention. See, for all, Fernando J. Bronze, *Lições de Introdução ao Direito*, Coimbra: Coimbra Editora, 2006, 372-376, 762-832.

deviant option, is here projected, then,

a) on the one hand, to accomplish a *specifying* and *qualifying function* (in a specialized linguistic level), as an affirmative means for emphasizing-determining not exactly the object(s) to be subjected to interpretation, but the very *activity* and *craft* interpretation stands for, focusing on the question of how it operates and what it can potentially *produce* in result, as a practical, transformative and, so, a *performative* (in opposition to a theoretical, confirmative and declarative) act[14] capable of creating realities of their own[15] (even if by «killing» the seeds of alternative realities, and, in this case, manifesting a *ius*-pathological character[16]). Besides that, it is an act that only takes place and makes sense as such in the realm of a particular culture, where it is consistently put forward by particular groups of subjects and interpreters who share a complex «non-transparent» communicative and regulative back-

[14] «Laws are intended to have performative effects: they are expected *to do* something» (Desmond Manderson, *Songs Without Music — Aesthetic Dimensions of Law and Justice*, California: University of California Press, 2000, 28, italics added).

[15] «Legal judgments are both statements and deeds. They both interpret the law and act on the world. A conviction and sentence at the end of a criminal trial is the outcome of the judicial act of legal interpretation. But it is also the authorisation and beginning of a variety of violent acts.» (Costas Douzinas / Ronnie Warrington, "A Well-Founded Fear of Justice": Law and Ethics in Postmodernity", *Law and Critique* 2 (1991) 115-147, 115, 115-117 esp., cit. at 115).

[16] In allusion to Robert Cover's *jurispathic* and *homicidal* comprehension of judicial interpretation (which he opposes to a constructive and integrative comprehension of *literary* — i.e. *non-legal — interpretation*), as an activity that would constitute a violent way of promoting «peace» (by asserting a particularly performative kind of «violence»: «[l]egal interpretation takes place in a field of pain and death»; «it [interpretation] must be capable of massing a sufficient degree of violence to deter reprisal and revenge.» / «Judges are people of violence. Because of the violence they command, judges characteristically do not create law, but kill it. […] Confronting the luxuriant growth of a hundred legal traditions, they assert that *this one* is law and destroy or try to destroy the rest» (Robert M. Cover, "Violence and the Word", *Yale Law Journal* 95 (1986) 1601-1629, 1601, 1610, 1617; Idem (2004 [1983]), «*Nomos and* Narrative», in Martha Minow / Michael Ryan / Austin Sarat, ed., *Narrative, Violence, and the Law — the essays of Robert Cover,* Ann Arbor: The University of Michigan Press, 155). See also Carol] Greenhouse (1995). «Reading Violence», in Austin Sarat / Thomas R. Kearns, ed., *Law's Violence*, Ann Arbor: The University of Michigan Press, 105-139; Austin Sarat / Thomas R. Kearns, «Making Peace with Violence: Robert Cover on Law and Legal Theory», in *ibid.*, 211-250.

ground, or backgrounds, regarding the *nomoi* of juridical experience[17], so that, at the same time naming-qualifying an act and the type of community(ies) it belongs to or in which it is brought to life, from or instead of a moment of reading, interpretation becomes a specific ongoing *art-techné*, a progressive, instrumental, *poietic* practice played in manifold ways, even if not necessarily conventional;

b) on the other hand, to accomplish a simultaneous *heuristic encompassing function,* bringing about the comprehensive notion that the very *object* of the so-referred interpretation encompasses in its substantial core a number of different substrates, materials and contents to be *enacted* — apart from particular *laws, contracts, precedents*, and *statutes,* and from the traditional *sources of knowledge* of law given to textual recognition, other sources that can be assumed as important, even if not necessarily or not always autonomously, to the constitution of the normative criteria informing the *fundament-reasons* behind the acts of judgement concretely taken within *juridical* community, including non-formally authoritative, non-verbal, non-visual (and, in this way, non-paradigmatic) materials, especially those concerning symbolically constituted dimensions of historical *praxis,* subjectivity and intersubjectivity. So that the word *juridical* is meant to operate here, finally, a dynamic *naming* capacity, leading to the inclusion of "non-scripted" *performances* and elements *to be performed* in a normative universe or cosmos densified "juridically", and, consequently, under the interpretation umbrella.

The proposals to be discussed mobilize these complementary functions diffusely and interchangeably, and, although they do not necessarily disrupt the textual priority enterprise in an open fashion and with the support of consistent methodologies, overall preserving, for this matter, the *letter-acy of legalism*, their introduced framings of juridical world and interpretation bear very particular comprehensions of the nature and role of juridicity and its cultural place, practical autonomy and *modus operandi,* all implicated in intricate aesthetic notions of the nature of interpersonal relations and the propelling dynamics they can be embedded in (as we will see by exploring closer,

[17] See Robert Cover, «*Nomos* and Narrative», 98-99 (esp.); Franklin G. Snyder (1999), "Nomos, Narrative, and Adjudication: Toward a Jurisgenetic Theory of Law", *William & Mary Law Review* 40/5: 1623-1729, 1632 (esp.).

at the end, even though briefly, some related specific approaches[18]). What leads us immediately to the *second* branch of the mentioned twofold demand.

As anticipated, the use of *aesthetic* as a qualifying or specifying feature of certain contemporary juridical discourses is not properly easy. The difficulties here arise from various sources. *First*, there is the unescapable *complexity* of our present circumstance, a complexity that can also be perceived in a multiplying projection over contemporary juridical thinking, leading to complementary lexical and epistemological difficulties and also preventing, or at least putting on hold, the trace of strong conceptual and classificatory ambitions[19]. *Second*, there are historical difficulties as well. For the word *aesthetic,* and the types of contexts and connections it entails, are far from being fixed. In a way that any analytical reference to *aesthetic* as an adjective is not a solution, but, first, a problem.

As an appeal to the senses leading to a sensualist empiricism overall distant from the possibility of *true* knowledge, the immediate way of contact with and apprehension of a given object by a sensitive apparatus (a stimulus absorbed *outside logos* and *rationality*), the classical Greek reference to *aisthesis* indicates a type of generic *perception* or, simply, first impression, linked to *doxa* and its imponderability, and, in this way, not sufficiently solid and necessarily trustworthy. In fact, it is the first of the hypotheses tested and discarded by Socrates, in Plato's *Theaetetus* dialogue, as a possible *singular* answer to the fundamental philosophical question of what true knowledge *(epistēme)* really is[20].

Then, blended in Aristotle's ethics and theory of knowledge, *aisthesis* is placed as a passive faculty and «interactive» appeal to the senses that can also function as a fertile device or first *cognitive step*

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[18] Mainly those presented by Desmond Manderson / Costas Douzinas / R. Warrington. Approaches that must be taken, for this purpose, in an analytic and non-excluding manner, and, so, only as a discursive filter traced in order to highlight the importance of the pre-methodological contributions they specifically constitute. A filter that necessarily leaves aside, conversely, other stimulating possibilities…

[19] See, for all, José Manuel Aroso Linhares. "A Representação Metanormativa do(s) Discurso(s) do Juiz: O "Testemunho" Crítico de um "Diferendo"?", *Revista Lusófona de Humanidades e Tecnologias* (2008) 101-120, 108 (especially); Idem, "Juízo ou Decisão?": Uma Interrogação Condutora no(s) Mapa(s) do Discurso Jurídico Contemporâneo", in F. J. Bronze / J. M. Linhares / M. A. Reis Marques / A. M. Gaudêncio, ed., *Juízo ou Decisão? O Problema da Realização Jurisdicional do Direito,* Instituto Jurídico da Faculdade de Direito da Universidade de Coimbra, 2016, 227-249.

[20] See Plato (2006), *Teeteto*, transl. Marcelo Boeri, Buenos Aires: Losada, 29-34; *The Continuum Companion to Plato* (2012). Gerald A. Press, ed., London: Continuum, 96-98.

toward particular objects — even though not *properly* rational, since it is seen as a faculty belonging to all animals –; a cognition that could be subjected, in given circumstances, to further inquiry by proper rational devices, whether the ones concerning practical reasoning and *phronēsis,* and then relating to things exposed to *change,* or the others belonging to theoretical reasoning and *sophia,* related to fixed objects; so, in a way, *aisthesis* is linked to the realm of Aristotle's intellectual virtues, as they are exposed in *Nicomachean Ethics* — they stand, as R. Shiner asserts, «at the other end of one single continuum which begins with *aisthēsis*»[21]. Though not leading by itself neither to *alétheia* and *episteme* nor to practical truth[22], by the means of *aisthesis* a rational being could at least open the door for a possible further knowledge of what is close to the eye.

Only in 18th century, Alexander Gottlieb Baumgarten's work, which culminates in his incomplete *Aesthetica/Ästhetik* (1750-58), would explore the reference to *aesthetics* as a specific term to deepen (and increase) the classical Greek-Aristotelean reference and name a philosophical field and gnoseological theory (an approach later developed by Immanuel Kant and others), establishing the basis of «einer [...] metaphysisch fundierten Schönheitslehre und einer Kunsttheorie»[23]: for Baumgarten, aesthetics was a kind of knowledge[24] about art *(theoria liberalium artium)* and beauty *(perfectio phaenomenon*[25]), a *scientia cognitionis sensitivae*[26].

Additionally, if for Baumgarten «the truth of art remains sensual, unconceptualized» and «inaccessible by the means of logic»[27],

[21] «*Aisthēsis*, as an innate interactive capacity possessed also by non-rational animals, cannot itself be a state of mind which rehearses general truths in practical contexts, even though whatever faculty does so rehearse cannot do without *aisthēsis.*» (Roger A. Shiner (1979), "*Aisthēsis*, Nous, and P*hronēsis*", *Philosophical Studies* 36: 377-387, 379, 380 — cited, 381 — cited.).

[22] About the importance of the conjugation of *aisthēsis* and *nous* (then defined as «the ability to see the universal in the particular) to *phronēsis* and the formation of practical knowledge (marking, the same time, the insufficiency of *aisthēsis* to constitute the major premise of a practical syllogism), as projected in Aristotle's *Nicomachean Ethics*, see Roger A. Shiner, "*Aisthēsis*, Nous, and P*hronēsis*", 381 (especially).

[23] Alexander Gottlieb Baumgarten (2007 [1750]), *Ästhetik [Aesthetica],* transl. Dagmar Mirbach, Hamburg: Felix Meiner, xxvii (introduction).

[24] «Baumgarten's aesthetics refers to a theory of sensibility as a gnoseological faculty, i.e. a faculty that produces a certain type of knowledge» (Kai Hammermeister (2002), *The German Aesthetic Tradition*, Cambridge — u.k. / New York: Cambridge University Press, 4).

[25] Alexander Gottlieb Baumgarten, *Ästhetik [Aesthetica],* liii (introduction).

[26] Alexander Gottlieb Baumgarten, *Ästhetik [Aesthetica],* 10 (prolegomena § 1).

[27] Kai Hammermeister, *The German Aesthetic Tradition,* 13.

Romanticism added to these conceptions and ended up attaching the idea of aesthetic experience to the *seduction* provoked by a mysterious beauty and the mysticism it increases. In the extent beauty wakens the fine senses of human beings, it can also transform (and torment) the souls, it has indeed a *sublime* and a redeeming potential, although not in itself a purely instrumental value, making it possible for the observers, for instance, when before a piece of art, to escape from the arid terrain of axiomatic logic and reason, the limitations of material world and physicality, and to connect themselves, even though briefly, to the mystic power of the immaterial, the untouchable, the unknown. Reality is an illusion and illusion is the reality to wish for. The romantic aesthetics was then attached to rupture, subversion, and suspension, to the possibility of escape from an objective, exterior world infected by the alienation of modernity (Schiller, Novalis) — a delusive «physical» world rejected by the «exiled» artist and *aisthetikos*, who lives in a «sublime», elevated «state» (see Schiller's opposition between the «physical» and the «aesthetical state»[28]), only hoping the return to a «paradise lost» far away[29].

Anyway, there were always an expected *tension*, sometimes an *opposition*, between aesthetics and reason, and, consequently, the subjects, elements/categories, and questions to be considered in the scope of each, the sublime and the logic, the temporary and the long-lasting, the instantaneous and the perennial, evanescent and solid, the particular and the universal, contingent and necessary, the malicious and the serious, the *artistic* and the *lawful*; a tension that is revisited, explored, and, somewhat, availed, if not, in certain ways, rearranged and reconciled (certainly critically reassessed) by aesthetic comprehensions of law. Which is not equal to automatically erase, revoke and surpass the same tension — on the contrary, it is to make it profitable.

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[28] Friedrich Schiller, *Über die ästhetische Erziehung des Menschen in einer Reihe von Briefen: mit den Augustenburger Briefen,* Stuttgart: Reclam, 2013.

[29] «[…] This alienation, keenly sensed, is often experienced as exile […] The soul ardently desires to go home again, to return to its homeland, in the spiritual sense, and this nostalgia is at the heart of the Romantic attitude. What is lacking in the present existed once upon a time, in a more or less distant past. The defining characteristic of that past is its difference from the present: the past is the period in which the various modern alienations did not yet exist» (Michael Löwy / Robert Sayre (2001). *Romanticism against the Tide of Modernity*, transl. Catherine Porter, Durham / London: Duke University Press, 21-22).

Law & aesthetics — an overview

If «nothing remains untouched by the aesthetic temperament», and if «reason and aesthetics stand not in hostile counterpoint», as D. Manderson affirms, let alone the law, «the most ostensibly rational of human endeavors»[30]. The aesthetic claim carries, then, an appeal for a constitutive moment of *sensorial input*: according to Manderson, and rejecting «the ideal of an objective or trans-historical content to aesthetic experience [...,] the aesthetic speaks to our senses and not our intellect; our emotions and not our logic are engaged»[31]. Pierre Schlag, despite his refusal to «equate an aesthetics with a jurisprudence»[32] and of his metadogmatic concentration on the multiple «grids» in legal thought[33], also expresses a classical conception of *aisthesis* noting that the *aisthetikos* is not properly preoccupied with «the province of beauty and fine arts», but, instead, with «the forms, images, tropes, perceptions, and sensibilities that help shape the creation, apprehension, and even identity of human endeavors, including, most topically, law»[34].

Despite *aesthetic* has always been taken for an unstable word to be put in reference to an unstable world in general, it should be reappraised, in the context of the aesthetic micro-universes in contemporary juridical thinking, both as a *particular bridge* to *rationality* and reason (though in a special and deliberately disruptive fashion, which means rejecting, in different ways, modern rationalism and the epistemology of scientificism — a point to what we shall return soon), and, complementary, as a milestone for the singularity of the concrete and for the place of *emotivism* in perception and in value judgment — it is therefore the case of evoking, approaching, a different reason or alternative types of reasons.

An emotivism, however, that is not exactly pure intuitionism, since it somehow rejects overpowering uncontrollability: rather, it enlightens the transformative and heuristic, the integrative capacity

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[30] Desmond Manderson, *Songs Without Music,* 24.

[31] Desmond Manderson, *Songs Without Music,* 10-11.

[32] See Pierre Schlag, "The Aesthetics of American Law", *Harvard Law Review* 115/4 (Feb., 2002) 1047-1118, 1054.

[33] «While the grid does take a prodigious effort to create, one of its great virtues for both judges and academics is that it enables microthought». See Pierre Schlag, "The Aesthetics of American Law", 1050, 1051, 1055-1070, 1058 (quoted).

[34] See Pierre Schlag, "The Aesthetics of American Law", 1050.

of accessing and uncovering the underlying determining *immaterial* (foremost the *political*, *ideological*, *axiological* and *ethical…*) basis of practical actions and decisions. In short, aesthetics is projected as a call for *sensitive rationality* toward *particulars* that allows the related perspectives to draw *from outside* a given *dry* institutional, one-dimensionally conceived, juridical system the inspiration for a symbolic atmosphere able to put the "airless" legal order and its correspondent practices to breathe *again* through a number of material stimuli and demands, these necessarily filtered by the presence of expectedly humanifying living values. What just underlies the common persistence of orthodox, "already-there", comprehensions of the «rule of law» cultural and civilizational meaning and of the social and normative constraints and limits believed to belong to a static rule of law's world[35].

Mapping aesthetics

The appeal to an aesthetic mindset and rationality cannot, nevertheless, be referred lightly. Considering the convergence between a turn to practical reasoning and a parallel avoidance of romanticism and nihilism, there is, as already suggested, a strong methodological component normally involved, which brings back the problem of juridical interpretation to the center of the stage. So, any attempt to project the possibility of juridical interpretation (as the typically performative — and in this way not simply *mimetic* or even reproductive — *enactment* of *juridical sources* — in the sense already specified —

[35] Negative and somehow limited and caricatural views of a humanly claustrophobic "Kafkaesque" rule of law's empire are, at this point, a common trace easily identified in critical contemporary perspectives, aesthetic ones included. According to Costas Douzinas and Adam Gearey, the rule of law means an invitation for blindness and unethical abstention, reducing justice to nothing more than a procedural device subjected to further administration: «[…] indeed the main requirement of the rule of law is that all subjective and relative values should be excluded from the operation of the legal system. In formal terms, justice is identified with the administration of justice and the requirements and guarantees of legal procedure. In substantive terms, justice loses its critical character and acts, not as a critique, but as a critical apology for the extant legal system» (Costas Douzinas / Adam Gearey (2005). *Critical Jurisprudence: The Political Philosophy of Justice,* Oxford / Portland: Hart Publishing, 27). Desmond Manderson, however, presents here a sort of deviant or antagonist voice, since he tries to *recover* the meaning of the rule of law by the means of aesthetics: «polarity and modernism suggest a way past this false dichotomy — a way of understanding the rule of law while *at the same time* embracing contingency, uncertainty, and contradiction.» (Desmond Manderson, "Modernism, Polarity, and the Rule of Law", 477).

by communities of interpreters) in a typically non juridical field such as the one of aesthetics must overcome the previous requirement of establishing substantial connections (more than tracing positive analogies) between the experiencing of law and the aesthetic experience. In a way that the relationship between «law, values, and aesthetics» can appear as «mutually constitutive»[36], instead of simply expressive, figurative or external. To do that, it will be necessary to unlace fundamental points of intertwining between the assumed aesthetic and juridical universes.

In fact, despite the inner complexity of particular *examples*, and without dismissing the epistemological-methodological obstacles specifically involved, it is possible to synthetize better, at this point, some central or structural aspects to which seems to converge the typical law & aesthetics' core, so that we can try to submit it to the diagnosis of a sort of *congregating* map:

First, there is that mentioned *practical or methodological aspect,* always emphasizing the importance of singularity for a presently plausible constitution of normativity and starting from the notion that law only becomes real (only find the proper conditions to — partially and momentarily — descend from the culturally-constructed *myth* of a blindfolded *Justitia*[37]) when it is tested against experience, a presumption that puts the problem of *judgment* at the center*, enhancing the related problems of sources and interpretation,* and not rarely introducing the discussion of specific models or images of *interpreters* and *judges*. Notwithstanding the privilege of this methodological aspect, in the possibility of *becoming* real and *visible*, law would only confirm the apparent paradox of being first an *act of imagination*[38], one that, in its essential *invisibility* (or in the *non-visibility*[39] that insistently haunts it), if not in the invisibility and the myth, or the «forgetting» dimension, «repressed»/«suppressed» in its own foundations[40] (the founda-

[36] Desmond Manderson, *Songs Without Music,* 28.

[37] About the multiple images and respective symbols historically associated to the Roman Goddess *Justitia* (until the famous blindfolded version) and their successive manifold appropriations by the myth of creation of a secular and rational legal culture, see Jacques de Ville (2011). "Mythology and the Images of Justice", *Law & Literature* 23/3: 324-364, 348-355.

[38] See Jacques de Ville, "Mythology and the Images of Justice", 354.

[39] According to Jacques de Ville's reading on Derrida's conception of invisibility/blindness as «[…] the *absolute* invisible withdrawn from sight». See Jacques de Ville, "Mythology and the Images of Justice", 355.

[40] «[W]e have not *lost* the foundations of law, we *lack* them». See Desmond Manderson, 499.

tions of its practices)[41], stands in parallel with other acts belonging to the same imaginary quality, such as works of art and literature (in effect, law is seen as «a literature which denies its literary qualities»[42], based on a massive narrative of repression).

Second, there is also an *ideological or materially densifying foundational aspect*, grounded on the presumption that the law should be synchronized with certain views of what *justice* can potentially *mean* in a substantial sense and of the means by which law's experiencing could and could not possibly approach and correspond to such meanings, not intending to *consume* them, but to make them sufficiently *closer* (which is very different of attempting to specify or conceptualize in advance what justice *can* possibly *be* in normative terms, as a pre-conceived entity, by exclusion of other pre-conceived entities). It is, in fact, this opening of a material door that specifically prevents the acceptance by important authors like Costas Douzinas of simply procedural, functional or formal conceptions of law and justice, since such perspectives presuppose the impossibility of a materially humanly-based collective encounter to be mediated by law by the means of congregating values, opting instead to merely *regulate dissent* through functional or procedural instruments. Manderson follows this lead referring to the word *justice*, in various texts, as a *verb* and not a *noun*. Accordingly, Douzinas and Adam Gearey state that justice must remain *indeterminate* in a way it cannot be the subject of any truly theoretical effort, since «injustice [the feeling of it] exceeds the theory of justice»[43].

Such comprehensions of the relations between law and justice always presuppose, then, structurally, a situation of regulative distance and normative tension between law and the regulative criteria for constituting justice, one that can be manifested either as «polarity or deconstruction»[44], or as «nested opposition», based on an intricate

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[41] See Peter Goodrich, *Law in the Courts of Love,* 121 f.

[42] See Peter Goodrich, *Law in the Courts of Love,* 112.

[43] Costas Douzinas / Adam Gearey, *Critical Jurisprudence*, 30.

[44] «Polarity allows us to more clearly see that it is not only an anti-positivist theory of law, but equally, and, despite many assertions to the contrary, an anti-transcendental one.»/«polarity respects the constitutive and ineradicable fact of their opposition-an unending and productive back-and-forth movement between incommensurable principles.»/«The tension between justice as sameness and justice as difference, between law as calculation and justice as the incalculable, describes a predicament that is *incapable* of yielding to a choice, a compromise, a balance, or a synthesis.». See Desmond Manderson, "Modernism, Polarity, and The Rule of Law", 477, 491, 497.

logic of similarity and difference[45], in which these similarities and differences can only be determined in context[46]. This distance would provide the necessary gap for operating aesthetics.

In the background of such relations, it is presupposed, also, now as an intentional aspect, the assumption of positive compromises at fundamental levels of communitarian engagement, which happen to appear as entangled with a somewhat caricatural postmodern comprehension of the *juridical subject*: the "new" person before the law is not expected to be the «bare life» that humbly kneels before the «sovereignty» of a law that comes from above, as Giorgio Agamben states and Klimt illustrates in the form of a monochromatic chained naked man in his painting *Jurisprudenz*[47], or the general impersonal *homo juridicus* as his was conceived under the lenses of modernity, whose main trace was his inherent *fungibility* (not just revealed in the possibility of his continual insertion in interchangeable relations with other subjects, but in the fact of carrying in his philosophical kernel an essential fungibility expressed in the dual nature of his own identity, as sovereign and subject, and, so, self-bond to State's law)[48]. This person is, by opposition, the *fractured* women and men from the present circumstance, who find in their historical, social and phenomenological conditions the concrete keys for tracing particular and irreducible *identities*, and, in these identities, elementary dimensions of *unfungibility*, claiming for different ethical-juridical fundaments and bases for *recognition.*

This view of *justice* requires, then, the resort to an ethical component grounded on proximity and singularity that *tends to* enhance *responsibility* over *rights*, mainly attending to the influences of E. Levinas and J. Derrida. But it can also lead to an increase of the role of *rights* (human rights especially) as places for positive *recognition* of subjective singularity — «link[ing] the floating and symbolic signifier to a particular signified»[49] and putting in evidence a post-modern circumstance in which

[45] See Jack Balkin's conception of «nested opposition» in Jack Balkin (1990). "Nested Oppositions", *The Yale Law Journal* 99: 1669-1705.

[46] See Jack Balkin (1994). "Transcendental Deconstruction, Transcendent Justice". *Michigan Law Review* 92: 1131-1186.

[47] Here in open *dialog* with the instigating analysis of the relations between the subject, law, and violence purposed by Desmond Manderson in "Klimt´s Jurisprudence — Sovereign violence and the Rule of Law*", Oxford Journal of Legal Studies* 35/3 (2015) 515–542.

[48] See Alan Supiot (2005). *Homo Juridicus — Ensaio sobre a Função Antropológica do Direito [Homo Juridicus - Essai Sur La Fonction Anthropologique Du Droit],* transl. Joana Chaves, Lisboa: Piaget, 39.

[49] See in Costas Douzinas, *The End of Human Rights — Critical Legal Thought at the Turn of the Century*, Oxford: Hart Publishing, 2000, 259.

the very «legislation» is dreamed of — fantasized? — as an autonomous instance of «desire»[50]… a desire, however, grounded on another desire more profound and close to the self, not just in psychological, but in social-political levels, that of "expanding" the comprehension of juridical subjectivity and personhood to other/alternative experiences of the living and symbolic self «[…] often considered to be deviant, abnormal or alien»[51], even though such an expansion is to be achieved by linguistically narrowing the generality of rights by the means of particularization of specific communities or groups desired to be explicitly *seen* and *named by law*, manifesting a more individually-focused background — albeit not properly individualistic and liberal, since both the liberation of individual claims and naming of individual claimants function here as presuppositions for the liberation of *communities to be, communities to come,* intentionally based on values that only can be thought of and attained collectively, such as *solidarity* and *equality*.

In both ways, i.e. whether enhancing the role of rights or of duties, this ideological or foundational core component is essentially linked to the methodological aspect and puts the *judge* — the *third* — *inside*, instead of *outside*, the conflict[52], almost as if she has topically renounced to law's condition of thirdness (tertiality — *tertialité*), both in objective and subjective levels, to be entrusted with the role of a subject herself, capable, as any adjudicator, of "compare" and "calculate", but fundamentally (*personally and intimately*, not just *institutionally*) responsible for the equation made — including for possible failures[53].

An additional formative component of this ideological material aspect refers to a *political verve,* first inspired by the contributions of critical legal scholars in the eighties/nineties, but expanded to post-modern accounts of jurisprudence, like the ones presented by *feminist critiques of law*, the greater contribution of which would lie on the "personalization" of legal texts by adding to them an underlying

[50] «Rights are linguistic fictions that work and recognitions of a desire that never ends.». About the particularization phenomenon in its paradoxical relation to the necessary indeterminacy of human rights, see the critique proposed by Douzinas in Costas Douzinas, *The End of Human Rights*, 259-261 (esp.).

[51] Julia J. A. Shaw (2018), "From Beethoven to Bowie: Identity Framing, Social Justice and the Sound of Law", *International Journal for the Semiotics of Law* 31: 301–324, 308.

[52] «The judge and law teachers are always involved and implicated, called upon by the other to respond to the ethical relationship by the other.» (Costas Douzinas / Adam Gearey, *Critical Jurisprudence*, 27).

[53] See Costas Douzinas / Ronnie Warrington (1994). *Justice Miscarried: Ethics and Aesthetics in Law*, New York / London: Harvester Wheatsheaf.

personal and self-transformative aspect or, according to Manderson, a «standpoint»[54]. This political enthusiasm flows into a kind of ultimate *fusion* between the experiences of politics, law, and ethics.

But a *third* core component of the aesthetic proposals obliges us to confront yet again that *critical or disruptive aspect* related to the rejection of both "traditional" and "new" forms of rationality, and, to an extent, of irrationality as well. Therefore, refusing to accept the common references in methodological thinking to alliances between *transcendence* and *objectivity*, in this way trying to overcome the risks of a blind escape from proximity, the aesthetic voices, as already anticipated, fight directly the acceptance of axiomatic postulates and deductive mechanisms of reasoning, so understood as prompt expressions of orthodox normativist formalism; but they also reject any chance to recover those echoes behind the masks of pointed contemporary «orthodoxies»[55] or «faux-normative»[56] perspectives, such as the one generically recognized in Ronald Dworkin, «who never forgets the *distinctiveness* of the legal enterprise»[57], and both his view of law as integrity and his aesthetic hypothesis.

Expressly appealing to coherence and tradition throughout his theory of *law as interpretation*[58], and so highlighting the pending adjustment of new juridical decisions both before the past history of precedents and the moral consciousness, or simply political morality, of a given community, Dworkin is seen here as a nostalgic liberal conservative fantasizing with past perfection. Indeed, Douzinas and Ronnie Warrington, D. Manderson, Robin West, and many others, openly criticize the author's quest for innerness, arguing that there can be no such thing as a moral objective political *consciousness* to

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[54] «One of the enduring legacies of critical legal studies, to some extent, and of feminist legal theory in particular has been their emphasis on personalizing legal writing as a means of opening up issues of subjectivity and of standpoint.» (Desmond Manderson, *Songs Without Music,* 34).

[55] See Costas Douzinas / Ronnie Warrington, "A Well-Founded Fear", 115, n. 1 («orthodox jurisprudence»).

[56] See Robin West (2011), *Normative Jurisprudence: An Introduction,* Cambridge: Cambridge University Press, 189.

[57] See José Manuel Aroso Linhares. "Law in/as Literature as an Alternative Humanistic Discourse: the Unavoidable Resistance to Legal Scientific Pragmatism or The Fertile Promise of a Communitas Without Law?", in P. Mittica, ed. *ISLL Papers Special Issue. Dossier on Law and Literature. A Discussion on Purposes and Method [Proceedings of the Special WS on Law and Literature held at 24th IVR World Conference in Beijing, September 2009],* 2010, 39.

[58] See Ronald Dworkin (1982), "Law as Interpretation", *Texas Law Review* 60: 527-550.

inform the material constitution of legal *principles*, as well there is none consistent *objective* sense running through past history of juridical decisions to be shared and transmitted to the future[59]. In short, the overall conservatism detected in Dworkin's approach would arise from his insistence on hermeneutic interpretive features (submitted to these legalistic-inspired features, the "brightness" of Dworkin's «best-light» hypothesis would be just «blinding»[60]), which would lead to a frustration of truly aesthetic and transformative ambitions[61].

In this general critique of orthodoxy, then, are rejected basically any theory related to *centripetal* aspirations towards legal order that could potentially lead to the strengthening of the law we already *have* according to a *grid aesthetics*, quoting Schlag, i.e. an aesthetics consisting in «bright-line rules, absolutist approaches, and categorical definitions»[62], based on the correspondent claims of integrity, coherence and fidelity. Additionally, are rejected, also, at this point predictably, the appeal to anyhow *seemingly internally* constituted meanings of justice.

Finally, as a sort of counterpoint, it is rejected, at the same time, the peril of new forms of *centrifugal* rationalities akin to pure *pragmatism, technocracy, and economism*, as well any contemporary conception of the juridical subjectivity/intersubjectivity in which the rational, scientific, and calculating contingent aspirations towards atomized wills and interests are put ahead of the normative-aesthetic

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[59] See Douzinas' and Robin West's critiques of Dworkin's perspective, for example, in Costas Douzinas, *The End of Human Rights*, 247 f., 328 f.; Robin West, *Normative Jurisprudence,* 5-6 (especially).

[60] Robin West, *Normative Jurisprudence,* 31.

[61] For Manderson, Dworkin fails both regarding hermeneutics and aesthetics: «there is a striking simplicity to his approach. He argues that our role when confronting a work of art is not to criticize but to make it "the best it can be," to read it as kindly as possible, and that likewise we ought to strive to interpret our legal system in the best possible light. But this misunderstands a hermeneutic approach, which, while it admittedly requires us to respect and participate in the tradition to which a work speaks, does not permit us to abandon our critical stance or to equate the "best reading" of something with seeing it in its "best light." This is sheer equivocation.» (Desmond Manderson, *Songs Without Music,* 30). More about this Dworkin critique can be read in Brisa Paim Duarte (2016), "O(s) Movimento(s) (do) Direito & Literatura no Cerco da Autorreferencialidade: Um Trajeto Polifónico e (alguns) Possíveis Mapeamentos [The Law & Literature Movement(s) Under the Siege of Self-Referentiality: a Polyphonic Path, and (Some) Possible Mappings]", *Boletim da Faculdade de Direito* 92/2: 1103-1160, 1123-1127.

[62] «For instance, the most obvious expression of the grid aesthetic is the "scientific" jurisprudence of the turn of the twentieth century (roughly I870-I920).» (Pierre Schlag, "The Aesthetics of American Law", 1051, 1053, 1055-1070).

implications of humanism[63]. In the same way, some voices, like Manderson and Douzinas, explicitly insist in refusing easy connections to relativism and nihilism, understood as manifestations of a pure romantic avoidance of compromising with trans-individuality in behalf of an even more romantic belief in transcendent inspiration and bare subjectivity, an open door to the irrationality of unnegotiable, inaccessible, and dangerous wills and values.

It is necessary to synthetize, yet, another two additional features that, essentially, complement each other, both connected to the issue of *system of law's comprehension*. The first concerns to the *problem of sources*, the second to what one could call the *imaginary dimension*.

Aesthetic comprehensions of law's sources are, as we suggested at the beginning, fundamentally based on *plurality*. Not exactly the plurality/pluralism manifested on the acceptance of the juridical value of a numerical variety of positive legal systems and formative contexts, so coexisting in the same time and space in a mutual internal normative tension that exposes, and, sometimes, reinforces, the frontiers between the official and the marginal, the institutional and the "parallel" legal orders, the legitimate and the illegitimate[64], but, diversely, the *formative* and the *performative* plurality that materially irrigates *the* system of law (in its exterior face, a pre-acquired recognizable group of official materials) with different kinds of sources came from different backgrounds, inside and outside the common field one can recognize as *the* canonic (or paradigmatic) legal system[65], plus the equally important *symbolic* plurality that nourishes the traditional sources in presence, as well other possible sources to be vindicated, with other possible senses and meanings, filtered by the sensibility (and imaginary ability) of institutionally authorized agents, such as judges, academics, and lawyers. The sacred importance traditionally

[63] See, for all, Manderson's argument regarding the equivocal premise of law and economics: «"Law and economics" assumes human beings to be fundamentally rational actors with economic desires. Such an impoverished understanding of human motivation and meaning explicitly eliminates the aesthetic dimension […] law and economics is too weak a currency to offer us any purchase» (Desmond Manderson, *Songs Without Music,* 33).

[64] See Emmanuelle Bernheim (2011), «Le «pluralisme normatif»: un nouveau paradigme pour appréhender les mutations sociales et juridiques?», *Revue interdisciplinaire d'études juridiques* 67 : 1-41.

[65] See the congregating analysis proposed by Manderson regarding Douzinas' and Goodrich's contributions: «Not only poems and plays but paintings and architecture too are treated as creators of legal meaning, and this approach touches in innovative ways on the manner in which law is communicated through images, icons, and myths.» (Desmond Manderson, *Songs Without Music,* 32).

attributed to texts by Christianity, as well the banishment of idols by Protestantism, would be responsible for the institutions' secular distrust on the constitutive juridical power of cultural images and icons[66]. If, throughout legal history, the text became the easily-recognizable expression of law's approved manifestations, organization and systematicity, mainly, *but not exclusively*, in civil law systems, it was not without the institutionalized sacrifice of other richer dimensions of juridicity, or even — according to Peter Goodrich — the sacrifice of an imagistic and pictorial dimension of law which goes back to the original early-modern pre-textual experience, the complex *art of "legal" emblemata*[67].

The system here is in fact more like an open *place* or *space* that could be associated to the experience of law, a place that could be shared, and lived, by its subjects and interpreters. Since the unifying factor necessary to the very idea of systematicity is critically freed from its common positivist subordination to authoritative acts of will and power, besides the ideas of consistency, coherence, or even of any stable, static, and objective/objectifiable general shared consciousness, it depends, to an extent, of the convergence of a material understanding about the *unifying potential of an imaginary dimension* (which happens to be the final additional aspect we would like to refer).

This *imaginary dimension,* the comprehension of which is fundamental to the very understanding of sources' plurality, consists indeed in a changing driving force that *feeds* back the unsystematic system always synchronizing it with the *singularity* of the present. The constitutive link between a pluralist account of the juridical sources and the imaginary dimension contributes to affirm the ideas that law can be in any aesthetic mechanism performed and produced in "reality", such as paintings, songs and literary works[68], or in any form of cultural expression, and that the traditional sources are, ultimately, just tools historically and circumstantially projected, inside legal civilizational history and tradition, *to establish aesthetics*.

In this way, unattached from the final fundament of a simply ra-

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[66] See Desmond Manderson, *Songs Without Music,* 32.

[67] See Peter Goodrich / Valérie Hayaert, ed. (2015), *Genealogies of Legal Vision,* London / New York: Routledge; Peter Goodrich (2017), "Imago Decidendi — On the Common Law of Images", *Brill Research Perspectives in Art and Law*, 1/1: 1-57; Idem (2013), *Legal Emblems and the Art of Law — Obiter Depicta as the Vision of Governance*. Cambridge: Cambridge University Press; *idem* (2013). "Visiocracy: On the Futures of the Fingerpost", *Critical Inquiry* 39/3: 498-531.

[68] Although law & aesthetics is not exactly intended to be simply an outsource of the law & literature movement.

tional and deliberate act of creation made by contingent wills and authorities, and so from the very idea of law as a pure message of power, the final source of juridicity, then (which should be pursued by its interpreters), inhabits a symbolic and immaterial, culturally shared *ius imaginarium*, in a way it cannot be paralyzed or even fully perceived by current discourses and languages, since the kind of imagination that responds for shaping the core of the contingent representations of law's universe is always in progress, and, so, always ahead, as a type of macro-regulative principle.

Looking closer

But, taking a closer look at specific proposals, and considering the aspects enhanced in the suggested mapping, what could be concretely implied in an aesthetic interpretation of law or in an aesthetic comprehension of adjudication process[69]? For Douzinas and Warrington, «aesthetic judgments are […] subjective and individual yet in the service of the undetermined universal»[70]. Announcing an appeal to universality grounded on the *aprioristically* assumed ethical affirmation of an absolute alterity, which always demands an absolute responsibility for the Other's personal calling, they simultaneously affirm a counterbalanced appeal to particularity and a not-purely-casuistic Aristotelian *phronēsis*, one to be grounded on that universal imperative, and so in the assumption that true justice is always *necessarily objectively intangible,* and, because of its inaccessibility, it can function as a regulative imperative that can add to positive-institutional law, through the aesthetic interpretation of its circumstantially densified contents, that desirable ethical component.

Assuming aesthetics as a sort of *aisthesis,* Manderson links it to perception, as well as to the normative density of certain emotionally or aesthetically apprehended meanings and values involved in a comprehensive view of «justice», in order to perform his methodological appeal to complexity and pluralism by the means of discursive com-

[69] A previous and extended version of the following commentary to the models of judgement can be read in Brisa Paim Duarte (2017). "Law's Practical Realization and the Challenges of Narration, Translation, Performance, and Imagination: A Symbolic Reassurance of "Juridical" Singularity?", *Teoria e Critica della Regolazione Sociale* (2/2017); Flora Di Donato / Paolo Heritier, ed., *Humanities and Legal Clinics. Law and Humanistic Methodology/ Humanities e Cliniche Legali. Diritto e metodologia umanistica,* Milano: Mimesis, 2018, 55-69, 63 f.

[70] See Costas Douzinas / Ronnie Warrington, *Justice Miscarried*, 182.

munication — as if people could resort to an aesthetic interpretation of reality — including law's — in order to form the basis of non-orthodox arguments about practical subjects, favoring life instead of filtering it through the pre-established constraints and possibilities already-in-place in the idiom of theory. Since aesthetics, as said, is not simply identified to pure contingency, and therefore has not a bare subjective and non-negotiable nature, the final test of practical pertinence or material adequacy of the arguments specifically put in play, for instance, in the course of a judicial controversy, would be fulfilled by submitting the arguments in question to a further dynamics of dialogical confrontation, and, so, to the constitutive dynamics of opposition. At the center of this notion lies an attempt to recover a sort of aesthetic sense to the rule of law's empire (not simply a critique and a rejection of it)[71], the meaning of which ought to be reinterpreted and reenacted under the *normative assertion of polarity*[72], which can be understood as a strong material appeal to diversity and complexity, in a way that the judge, *a priori* exposed to her own ignorance and fallibility, and counting on her fruitful pre-disposition to self-criticism, «must be willing to make the frequent discovery that he or she is a fool»[73]. This resource to fallibility or, better, *correction/corrigibility,* evokes the necessity of a humble *but hard listening* of the different voices in presence, and so the very realization of law would be improved by the means of an institutional, but disruptive, *polyphony* and the dynamics it entails, one that is favored by a particular interpretation of Mikhail Bakhtin's *heteroglossia* and its «double-voicedness»[74]: polyphony leads to contradiction and contradiction leads to the kind of disruptive, unsettling difference current law needs to absorb or at least try to achieve.

In conclusion, under such lenses, normative contents, values, and intentions, whether the ones presented in laws or statutes, dog-

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[71] See footnote 34.

[72] See footnote 43.

[73] See Desmond Manderson (2012), "Between the Nihilism of the Young and the Positivism of the Old: Justice and the Novel in DH Lawrence", *Law and Humanities - ANU College of Law*, 1-23, 21; Idem (2012), "Modernism, Polarity, and The Rule of Law", 504; Idem (2010), "Judgment in Law and the Humanities", in Austin Sarat / Matthew Anderson / Cathrine O. Frank, ed., *Law and the Humanities: an introduction,* 496-516, Cambridge: Cambridge University Press, 514-516.

[74] See Mikhail Mikhailovich Bakhtin (1981). «The Discourse in the Novel», in Idem, *The Dialogic Imagination*. Austin; London: University of Texas Press, 269-434; Desmond Manderson (2012), Mikhail Bakhtin and the Field of Law and Literature. Journal of Law, Culture, and the Humanities, 8 ed.: 1-22.

matic criteria, precedents and so on, plus the very social *mirror* (the *speculum)* of a legal order, as it is continually framed, by multiple intervening voices from the present and from the past, in its physical projections (considered in its concrete objective manifestations and interferences in "reality" of people's lives) and in its imaginary potential (considered in the positively assumed densifying capacity of an incorporeal aesthetic dimension), happen to be turned into a(nother) cultural/social body of texts to be interpreted, «to be defended and transformed in the flux of their ceaseless oscillation» (says Manderson regarding «legal decisions»[75]).

To the point that it is the whole of a given juridical universe which ends up being *textualized* and *performed,* if not ultimately *dissolved* in the anxiety to be synchronized with multiple views of an inclusive, dialogic, material *justice*[76]. Stating the law as an «aesthetic enterprise»[77] requires, therefore, taking seriously the challenges posed by humbleness and fallibility, unpredictability and openness, fragmentation and pluralism, and, fundamentally, it presupposes the questioning of law's secular "myths" and authority, a departure of law's fundamental states. Regardless of our possible different views on the source and nature of law's authority and autonomy, and also of how we could critically approach the new fracturing, increasingly complex and difficult problems posed by *liquid* times, those disruptive and constructive forces are always, nonetheless, important voices to be raised and challenges to be taken.

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[75] See Desmond Manderson, "Between the Nihilism of the Young", 20-21.

[76] «A general jurisprudence aims to bring back into the picture those other aspects of the legality of existence — aesthetic, ethical and material — which are absolutely crucial to social reproduction. By reminding us that writers and artists have legislated, while philosophers and lawyers (some celebrated, others forgotten) have spoken poetically, we suggest the possibility of new ways of thinking and living the law.» (Costas Douzinas / Adam Gearey, *Critical Jurisprudence*, 34).

[77] See Pierre Schlag, "The Aesthetics of American Law", 1049.

13

A CRENÇA/CONVICÇÃO NO CONTEXTO JUDICIAL: DIÁLOGOS COM A FILOSOFIA PRAGMATISTA[1]

Rui Soares Pereira

1. Introdução

I. Na filosofia (e na ciência), algumas diferenças entre a dúvida e a crença costumam ser exploradas e discute-se de que forma os chamados "métodos de fixação da crença" permitirão fazer cessar aquilo

[1] Texto elaborado para apresentação no dia 26 de Abril de 2017, na Faculdade de Direito da Universidade de Coimbra, no contexto do *Primeiro Encontro Luso-Polaco de Teoria do Direito e Metodonomologia*, organizado pelo Instituto Jurídico da Faculdade de Direito da Universidade de Coimbra, o Center for the Theory and Philosophy of Human Rights, o Center for Public Policy e a Associação Portuguesa de Teoria do Direito, Filosofia do Direito e Filosofia Social. É devido um agradecimento aos participantes do Encontro pelos comentários e sugestões apresentados, bem como à organização, em especial ao Professor Doutor José Aroso Linhares.

que pode ser designado por "estados de dúvida" e atingir aquilo que poderá corresponder então a um "estado de crença".

Aquelas diferenças, bem como o problema dos métodos de fixação da crença, também se manifestam no âmbito de um processo judicial, nomeadamente quando são tomadas decisões para as quais se exige um certo grau de crença ou convicção.

Em relação aos factos em litígio, são habitualmente feitas apreciações com pretensões de validade que representam o culminar ou são o resultado de uma tensão ou oscilação, verificada ao longo do processo, entre o que pode ser considerado como gerador de "estados de dúvida" e o que se entende que pode determinar "estados de crença" ou "estados de convicção".

No entanto, é possível identificar diversas particularidades que permitem sustentar a ideia segundo a qual as conclusões alcançadas na filosofia sobre a crença e os métodos para a sua fixação não serão transponíveis (pelo menos de forma fácil e total) para o contexto judicial.

II. Vários temas e outros aspectos mais ou menos relacionados poderiam ser convocados para esta discussão.

Contudo, entendemos que a discussão deverá centrar-se essencialmente nos contributos da filosofia (e da ciência) para o estabelecimento da diferença entre a dúvida e a crença e para as tentativas apresentadas no sentido da fixação do estado de crença.

Entre os temas relacionados e que assaltam a mente quando se pensa na questão da crença ou da convicção estarão certamente o da verdade e o do conhecimento. E vários são os autores que, ao analisarem a questão da crença, se referem igualmente ao problema da verdade e ao problema do conhecimento.

Ao tema da verdade também vimos dedicando algumas reflexões, procurando sublinhar (em linha com o magistério de Castanheira Neves) a relevância e o sentido no direito da ideia de verdade prática[2] e procurando também – sempre que possível – relacioná-la com uma perspectiva pragmatista sobre a verdade, a realidade e a objectividade[3]. Mas, tratando-se de um outro tema e que assume uma relevância que não é meramente processual, não será abordado nesta ocasião.

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[2] Rui Soares Pereira, "Modelos de prova e Prova da Causalidade", in ATFD e Instituto Jurídico da Faculdade de Direito da Universidade de Coimbra, *VI Jornadas de Teoria do Direito, Filosofia do Direito e Filosofia Social — Juízo ou decisão? O problema da realização jurisdicional do direito*, 2016, 447-483.

[3] Rui Soares Pereira, *O Nexo de Causalidade na Responsabilidade Delitual: Fundamento e Limites do Juízo de Condicionalidade*, Coimbra: Almedina, 2017, 1137-1146.

III. Em termos metodológicos, optámos por proceder a uma análise do problema da crença e da convicção no domínio da filosofia pragmatista e depois por procurar compatibilizar as principais conclusões aí alcançadas com a realidade do processo judicial, sem esquecer que a racionalidade jurídica não se esgota numa racionalidade de índole processual ou procedimental, mas assenta numa intencionalidade normativamente fundamentante[4].

Justifica-se apresentar uma pequena explicação para a opção de dialogar com a filosofia pragmatista.

Em especial, as reflexões de Susan Haack, Cheryl Misak, Albrecht Wellmer e Robert Brandom representam avanços muito significativos em relação ao problema da crença, sobretudo na medida em que sugerem várias melhorias em relação ao pensamento de autores como Charles Sanders Peirce e William James e procuram apresentar soluções que apelam a uma certa interconexão entre a justificação, a verdade, a intersubjectividade e a objectividade.

Os desenvolvimentos e as análises críticas levadas a cabo no domínio da filosofia pragmatista pareceram-nos, até pela influência exercida pelo pragmatismo no realismo jurídico norte-americano[5], relevantes para uma adequada ponderação do papel da crença e da convicção no contexto judicial. Sobretudo acentuam a importância de a questão ser analisada em correlação com outros temas (como os da justificação, da verdade, da intersubjectividade e da objectividade), permitindo assim estabelecer uma relação mais fácil com as situações identificadas no processo judicial que parecem atribuir relevância à crença ou à convicção e até exigir graus de crença ou convicção e, ao mesmo tempo, fazer uma adequada ponderação das particularidades do processo judicial.

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[4] António Castanheira Neves, "Arguição nas Provas de Doutoramento de Fernando Augusto de Freitas Motta Luso Soares", *Boletim da Faculdade de Direito* 68 (1992) 381-399 (391-395 e 398): "Mesmo que a racionalidade jurídica fosse de índole tão-só procedimental ou processual, i. é, de uma validade de decisão aferível não pelo conteúdo mas pelas regras convencionais ou metódicas de a obter (…) — o que tenho por muito discutível -, ainda assim o processo judicial e racionalidade processual se distinguiriam, como uma instituição se distingue de uma intencionalidade".

[5] O realismo jurídico norte-americano caracteriza-se por ser uma conceção instrumentalista do direito (José Lamego, *Elementos de Metodologia Jurídica*, Coimbra: Almedina, 2016, 201-206), tendo como base filosófica o pragmatismo americano (Manuel Atienza, *O Sentido do Direito*, Lisboa: Escolar Editora, 2014, 312). Sobre as relações entre a corrente filosófica pragmatista e o movimento do realismo jurídico norte-americano e, em particular, o contributo de Charles Sanders Peirce para este movimento, cfr. Roberta Kevelson, "Semiotics and Methods of Legal Inquiry: Interpretation and Discovery in Law from the Perspective of Peirce's Speculative Rethoric", *Indiana Law Journal* 61/3 (1986) 355-371.

IV. Delimitada a análise a realizar, a exposição que se segue será organizada em torno de cinco pontos.

Um primeiro ponto será dedicado à recolha das diferenças entre a dúvida e a crença encontradas na filosofia pragmatista.

Num segundo ponto proceder-se-á a uma ponderação da relevância dos chamados "métodos de fixação da crença" na filosofia pragmatista.

Um terceiro ponto efectuará uma descrição das várias operações realizadas no contexto da aplicação no direito nas quais parecem assumir relevância a crença e a convicção.

Um quarto ponto apresentará uma identificação das hipóteses decisórias em que num processo judicial é frequente referir a existência de diferentes graus de crença ou convicção exigível.

Num quinto ponto serão assinaladas as particularidades do processo judicial, que poderão dificultar ou tornar problemática a transposição para o contexto judicial das conclusões alcançadas na filosofia (mesmo a pragmatista) sobre a crença e a convicção.

Realizado este percurso, faremos algumas considerações finais, procurando também identificar as conclusões extraídas da análise realizada.

2. As diferenças entre a dúvida e a crença na filosofia pragmatista

I. Vários autores poderiam ser referidos em relação ao problema da dúvida e da crença ou convicção na filosofia, com ou sem ligação com a questão altamente debatida da crença religiosa[6].

Porém, no contexto da corrente filosófica pragmatista dois nomes se assumem como incontornáveis e decisivos: Peirce e James. Habitualmente designados como os "pais do pragmatismo", a Peirce e a James se pode atribuir, ainda que com diferenças, o estabelecimento das bases filosóficas da corrente pragmatista em relação à questão da crença. Contudo, importa não olvidar que as posições destes autores vieram a conhecer desenvolvimentos e análises críticas por parte de

[6] Sobre esse tema e sua relação com a crença religiosa, cfr. Desidério Murcho, "Fé, epistemologia e virtude", in Desidério Murcho, org., *A Ética da Crença*, Lisboa: Bizâncio, 2010, 17-95, e *Todos os Sonhos do Mundo e outros Ensaios*, Lisboa: Edições 70, 2010, 103-158. Interessantes são as reflexões de Ludwig Wittgenstein sobre a crença religiosa, expressas em três conferências, a partir das quais alguns autores têm concluído ser, na opinião de Wittgenstein, de diferenciar a crença religiosa da crença empírica e da crença científica — Hilary Putnam, *Renovar a Filosofia* Lisboa: Piaget, 1998, 191-220 — trad. de *Renewing Philosophy*, 1992, (em especial, 205 e 211).

vários autores filiados na corrente filosófica pragmatista que aqueles inauguraram.

II. Optando por analisar o tema à luz da corrente filosófica pragmatista, talvez seja suficiente apresentar duas perspectivas principais sobre a questão da crença: a perspectiva absolutista, de acordo com a qual é possível chegar ao conhecimento da verdade e saber quando esse conhecimento foi alcançado, e a perspectiva empirista, segundo a qual embora seja possível alcançar o conhecimento da verdade não podemos saber quando é que infalivelmente o fizemos por existir uma diferença entre o poder saber-se uma coisa e o saber-se com certeza que sabemos. Essas perspectivas enquadram-se, como é bom de ver, nos modos absolutista e empirista de acreditar na verdade, que não se confundem com o chamado "cepticismo filosófico sistemático".

Ora, o pragmatismo apresenta algumas vantagens em relação às duas perspectivas antes referidas.

Por um lado, rejeita o cepticismo filosófico sistemático, constituindo essa atitude, a par do falibilismo, um aspecto central da tradição pragmatista[7].

Por outro lado, conforma-se mais facilmente com a tradição empirista, que aliás terá prevalecido na ciência, embora a visão absolutista sobre a crença (predominante na filosofia) não deixe de assumir um relevo particular na opinião de alguns pragmatistas.

III. É o próprio James — um dos pais do pragmatismo - que o diz no seu célebre artigo "A vontade de acreditar", de 1896.

Aí se refere concretamente: "De algumas coisas sentimos que estamos certos: sabemos, e sabemos que sabemos. Algo ressoa em nós, um sino que bate as doze badaladas, quando os ponteiros do nosso relógio mental deram a volta ao mostrador e se encontram ao meio-dia. Os maiores empiristas entre nós só o são quando reflectem: abandonados aos seus instintos, dogmatizam como papas infalíveis" [8].

Concluindo que todos somos absolutistas por instinto, James sugere então que a única forma de ultrapassar esta fraqueza humana é tudo fazermos para dela nos conseguirmos libertar e nos assumirmos como homens de reflexão, tal como se impõe a qualquer empirista.

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[7] Michael Bacon, *Pragmatism: an introduction*, Cambridge, uk: Polity Press, 2012, 6.

[8] William James, "A vontade de acreditar", in Desidério Murcho, org., *A Ética da Crença*, Lisboa: Bizâncio, 2010, 137-174 (152).

IV. O que sugere concretamente James para superar essa fraqueza humana?

Por um lado, sugere James que se abandone a doutrina da certeza objectiva, por entender que, embora sejam excelentes ideais com que brincar, os indícios objectivos e a certeza não podem ser encontrados em lado algum. Por outro lado, James sugere que continuemos a procurar a verdade ou a ter esperança nela, ou seja, a depositar a fé de que é possível progredir cada vez mais na direcção da verdade, acumulando de forma sistemática experiências e reflectindo sobre elas, por entender que a verdade nada mais significa do que a confirmação pela direcção total do pensamento de uma hipótese que tenha sido colocada[9].

Todavia, James vai ainda mais longe ao afirmar que as nossas opiniões sobre algo são influenciadas pela nossa natureza passional (o facto de querermos evitar ser enganados e pretendermos encontrar um modo de encontrar a verdade) e que essa influência constitui um facto determinante (mas inevitável e legítimo) das escolhas que fazemos. Se na generalidade das ocasiões em que não existe grande vantagem de obter a verdade poderá evitar-se o risco de erro não tomando qualquer decisão ou poderá tomar-se uma decisão com base nos melhores indícios disponíveis num determinado momento à luz de qualquer princípio considerado aceitável, também é certo que muitas vezes na mente puramente judicativa são considerados os desejos dos indivíduos em ver confirmadas as suas crenças. Isso não é em si problemático na medida em que, pese embora tenham interesse no resultado da investigação a realizar, esses indivíduos não deixam de recorrer a métodos que evitam que se deixem iludir e promovem a procura de uma verdade tecnicamente verificada. Em todo o caso, não sendo forçosa uma opção pela hipótese que se prefere, deverá considerar-se como ideal o intelecto friamente judicativo, ou seja, despido de hipóteses de estimação, sem que se veja em tal proposta uma exigência de espera pelos chamados indícios coercivos. Mesmo sem uma prova tangível terão de ser decididas questões morais e existem inclusive certas questões de facto cuja verdade parece depender do desejo por certo tipo de verdade, que cria a sua própria verificação. Isto é, existem factos cuja ocorrência parece depender de uma fé preliminar no seu advento (de uma acção pessoal nossa)[10].

[9] William James, "A vontade de acreditar", 153-157.

[10] William James, "A vontade de acreditar", 157-167.

Daqui decorre para James que existe uma liberdade de acreditar em qualquer hipótese suficientemente viva para ser uma tentação para a nossa vontade e que mesmo quando optamos por aguardar pela verdade estamos a agir e a tomar as rédeas da nossa própria vida[11].

V. Esta visão de James sobre a crença encontrou eco noutros filósofos pragmatistas e veio a receber alguns esclarecimentos em relação a leituras apressadas que daquele autor poderiam ser realizadas.

No essencial, James sugeriu, contra outros autores, que em certas situações (não restritas à religião) alguém tem o direito de acreditar, apesar de a prova existente para suportar essa crença ser insuficiente[12]. Ou seja, para James não seria sempre errado acreditar quando a prova disponível é insuficiente, pois em certos casos (como seria o da crença religiosa) não é possível adiar a formulação de uma crença, passando por isso a existir o direito de acreditar na falta de prova suficiente. Assim sendo, parece que a sua visão correria o risco de ser interpretada como sustentando afinal que os indivíduos são livres de acreditar naquilo que quiserem desde que isso vá ao encontro das suas necessidades individuais[13].

No entanto, essa não é a visão de James. Desde logo, essa liberdade existe apenas em relação às opções que não podem ser decididas pelo intelecto, estando James essencialmente a pensar na crença religiosa. Além disso, James não desconsiderou a questão da verdade, simplesmente[14] rejeitou que na falta de prova pudéssemos adoptar (a fim de evitar crenças falsas) uma postura céptica, sem crenças e a

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[11] William James, "A vontade de acreditar", 171-173.

[12] Hilary Putnam, *Renovar a Filosofia* cit., pp. 265-267, sublinhou que: "para James, a necessidade de acreditar "antes da prova" não se confina a decisões de ordem religiosa ou existencial. Ela desempenha um papel essencial na própria ciência"; "a sua tese (...) era de que a ciência nunca teria evoluído se insistíssemos em que os cientistas nunca acreditam em teorias nem as defendem a não ser com base em provas suficientes"; "James achava que todo o ser humano tem de tomar decisões antes da prova", tanto mais que, na sua opinião, "quem age apenas quando as "vantagens calculadas" são favoráveis não vive uma vida humana com sentido".

[13] Michael Bacon, *Pragmatism: an introduction*, 30-32.

[14] A este propósito, refere Hilary Putnam, *Renovar a Filosofia*, 266, sobre James: "Quando se chega à decisão institucional, à decisão tomada pela ciência academicamente organizada, de aceitar uma teoria ou não, é importante aplicarmos o método científico. No contexto da justificação (embora James não empregue esse jargão), James estava totalmente do lado da atenção escrupulosa às provas. Mas James reconheceu, antes de aparecer o positivismo lógico, que há outro momento no processo científico, o momento da descoberta, e que nesse contexto não podem aplicar-se os mesmos constrangimentos".

aguardar mais informação, e considerou que a procura da verdade seria suficientemente importante para ser corrido o risco de serem alcançadas falsas crenças[15].

3. A relevância dos métodos de fixação da crença na filosofia pragmatista

I. Entrando nos chamados "métodos de fixação da crença" uma obra se assume como essencial na tradição pragmatista.

Trata-se do artigo de Peirce, publicado em 1877 e intitulado "A fixação da crença"[16].

Nesse artigo, partindo da ideia segundo a qual a irritação da dúvida (mas não de uma dúvida universal ou meramente hipotética como sugeriu Descartes[17]) provocaria uma luta (o inquérito) tendo em vista atingir um estado de crença (não uma certeza, mas uma crença que nos afaste da dúvida), Peirce distinguiu quatro métodos de fixação da crença: o método da tenacidade, que permitiria chegar a uma crença independentemente do peso da prova que a favoreça ou contrarie, o método da autoridade, que permitiria considerar fixadas e decisivas certas crenças de acordo com declarações de uma autoridade, o método *a priori*, em que a crença surgiria como resultado de algo que agrada à razão, e o método científico, que compreenderia a prova e a partir dela se tornaria possível concluir se as crenças existentes se conformam ou não com ela. Assinalando vantagens e inconvenientes

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[15] Michael Bacon, *Pragmatism: an introduction*, 32-33. Cfr. a citação que James faz de Fitzjames Stephen e com a qual conclui "A vontade de acreditar", 173-174.

[16] Charles Sanders Peirce, "A fixação da crença", in Idem, *Antologia Filosófica*, Lisboa: Imprensa Nacional-Casa da Moeda, 1998, 59-74.

[17] Sobre a crítica de Peirce ao cartesianismo, cfr. Richard J. Bernstein, *The Pragmatic Turn*, Cambridge, uk: Polity Press, 2010, 32-52. Entre nós, reconhecem a importância do pensamento de Peirce, José Aroso Linhares, *Regras de Experiência e Liberdade Objectiva do Juízo de Prova*, 1988, (Boletim da Faculdade de Direito da Universidade de Coimbra, suplemento 31), 1-364 (163-164, nota 468), ainda que reforçando que a compreensão do sentido da heurística de Peirce não pode olvidar o "específico postulado de cientismo", Fernando Luso Soares, *A decisão judicial e o raciocínio tópico-abdutivo do juiz: um ensaio de lógica para juristas*, Lisboa: Cosmos, 1993, 143 e s.; e António Castanheira Neves, "Arguição nas Provas de Doutoramento", embora chamando a atenção (*idem*: 392) para o facto de o pragmatismo de Peirce ser um "pensamento de intencionalidade finalística (segundo uma razão instrumental e sob um critério consequencialista) que reconverte a própria filosofia prática à filosofia teorética, já que todas as proposições válidas em todos os domínios (quer de directo conhecimento objectivo, quer de acção social) tomam a forma de enunciados nomológicos (científicos-técnicos)".

a cada um desses métodos, acabou Peirce por concluir ser preferível o método científico, tendo em consideração o facto de este método ser sensível à prova e à experiência.

É que, pese embora as vantagens apresentadas pelos outros métodos, só o método científico, na opinião de Peirce, estaria em condições de satisfazer as nossas dúvidas: por um lado, por estar em causa um método de determinação das nossas crenças que permitiria, através de uma influência externa e capaz de afectar qualquer indivíduo, alcançar conclusões finais comuns a qualquer homem e que poderiam gerar acordo de opiniões; por outro lado, por permitir começar com factos conhecidos e observados e passar para o desconhecido através de uma aplicação do método sem fazer apelo imediato a sentimentos e objectivos[18].

II. A preocupação de Peirce residia em encontrar uma forma de tornar uma crença aceitável numa comunidade de investigadores, ou seja, que fosse capaz de gerar consenso entre diferentes investigadores[19].

Contudo, embora a análise de Peirce tenha conhecido difusão e aceitação (em especial na comunidade científica), tendo inclusivamente antecipado o princípio do verificacionismo do positivismo lógico, a verdade é que no próprio seio da corrente filosófica pragmatista surgiram algumas chamadas de atenção que ajudam a esclarecer a análise de Peirce e que se assumem talvez como mais promissoras.

Desde logo, a circunstância de a análise de Peirce poder significar um abandono da teoria da correspondência da verdade. Sobre este ponto não interessa agora pronunciar-nos. Bastará dizer que Peirce parece de facto ter atribuído relevância ao consenso (de todos os investigadores), mas em qualquer dos casos num sentido bastante diferente daquele que veio a ser assumido por outros autores no âmbito das chamadas "teorias do consenso ou consensuais" [20], como é o caso das sustentadas por Hillary Putnam e Jürgen Habermas[21].

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[18] Charles Sanders Peirce, "A fixação da crença", 66-74.

[19] Michael Bacon, *Pragmatism: an introduction*, 23.

[20] Robert Alexy atribui também relevância ao consenso ao propor aquela que é conhecida por teoria processual da argumentação jurídica. Para uma explicação sucinta dessa teoria e respectiva crítica, propondo que, ao invés de se procurar as condições de um discurso racional para alcançar um consenso sobre uma solução, deverá antes optar-se por construir o que designa por teoria do dissenso racional, cfr. Miguel Teixeira de Sousa, *Introdução ao Direito*, Coimbra: Almedina, 2012, 421-433.

[21] De alguma forma, Peirce já expressava a ideia de relevância do consenso ao considerar a verdade como sendo «the opinion "fated to be believed by all who investigate» - *apud* Susan Haack, *Evidence Matters: Science, Proof and the Truth in the Law*, Cambridge: Cambridge University Press, 2014, 299 -, mas num sentido bem diferente do que mais tarde foi assumido por Jürgen Habermas. A formulação de

Além disso, o facto de a sua análise poder conduzir a uma identificação entre aquilo que é real e aquilo que é julgado como real. Sobre este ponto, sim: temos de nos pronunciar. A esta crítica, o próprio Peirce parece ter respondido ao referir-se à diferença entre aquilo que uma determinada comunidade pode pensar e aquilo que um inquérito em geral pode eventualmente levar a concluir. Ora, na opinião de Peirce, só através de um verdadeiro inquérito (de uma investigação crítica), envolvendo um testar rigoroso de hipóteses e uma disponibilidade para as rever caso sejam fornecidas razões para tal, poderia chegar-se à verdade. Para Peirce, a verdade não seria aquilo com que uma determinada comunidade concorda (tal como o real não é determinado pela comunidade), mas seria antes a conclusão que um verdadeiro inquérito poderá revelar (tal como o real é aquilo para o qual é conduzida a comunidade)[22].

III. Mais recentemente, alguns pragmatistas, preocupados com a dificuldade de sustentar a possibilidade de um consenso entre investigadores e de uma convergência de crenças e também com o significado a atribuir ao fim da investigação como ideal regulador, vieram formular outras propostas no sentido de ultrapassar eventuais críticas à análise de Peirce.

Entre esses pragmatistas contam-se Haack[23], Misak[24], Wellmer[25] e Brandom[26].

Peirce em questão ("How to Make Our Ideas Clear", *Popular Science Monthly* 12 (1878) 286-302) é a seguinte: «*The opinion which is fated to be ultimately agreed to by all who investigate, is what we mean by the truth*». Idêntica é a posição de Richard Rorty, *Philosophy and the Mirror of Nature*, Princeton: Princeton University Press, 1979, 176, ao afirmar que a verdade «*is what our peers will let us get away with saying*». Contudo, importa notar que Peirce não terá defendido propriamente que o consenso alcançado na comunidade de investigadores constituísse «the measure of truth and reality» - Richard J. Bernstein, *The Pragmatic Turn*, 112.

[22] Michael Bacon, *Pragmatism: an introduction*, 24.

[23] Susan Haack, *Evidence and Inquiry: Towards Reconstruction in Epistemology*, Oxford: Blackwell, 1993, *Evidence and Inquiry: A Pragmatist Reconstruction of Epistemology*, Amherst, NY: Prometheus Books, 2009, e *Evidence Matters: Science, Proof and the Truth in the Law*.

[24] Cheryl Misak, *Truth, Politics, Morality: Pragmatism and Deliberation*, London: Routledge, 2000, e *Truth and the End of Inquiry: A Peircean Account of Truth*, Oxford: Oxford University Press, 2004.

[25] Albrecht Wellmer, "The Debate About Truth: Pragmatism Without Regulative Ideas", *Critical Horizons* 4/1 (2003) 29-54.

[26] Robert Brandom, *Making It Explicit*, Cambridge — Mass.: Harvard University Press, 1994.

IV. No caso de Haack, que tem levado a cabo um projeto de reconstrução da epistemologia (com relevância também no domínio jurídico), é possível encontrar uma sugestão de combinação das visões fundacionalistas com as coerentistas (aquilo que designa por "foundherentism"): por um lado, aceita que a experiência possa desempenhar um papel na justificação das crenças, mas sem aceitar (como sugerem os fundacionalistas) que possa existir uma modalidade privilegiada de crenças epistemicamente fundamentais; por outro lado, defende que a justificação é o resultado de crenças que se suportam entre si, mas sem aceitar (como sugerem os coerentistas) que a crença possa dispensar suporte probatório. Uma crença será justificada para Haack se for resultado de um raciocínio baseado em crenças mutuamente suportadas e suficientemente provadas. À partida, tal como em Peirce, uma crença bem justificada será o produto de um inquérito (ou investigação crítica), o qual deve ser genuíno e conduzido (tal como sucede no caso do método científico) em termos de uma procura da verdade desinteressada. Embora tal não tenha de significar considerar a ciência epistemicamente privilegiada[27], a verdade é que esta encontra-se, na opinião de Haack, comprometida com o testar de hipóteses de forma critica, com a experimentação e com uma análise sistemática da prova, não podendo ser reduzida ao acordo dos cientistas[28].

Também Misak veio sustentar uma posição na linha da análise de Peirce, reforçando a ideia de que a crença genuína teria de ser sensível à prova e à experiência amplamente construídas, mas procurando em todo o caso melhorá-la através do sublinhar da relação entre inquérito e crença verdadeira: uma crença poderia ser considerada verdadeira caso, tendo sido realizada uma investigação até onde fosse possível sobre o assunto, essa crença resistisse à dúvida, já que não seria posta em causa por uma experiência ou um argumento recalcitrante[29]. Para isso, a crença teria de se encaixar com a prova e responder à prova, pois só desse modo estaríamos seguros da dúvida[30]. Com esta sugestão de Misak consegue-se evitar qualquer referência ao fim hipotético da

[27] Considerando, aliás, já que a ciência é apenas um género de literatura, cfr. Richard Rorty, *Consequências do Pragmatismo* Lisboa: Instituto Piaget, 1999, trad. de *Consequences of Pragmatism*, 1982, 45-46. Mas Rorty é um crítico da epistemologia, o que contrasta com a insistência de Haack no sentido de a filosofia se tornar científica e a sua visão da epistemologia como desempenhando uma função não meramente convencional — Susan Haack, *Evidence Matters: Science, Proof and the Truth in the Law*, 4.

[28] Michael Bacon, *Pragmatism: an introduction*, 147-150 e 152-155.

[29] Richard J. Bernstein, *The Pragmatic Turn*, 112-113.

[30] Michael Bacon, *Pragmatism: an introduction*, 162.

investigação ou às condições epistémicas ideais, mas parece que não fica resolvido o principal problema que a análise de Peirce coloca: como referem alguns autores, é impossível assegurar alguma vez que as nossas crenças actuais são verdadeiras, pois, seguindo aquela posição, as crenças actuais poderão ser sempre revertidas no futuro e não existe qualquer critério que nos diga se foi ou não realizada uma investigação até onde poderia ser realizada[31]. Simplesmente, na perspectiva de Misak (que não confunde o falibilismo com o cepticismo) a única coisa que pode ser exigida em termos de verdade (noção que continua a desempenhar um papel normativo no inquérito essencialmente para dar sentido às nossas práticas) é procurar alcançar consenso através de um inquérito genuíno e não a certeza de possuirmos uma crença capaz de satisfazer sempre os nossos propósitos, pelo que desde que seja tomada em consideração de forma genuína a prova e as razões que nos são apresentadas não existe qualquer motivo para não podermos afirmar com confiança que as crenças são verdadeiras[32].

V. Diferentemente se posicionaram Wellmer e Brandom.

O primeiro procurou sustentar uma conexão interna entre verdade e justificação, mas sem qualquer referência a uma ideia de justificação sob condições ideais como sugeriram Putnam e Habermas: a verdade, abrangendo várias perspectivas, é para Wellmer essencialmente controversa. Wellmer explicou a conexão interna entre a verdade e a justificação apelando a um espaço de verdade transubjectivo que é constituído apenas por perspectivas diferentes, o que na sua opinião permitiria explicar normativamente a verdade sem recurso a ideias regulativas e torná-la essencialmente de natureza controversa[33].

Por seu turno, Brandom procurou relacionar a justificação, a verdade e a objectividade através de uma adequada compreensão da dinâmica das práticas discursivas inferenciais. Ao invés de considerar a comunidade como um árbitro final do que é verdadeiro e objectivo, Brandom sugeriu que nas práticas discursivas não existe uma perspec-

[31] Richard J. Bernstein, *The Pragmatic Turn*, 115. Porém, veja-se a chamada de atenção em relação à crítica formulada por este autor em Michael Bacon, *Pragmatism: an introduction*, 164: "It seems, though, that here Bernstein forgets Peirce's injunction to be careful to keep in mind the difference between fallibilism and skepticism. We must be mindful that our beliefs, however confident we may be in them, might turn out to be false, but, if we genuinely attend to the evidence and reasons that are presented to us, there is no reason not to confidently claim that they are true".

[32] Michael Bacon, *Pragmatism: an introduction*, 162-164.

[33] Richard J. Bernstein, *The Pragmatic Turn*, 116-119.

tiva privilegiada (uma espécie de ponto de vista metaperspectivo) que esteja acima das perspectivas dos diferentes participantes, mas apenas perspectivas concorrentes. Brandom adoptou um entendimento sobre a intersubjectividade que afasta a possibilidade de identificação de uma perspectiva privilegiada (normalmente feita coincidir com a da correcção objectiva) sobre as demais perspectivas concorrentes na prática discursiva em relação à verdade, mas isso, em seu entender, não afectaria o carácter racional das afirmações que ao abrigo da mesma são realizadas[34].

4. As operações de aplicação do direito onde a crença ou a convicção assumem relevância

I. Feito o enquadramento da questão da crença e dos métodos para a sua fixação na corrente filosófica pragmatista, justifica-se agora proceder à identificação no âmbito do processo judicial das situações em que a crença ou a convicção assumem relevância.

Essas situações reconduzem-se essencialmente a momentos fundamentais do processo judicial aos quais é atribuído um papel à crença ou à convicção.

Seguindo a orientação de Rui Pinto Duarte, expressa num artigo intitulado "Algumas Notas acerca do Papel da «Convicção-Crença» nas Decisões Judiciais"[35], estaremos a falar das várias operações (inseparáveis, interligadas e distinguíveis apenas por razões ligadas à organização dos tribunais) em que se analisa a tarefa de aplicação do direito[36].

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[34] Richard J. Bernstein, *The Pragmatic Turn*, 119-123.

[35] Rui Pinto Duarte, "Algumas Notas acerca do Papel da «Convicção-Crença» nas Decisões Judiciais", in Idem, *Escritos Jurídicos Vários 2000-2015*, Coimbra: Almedina, 2015, 107-119 = *Themis* 4/6 (2003) 5-17.

[36] Sobre as várias operações da chamada "aplicação judicial do direito" e uma defesa do modelo logicista (dedutivista) de aplicação do direito, cfr. José Lamego (*Elementos de Metodologia Jurídica*, 155-171 e 173-208). Para uma crítica ao modelo dedutivista de aplicação do direito, cfr. Paulo de Sousa Mendes, "Sobre o estatuto não científico da dogmática jurídica no pensamento de Kelsen", in *Estudos em Homenagem ao Professor Doutor Carlos Pamplona Corte-Real*, Coimbra: Almedina, 2016, 851-864 (863), e *Causalidade Complexa e Prova Penal*, Coimbra: Almedina, 2018, 24-28. Em todo o caso, uma defesa do dedutivismo (afastando algumas objecções habituais e no sentido de o raciocínio jurídico poder ser e de facto ser sempre em parte dedutivo) pode ser encontrada em Neil MacCormick, *Rhetoric and the Rule of Law: a theory of legal reasoning*, Oxford: Oxford University Press, 2005, chapter 4, 49-77.

II. Desde logo, a operação de fixação dos factos.

Nessa operação estão claramente presentes as crenças ou convicções, que influenciam as decisões do julgador, designadamente quando o mesmo tem de formular o juízo probatório. Recorde-se que a própria prova, que integra as premissas de facto da justificação externa da decisão[37], destinar-se-á, de acordo com o artigo 341.º do Código Civil, a criar no espírito do julgador uma convicção sobre a realidade de um facto: é através da prova que se poderá resolver a dúvida sobre a veracidade de um facto havido como controvertido. E são várias as disposições legais de natureza processual (penal ou civil, por exemplo) que aludem de forma expressa à convicção.

Por exemplo, nos artigos 369.º, n.º 1[38], 405.º, n.º 2[39], 607.º, n.ºs 4 e 5[40], 612.º[41] e 879.º, n.º 5, alínea a)[42], do Código de Processo Civil (CPC), surgem referências à convicção, sendo esta por vezes precedida

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[37] Miguel Teixeira de Sousa, *Introdução ao Direito*, 451-455.

[38] Artigo 369.º: "1 - Mediante requerimento, o juiz, na decisão que decrete a providência, pode dispensar o requerente do ónus de propositura da ação principal se a matéria adquirida no procedimento lhe permitir formar *convicção segura* acerca da existência do direito acautelado e se a natureza da providência decretada for adequada a realizar a composição definitiva do litígio."

[39] Artigo 405.º do CPC: "2 - Produzidas as provas que forem julgadas necessárias, o juiz ordena as providências se adquirir a *convicção* de que, sem o arrolamento, o interesse do requerente corre risco sério".

[40] Artigo 607.º do CPC: "4 - Na fundamentação da sentença, o juiz declara quais os factos que julga provados e quais os que julga não provados, analisando criticamente as provas, indicando as ilações tiradas dos factos instrumentais e especificando os demais fundamentos que foram decisivos para a sua *convicção*; o juiz toma ainda em consideração os factos que estão admitidos por acordo, provados por documentos ou por confissão reduzida a escrito, compatibilizando toda a matéria de facto adquirida e extraindo dos factos apurados as presunções impostas pela lei ou por regras de experiência. 5 - O juiz aprecia livremente as provas segundo a sua *prudente convicção* acerca de cada facto; a livre apreciação não abrange os factos para cuja prova a lei exija formalidade especial, nem aqueles que só possam ser provados por documentos ou que estejam plenamente provados, quer por documentos, quer por acordo ou confissão das partes".

[41] Artigo 612.º do CPC: "Quando a conduta das partes ou quaisquer circunstâncias da causa produzam a *convicção segura* de que o autor e o réu se serviram do processo para praticar um ato simulado ou para conseguir um fim proibido por lei, a decisão deve obstar ao objetivo anormal prosseguido pelas partes".

[42] Artigo 879.º do CPC: "5 - Pode ser proferida uma decisão provisória, irrecorrível e sujeita a posterior alteração ou confirmação no próprio processo, quando o exame das provas oferecidas pelo requerente permitir reconhecer a possibilidade de lesão iminente e irreversível da personalidade física ou moral e se, em alternativa: a) O tribunal não puder formar uma *convicção segura* sobre a existência, extensão, ou intensidade da ameaça ou da consumação da ofensa; (...)".

ou seguida de adjectivação: "convicção segura"; "prudente convicção".

Tal também sucede, mas sem outra adjectivação além da referência à liberdade do julgador na sua formação, nos artigos 127.º[43], 163.º, n.º 2[44], 344.º, n.º 3, alínea b) e n.º 4[45], 355.º, n.º 1[46], 365.º, n.º 3[47] e 374.º, n.º 2[48], do Código de Processo Penal (CPP).

Contribuindo as crenças ou convicções para a formulação do juízo probatório por parte do julgador, convém não esquecer que podemos estar nuns casos a falar de crenças ou convicções de natureza individual, onde assume também relevância o lado emocional do julgador, e noutros casos de crenças ou convicções de natureza social ou coletiva[49].

Mas não é apenas na fixação dos factos em primeira instância que podemos atribuir um papel à crença ou à convicção.

III. Também em sede de recurso surge esse papel, na medida em que se entende que, por exemplo, a Relação, no uso dos seus poderes de controlo sobre a apreciação da prova realizada em primeira instância (que têm vindo a ser progressivamente acentuados como se sabe[50]), não pode deixar de formar uma nova convicção (ou, se se

[43] Artigo 127.º do CPP: "Salvo quando a lei dispuser diferentemente, a prova é apreciada segundo as regras da experiência e a *livre convicção* da entidade competente".

[44] Artigo 163.º do CPP: "2 - Sempre que a *convicção* do julgador divergir do juízo contido no parecer dos peritos, deve aquele fundamentar a divergência".

[45] Artigo 344.º do CPP: "3 - Exceptuam-se do disposto no número anterior os casos em que: (…) b) O tribunal, em sua *convicção*, suspeitar do carácter livre da confissão, nomeadamente por dúvidas sobre a imputabilidade plena do arguido ou da veracidade dos factos confessados; (…). 4 - Verificando-se a confissão integral e sem reservas nos casos do número anterior ou a confissão parcial ou com reservas, o tribunal decide, em sua *livre convicção*, se deve ter lugar e em que medida, quanto aos factos confessados, a produção da prova".

[46] Artigo 355.º do CPP: "1 - Não valem em julgamento, nomeadamente para o efeito de formação da convicção do tribunal, quaisquer provas que não tiverem sido produzidas ou examinadas em audiência".

[47] Artigo 365.º do CPP: "3 - Cada juiz e cada jurado enunciam as razões da sua opinião, indicando, sempre que possível, os meios de prova que serviram para formar a sua *convicção*, e votam sobre cada uma das questões, independentemente do sentido do voto que tenham expresso sobre outras. Não é admissível a abstenção".

[48] Artigo 374.º do CPP: "2 - Ao relatório segue-se a fundamentação, que consta da enumeração dos factos provados e não provados, bem como de uma exposição tanto quanto possível completa, ainda que concisa, dos motivos, de facto e de direito, que fundamentam a decisão, com indicação e exame crítico das provas que serviram para formar a *convicção* do tribunal".

[49] Rui Pinto DUARTE, "Algumas Notas acerca do Papel da «Convicção-Crença» nas Decisões Judiciais", 108-109.

[50] Ao ponto de se falar numa verdadeira autonomia decisória e na formulação

preferir, uma convicção própria ou autónoma) sobre as provas produzidas na instância recorrida para assegurar o duplo grau de jurisdição em matéria de facto[51], embora se possa suscitar a dúvida sobre se o grau de crença ou convicção exigível coincide ou não com aquele que se impõe para a primeira instância.

À partida, a nova convicção (convicção própria ou autónoma) cuja formação se exige por parte da Relação implicará apenas o confronto com a convicção formada pela primeira instância, após o qual aquela concluirá pela confirmação da decisão recorrida (se a convicção da Relação coincidir) ou pela revogação e substituição da decisão recorrida (se e na medida em que a convicção da Relação divergir)[52].

IV. Não se julgue, porém, que a crença ou a convicção só assumem relevância em relação às operações de aplicação do direito centradas na chamada "matéria de facto" ou "questão-de-facto"[53].

Na própria interpretação jurídica (que é sempre necessária, importa sublinhar[54]), a crença ou a convicção têm certamente uma pala-

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de uma convicção sobre a matéria de facto absolutamente independente da convicção do tribunal *a quo* — Cláudia Alves Trindade, *A Prova de Estados Subjetivos no Processo Civil: presunções judiciais e regras da experiência*, Coimbra: Almedina, 2016, 348.

[51] Ac. stj de 24.09.2013, Proc. 1965/04.9tbstb.e1.s1 (Azevedo Ramos), disponível em *www.dgsi.pt*. Assim também António Abrantes Geraldes, *Recursos no Novo Código de Processo Civil*, 3.ª ed., Coimbra: Almedina, 2016, 245 e 247: "a Relação tem autonomia decisória, competindo-lhe formar e formular a sua própria convicção, mediante a reapreciação dos meios de prova indicados pelas partes e daqueles que se mostrem acessíveis; "a Relação, assumindo-se como um verdadeiro tribunal de instância, está em posição de proceder à sua reavaliação, expressando, a partir deles, a sua convicção com total autonomia".

[52] Miguel Teixeira de Sousa, "Prova, poderes da Relação e convicção: a lição da epistemologia — Anotação ao acórdão do Supremo Tribunal de Justiça de 24.09.2013, Proc. 1965/2004", *Cadernos de Direito Privado* 44 (2013) 29-36 (33-34).

[53] Embora importe recordar — nunca é demais repisar este ponto - que está há muito afastada a possibilidade de recuperação da distinção entre questão-de-facto e questão-de-direito tal como esta distinção costumava ser formulada e justificada — António Castanheira Neves, *Metodologia Jurídica. Problemas Fundamentais*, Coimbra: Coimbra Editora, 1993, 163-286; e Idem, "Matéria de Facto — Matéria de Direito", in Idem, *Digesta*, vol. 3, Coimbra: Coimbra Editora, 2008, 321-336.

[54] António Santos Justo, *Introdução ao Estudo do Direito*, 3.ª ed., Coimbra Editora, 2006, 315-316; e Miguel Teixeira de Sousa, *Introdução ao Direito*, 327, 329 e 330: "Por muito indiscutível que possa parecer o significado de uma fonte do direito, é sempre possível imaginar circunstâncias que exigem a determinação desse significado", razão pela qual se entende que a interpretação de uma fonte de direito é sempre necessária e nunca pode ser considerada dispensável, tanto mais que há mui-

vra a dizer, sendo que o seu papel parece aliás aumentar nas situações de indeterminação linguística e também quando o intérprete se vê confrontado com um conceito indeterminado: aí terá o mesmo de considerar, não apenas as suas crenças ou convicções, mas também as crenças ou convicções vigentes na comunidade em que se integra, sem que se possa ver na opção que venha a realizar por uma ou outra solução (muitas vezes emocionalmente co-determinada) o resultado da aplicação do método científico ou de uma mera operação lógica[55].

V. Naturalmente que outras situações poderiam ser aqui referidas, mesmo fora do domínio da aplicação do direito.

Repare-se que o próprio legislador assume muitas vezes a sua preocupação com o problema da dúvida em várias disposições substantivas e processuais[56].

Nada disso deve ser entendido como surpreendente, pois a dúvida manifesta-se no pensamento em geral e também no pensamento jurídico, sendo o legislador sensível às diversas situações em que o aplicador é colocado perante uma dúvida e procurando, por isso, indicar formas de o aplicador a poder superar, tendo em conta a proibição de irresolução do litígio (ou de proibição de abstenção de julgar)[57].

Essas dúvidas podem ser ordenadas segundo vários critérios e em certos casos a sua negação é feita equivaler a uma afirmação de certeza, podendo ser identificadas várias adjectivações na legislação ("dúvidas

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to que se abandonaram orientações erróneas que se encontram subjacentes ao adágio *in claris non fit interpretatio* ou à *plain-meaning rule*. Assim, mesmo quando o texto da fonte de direito não origina dificuldades de interpretação inerentes às ambiguidades sintáctica e semântica, à vagueza ou porosidade das palavras e à modificabilidade do significado ou decorrentes da própria realidade jurídica, é necessário realizar sempre a tarefa de interpretação: é esta que permitirá apurar, desde logo, se o significado é ou não claro, pois antes da interpretação nada pode ser considerado claro.

[55] Rui Pinto Duarte, "Algumas Notas acerca do Papel da «Convicção-Crença» nas Decisões Judiciais", 117-118.

[56] Rui Pinto Duarte, "Algumas Notas acerca da Dúvida no Direito", in Idem, *Escritos Jurídicos Vários 2000-2015*, Coimbra: Almedina, 533-553 = in *Estudos dedicados ao Professor Doutor Nuno José Espinosa Gomes da Silva*, vol. 2, Lisboa: Universidade Católica Editora, 2013, 473-492.

[57] Karl Engisch, *Introdução ao Pensamento Jurídico*, 6.ª ed., Lisboa: Fundação Calouste Gulbenkian, 1988, 100 e s.). Em particular admite Engisch (*ibid.,* 102) que, para além de dúvidas sobre a questão-de-facto, podem existir dúvidas sobre a questão-de-direito. Em rigor, é possível dizer que a proibição de abstenção de julgar que vigora no artigo 8.º, n.º 1, do Código Civil também justifica que o juiz, perante casos omissos, tenha de integrar as lacunas detectadas e depois decidir os casos — Miguel Teixeira de Sousa, *Introdução ao Direito*, 397.

sérias", "dúvidas fundadas", "dúvidas fundamentadas", "dúvidas graves", "dúvidas legítimas")[58].

5. As decisões do processo judicial que exigem graus de crença ou convicção

I. Apesar de ser possível identificar num processo judicial situações em que a crença ou a convicção assumem relevância, raramente se discutem os problemas relacionados com os chamados "graus de crença ou de convicção" ou com a chamada "medida da prova".

Estes problemas costumam ser reconduzidos à influência que os princípios e as normas jurídicas vigentes num determinado ordenamento jurídico têm no que respeita às exigências de certeza (ainda que relativa) em relação aos factos.

Afirma-se então que, por força desses princípios e dessas normas, são formuladas diferentes exigências por parte do legislador em termos de graus de crença ou de convicção, que o julgador não pode desconsiderar no momento da aplicação do direito.

Repare-se que não estão em causa as consequências do *non liquet* (cfr. artigo 8.º, n.º 1, do Código Civil), as quais respeitam a uma questão diferente: o problema do ónus da prova objectivo ou da resolução das situações de dúvida irredutível[59]. Se o tribunal está em dúvida sobre a questão-de-facto, apesar da actividade probatória desenvolvida, então, tal como na dúvida sobre questão-de-direito, não poderá afastar essa dúvida decidindo apenas por uma das versões (dos factos) em discussão: tem de resolver o litígio, mesmo que não seja capaz de resolver a dúvida, e recorre para o efeito a uma regra jurídica (um princípio ou uma norma) que lhe indica como deverá decidir[60].

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[58] Rui Pinto Duarte, "Algumas Notas acerca da Dúvida no Direito".

[59] Na doutrina portuguesa discute-se se o denominado ónus da prova objectivo é em rigor um ónus e, em qualquer dos casos, se estamos perante um critério de distribuição do ónus da prova ou apenas perante um critério de decisão para situações de incerteza. Contra a qualificação como ónus e como critério de distribuição, cfr. Cláudia Alves Trindade, *A Prova de Estados Subjetivos no Processo Civil,* 136-137.

[60] Karl Engisch, *Introdução ao Pensamento Jurídico*, 102-104. Na formulação de Artur Anselmo de Castro, *Direito Processual Civil Declaratório*, vol. III, Coimbra: Almedina, 1982, 349-350: "ao "non liquet" no domínio dos factos corresponde ou deverá sempre corresponder um "liquet" jurídico. O processo visa resolver definitivamente o litígio entre as partes, evitando que a questão possa voltar a pôr-se, em seu prejuízo e da própria paz e segurança social". Em sentido idêntico, Manuel A. Domingues de Andrade, *Noções Elementares de Processo Civil*, Coimbra: Coimbra Editora, 1979, 198-199.

Neste problema está em causa saber sobre qual das partes recai o risco da falta ou insuficiência de prova (a *inopia probationum*, ou melhor, da falta ou insuficiência de qualquer convicção do tribunal sobre a veracidade de uma afirmação de facto ou representação de facto[61])[62], sendo possível constatar que na construção da solução para esse problema (ou melhor, na definição dos critérios de solução para o *non liquet*) assumem influência, entre outros[63], a inquisitoriedade judiciária e a disponibilidade das partes, e que a própria lei se encarrega

[61] As diferentes formulações (demonstração da realidade ou verdade do facto ou veracidade da afirmação ou representação de facto) procuram exprimir as divergências verificadas na doutrina sobre o objecto da prova (factos, afirmações de factos ou representações de factos) — João Antunes Varela / José Miguel Bezerra / Sampaio e Nora, *Manual de Processo Civil*, 2.ª ed., Coimbra: Coimbra Editora, 1985, 434-436; Miguel Teixeira de Sousa, *As Partes, o Objecto e a Prova na Acção Declarativa*, Lisboa: Lex, 1995, 195-197; e João Marques Martins, *Presunções Judiciais na Responsabilidade Civil Extracontratual*, Cascais: Principia, 2017, 103-114. Seja como for, poderá dizer-se com Adriano Vaz Serra, "Provas (Direito Probatório Material)", *Boletim do Ministério da Justiça* 110 (1961) 61-256 (74, nota 24-a) que, na medida em que uma afirmação de facto ou uma representação de facto deve quanto possível coincidir com a realidade e traduzi-la, nada impede que na linguagem se continue a fazer referência à demonstração da realidade ou da verdade do facto.

[62] No fundo, contra quem o julgador dará como inexistente um facto, uma afirmação de facto ou uma representação de facto, quando não se convença da sua realidade ou veracidade.

[63] O critério de solução no âmbito do processo penal distingue-se do da generalidade dos processos judiciais (tribunal decidir contra a parte sobre a qual recai o ónus de provar o facto controvertido — *in dubio contra actorem* ou *in dubio contra reum*) em virtude da vigência do princípio *in dubio pro reo* — Miguel Teixeira de Sousa, *Introdução ao Direito* cit., p. 455. A posição tradicional nega a existência de ónus da prova no processo penal, mas existem autores que criticam essa posição, sublinhando alguns (Pedro Múrias, *Por uma distribuição fundamentada do ónus da prova*, Lisboa: Lex, 2000, 26-28) que se trata de uma figura da teoria geral do direito ou até da teoria da argumentação ou da decisão que marca por isso presença em vários ramos de direito e em vários tipos de processo e referindo também outros (Paulo de Sousa Mendes, *Lições de Direito Processual Penal*, Coimbra: Almedina, 2013, 217-218, e *Causalidade Complexa e Prova Penal*, 88-90) que existe inclusive a possibilidade de sustentar a existência de um ónus de prova distribuído entre a acusação e o arguido e diferenciado consoante esteja em causa o ónus de alegação, o ónus de produção, o ónus de persuasão ou o ónus táctico. Quando se queira defender por impugnação ou por excepção, sobre o arguido impendem as duas primeiras espécies de ónus, mas não o ónus de persuasão (que continua a impender sobre a acusação) e o ónus táctico (distribuído pela acusação e pelo arguido). Sobre uma possível diferenciação do ónus da prova *"between qualifications upon an entitlement* [ou legal qualifications] *and exceptions of it"* e a possível justificação lógica ou meramente pragmática para tal diferença, cfr. Neil MacCormick, *Rhetoric and the Rule of Law: a theory of legal reasoning*, 245-247.

em alguns casos de fornecer critérios especiais para a sua resolução[64].

II. A questão sobre a qual nos debruçamos é outra bem distinta e está relacionada com a medida da convicção exigida para a prova de um facto, de uma afirmação de facto ou de uma representação de facto.

Muitas vezes identificada noutros ordenamentos jurídicos[65] e também entre nós[66] com os chamados "standards de prova", essa ques-

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[64] Miguel Teixeira de Sousa, *As Partes, o Objecto e a Prova na Acção Declarativa*, 257-262.

[65] Sobre os *standards* de prova, cfr., *inter alia*, Ronald J. Allen, "Standards of Proof and the Limits of Legal Analysis" (May 3, 2011), Northwestern Public Law Research Paper No. 11-47, disponível em ssrn: <http://ssrn.com/abstract=1830344>; Fredrik E. Vars, "Toward a General Theory of Standards of Proof " (May 10, 2010), in *Catholic University*, Forthcoming; U of Alabama Public Law Research Paper No. 1604065, disponível em ssrn: <http://ssrn.com/abstract=1604065>; Emily L. Sherwin/Kevin Clermont, "A Comparative View of Standards of Proof", in *American Journal of Comparative Law* 50 (2002) 243, Univ. of San Diego Public Law Research Paper No. 32, 2002, disponível em ssrn: <http://ssrn. com/abstract=285832> or <doi:10.2139/ssrn.285832>; Kevin Clermont, "Standards of Proof Revisited", Cornell Legal Studies Research Paper No. 1321029, Emotion in Context: Exploring the Interaction between Emotions and Legal Institutions Conference, University of Chicago Law School, May 2008, *Vermont Law Review* 33 (2009) disponível em ssrn: <http://ssrn.com/ abstract=1321029>; e Joseph L. Gastwirth, "Statistical Reasoning in the Legal Setting", *The American Statistician* 46/1 (1992) 55-69 (56-60). Num artigo recente, Kevin Clermont, "Staying Faithful to the Standards of Proof", *Cornell Law Review,* Forthcoming; Cornell Legal Studies Research Paper No. 18-45 (2018), disponível em ssrn: <https://ssrn.com/abstract=3243089>, veio sublinhar, contra os apologistas de uma reforma do direito (no sentido de uma desvalorização da descoberta da verdade em prol da mera produção de um resultado aceitável ou de um realçar dos *standards* de prova) que os *standards* de prova funcionam bem e que deverão ser entendidos de acordo com os próprios critérios do direito e sem recurso a reflexões probabilísticas. Posição idêntica pode ser encontrada em Susan Haack, *Evidence Matters: Science, Proof and the Truth in the Law*, 47-77, ao defender que os *standards* de prova são melhor compreendidos "as degrees of warrant" e que estes não são probabilidades (matemáticas). Resta, no entanto, saber se ainda assim há espaço para juízos de probabilidade informal e se estes juízos podem vir a ser (com vantagem) quantificados.

[66] Cfr., por exemplo, Mafalda Melim, "Standards de prova e grau de convicção do julgador", *Revista de Concorrência & Regulação* 4/16 (2013) 143-193; e Paulo de Sousa Mendes, "A incerteza factual e a prova no processo penal", in André Paulino Piton / Ana Teresa Carneiro, coord., *Liber Amicorum: Manuel Simas Santos*, Lisboa: Rei dos Livros, 2016, 1057-1079. Ao contrário do que se possa pensar e por vezes se invoca, nos ordenamentos jurídicos continentais existem algumas consagrações legais de *standards* de prova. Para além da consagração no Código de Processo Penal italiano, para a qual terá exercido influência decisiva a posição de Federico Stella (Paulo de Sousa Mendes, "Medida da prova" (em curso de publicação), iii/4, nota 34), cfr. artigo 9.º, n.ºs 2 e 3, da Lei n.º 38/2012, de 28 de Agosto, alte-

tão reconduz-se às variações conhecidas e trabalhadas pelos processualistas em termos de graus de prova ou de medida da prova.

Partindo da ideia geral segundo a qual a prova tem por finalidade a formação da convicção do tribunal (ou do julgador)[67] sobre a realidade de um facto (artigo 341.º do Código Civil)[68] ou a demonstração da veracidade de uma afirmação sobre um facto[69] (ou, se se preferir, a demonstração convincente de uma afirmação de facto ou então a formação da convicção do julgador sobre a veracidade de uma representação de facto[70])[71], discute-se qual a medida da convicção necessária para que o tribunal (ou o julgador) possa julgar como provado um facto. Para o efeito, faz-se apelo aos chamados "graus de prova" ou, numa designação tida por sinónima, aos "graus de convicção exigida" ao tribunal ou julgador. Admitindo-se que a convicção possa ser formada a partir de qualquer meio de prova, logo se acentua existirem diferentes exigências respeitantes à fundamentação da convicção, as quais se exprimem por três ideias diferentes: a prova *stricto sensu*, que, ainda que possa fundamentar-se apenas na probabilidade da realidade do facto (ou seja, o facto ser considerado provado com base numa regra de probabilidade), não consente qualquer outra configuração da realidade (isto é, não admite qualquer dúvida do tribunal; a mera justificação (típica do universo das providências cautelares), que se basta com a demonstração da verosimilhança ou plausibilidade do

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rada pelas Leis n.ºs 33/2014, de 16 de Junho, e 93/2015, de 13 de Agosto (Lei Antidopagem no Desporto): "2 - A prova é considerada bastante para formar a convicção da instância se permitir formular um juízo de probabilidade preponderante, ainda que tal juízo possa ser inferior a uma prova para além de qualquer dúvida razoável. 3 - Recaindo o ónus da prova sobre o praticante desportivo ou outra pessoa, de modo a ilidir uma presunção ou a demonstrar factos ou circunstâncias específicas, a prova é considerada bastante se permitir pôr fundadamente em causa a violação de uma norma antidopagem, exceto no caso do artigo 67.º, em que o praticante desportivo está onerado com uma prova superior."

[67] O destinatário da prova será o julgador, na conhecida expressão *judici fit probatio*.

[68] João Antunes Varela / José Miguel Bezerra / Sampaio e Nora, *Manual de Processo Civil*, 434-436.

[69] Miguel Teixeira de Sousa, *As Partes, o Objecto e a Prova na Acção Declarativa*, 195-196.

[70] João Marques Martins, *Presunções Judiciais na Responsabilidade Civil Extracontratual*, 114.

[71] Está sobretudo em causa a criação ou formação de um estado de crença ou convicção judicial baseado numa certeza relativa: para uns na realidade de um facto (João Antunes Varela *et al.*), para outros na veracidade de uma afirmação de facto (Miguel Teixeira de Sousa) e para outros na veracidade de uma representação de facto (João Marques Martins).

facto e consente uma certa margem de incerteza ou de dúvida, assentando apenas numa certa probabilidade sobre a verificação de um acontecimento; o princípio ou começo de prova, que não é suficiente para estabelecer, por si só, qualquer prova e vale apenas como factor corroborante da prova de um facto[72].

Não obstante, autores existem que não adoptam a terminologia de graus de prova e utilizam antes a expressão "medida da prova"[73]. Mais relevante do que isso: esclarecem que as diferentes medidas da prova que estão presentes num determinado ordenamento jurídico (sejam ou não utilizadas na linguagem das fontes legislativas ou jurisprudenciais)[74] se assumem essencialmente como "critérios jurídicos que servem para minimizar o custo esperado de erro judicial"; sustentam também que, ao contrário do que por vezes se afirma, as fórmulas legais em matéria de prova "não fazem qualquer referência ao grau de convicção que o juiz de facto tem de alcançar na decisão"; sugerem que a convicção do julgador de facto deve ser vista como exprimindo, não a máxima certeza possível, mas um mero "juízo de probabilidade sobre a veracidade de alegações de facto"[75]. Por último, admitem que a medida da prova seja "diferente para os elementos constitutivos do crime e para as eximentes da pena" e que "não se repercute da mesma maneira sobre a medida da prova de todas as possíveis defesas" do arguido[76].

III. Esta posição dá, em nosso entender, guarida à discussão sobre se num dado ordenamento jurídico podemos encontrar diferentes graus de probabilidade quanto à veracidade das proposições factuais, das afirmações de facto ou das representações de facto (a regra da prova para além da dúvida razoável, a qual "autoriza o juiz de facto a

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[72] Miguel Teixeira de Sousa, *As Partes, o Objecto e a Prova na Acção Declarativa*, 200-204.

[73] Paulo de Sousa Mendes, "A incerteza factual e a prova no processo penal", *Causalidade Complexa e Prova Penal* 90: 410-413, e "Medida da prova". Neste último escrito (III/1, nota 9) refere-se o autor à diferença presente no sistema anglo-americano entre a medida da prova — o "grau de convicção que o juiz de facto tem de atingir para dar como provadas as alegações de facto sujeitas à sua apreciação" - e o peso da prova — "a maior ou menor relevância prima facie dos meios de prova já coligidos para incrementar a probabilidade de uma dada hipótese submetida à decisão do juiz de facto" *(evidentiary weight)*.

[74] Neil MacCormick, *Rhetoric and the Rule of Law: a theory of legal reasoning*, 165, nota 10, dá nota do facto de os juízes ingleses terem procurado desencorajar a fórmula da dúvida razoável, mas que os juízes escoceses terão preferido mantê-la.

[75] Paulo de Sousa Mendes, "Medida da prova", III/2.

[76] Paulo de Sousa Mendes, *Causalidade Complexa e Prova Penal*, 90-91 e 412-413.

declarar como provados certos enunciados factuais se e só se estiver convicto do elevado grau de probabilidade quanto à ocorrência dos factos de referência"[77], e a regra da probabilidade ou prova preponderante, que aparentemente se basta com "um grau de probabilidade tão elevado que baste para as necessidades da vida"[78]), sugerindo alguns inclusive que tal diferença (detetável, por exemplo, entre o processo penal e o processo civil) deveria encontrar com ganho consagração na legislação processual[79].

Para além disso, esta problemática abre espaço para discutir uma questão essencial que não costuma surgir na literatura jurídica: a de saber se existem ou não verdadeiramente graus de crença ou convicção ou se, ao invés, o que temos apenas são graus diferentes exigências de indiciação (e da prova)[80], em muitos casos exprimíveis apenas por juízos de probabilidade.

A doutrina parece admitir que sim. Desde logo, sugere que da prova deverá ser distinguida a simples justificação, credibilidade ou prova informativa ou informatória (que exige uma probabilidade menor) e a suspeita (que exige uma probabilidade ainda inferior à justificação)[81]. Depois, em virtude da distinção entre a prova *stricto sensu*, a mera justificação e o princípio de prova, a doutrina pretende ver aí diferentes medidas da convicção necessária para que o tribunal possa julgar determinado facto como provado[82]. O mesmo se poderá dizer em relação às dúvidas: embora se esteja a exigir sempre o mesmo (que as dúvidas sejam relevantes e capazes de suspender um juízo afirmativo sobre algo), diz-se que a intensidade da dúvida pode variar[83].

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[77] Paulo de Sousa Mendes, *Causalidade Complexa e Prova Penal*, 411.

[78] Adriano Vaz Serra, "Provas", 82. Ou, noutra formulação equivalente, "suficiente para as necessidades práticas da vida" — Manuel A. Domingues de Andrade, *Noções Elementares de Processo Civil*, 192.

[79] Paulo de Sousa Mendes, "Medida da prova", III/3. Embora em escrito anterior — "A incerteza factual e a prova no processo penal", cit. — o mesmo autor tenha admitido que tanto em processo civil como em processo penal a medida da prova seria uma medida de certeza possível para as necessidades da vida (acolhendo a fórmula usada por Vaz Serra) e que nos ordenamentos jurídicos europeus continentais a medida da prova exigida em processo civil seria muito superior à probabilidade preponderante vigente nos sistemas inglês e norte-americano, o que apontaria para uma medida da prova equivalente nos processos civil e penal e em desconsideração de eventuais diferenças em termos de risco de erro judicial.

[80] Para quem não admita que toda a prova é no fundo indiciária.

[81] Adriano Vaz Serra, "Provas", 82, nota 31-a; Manuel A. Domingues de Andrade, *Noções Elementares de Processo Civil*, 192-193; e Artur Anselmo de Castro, *Direito Processual Civil Declaratório*, 346 e nota 6.

[82] Miguel Teixeira de Sousa, *As Partes, o Objecto e a Prova na Acção Declarativa*, 200.

[83] Rui Pinto Duarte, "Algumas Notas acerca da Dúvida no Direito", 551-552.

Sucede que, em literatura recente não jurídica, chama-se a atenção para o facto de existirem vários argumentos contra a ideia segundo a qual as crenças surgem em graus, apesar de essa atribuição ser intuitiva e encontrar até arrimo em certas frases habitualmente usadas na linguagem corrente[84]. Ou seja, fora do direito não é inequívoco ou poderá considerar-se, pelo menos, duvidosa qualquer afirmação no sentido de se poder considerar a existência de uma espécie de gradação ao nível da crença ou da convicção.

Trata-se de um aspecto que vale a pena certamente acompanhar: é que a temática relativa aos graus de crença corresponde a um dos aspectos centrais da teoria das probabilidades subjectivas e a identificação das probabilidades com os graus de crença suportados na prova é considerada um dos elementos chave da sustentação do probabilismo[85] que tem conhecido (de dentro e fora do direito) forte crítica[86].

IV. Mais importante do que isso serão os reflexos que uma conclusão acerca da existência ou não de graus ao nível da crença e da convicção poderá ter no contexto judicial (tanto no processo penal como no processo civil) e que aqui importa aludir.

É comum fazer-se referência àquela ideia (como se explicará, discutível) de gradação de exigência de convicção e tal ideia surge com frequência invocada na doutrina e nas decisões dos tribunais superiores, certamente incentivada pela adjectivação usada pelo legislador (ou pela jurisprudência) quando se refere à convicção e/ou à dúvida.

Contudo, admitindo que não existem verdadeiramente graus de crença ou de convicção, estará confirmada a tese defendida por alguns autores penalistas (Castanheira Neves[87], Figueiredo Dias[88] e Paulo de

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[84] Andrew Moon, "Beliefs do not come in degrees", *Canadian Journal of Philosophy* 47/6 (2017) 760-778.

[85] Lina Eriksson/Alan Hájek, "What Are Degrees of Belief?", *Studia Logica* 86/2 (2017) 183-213.

[86] Cfr., *inter alii*, L. Jonathan Cohen, *The Probable and the Provable*, Oxford: Oxford University Press, 1977; e Susan Haack, *Evidence Matters: Science, Proof and the Truth in the Law*, 14, 47-77, que rejeita esse probabilismo no direito (no essencial "identifying degrees of warrant with mathematical probabilities") e chama a atenção para os equívocos do ponto de vista de uma teoria da justificação mesmo por parte daqueles que sustentam o probabilismo recorrendo às probabilidades subjectivas bayesianas.

[87] António Castanheira Neves, *Sumários de Processo Criminal*, dactilografados, Coimbra, 1968, 36-37.

[88] Jorge de Figueiredo Dias, *Direito Processual Penal*, Coimbra: Coimbra Editora, 1974, 133: "tem pois razão Castanheira Neves quando ensina que na suficiência dos indícios está contida a mesma exigência de verdade requerida pelo julgamento

Sousa Mendes[89])[90] segundo a qual não é possível identificar no domínio processual (penal) diferentes exigências formuladas em cada fase processual em termos de convicção para a tomada de decisões.

Quando, por exemplo, no artigo 283.º, n.ºs 1 e 2, do CPP se refere que "se durante o inquérito tiverem sido recolhidos indícios suficientes de se ter verificado crime e de quem foi o seu agente, o Ministério Público, no prazo de 10 dias, deduz acusação contra aquele", e que "consideram-se suficientes os indícios sempre que deles resultar uma possibilidade razoável de ao arguido vir a ser aplicada, por força deles, em julgamento, uma pena ou uma medida de segurança", não poderá aí ver-se uma expressa consagração de uma diferença de grau de convicção exigível em relação à decisão de pronúncia a tomar pelo juiz de instrução no final da fase de instrução (artigo 308.º, n.º 1, do CPP — "tiverem sido recolhidos indícios suficientes de se terem verificado os pressupostos de que depende a aplicação ao arguido de uma pena ou de uma medida de segurança"), nem tão-pouco em relação à decisão de condenação a tomar pelo juiz de julgamento no final do julgamento (artigo 375.º do CPP). A diferença a assinalar em relação a cada uma dessas decisões não se explica em termos de gradação da convicção exigível sobre os factos, mas sim em termos de gradação da indiciação (e/ou da prova) que se encontra disponível para a decisão sobre esses factos. Em todas essas decisões o decisor terá de

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final, só que a instrução preparatória (e até a contraditória) não mobiliza os mesmos elementos probatórios que estarão ao dispor do juiz na fase do julgamento, e por isso, mas só por isso, o que seria insuficiente para a sentença pode ser bastante ou suficiente para a acusação."

[89] Paulo de Sousa MENDES, *Lições de Direito Processual Penal*, 75-76.

[90] Nesse sentido também se pronuncia, por exemplo, Jorge Noronha e SILVEIRA, "O conceito de indícios suficientes no processo penal português", in Maria Fernanda PALMA, coord., *Jornadas de Direito Processual Penal e Direitos Fundamentais*, Coimbra: Almedina, 2004, pp. 155-181 (161 e 171). Uma posição duvidosa a este respeito (parecendo ir ao encontro da tese segundo a qual a suficiência de indícios equivale ao *standard* de processo civil da probabilidade ou prova preponderante) encontra-se em Germano Marques da SILVA, *Direito Processual Penal Português*, vol. 3, Lisboa: Universidade Católica, 2015, 171, ao escrever: *"A referência que o art. 301.º, n.º 3, faz à natureza indiciária da prova para efeitos de pronúncia inculca a ideia de menor exigência, de mero juízo de probabilidade. (...) A lei só admite a submissão a julgamento desde que da prova dos autos resulte uma* probabilidade razoável *de ao arguido vir a ser aplicada, por força dela, uma pena ou medida de segurança (art. 283.º, n.º 2);* não impõe a mesma exigência de verdade requerida pelo julgamento final. *A lei não se basta, porém, com um mero juízo subjectivo, mas antes exige um juízo objectivo fundamentado nas provas dos autos. Da apreciação crítica das provas recolhidas no inquérito e na instrução há-de resultar a convicção da forte probabilidade ou possibilidade razoável de que o arguido seja responsável pelos factos da acusação".*

ficar persuadido da culpabilidade do arguido e, nas fases anteriores ao julgamento, formar e exprimir em termos de prognose uma verdadeira convicção de probabilidade de condenação do arguido no julgamento[91]. A única diferença poderá residir na confiança passível de ser depositada na decisão, tendo em conta que, à partida, só realizada a prova em audiência de julgamento, com observância dos princípios e asseguradas as garantias devidas, uma qualquer decisão condenatória se pode considerar (devidamente) justificada[92].

Além disso, a conclusão acima assinalada — a ser correcta — poderá revelar-se particularmente importante também no processo civil.

É que, por exemplo, a diferença habitualmente assinalada em termos da crença ou da convicção exigida para os procedimentos cautelares e para os processos não cautelares (isto é, a circunstância de para aqueles bastar, ao contrário destes, uma mera justificação, que assenta numa mera probabilidade sobre a ocorrência de um evento e consente uma certa margem de incerteza ou de dúvida) poderá esconder um equívoco[93]. O mesmo em relação à diferença que certos autores sublinham entre a justificação e a suspeita[94].

V. Esse equívoco seria o resultado da confusão entre duas realidades distintas e que muitos vêem como sinónimas: por um lado, o grau de prova exigido para a prova de um determinado facto (o de saber se a prova é suficiente para que o facto possa ser dado como provado) e, por outro lado, o grau de convicção do tribunal necessário para a prova de determinado facto.

Não raras vezes diz-se que podem existir graus na convicção-crença dos juízos em "matéria de facto"[95] ou que se justifica traçar distinções entre os graus de convicção exigíveis para se dar certo facto

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[91] Esse parece ser o sentido expresso no Ac. RL de 09.04.2013, Proc. 1208/11.9TDLSB.L1-5 (Jorge Gonçalves), disponível em <www.dgsi.pt>: "Em sede de pronúncia, o juízo sobre a suficiência dos indícios deverá passar pela bitola da probabilidade elevada ou particularmente qualificada, correspondente á formação de uma verdadeira convicção de probabilidade de condenação, a qual num juízo de prognose, deve ter a potencialidade de vir a ultrapassar a barreira do in dubio pro reo na fase de julgamento".

[92] Jorge Noronha e Silveira, "O conceito de indícios suficientes", 172.

[93] Miguel Teixeira de Sousa, *As Partes, o Objecto e a Prova na Acção Declarativa*, 200-204.

[94] Adriano Vaz Serra, "Provas", 82, nota 31-a; Manuel A. Domingues de Andrade, *Noções Elementares de Processo Civil*, 192-193, e Artur Anselmo de Castro, *Direito Processual Civil Declaratório*, 346.

[95] Rui Pinto Duarte, "Algumas Notas acerca do Papel da «Convicção-Crença» nas Decisões Judiciais", 113-114.

como provado[96]. Essa conclusão pode ser inclusive fruto da adjectivação de que se socorre por vezes o legislador (ou a jurisprudência) quando se refere à convicção e/ou às dúvidas.

No entanto, se não existir de facto qualquer gradação ao nível da crença ou da convicção, como sugere a literatura não jurídica acima referida, esses graus e distinções não poderão continuar a ser afirmados e terá de optar-se por uma outra solução que abandone a tese da gradação e ao mesmo tempo atribua sentido à nossa tendência para ver a crença ou convicção como algo (até intencionalmente por parte do legislador ou da jurisprudência) gradativo.

VI. Quando a lei (ou a jurisprudência) formula exigências diferentes em termos de prova estará a referir-se à medida de crença ou convicção do tribunal necessária para a prova de determinado facto ou ao grau de prova exigido para que o tribunal considere um determinado facto como provado?

Por exemplo, a mera justificação (típica das providências cautelares) pressupõe o convencimento pelo tribunal de ser provável a ocorrência do facto (consentindo incerteza ou dúvida), ao passo que a prova *stricto sensu* exige um convencimento pelo tribunal da ocorrência do facto (sem incerteza ou dúvida). No entanto, será que a convicção ou o convencimento que são exigíveis ao julgador em ambos os casos se distinguem verdadeiramente em termos de grau, ou apenas em virtude do objecto sobre o qual incidem?

Na mera justificação, o objecto da convicção parece ser a probabilidade de ocorrência do facto; na prova *stricto sensu*, o objecto da convicção já será a realidade do facto, podendo o tribunal socorrer-se da probabilidade do facto apenas como meio para formar a sua convicção. Pode ver-se nisto uma exigência de gradação da crença ou convicção? Quando o julgador expressa a sua convicção pode dizer-se que ela é mais forte na segunda situação do que na primeira? Ou apenas que a justificação que a suporta é mais forte na segunda (até por não consentir dúvidas ou incertezas) do que na primeira (que as consente)?

[96] Margarida Lima Rego, "Decisões em ambiente de incerteza: probabilidade e convicção na formação das decisões judiciais", *Julgar* 21 (2013) 119-147.

6. As particularidades do processo judicial e a transposição das conclusões da filosofia pragmatista acerca da crença e da convicção

I. Apesar de no processo judicial serem identificáveis decisões que atribuem relevância à crença ou à convicção e que são muitas vezes construídas apelando a graus de crença ou convicção, importa agora assinalar algumas particularidades que dificultam ou tornam problemática a transposição para o contexto judicial das conclusões alcançadas na filosofia pragmatista sobre a crença e a convicção.

Em primeiro lugar, a tarefa de aplicação do direito constitui um imperativo a que a dúvida não poderá obstar, devendo entender-se que a falta de certeza das proposições (de facto ou de direito) não constituirá obstáculo à sua validade[97].

Neste particular, poderão ser particularmente frutuosas várias das reflexões acima apresentadas pelos adeptos da corrente filosófica pragmatista. Desde logo, a aceitação por parte de James da possibilidade de serem formadas crenças ainda que a prova disponível seja insuficiente, sem que tenhamos que optar por suspender o juízo acerca de uma determinada realidade[98]. Além disso, as chamadas de atenção formuladas por Peirce, Haack e Misak: por um lado, que uma crença bem justificada será fundamentalmente o produto de um inquérito (ou investigação crítica), o qual deve ser genuíno e conduzido em termos de uma procura da verdade desinteressada; por outro lado, que não se vislumbra qualquer motivo para, apesar da relevância que a verdade tem, se exigir mais do que ser tomada em consideração de forma genuína a prova e as razões apresentadas para ser possível afirmar com confiança que determinada crença é verdadeira[99].

Assim sendo, na linha de Teixeira de Sousa, poderá ver-se a prova como tendo, não apenas a típica função demonstrativa ("formar a convicção sobre a verdade de um facto controvertido"), mas também uma função de eliminação da incerteza ("dissipar uma dúvida sobre um facto controvertido ou, numa formulação mais técnica, evitar um *non liquet* sobre esse facto"), que não se confunde com alegados objectivos de criação de certeza sobre um facto controvertido[100].

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[97] Rui Pinto Duarte, "Algumas Notas acerca da Dúvida no Direito", 553.

[98] Michael Bacon, *Pragmatism: an introduction*, 30-33.

[99] Michael Bacon, *Pragmatism: an introduction*, 147-170.

[100] Miguel Teixeira de Sousa, *A Prova em Processo Civil: ensaio sobre uma concepção inferencial*, São Paulo: Editora Revista dos Tribunais, 2018, § 2.º. Mais à frente o

II. Em segundo lugar, mesmo que se rejeite uma visão céptica e se adopte uma visão sobre a verdade e sobre a crença coincidente com a dos absolutistas e dos empiristas (isto é, de que existe e é possível conhecer um mundo real fora da consciência), o certo é que a correspondência que se procura estabelecer no contexto da prova judicial não coincide exactamente com a correspondência habitualmente pretendida na filosofia.

Na verdade, a correspondência relevante no contexto judicial é entre aquilo que foi afirmado ou alegado em juízo (uma proposição ou afirmação jurídica ou uma representação jurídica) e a realidade. E essa correspondência implica, tal como sucede com o conhecimento proposicional ou factual (para o qual são formuladas 3 condições), que o julgador seja capaz de formar uma convicção verdadeira e justificada sobre um facto a provar: só poderá dá-lo como provado se acreditar que o facto é verdadeiro e se for justificado acreditar que é verdadeiro. Só desta forma se torna possível ao julgador num processo judicial alcançar conclusões verdadeiras não acidentais. Essas conclusões poderão ser alcançadas quando o conhecimento é obtido directamente, mas também quando resulta indirectamente de qualquer outra forma de comunicação (como será o caso da prova testemunhal), pese embora os problemas associados à confiança do julgador na prova indirecta e à sua fiabilidade[101].

Não obstante, na medida em que a corrente filosófica pragmatista aceita a existência de uma realidade independente das nossas crenças subjectivas e aceita também que o nosso conhecimento pode corresponder a essa realidade, ainda que as afirmações ou representações sobre a realidade estejam dependentes do fornecimento de razões e, por isso, da nossa *praxis* de justificação, parece-nos que estará em boas condições para fornecer algum apoio para realizar aquela tarefa de correspondência entre as proposições ou representações jurídicas e a realidade.

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mesmo autor conclui (*idem*: § 5.º): "a prova não visa criar uma certeza sobre o facto controvertido, mas antes — e apenas — eliminar uma incerteza e evitar um *non liquet* sobre esse facto. O facto controvertido considera-se provado, não porque haja a certeza da sua verdade, mas porque não há nenhuma justificação para não admitir a sua verdade em função da prova produzida perante o tribunal".

[101] Miguel Teixeira de Sousa, "Prova, poderes da Relação e convicção", 34-35. Sobre a necessidade de recurso à prova indirecta (ou mediata) e a justificação das decisões fundadas em presunções judiciais, bem como a explicação e confirmação das presunções judiciais (vistas como raciocínios inferenciais indutivos), cfr., respectivamente, Cláudia Alves Trindade, *A Prova de Estados Subjetivos,* 69 e s.; e João Marques Martins, *Presunções Judiciais na Responsabilidade Civil Extracontratual*, 151-194.

III. Em terceiro lugar, a prova em juízo parece implicar a conjugação de perspectivas não coincidentes sobre a justificação epistémica[102], o que a generalidade da literatura que reflecte sobre a epistemologia e a justificação não parece querer admitir[103].

Desde logo, a convicção acerca da verdade de um facto terá de se fundamentar numa outra convicção ou terá de poder ser inferida de uma outra convicção, tal como sugerem as orientações fundacionalistas da epistemologia, e ser ao mesmo tempo coerente com outras convicções (ou proposições), tal como apontam as orientações coerentistas. Embora a coerência entre convicções ou proposições não seja garantia da sua veracidade, constitui uma exigência indispensável em processo, pois: se se verificar incoerência terá de concluir-se que as proposições ou pelo menos uma delas não será verdadeira; se se verificar coerência, a probabilidade de as proposições serem verdadeiras aumenta. Assim, a conclusão acerca de um facto terá de se fundamentar num meio de prova sobre a qual o julgador formou convicção, mas deve exigir-se também que essa conclusão surja reforçada por outras convicções[104].

Além disso, formula-se a exigência, não só de que todos os factores relevantes para a formação da convicção estejam acessíveis ao julgador, como sugerem as orientações internalistas, como de o processo de aquisição da convicção ter de poder ser considerado fiável, como sustentam as orientações externalistas. No processo, o julgador deverá reflectir sobre as suas convicções e encontrar e exprimir uma justificação para essas convicções, ao mesmo tempo que deverá ser adoptado um procedimento probatório que garanta a fiabilidade da produção da prova ou, pelo menos, favoreça a probabilidade de com base nela o julgador forme uma convicção verdadeira[105].

Ora, também aqui, parece que a corrente filosófica pragmatista, em especial aquela em que se estriba o pensamento de Haack, estará em boas condições para dar suporte à conjugação de perspectivas não coincidentes sobre a justificação epistémica. Haack procura conjugar

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[102] Sobre estas perspectivas, Jonathan Dancy, *Epistemologia Contemporânea* (trad. de *Introduction to Contemporary Epistemology*, 1985), Lisboa: Edições 70, 2002, 73 e s.; e Susan Haack, *Evidence and Inquiry: Towards Reconstruction in Epistemology*, e *Evidence and Inquiry: A Pragmatist Reconstruction of Epistemology*.

[103] Não assim, por exemplo, James W. Cornman, "Foundational versus Nonfoundational Theories of Empirical Justification", *American Philosophical Quarterly* 14/4 (1977) 287-297, que chegou a sugerir que a teoria da justificação empírica mais razoável resultaria de uma mistura entre fundacionalismo e coerentismo.

[104] Miguel Teixeira de Sousa, "Prova, poderes da Relação e convicção", 35-36.

[105] Miguel Teixeira de Sousa, "Prova, poderes da Relação e convicção", 36.

uma orientação fundacionalista com uma orientação coerentista, referindo expressamente que adopta uma teoria "intermédia entre as tradicionais famílias rivais de teorias de justificação epistémica, fundacionalismo e coerentismo"[106].

De resto, na medida em que a corrente filosófica pragmatista procura discutir de forma interligada a verdade, a *praxis* de justificação e a objectividade, fazendo apelo à ideia segundo a qual uma noção comum de verdade pode ser alcançada recorrendo às práticas sociais (ou intersubjectivas) de justificação com as quais aquela noção se encontra internamente conectada, sejam tais práticas caracterizadas através de ideias regulativas ou condições ideais (como sugeriram Putnam e Habermas) ou por recurso às diferentes perspectivas dos participantes consideradas essencialmente controversas, concorrentes e não privilegiadas (Wellmer e Brandom)[107], poderá ver-se nessas práticas sociais de justificação uma importante ideia para definir o critério que permitirá ao julgador reflectir sobre as suas convicções e encontrar e exprimir uma justificação considerada adequada no ordenamento jurídico para essas convicções.

Contudo, como assinalou Castanheira Neves, importa não esquecer que o juízo jurídico-decisório (e, por isso, também o juízo probatório[108]) não se deixa capturar pela intencionalidade finalística, instrumental e teorético-científica que caracteriza o pragmatismo (designadamente o filiado em Peirce), visando alcançar uma intencionalidade normativamente fundamentante[109].

7. Considerações finais

I. Optou-se por proceder a uma análise do problema da crença e da convicção no domínio da filosofia pragmatista e depois por tentar compatibilizar as principais conclusões aí alcançadas com a realidade

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[106] Susan Haack, *Evidence Matters: Science, Proof and the Truth in the Law*, 13.

[107] Richard J. Bernstein, *The Pragmatic Turn*, 113-123.

[108] Sustentando que a controvérsia probatória não está desligada da controvérsia global nem a decisão probatória da decisão judicial, cfr. José Aroso Linhares, *Entre a Reescrita Pós-Moderna da Modernidade e o Tratamento Narrativo da Diferença ou a Prova como um Exercício de «Passagem» nos Limites da Juridicidade (Imagens e reflexos pré- metodológicos deste percurso)*, Coimbra: Coimbra Editora, 2001, e "Evidence (or proof?) as law's gaping wound: a false persistent aporia?", *Boletim da Faculdade de Direito* 88/1 (2012) 65-89 (83); e Rui Soares Pereira, "Modelos de prova e Prova da Causalidade", 455-456, e *O Nexo de Causalidade na Responsabilidade Delitual*, 1172-1173.

[109] António Castanheira Neves, "Arguição nas Provas de Doutoramento", 391-395.

do processo judicial, sem esquecer a intencionalidade normativa da racionalidade jurídica decisória enquanto tal.

Isto porque se partiu do pressuposto que os desenvolvimentos e as análises críticas levadas a cabo no domínio da filosofia pragmatista poderiam ser particularmente úteis: devido ao facto de acentuarem a importância da análise da questão em correlação com outros temas (como os da justificação, da verdade, da intersubjectividade e da objectividade), permitindo assim estabelecer uma relação mais fácil com as situações identificadas no processo judicial que parecem atribuir relevância à crença ou à convicção e até exigir graus de crença ou convicção e, ao mesmo tempo, permitirem fazer uma adequada ponderação das particularidades do processo judicial.

Várias conclusões podem ser extraídas da análise realizada.

II. Em relação às diferenças entre a dúvida e a crença encontradas na filosofia pragmatista, verificou-se que as mesmas resultam essencialmente da adopção de uma perspectiva que rejeita o cepticismo cartesiano e em certos casos se assume mesmo como empirista radical, mas não existe propriamente uma visão comum aos pragmatistas sobre as consequências práticas associadas à crença. Se para Peirce essas consequências serão apenas as que podem ser observadas e por isso generalizadas (antecipando o princípio do verificacionismo dos positivistas lógicos), em James assumem relevância quaisquer consequências na vida do crente (contrastando com as visões positivistas).

Fazendo uma ponderação da relevância dos chamados "métodos de fixação da crença" na filosofia pragmatista, pode dizer-se no essencial que a posição de Peirce a esse respeito se revela ainda hoje dotada de alguma aceitação, ainda que valha a pena chamar a atenção para o facto de, tal como Peirce intuía, não ser possível hoje dizer que apenas o método científico constitua um método adequado para a fixação da crença, conclusão que é particularmente relevante para o direito onde se suscitam problemas práticos de sentido e de validade (a intencionalidade normativa fundamentante) que não se deixam capturar pelos esquemas usados por esse método.

Partindo da descrição das várias operações realizadas no contexto da aplicação no processo judicial nas quais parecem assumir relevância a crença ou a convicção, fácil será constatar que as mesmas serão a fixação dos factos, a própria aplicação do direito aos factos e a relevância das dúvidas.

Em relação às hipóteses em que é frequente referir a existência de diferentes graus de crença ou convicção exigível, pode admitir-se que tal

referência tenha uma explicação. Contudo, a mesma poderá resultar de um equívoco, sendo certo que também os avanços verificados na filosofia têm legitimamente colocado em dúvida sobre se existe verdadeiramente a possibilidade de considerar a crença ou a convicção como gradativas.

Algumas particularidades assinaladas ao processo judicial podem dificultar ou tornar problemática a transposição para o contexto judicial das conclusões alcançadas na filosofia (pragmatista) sobre a crença e os métodos para a sua fixação. Nesse particular, poderá valer a pena tomar em consideração algumas especificidades que dão o mote à conjugação de perspectivas não coincidentes sobre a justificação epistémica tal como sugerem alguns pragmatistas mais recentes.

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14

CORRECTNESS AND *RATIONALITY* AS *PRESUMPTIONS OF BINDINGNESS* IN ADJUDICATION: ON THE METHODOLOGICAL RELEVANCE OF *JUDICIAL PRECEDENTS* AND *DOGMATIC MODELS* IN EUROPEAN *CIVIL LAW* AND *COMMON LAW* SYSTEMS

Ana Margarida Gaudêncio

1. The historically and intentionally diverse European Legal Systems' structures: *common law* and *civil law*

The historically and intentionally diverse European Legal Systems' structures — *civil law* and *common law* systems — share a partially common tradition in what concerns the methodological relevance of *Juristenrecht* in law's construction. Even though invoking

different intentionalities, and generating distinct *methodological* and *normative* consequences(-results), both in *civil law* and in *common law* systems a normatively constituting meaning is actually accorded — by academics, lawyers and judges — to the specific *roles* played by *judicial jurisprudence* and *legal dogmatics* in *adjudication*, whether they state this latter primarily as the *logically correct application of law* (*inductively* or *deductively* acknowledged…), on the one hand, or as a *normatively constitutive concrete realization of law* (*analogically* constructed…), on the other hand…

The dialogue between *common law* and *civil law* systems will be proposed, in this context, through the consideration of the *task* of *legal norms*, *judicial jurisprudence* and *legal dogmatics* in adjudication, entailing a specific overcoming of the normativistic heritage(s), in a *jurisprudentialist* approach, by understanding *adjudication* as a *judicative decision* — beyond *adjudication* as a strictly *theoretical-deductive application*, or as a sternly *practical-finalistic decision*… In such an approach, *judicial decision* represents an effectively *practical*, *concrete*, rationally dialectical-dialogical *realization of law*, to which the whole *legal system* is convoked, in all its *strata*: *normative principles*, *legal norms*, *judicial jurisprudence*, *legal dogmatics*, and *legal reality.* Therefore, *judicial jurisprudence* and *legal dogmatics* are understood as *methodological skills* which operate as constitutive juridical *criteria*, in their distinct *roles*, constitutively expressing the specific *juridically binding presumptions* they hold — respectively as a *presumption of correctness (Richtigket)* and a *presumption of rationality (Rationalität)*…

The *rule of law* in the European context has been historically represented by different expressions of the *role of law*. Still the contemporary (re)construction of European Community Law restates common law and civil law as ordinary experiences in the European Community context, while understood as a *community of law (Europäische Union als Rechtsgemeinschaft)*[1]. The nuclear question to be considered concerns the historical dialogue between *common law* and *civil law* systems, confronting *legal norms*, *judicial jurisprudence* and *legal dogmatics* in adjudication, which evolved, by approximation — a crescent «"continentalization" of English law and "insularization" of continental law» (P. Bronze) —, mostly through the overcoming(s) of

[1] See, for instance, the diagnosis published on 2003, about the construction of European Community Law, Reiner Schulze / Ulrike Seif, "Einführung", in Reiner Schulze / Ulrike Seif, Hrg., *Richterrecht und Rechtsfortbildung in der Euröpaischen Rechtsgemeinschaft*, Köln: Mohr Siebeck, 2003, 7-8.

the normativistic heritage(s)[2].

The settled *traditional-historical* distinction between *civil law* and *common law* systems in the European context, as the mirror of a relationship between *law* and *power*, in its different forms, can be synthetically illustrated through the words by which Giovanni Orrù enlightens it in his *Lezioni di storia del pensiero teorico-giuridico Moderno*, pointing out that in continental Europe judges used to be instruments of regal absolutism, looking for law's certainty, while in England judges would be able to act even against the sovereign power: «Sul continente I giudici erano per lo più strumenti dell'assolutismo regio, ed in questo va vista la causa dell'esigenza della certezza del diritto, che doveva costituire un argine all'arbitrario imperversare del sistema contro il cittadino. Ben diversa e quasi opposta era la situazione in Inghilterra: qui il diritto prodotto dai giudici, detto *common law*, era sempre andato in direzione contraria alle tendenze del pottere sovrano, il quale invece cercava di consolidare la sua influenza proprio attraverso le leggi»[3]. And it should be emphasized right away, also exemplarily with Orrù, within that *diagnosis* of the past, that that measured distance is not anymore recognizable in the same way from the second half of the nineteenth century on, for not only by Bentham's and Austin's codification proposals, but also by the development of the techniques of *distinguishing* and *overruling*, the *bindingness* of judicial precedents changed: «In questi ultimi tempi, nel mondo anglosassone, la dottrina del precedente è andata via perdendo quel rigore que è stato in passato una sua caratteristica. Il precedente, infatti, non à piú in realtà strettamente vincolante, ma lo è quasi solo presuntivamente. L'idea della vincolatività assoluta ha avuto il suo momento di auge, nella dottrina e nella prassi della *common law*, solo nella prima metà del secolo scorso, più o meno durante il periodo della propagazione dell'idea di codificazione ad opera di Bentham e Austin. Le technique del *distinguishing* e del *overruling* permettono al giudice inglese di liberarsi da un precedente, se giudicato manifestamente irragionevole (*plainly unreasonable*)»[4].

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[2] On the crescent "'continentalization' of English law and 'insularization' of continental law", see F. Pinto Bronze, "*Continentalização" do direito inglês ou "insularização" do direito continental? (proposta para uma reflexão macro-comparativa do problema)*, Coimbra: Coimbra Editora, 1982, 123 f., especially 165 f., 174 f. See also Álvaro Núñez Vaquero, "Five Models of Legal Science", *Revus* 19 (2013) 53-81 <https://revus.revues.org/2449#text>.

[3] Giovanni Orrù, *Lezioni di storia del pensiero teorico-giuridico Moderno*, Torino: Giappichelli, 1988, 191.

[4] Giovanni Orrù, *Lezioni di storia del pensiero teorico-giuridico Moderno*, 192.

Despite the obvious confluence, the meanings of *law* and *reality* and their connections — considering the *problem-case* and the *legal statute* as starting points to legal thinking and adjudication — emphasize the essential difference between *common law* and *civil law* systems. As it has been remembered, though not absolutely defended, by Reiner Schulze and Ulrike Seif, regarding *Richterrecht*'s contemporary relevance in the building of European law's systems, the *methodological* distinction between continental *civil law system* and *common law system* rests, *traditionally*, mostly on the *deductive* character of the former and the *inductive* nature of the latter. In fact, in such a distinction, the *continental* civil law would be understood as mainly *deductive*, for a systematic codification is composed by abstract norms, this way providing the basis for solving cases, whereas *English* common law would be mainly *inductive*, for in this latter general rules would derive from cases, so that decision-making in common law systems would be typically determined by *stare decisis*[5].

1.1. The normativistic heritage: 19th Century

1.1.1. *Rules* and *principles* as *norms*

In normativistic proposals, from the nineteenth century on, mostly, *rules* and *principles* should be understood as *norms* — meaning *general* and *abstract* normative *criteria* to action, ordered by the authority of the institutionalized instance to establish them —, both

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On the doctrine of codification by Bentham an Austin, see 195-198. See also F. Pinto Bronze, *"Continentalização" do direito inglês ou "insularização" do direito continental?*, 177 f.

[5] *See* Reiner Schulze / Ulrike Seif, "Einführung", 8 f.. «There are two major legal systems within the European Union: continental civil law as opposed to the common law of England and Ireland. Their characteristic features are marked by a distinctly different method and style of legal reasoning.

The continental approach is mainly deductive: a systematic codification provides abstract norms, which provides the basis for solving cases. By contrast, common law is mainly based on induction: general rules are derived from cases. Therefore, decision-making is largely determined by precedent: if precedents are not distinguished then they are legally binding (doctrine of stare decisis).

(...)

(...) Common law and civil law are neither purely inductive nor purely deductive. Both systems require a certain degree of abstraction on the on hand and concretion on the other hand». — Reiner Schulze / Ulrike Seif, "V. Summary", in Reiner Schulze / Ulrike Seif, Hrg., *Richterrecht und Rechtsfortbildung in der Euröpaischen Rechtsgemeinschaft*, 22-23.

in *common law* and in *statute law*. In civil law systems, a normativistic *intentional dualism* would counterpoint the practical character and intention of *law* — created and instantiated as *legal norm* — and the theoretical, apophantic character and intention of *legal thinking* — understood and instantiated as *legal positivistic science*… —, which was to consider *legal norms* as *cognoscible objects*[6]. As illustrated by Jhering's proposal, in his quasi-*chemical* understanding of *legal system* as a *formal-abstract structure* logically constructed through *legal(juridical) concepts,* the *Begriffsjurisprudenz* exemplarily showed the meaning of *legal thinking*, and *legal dogmatics*, as *legal science*, to be assumed as a logical inductive production of progressively general and abstract logical formulations, while growingly both normatively *simpler* and logically *clearer*. The *juridical bodies (Körper)*[7] would then represent the logical purification of legal *data* (whether *consuetudinary* or *legal* criteria, translated by *normative propositions*), in order to construct *objective* law. And the pyramidal structure of Puchta would also demonstrate the inductive/deductive *rationale*, by logically relating *criteria* and *concepts* with each other, in different hierarchical levels[8]. In common law systems, similarly, the relevance of criteria *inducted* from *rationes decidendi* was decisive, and legal dogmatics was also invoked[9], as it could be considered in *civil law* systems, also relating case-law and doctrinal reasoning, in the Middle-Ages, in the early Modern and in the Enlightenment period[10].

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[6] A. Castanheira Neves, *Teoria do Direito*. Lições proferidas no ano lectivo de 1998/99, Coimbra, 1998, policop., 57-69 (A4 version).

[7] Pierluigi Chiassoni, "21.4.1. Rudolf von Jhering", in Enrico Pattaro / Corrado Roversi, ed., *Legal Philosophy in the Twentieth Century: The Civil Law World*, vol. 12, Tome 2, Enrico Pattaro, ed., *A Treatise of Legal Philosophy and General Jurisprudence*, Dordrecht etc.: Springer, 2016, 590-597.

[8] Karl Larenz, *Methodenlehre der Rechtswissenschaft* (Heidelberg: Springer, 1960), 3. Aufl., Berlin / Heidelberg: Springer: 1995,17 f., 263 f.

[9] David J. Ibbetson, "Case-Law and Doctrine: a Historical Perspective on the English Common Law", in Reiner Schulze / Ulrike Seif, Hrg., *Richterrecht und Rechtsfortbildung in der Euröpaischen Rechtsgemeinschaft*, 27 f., 37; Aleksander Peczenik, *Scientia Juris: Legal Doctrine as Knowledge of Law and as a Source of Law*, vol. 4, Enrico Pattaro, ed., *A Treatise of Legal Philosophy and General Jurisprudence*, Dordrecht etc.: Springer, 2007, 17 f.

[10] David J. Ibbetson, "Case-Law and Doctrine: a Historical Perspective on the English Common Law", 29 f.; F. Pinto Bronze, *"Continentalização" do direito inglês ou "insularização" do direito continental?*, 123-142.

1.1.2. *Unidimensional* horizontal-coherent and vertical-consistent legal systems

Concomitantly, in such normativistic approaches the *legal system* was structured as a logically rational concatenation of norms from which general principles of law and concepts would be logically constructed, conferring a *horizontal-coherent rational unity* to the system of norms, which is to be clearly distinguished from a *vertical-consistent logical rational unity* of a system of norms, such as the one Kelsen's proposal states[11]. Such a *horizontal-coherent rational unity* would, then, lay on the concatenation of concepts with each other and within the legal system, as a matter of coherence, meaning the relation between the subjects should be considered as their content. Conversely, the *vertical-consistent logical rational unity* of a system of norms asserts an *architecture* in which the norms which constitute the system must take place in a specific level, both in their construction and in order to be valid.

1.2. *Law* as *system*, *system* as *law(?)*: on the one-dimensional/multidimensional debate on legal systems' construction

Stating the possibility of invoking judicial precedents and dogmatic models as criteria to judicial adjudication demands some clarifying notes on the constitution of a legal system, mostly the presupposition of a multidimensional legal system, in overcoming the positivistic one-dimensionality of legal systems[12].

Distinctly from both the nineteenth century *legal science* and the subsequent, even if differently stated, contemporary discussion confronting positivist and non-positivist proposals on legal thinking, in post-positivist approaches, distinct structures of legal systems arise, mostly focusing on a multidimensional structure, such as in the *jurisprudentialist* model presented by A. Castanheira Neves — particularly stating a specific practical-normatively constructed and axiologically

[11] A. Castanheira Neves, *Teoria do Direito*, 55-56; Idem, "A unidade do sistema jurídico: o seu problema e o seu sentido", *Boletim da Faculdade de Direito de Coimbra: Estudos em Homenagem ao Prof. Doutor Joaquim José Teixeira Ribeiro*, Número Especial / vol. II (1979) 73-184; also *in Digesta — Escritos acerca do Direito, do pensamento jurídico, da sua metodologia e outros*, vol. II, Coimbra: Coimbra Editora, 1995, 95-180.

[12] A. Castanheira Neves, "A unidade do sistema jurídico: o seu problema e o seu sentido", *passim*.

bounded legal system[13], meaning that the unity of the legal system should be conferred not by the reduction of its constitutive elements to a formal-rational-logical presupposition, but by the dialectically normative-substantial relation of bindingness among its constitutive elements, or *strata*: *normative principles*, *legal norms*, *precedents*, *dogmatics*, and *legal reality*[14]. Such a multidimensional, or multi-layered, legal system requires, consequently, distinguishing *normative principles* as *foundational* axiological principles, from which *normative criteria* — presented by *legal norms*, *judicial precedents*, and *legal dogmatics* — are normatively operative *consequences*, whose task is to accomplish that axiology in its relation with intersubjective juridical reality — and, so, entailing *juridical intentionality* as *teleonomology*.

2. Adjudication among *theoretical-deductive application*, *practical-finalistic decision* and *practical concrete realization of law*

Notwithstanding the foregoing, and even if following the perspective described by Reiner Schulze and Ulrike Seif, it must be kept in mind that the characteristic *inductive* construction of English Common Law, presented by the inductive creation of *criteria* by selecting *rationes decidendi* and *obiter dicta*[15], could also allow for a *deductive* construction of *legal solutions* in subsequent *analogous* cases. Such an understanding would denote that *deduction* would always be present in the *moment* of judicial decision, whether in *common law* or in *civil law* systems, since the approach to *legal reality* would comprehend the latter as the factual correlative of normative propositions — whether of *common* law or of *statute* law. This shows the relevance of a *para-*

[13] See Ana Margarida Gaudêncio, "From Centrifugal Teleology to Centripetal Axiology (?): (In)adequacy of the Movement of Law to the Velocity of Praxis", *Boletim da Faculdade de Direito* 88/1 (2012) 91-103, 100-101.

[14] A. Castanheira Neves, "A unidade do sistema jurídico: o seu problema e o seu sentido", 167-180, and *Apontamentos complementares de Teoria do Direito. Sumários e Textos*, policop., Coimbra, 1998, 48-51 (A4 version); J. M. Linhares, *"Na 'coroa de fumo' da teoria dos princípios: poderá um tratamento dos princípios como normas servir-nos de guia?"*, in Fernando Alves Correia / Jónatas E. M. Machado / João Carlos Loureiro, *Estudos em Homenagem ao Professor Doutor José Joaquim Gomes Canotilho,* vol. III — *Direitos e interconstitucionalidade: entre dignidade e cosmopolitismo*, Coimbra: Coimbra Editora, 2012, (Studia Iuridica 106; *Ad Honorem* 6), 395-421.

[15] *See* Reiner Schulze / Ulrike Seif, «*Einführung*», 8. See also F. Pinto Bronze, *"Continentalização" do direito inglês ou "insularização" do direito continental?*, 156 f.

digm of application in judicial decisions, which is not exclusive of the nineteenth century legal thinking, since it shows up nowadays, in many, mostly formal-argumentative, approaches [16].

Considering adjudication as a theoretical-deductive application, and, so, stressing that *paradigm of application*, the *legal norm* would be taken as the major premise to the *deduction*, and the minor premise would be built through *subsumption* itself, while considering the *fact(s)* under analysis as a *species* of the *gender* abstractly prescribed in the *norm's hypothesis*. If it were so, a logical deduction would determine the application of the legal consequence stated by the norm to the fact(s) in question. And it would presuppose that there would be no normatively constitutive contribution of reality to juridicity[17]…

Overcoming *legal positivism* has often stated an alternative *paradigm* of judicial realization as a *practical-finalistic decision* — it could be said a *paradigm of decision*[18] —, even mobilizing *rational theories of decision* to figure adjudication as an effective option taken amongst alternatives considered as means to ends which would be stated as objectives in law — whether judicial decisions or statute law — as a *final program*. In such a perspective, the selection of alternatives and the viability and adequacy of judicial decision would be determined by its effective consequences, as objectives turned into effects-*results*. That would mean that law should be pragmatically valuated (as in American Legal Realism and in Law and Economics, for instance), in function of, and as a function of, the objectives to whose accomplishment it could be used as an instrument, and, concomitantly, the effective results obtained through judicial performing in the social stage[19].

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[16] Joachim Lege, "Subsumtion pragmatisch: Deduktion, Induktion und Abduktion. Eine Kampfansage an die Verächter der Logik", in Gottfried Gabriel / Rolf Gröschner, Hrgs., *Sumsumtion*, Tübingen: Mohr Siebeck, 2012, (Politika 7), 259-280.

[17] A. Castanheira Neves, *Teoria do Direito*, 58-60, and "Método Jurídico", *Enciclopédia Polis*, Lisboa, S. Paulo: Verbo 1983-86, and *in Digesta*, vol. II, 283-336, 301-308; F. Pinto bronze, *Lições de Introdução ao Direito*, Coimbra: Coimbra Editora (2002), 2.nd ed., 2006, 370-376, 763-775.

[18] A. Castanheira Neves, *Teoria do Direito*, 102-105.

[19] «Hence, not accepting a consequentialist proposal, in which the concrete results of the judicial decision — its *effects* — wouldn't be specifically *juridical effects* — those resulting from the teleology of norms, e. g., the *effects* that the *Tatbestand* of applicable normative criteria predicts and requires to be *juridically assimilated*, subject to a previous, dialectical and normative assimilation through the *strati* of the *legal system (normative principles*, *legal norms*, *precedents*, *dogmatics*, and *legal reality)* —, but the "external" or "real" (empirical) effects, requiring empirical social predictive judgments». — Ana Margarida Gaudêncio, "From Centrifugal Teleology

Considering *adjudication* as a *judicative decision*, beyond a sternly *theoretical-deductive application* or a strictly *practical-finalistic decision*, requires the enunciation of judicial decision as an effectively *practical concrete* rationally dialectical-dialogical *realization of law*, to which the whole *legal system* is convoked. Such a *practical concrete realization of law* requires a specific *analogical relation* between the *case-problem* presented and the (constituting) *legal system*[20]. So, it is not a matter of *subsumption* of *facts* to the *hypothesis* of *norms*, or of *finalistic selection* between *alternatives*, it requires a specific practical dialectical-dialogical *judgment*, through practical legal rationality — materially founded and constituted, and, nonetheless, normatively and argumentatively enounced. Consequently, the *judicative decision* is progressively built within a *methodical scheme* in which the distinction *question-of-fact / question-of-law* is only allowable as an analytical tool. Indeed, the distinction *question-of-fact / question-of-law* is not in question in such a construction, meaning that what is at stake is the dialectical link constructed between the concrete *case-problem* — the case-*thema* — and the legal system as a whole (or the case solved in abstract by the legal norm — the case-*foro*, or *exemplum*), in its distinct dimensions, or *strata*[21].

3. The place of *judicial precedents* and *legal dogmatic models* in adjudication

Beyond all the divergences on the historically and intentionally

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to Centripetal Axiology(?)", 101. See A. Castanheira Neves, *Metodologia Jurídica. Problemas Fundamentais,* Coimbra, Coimbra Editora, 1993, 205 f.

[20] A. Castanheira Neves, *Metodologia Jurídica*, 159, and "O actual problema metodológico da realização do direito", *Boletim da Faculdade de Direito: Estudos em Homenagem ao Prof. Doutor António de Arruda Ferrer Correia*, vol. III, Coimbra: Coimbra Editora, 1984, (1991), 11-58, also *in Digesta*, vol. II, 249-282.

[21] See A. Castanheira Neves, *Metodologia Jurídica,* 196-197, 205; Fernando Pinto Bronze, *A metodonomologia entre a semelhança e a diferença (reflexão problematizante dos pólos da radical matriz analógica do discurso jurídico),* Coimbra: Coimbra Editora, 1994, (Studia Iuridica 3), 139; Fernando Pinto Bronze, "Breves considerações sobre o estado actual da questão metodonomológica", *Boletim da Faculdade de Direito* 69 (1993) 177-199; Idem, "O jurista: pessoa ou andróide?", in *Ab uno ad omnes — 75 anos da Coimbra Editora,* Coimbra: Coimbra Editora, 1998, 73-122, 110-122; Idem, "A metodonomologia (para além da argumentação)", in Jorge de Figueiredo Dias / José Joaquim Gomes Canotilho / José de Faria Costa, org., *Ars Iudicandi — Estudos em Homenagem ao Prof. Doutor António Castanheira Neves,* vol. I — *Filosofia, Teoria e Metodologia,* Coimbra: Coimbra Editora, 2008, (*Studia Iuridica* 90; Ad Honorem 3), 335-373; Ana Margarida Gaudêncio, "From Centrifugal Teleology to Centripetal Axiology(?)", 95-96.

European Legal Systems' structures, the common tradition and development of *civil law* and *common law* systems still entail, in what concerns judicial decision, a reflection on the kind of *juridical criteria* both *judicial precedents* and *legal dogmatic models* embody — and, within it, on their methodological relevance, though they play distinct roles in law's construction —, and how they relate to *legal statutes*, in their creation — as *legislation* — and in their projection in *judicial law-making* — as *judicial decision*.

3.1. Normativistic and post-normativistic approach(es) on legal criteria, judicial precedents' and legal dogmatic models' methodological relevance

3.1.1. Adjudication as deduction: the normativistic understanding of legal norms, judicial precedents and legal dogmatic models and the rational role of *analogy* in *legal gaps*

In normativistic understandings, law should be stated in *legal norms*, thus set as the primarily relevant *criteria* of *juridicalness* — as constitutive juridical *criteria*, mostly in statute law creation, but also as adjudicating/judicial deciding juridical *criteria* —, placed on a logically organized one-dimensional *system*. Judicial jurisprudence and legal dogmatics would represent, in such approaches, external, logical and reflective consequences of the logically-deductive application of legal norms. This would be a fundamental question on common law systems' construction, on the assumption of judicial jurisprudence as a source of law, for the binding force of *stare decisis*, representing an effective *auctoritas*, would rest on *rationes decidendi*, as constitutive practical *memories* of valuation, which — with or without considering, or overcoming, *obiter dicta* — would be institutionally binding as *criteria* to future decisions in *analogous* cases, according to *stare decisis*, as *norms*. In such point, the distinction between *interpretation* and *application* would be decisive. The core question would be the distinction between *judicial precedents* as *concrete cases' decisions* — and their eventual *normative bindingness* — and as *normative general and abstract criteria* — inductively obtained from those decisions. Furthermore, it would be required to consider the possibility of regarding *judicial precedents* as *criteria*, meaning the judicial decision as a decision of a former *analogous* concrete case, or as solely the solution *scheme* proposed in its *ratio decidendi*[22]. In civil law

[22] See, on this distinction, Karl Larenz, *Methodenlehre der Rechtswissenschaft*,

systems, the *principle of legality* would affirm a strictly logical distinction between *interpretation* and *application*, in order to state a *deductive application* of law.

Consequently, *analogy* would be stated as a logical operative mechanism, allowed, under certain circumstances, if and when there wouldn't be the possibility of *subsumption* — through *syllogism* — of the *facts* under analysis to the interpretative (literally) admissible meanings of the *legal criteria*, mostly when there would be no connection between the literal selected meanings of the legal text (*grammar*) — in association with the meanings admitted by the other *intra-textual* elements — *logic*, *history*, *system* — and, when acceptable, the *extra-textual* element — *teleology* — and the *empirical factuality* in question[23]. *Analogy* would then compare *facts*, in order to state the capability of the *omitted facts* — the omissions, or gaps… — to be subsumed to the literal positive relevance of the juridical criterion's text — such a subsumption would be called *analogia legis*, and, when it were impossible to achieve, there could be the possibility of subsumption of the omission to the *general principle(s) of law* in force on the matter in which the omission could be subsumed — there it would be *analogia juris*[24].

3.1.2. Beyond normativism(s), adjudication in a *paradigm of judicative decision*: a practical-normative understanding of legal norms, judicial precedents and legal dogmatic models and the role of *analogy* as the specific juridical *rationale*

Beyond normativism(s), mostly considering a *paradigm of adjudicative decision*, regarding adjudication as a practical concrete realization of law, as it has been declared, entails several intentional and methodological changes.

When considering a *practical-normative rationalization* of adjudication, *interpretation* will be included *in adjudication*, as an operative step towards the concrete realization of law, in which there will be integrative moments, which means that the formal-logic scission between *interpretation* and *integration* will have no place. This way,

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252-261, especially 253. See also Aleksander Peczenik, *Scientia Juris*, mostly 26.

[23] A. Castanheira Neves, "Interpretação Jurídica", in *Digesta — Escritos acerca do Direito, do pensamento jurídico, da sua metodologia e outros*, vol. II, Coimbra Editora, Coimbra 1995, 337-377.

[24] A. Castanheira Neves, *Teoria do Direito*, 108-110.

there will be no intentional distinction between *interpretation* and *application*, on the one hand, neither between *application* and *integration*, on the other hand. *Interpretation*, *application* — not as deduction — and *integration* will be, therefore, methodological steps in the construction of *judicative decision*, with or without the mediation of a *legal norm*, and, then, to the normatively constitutive dialectical relation settled between *problem* — the concrete situation of reality requiring a legal answer — and *system* — the juridical intentionality and content proclaimed in the legal system[25], considering *normative principles* as axiological foundations, and *legal norms*, *judicial precedents* and *legal dogmatic models* as practical-normative criteria intentionally joining in *judicative decision*. Thus, in such a *judicative decision*, taken as a *practical realization* of law, there will be no deductive application, as stated on logic *normativistic subsumption* or on strict *argumentative deduction* or on some other strictly *procedural mechanism*, but a specific dialectical-analogical relation between *legal system* and *concrete problem*.

Therefore, considering *analogy* as the specific juridical *rationale*, interpretation in legal adjudication should not be affirmed anymore as a logical and abstract operation accomplished in an autonomous methodical hermeneutical moment, for the meaning of a juridical criterion is to be understood in the moment of and by the mediation of the concrete relevance of the case-problem *sub judice*. Analogy translates, here, then, a distinct judgment, in Aristotelian terms, representing a *comparison* between two terms, as *relata*, without implying a transition of level from the particular to the general and back to the particular, through a *tertium comparationis*, the *meaning-sense of legal normativity*[26]. And, then, a *judicative decision* will be constructed by stating the similarities and differences between those *relata*. This way, it would make no sense looking for a strictly logical distinction between *interpretation* and *application*, on the one hand, and between

[25] A. Castanheira Neves, *Metodologia Jurídica*, 238 f.; F. J. Bronze, 'O problema da *analogia iuris* (algumas notas)', in *Estudos em homenagem ao Professor Doutor José Dias Marques*, Almedina: Coimbra, 2007, 147-162; and "Pj → Jd: A equação metodonomológica (as incógnitas que articula e o modo como se resolve)", *Boletim da Faculdade* 87/2 (2011) 87-134, and 88/1 (2012) 13-53, and also *in Analogias*, Coimbra: Coimbra Editora, 2012, 311-391.

[26] F. Pinto Bronze, "Breves considerações sobre o estado actual da questão metodonomológica", 177-199; also *in Analogias*, 9-29, 24-25; and "Pj → Jd: A equação metodonomológica (as incógnitas que articula e o modo como se resolve)", in *Analogias*, 311-391, 345 f.

application and *integration*, on the other hand[27].

3.2. The judicial precedents and legal dogmatic models' *methodological presumptions of bindingness*: *correctness* (*Richtigkeit*) and *rationality* (*Rationalität*)

Correspondingly, in a *paradigm of judicative decision*, as considered above, *judicial precedents* and *legal dogmatic models* assume practical methodological relevance, with specific presumptions of *bindingness*, in non-normativistic terms — respectively, presumptions of *correctness* (*Richtigkeit*) and *rationality* (*Rationalität*).

3.2.1. The meaning(s) of judicial precedents' *correctness* (*Richtigkeit*)

Stating the meaning of judicial precedents' *correctness* (*Richtigkeit*) in the *jurisprudentialist* approach requires taking James Kent's consideration, in the *common law* context, of *correctness* as a *presumption* in favour of a mature deliberation, which would translate a methodological and institutional legal requirement to adjudication[28]. Stating the judges' adjudication as *correct* would be, and, it might be said, still is, understanding its *reasonableness* as a key point, in the adequacy of judicial decisions both to the reality and to the legal system — meaning a guarantee of *legal security* and, also through it, but, maybe, even beyond, of a certain sense of *legal justice*. Such a *presumption*, for Martin Kriele, would be one of (*non-absolute*) *justness/correctness — Richtigkeit*[29]. And for Larenz, and, after him, for Alexy, this *justness/correctness — Richtigkeit* — would be taken as a specific characteristic of judicial decisions, though not always as a *presumption*

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[27] A. Castanheira Neves, *Teoria do Direito*, 60 f.

[28] «A solemn decision upon a point of law, arising in any given case, becomes an authority in a like case, because it is the highest evidence which we can have of the law applicable to subject, and the judges are bound to follow that decision so long as it stands unreversed, unless it can be shown that the law was misunderstood or misapplied in that particular case. If a decision has been made upon solemn argument and mature deliberation, the presumption is in favour of its correctness (…)». — James Kent, *Commentaries on American Law*, Vol. 1, O. Halsted: New York (1826), 2.nd ed., 1832, 475-476.

[29] Martin Kriele, *Theorie der Rechtsgewinnung*, Berlin: Duncker und Humblot, 1976, 253-254, and *Recht und praktische Vernunft*, Göttingen: Vandenhoeck und Ruprecht, 1979, 91 f.

of bindingness to future decisions[30].

Considering judicial precedents as normative *criteria* with *presumptive bindingness* in civil law systems presupposes in tandem that this *presumptive bindingness* might be contested, under some circumstances, observed particular conditions and fulfilled specific requirements[31] — therefore, at once, recognizing the influence of Chaïm Perelman's *principle of inertia*[32] (which Alexy says *Trägheit* - Trägheitsprinzip[33]) and the correlative *burden of contra-argumentation* (in the meaning exemplarily explained by Perelman, and Orrù[34]). Besides, understanding this *presumptive bindingness of justness/correctness* presented by judicial precedents may also require — and it is required by the present proposal — recognizing it as an effectively methodologically constructed *source of law*, in a *phenomenological-normative perspective*[35], whether it is stated or not stated in positive *legal norms* concerning *legal sources*. This does not mean, however, to ascribe institutionally authoritative *formal bindingness* to judicial decisions in civil law systems. This *presumption of bindingness* — considering the role conferred to it by Martin Kriele, differently from that acceptable to Franz Bydlinsky, Karl Larenz, or Robert Alexy — states a materially and argumentatively based point of reference to a judge's decision. And this is so, in a *civil law* system, whether there is a *legal norm*

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[30] Robert Alexy, *Theorie der juristischen Argumentation*, 334 f.; and Karl Larenz, *Methodenlehre der Rechtswissenschaft*, 252-261, especially 254-255, and note 165-166.

[31] Franz Bydlinsky, *Grundzüge der juristischen Methodenlehre*, Wien: Wien Universitätsverlag, 2005, 107.

[32] Chaïm Perelman, *Logique juridique : nouvelle rhétorique*, Paris: Dalloz, 1976, II, 2.; Chaïm Perelman, *L'empire rhétorique: rhétorique et argumentation*, Paris: Vrin (1977), 2002, 93. See also Sebastián Urbina, *Reason, Democracy, Society: A Study on the Basis of Legal Thinking*, Dordrecht: Kluwer (1996), 2010, 8, 75; Edgar Bodenheimer, "Perelman's Contribution to Legal Methodology", *Northern Kentucky Law Review* 12 (1985) 391-417.

[33] Robert Alexy, *Theorie der juristischen Argumentation*, 336.

[34] Giovanni Orrù, *Richterrecht: il problema della libertà e autorità giudiziale nella dottrina tedesca contemporanea*, Milan, Giuffré. 1983, 109-111 («Differenze relativamente minime tra *common law* e *civil law*»). «In ogni caso, sia il giudice continentale, sia quello inglese sono obligati a consolidare le loro decisioni inserendole nel sistema: possono essere diversi i modi in cui questa coerenza viene cercata e dimonstrata, ma il risultato cui si deve arrivare è sostanzialmente il medesimo...» . — *Ibidem*, 111.

[35] A. Castanheira Neves, "Fontes do Direito. Contributo para a revisão do seu problema", *Boletim da Faculdade: Estudos em homenagem aos Profs. Doutores Manuel Paulo Merêa e Guilherme Braga da Cruz* 58/2 (1982) 169-285; also *Enciclopédia Polis*, Lisboa, S. Paulo, 1983-86, and *Digesta*, vol. II, 7-94.

which might be methodologically employed as a *tool of understanding* to the construction of the judicative decision, or not[36]. So, this *presumption of bindingness* is methodologically refutable, if justified, when the judge, concluding that the specific meaning of the judicial precedent convoked is not adequate to be invoked as a foundational normative argument to the construction of the present judicative decision, rejects its *presumption of bindingness* through a *burden of contra-argumentation*[37].

3.2.2. The meaning(s) of legal dogmatics's *rationality* (*Rationalität*)

Understanding legal dogmatic's *rationality* (*Rationalität*) as it is intended in the considered *jurisprudentialist* approach will require, on its turn, to discern *legal dogmatic models* as effective *rationally* normative relevant *models*, as foundations-*principles* or as *criteria*, in both cases taken as effective operational materially normative and dialogically argumentative mechanisms of *judicial adjudication*.

Recognizing to legal dogmatics a distinctive *presumption of bindingness* requires ascribing to it a specific function in judicial and legislative law-making. Such *bindingness* is not institutionally conferred, not in common law nor in civil law systems, thus it rests on the reasonableness of the reflective enouncements presented, meaning the relevancy of the materially constructed foundations, on the one hand, and justifications, on the other hand, to the normative relevance of reality when related to the normative relevance of juridical senses stated by and/or allowed by law and legal system. Therefore, ascribing to legal dogmatics a normatively constitutive rational relevance requires recognizing it to be not based on procedimental and/or argumentative terms nor on a mere descriptive function, rather laying on a subs-

[36] J. M. Linhares / Ana Margarida Gaudêncio, "The Portuguese Experience of *Judge-Made Law* and the Possibility of *Prospective* Intentions and Effects", in Eva Steiner, ed., *Comparing the Prospective Effect of Judicial Rulings Across Jurisdictions*, Ius Comparatum — Global Studies in Comparative Law, Vol. 3, Springer International Publishing, 2015, 185-201, especially 185-186, and 195 f.

[37] «The (…) judgments in question will benefit from a *presumption of justness* or *correctness* («Richtigkeit»), meaning that they should be understood as substantially adequate according to the juridical significances inscribed in the legal system they presuppose. This presumption is, however, refutable: if the judge contemplates refuting it, he must normatively and methodologically justify this change in orientation, complying with a *burden of contra-argumentation* (*Argumentationslast)*». — J. M. Linhares / Ana Margarida Gaudêncio, «*The Portuguese Experience of Judge-Made Law and the Possibility of Prospective Intentions and Effects*», 191-192.

tantially developed *rationality*, which stands for a multidimensional construction of judicial judgment as *judicative decision*.

Understanding legal dogmatics ahead of the normativistic-constructivist comprehension, mostly proposed by the dogmatic positivism of the nineteenth century — specifically in the way stated by Jhering[38], as has been said — requires not only the recognition of the three activities-tasks, or dimensions, that Alexy assigns to it — *descriptive-empirical*, *logical-analytical* and *normative-practical*[39] —, but also the recognition of the assertion that, besides these activities-tasks, though within them, legal reasoning must be understood not in strict *practical-argumentatively* terms but rather with normative *practical-material-argumentatively* intention and content.

Considering legal dogmatic models as *practical-material-argumentative criteria*, and, when justified, as *foundations-principles*, means taking *legal reasoning* as a practical-rationally foundational substance to law, not as a formal-logically procedural construction. And this brings about the statement of a *presumption of rationality* conferred to legal dogmatics[40]: the rationally *practical-material-argumentative* constructed models proposed by legal thinking represent law's construction as a materially autonomous critical reflection on legal reality, so that those models are methodologically available to be invoked in judicative decisions — in order to uphold a specific juridical answer, whilst interpreting statutes or common law rules, or autonomously constituting juridical *answers*(-solutions) to juridical *problems*(-cases). Thus, legal dogmatic models might accomplish specifically normative-constitutive tasks, such as *stabilization*, *heuristics*, *desoneration*, *technique*, and *control*, not only with argumentative, and/or semiotic, but also with specifically normative-constitutive meaning[41].

Accordingly, legal dogmatics may not be considered as a methodological tool specifically created to scientifically describe the normativity of law, or to supply any failure or gap in law — this would mean looking for dogmatic criteria as subsidiary tools in face of *hard cases*, namely if considering *hard cases*, globally, as those to which, due to *legal indeterminacy*, it would be possible to offer different, and even opposite, solutions, equally justifiable by *legal criteria*[42]. *Legal dogma-*

[38] R. von Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, Leipzig: Breitkopf und Härtel, 1858.

[39] Robert Alexy, *Theorie der Juristischen Argumentation*, 307 f.

[40] A. Castanheira Neves, *Apontamentos complementares de Teoria do Direito*, 51.

[41] Fernando P. Bronze, *Lições de Introdução ao Direito*, 660-662.

[42] On this meaning of *hard cases*, see Álvaro Nuñez Vaquero, *"Some Realism for Hard Cases"*, *in Theory & Practice of Legislation* 1/1 (2013) 149-171. See also Au-

tic criteria, otherwise, of argumentatively and axiologically substantial-normative compositions stated by legal thinking, reflecting on present binding positive law, de *jure condito*, and on future normatively bounded positive law, de *jure condendo.*

Legal thinking is, therefore, meant to be a practical, material, normative and argumentative construction, on legal practice and legal theory, a critically proposed construction of normativity — though not ideologically or politically engaged, neither in favour of nor in opposition to a certain ideological institutionalized power, rather as a dialogical reflection on what the law *is* and what it *should* be.

The *presumption of bindingness* conferred to *legal dogmatics* is, consequently, one of *rationality*, refusing a *normativistic-constructivistic* conceptualization, by general abstraction and/or inductive formal reasoning, and, therefore, ascribing to legal thinking the role of a materially normative reflection *about* the legal system, *de jure condito* and *de jure condendo*: a reflection able to critically state a *diagnosis* on the normative answers given to the practical-concrete problems, in order to consider the conditions of possibility of their maintenance, or of their overcoming, and, above all, the substantial and argumentative densification of the foundations of the former or of the latter normatively founded alternative —, and, thus, towards *normativity*, not *normativism*[43].

4. Conclusion: Correctness (*Richtigkeit*) and rationality (*Rationalität*) as constitutive juridical *criteria* in European law adjudication

Contemporarily, in the European Union Law — considering the *Consolidated version of the Rules of Procedure of the Court of Justice of 25 September 2012*[44] —, as it has been affirmed by David A. O. Edward, «(…) case-law of the Court of Justice is the work of judges working in a unique multinational and multilingual environment.

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lius Aarnio, *The Rational as Reasonable. A Treatise on Legal Justification*, Dordrecht etc.: D. Reidel, 1987, 13 f.

[43] A. Castanheira Neves, *Teoria do Direito*, 108-110.

[44] David A. O. Edward, "Richterrecht in Community Law", in Reiner Schulze / Ulrike Seif, Hrg., *Richterrecht und Rechtsfortbildung in der Euröpaischen Rechtsgemeinschaft*, 75-80, 75-76. The regulation is nowadays distinct. *Vide Consolidated version of the Rules of Procedure of the Court of Justice of 25 September 2012*, recently amended, in <http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp_en.pdf> (6/3/2017).

European *Richterrecht* is not legislation, it is no intended to be legislation and it should not be interpreted as if it were»[45]. This means that, though presenting different *intentionalities*, and generating distinct methodological and normative *consequences*(-*results*), whether in *civil law* or in *common law* systems, a specific methodological relevance shall be accorded to *Juristenrecht* in *adjudication…*

As considered above, judicial precedents and legal dogmatic models are to be taken methodologically as effectively constitutive *judicative criteria*, as effective operative materially normative and dialogically argumentative mechanisms to *judicial adjudication*, distinctly from *legal norms* as *criteria* — which assert a general and abstract determination and its *potestas*, within the corresponding *presumption of authority.* In their distinctive relevance and *presumptions of bindingness* — *correctness* and *rationality*, respectively —, judicial precedents and legal dogmatic models allow for a multidimensional construction of the judicial judgment as a *judicative decision*.

Legal norms, *judicial precedents* and *dogmatic models* — in their distinct normative *relevance* and *bindingness* — though constituting different operating *judicative criteria* — not alternative, rather collaborative —, in their distinctive *presumptions of bindingness* — *authority*, *correctness* and *rationality* —, presuppose the *legal system* as a set of normative meanings — in its complexity and in its multidimensionality, including the essentially founding *normative principles*, in their *validity*, also taken as a *presumption of bindingness* —, a set of foundations and of criteria normatively available to the effective construction and realization of law, in their *abstractness* and in their *concreteness.* And, whilst regarding the methodological relevance of *judicial jurisprudence* and of *legal dogmatics* as constitutive juridical *criteria* in a *normatively constitutive concrete realization of law*, it allows, then, for the highlighting of their different *roles*, therefore supporting the specific *juridically binding presumptions* they hold — as *correctness* (*Richtigket*) and as *rationality* (*Rationalität*) —, not merely *de facto*, but effectively *de jure*[46].

[45] David A. O. Edward, "Richterrecht in Community Law", 80.
[46] Aleksander Peczenik, *Scientia Juris*, 25-28.

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