journal for constitutional theory and philosophy of law

revus

revija za ustavno teorijo in filozofijo prava
časopis za ustavnu teoriju i filozofiju prava
revija za ustavna teorija i filozofija na pravoto

Ljubljana, 2023

revus

VSEBINA

V tokratni številki so objavljeni prispevki v angleščini in španščini.
Za slovenske povzetke in ključne besede glej strani 169–177.

TABLE OF CONTENTS

This issue is composed of papers in English and Spanish. For synopses and keywords, see pages 169–177.

David Duarte*

Rights as formal combinations of normative variables

Hohfeld's table of legal positions, though highly consistent under his own assumptions, seems to be vulnerable to the exact flaws assignable to those assumptions. Specifically, the assumptions that a norm is not a necessary condition of a legal position and that one single action in a correlativity line is sufficient to bring about the action's result. With a simple proposal of norm individuation, this paper develops a totally norm-based table of legal positions in which co-action from correlated agents is also considered (without threatening atomicity). Since a legal position is just the result of a combination of normative variables, the present approach leads to a strictly formal composition of legal positions in a way that challenges the role played so far by the traditional theories of rights.

Keywords: Hohfeld (Wesley Newcomb), legal norms, legal positions, correlativity lines, correlated agents

1 THE LEGAL NORMATIVIST APPROACH: TWO BASIC PRESUPPOSITIONS

At the beginning of *Normative Systems*, which is probably the most sophisticated piece of legal science written in the 20th century, Alchourrón and Bulygin point out the hardware differences between moral and legal systems (at least when the contemporary legal systems, combining primary and secondary norms [Hartian style], are taken as their archetype).[1] Among other reasons, this is because they stress the inexistence of a moral legislator, the inexistence of moral courts (which also means no official bodies for converting *prima facie* positions into definitive ones), and the significant fact that, as opposed to legal systems, it is particularly difficult to identify moral systems and, even more, the norms they entail.[2]

Accepting how incontestable these reasons seem to be, a relevant distance between moral and legal systems has to be recognized. And it follows from that distance that the transposition of normative propositions from one field to the

* davidduarte@fd.ulisboa.pt | Lisbon Legal Theory. University of Lisbon (Portugal). I would like to thank my colleagues of the Lisbon Legal Theory, particularly Pedro Moniz Lopes and Jorge Silva Sampaio, for their helpful comments on a previous draft of this paper. A very special acknowledgment is due to Andrew Halpin, with whom I had wonderful conversations about many of the topics addressed in this paper. I would also like to thank two anonymous referees for their constructive remarks. Finally, I am also grateful to the Lisbon Public Law Research Centre and the Fundação para a Ciência e Tecnologia for their financial support.

1 Alchourrón & Bulygin 1971: 2. On the distinction, see Hart 1994: 79.

2 Alchourrón & Bulygin 1971: 3.

other is, for the intellectual honesty of the enterprise, particularly delicate: it is possible to have true propositions regarding moral norms that are false with legal norms (and vice-versa).[3] Accordingly, and in order to keep a very precise object of inquiry, it is relevant to say that the next pages focus solely on legal norms. This means that the present approach to legal positions is strictly based on norms belonging to a legal system (no matter which).[4]

It is also relevant to say that a legal system is understood here as a set of norms or, equivalently, that such system is a set that has norms as its members.[5] And since membership to the set is defined by legality and deductibility, it follows that each legal system is a set containing only the norms produced through the exercise of competence and those that logically follow from them.[6] Furthermore, deductibility does not merely lead to the membership of other norms. Regardless of what composes a complete norm, from that criterion of membership equally follows that norms also include the deontic consequences somehow implied by a primitive one (to be addressed later on).[7]

A presupposition of a legal system as a set of norms entailing all its logical deontic consequences is the basis upon which the analysis of legal positions should be carried out. It shows, specifically, that the positions "existent" in a legal system are limited to those conferred by its norms (and their deontic consequences).[8] Besides removing normative positions that are here irrelevant (such as the moral ones), this means that the recognition of a position in a legal system depends (as a necessary condition) on a specific deontic modalization of action.[9] A table of legal positions must include, therefore, only and no other than the various (types of) positions that are given by the norms belonging to the set.

3 A good example (among many) is the statement (Marmor 1997: 16) by which one should go into the roots of a right in order to determine its limits. Rigorously, if this is acceptable in the moral realm, it seems unacceptable in the legal: here, limits of a right are given by the scope of the action deontically modalized (as linguistically enacted by the normative authority). The roots of a legal right are pre-normative data irrelevant for assessing what is inside or outside the scope of a linguistically enacted legal position.

4 Legal positions are a subject matter in which the contingency of legal systems plays almost no role (on this contingency, Bulygin 2010: 285, Mendonca 2000: 63). For instance, all the examples of norms given in this paper could belong to any legal system.

5 Bulygin & Mendonca 2005: 46, Kelsen 2005: 31.

6 Regarding these norms (criteria) of identification (recognition), Caracciolo 1986: 51, Bulygin & Mendonca 2005: 51. On the other hand, "exercise of a competence norm" here means any human-made production of norms, be it from the action of a normative authority or by the behaviour inherent to custom (and precedent, when it is the case).

7 Alchourrón & Bulygin 1971: 86, Moreso & Navarro 1998: 278.

8 Navarro & Rodríguez 2004: 117. The dependency that legal positions have from norms has strong methodological consequences: in some way, no accurate analysis of legal positions can be carried out without the frame given by the corresponding norms.

9 Also, strictly addressing the legal domain, Hohfeld 1919: 26, Kramer 1998: 8. On positions depending on deontic modalities and action, Sergot 2013: 363, Herrestad 1996: 56.

2 WHY THE HOHFELDIAN STRATEGY DOES NOT WORK: TOO LITTLE AND TOO MUCH

Within the knowledge that the Hohfeldian analysis gave to legal science one specific point is a clear game changer: atomicity (understood as the irreducibility of a legal position). While searching for the disambiguation of the word "right", Hohfeld arrived at a kind of "indivisible unit", from which he was able to create a table of legal positions in which all can be predicated as atomic.[10] Atomicity is, undeniably, an outstanding tool. It provides the means to understand complex legal positions, to understand the components they are composed of and, fundamentally, to understand the connection between an irreducible normative position and the (single) deontic modality that stands as its ground.

Whatever the future of the Hohfeldian legacy, one thing seems certain: once atomicity is lost (or it is not taken into full account), no improvements whatsoever can be made. The reason is simple: losing atomicity means losing the unique basis capable of explaining the morphological diversity of a molecular legal position.[11] Therefore, whenever no entailment is provided, assertions that claim-rights contain a claim to enforcement (for instance) are a way of playing a different game.[12] So, when taken seriously, atomicity draws a line that cannot be crossed (at least if cognitive growth is to be considered by legal science as a relevant epistemic value within the present topic).

It is known that Hohfeld made some mistakes. That is the case with opposites instead of contradictories, when he says that a liberty is the opposite of a duty (as presented in his scheme of jural relations). Since, however, when one is true the other is false, a liberty is the contradictory of a duty (and not its opposite).[13] That seems to be also the case when he says that a no-right is the correlative of a liberty (something said in the exact same sentence): bearing in mind the square of oppositions, the correlative of a liberty is a no-right not (a no-right is actually the correlative of a liberty not).[14] As is also visible in other parts of his seminal work, Hohfeld uses unilateral permissions but not always with complete accuracy.

10 Atomicity, then, stands for irreducibility (or indivisibility), which is what Hohfeld actually meant with the predicate "fundamental". Hohfeld 1919: 64, Halpin 1985: 436.

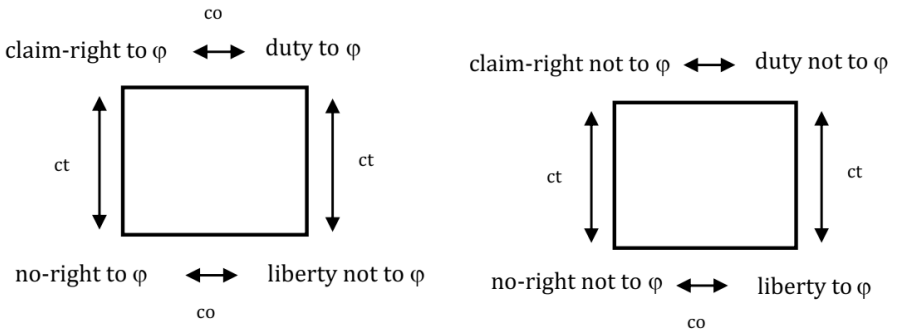
11 Since only atomicity explains the internal difference (through their atomic components) between distinct aggregated normative positions. Lindhal 2006: 331, Biasetti 2015: 954.

12 A problem transversally harming the whole will theory (Kramer 1998: 64). Examples of molecularity without considering atomicity appear, for instance, in Jaffey 2006: 140 or Steiner 1994: 73. On the virtues of atomicity, Schlag 2015: 218.

13 Hohfeld 1919: 38. On this point, Kocourek 1921: 27, O'Reilly 1999: 275.

14 Hohfeld 1919: 38. Correcting the so-called Hohfeldian mistakes: Williams 1956: 1138; Robinson, Coval & Smith 1983: 277.

(i) the following squares show the Hohfeldian positions already adjusted; the squares show the known contradictories (ct) and correlatives (co) in Hohfeld's table of first order legal positions:



These mistakes are not, however, particularly problematic. What is problematic in the Hohfeldian understanding is his specific engineering of correlativity, designed with a strategy of negations and contradictions, leading to the insufficient outcome of deontic positions without any independent content: the case of claim-rights and no-rights (now only regarding first order legal positions). To put it differently, the point rests on a conception of correlativity that, as a material equivalence, says nothing about the content of those positions and the deontic status of their holders: claim-rights and no-rights have no content besides being the correlatives of duties and liberties.[15]

(ii) a claim-right is "only" the correlative of a duty and has no deontic content: no one knows which deontic modality the holder is under; differently, the duty holder is in the position corresponding to being under an obligation; this might be expressed by the following scheme of correlativity:

claim-right to $\varphi \leftrightarrow O\varphi \rightarrow$ duty to φ

(iii) a no-right is "only" the correlative of a liberty not and has no deontic content: no one knows which deontic modality the holder is under; differently, the liberty holder is in the position corresponding to being under a permission; this might be expressed by the following scheme of correlativity:

no right to $\varphi \leftrightarrow P\varphi \rightarrow$ liberty to φ

15 Which is to say that duties and liberties have no content besides being the correlatives of claim-rights and no-rights (for instance, Kramer 1998: 13, Cruft 2004: 351). The main reason for addressing correlativity from the perspectives of claim-rights and no-rights rests on the (relevant) fact that, unlike duties (obligation) and liberties (permission), they do not stem from a deontic modality of their own. On the strict correlative content of the Hohfeldian legal positions, Eleftheriadis 2008: 115, Arriagada 2018: 14.

Such emptiness in two of the four first order Hohfeldian legal positions has deeper causes, though. Besides a false symmetry in each line of correlativity, the outcome of legal positions without an independent content apparently comes from a simplistic and rather reductive conception of normative action (uncritically accepted).[16] Actually, for Hohfeld, each line of correlativity ligates two holders sharing one single action that is assigned to only one of them. This is because Hohfeld thought that the exercise of a single action was sufficient to bring about its result, a premise that led him to disregard any other possible correlated action (by the holder of the correlated position).[17]

(iv) for Hohfeld, the duty ↔ claim-right line of correlativity is based on the single action φ (paying one-thousand dollars or staying off the land) assigned to the duty bearer; for Hohfeld, φ-ing is a sufficient condition to bring about the result (own the money or stay off the land).

(v) for Hohfeld, a liberty ↔ no-right line of correlativity is based on the single action φ (eating a shrimp salad or occupying Whiteacre) assigned to the liberty holder; for Hohfeld, φ-ing is a sufficient condition to bring about the result (have eaten the salad or occupied Whiteacre).

Hohfeld's understanding of action seems, however, to fall short. When considering that no result can be brought about without an interaction between both correlated holders, Hohfeldian correlativity is unable to accommodate the fact that some co-action from the no-right or the claim-right holders is (if possible) a necessary condition to achieve the result of the main action.[18] And if we accept this, we probably have to admit that norms present correlativity as a structural scheme with space for co-action and, furthermore, with space for its specific deontic modalization.[19] But if this is somehow correct, then Hohfeldian correlativity is clearly insufficient.

16 On that asymmetry, Halpin 2019a: 86, Lyons 1970: 45. This asymmetry has nothing to do with the one pointed out under non-atomic views of legal positions (Hart 1982: 184 or Simmonds 1998: 221). On the other hand, it seems also out of target to criticize the Hohfeldian symmetry based on the alleged flaws of correlativity (as apparently Frydrych 2019: 6 does). One thing is to know if the Hohfeldian correlativity is symmetric; another to know if it is (universally) valid for all duties or all liberties.

17 It is important to note that by "result of action" it is meant (as in von Wright 1963: 39) the state of affairs produced by the exercise of the type of action at hand (end-state of change) and the state of affairs in which that performance consists of (change). Similarly, Hornsby 2004: 18.

18 In the Hohfeldian scheme, since action is only assigned to one agent (Finnis 2011: 378, D'Almeida 2016: 556), there is no such thing as action (or specifically co-action) carried out by the no-right or the claim-right holders (Kramer 1998: 14, Williams 1956: 1145).

19 A problem already posed and analyzed by Lindahl (1977: 126; 2001: 160) for claim-rights and widely discussed regarding interferences in liberties (for instance, Lyons 1970: 54, Curtis Nyquist 2002: 251).

(vi) the Hohfeldian duty ↔ claim-right line of correlativity does not accommodate the fact that φ-ing by the duty bearer might be insufficient to bring about the result; if co-action from the claim-right holder is also necessary (e.g., meeting to receive the money), then correlativity implies an independent space for co-action by the claim-right holder and a specific deontic modalization for such co-action.

(vii) the Hohfeldian liberty ↔ no-right line of correlativity does not accommodate the fact that φ-ing by the liberty holder might be insufficient to bring about the result; if co-action from the no-right holder is also necessary (e.g., not grabbing the salad eater), then correlativity implies an independent space for co-action by the no-right holder and a specific deontic modalization for such co-action.

Showing positions without content or disregarding co-action are not, though, the only problems in the Hohfeldian system of jural relations. Looking into the table of second order legal positions, some other problems become visible, namely, in his disability ↔ immunity line of correlativity (but not only). For Hohfeld, an immunity is the correlative of a disability, which is the absence of competence. As a kind of right, an immunity is, then, the position one has when facing someone without the power to change a legal position.[20] It represents, consequently, the other Janus face of a not having power: it belongs to a "symmetry" between not being habilitated to produce deontic consequences and not being targeted by them.

Such a conception is, however, problematic. Independently of the conception of competence one may adopt, there is no understanding of such a notion that is able to justify that the contradictory of a position based on constitutivity (a disability) has to be seen as a legal position in itself. Accordingly, it is also difficult to understand how not having a competence can be the basis for a correlated legal position (immunity) that, in the same way, has never been conferred by any norm of the set.[21] Therefore, the strategy of negations and contradictions here seems to have taken Hohfeld too far. And one wonders whether he was not actually confusing norms with normative propositions.[22]

20 Hohfeld 1919: 60. On Hohfeld's immunities, Edmundson 2004: 91, Corbin 1919: 170.

21 This point was already unveiled in Kocourek 1921: 34 and developed later on in Kocourek 1923: 154. The question at hand is whether an immunity is not just a total absence (where "Alice does not have a pet" would be correct), differently from a position negatively described, the possible case of a no-right (where "Alice has a pet that is not a dog" would be correct). For this approach to Kocourek, Halpin 1985: 441.

22 On the difference between norms and normative propositions (the difference between prescribing "X has a right to φ" and describing "there is a right to φ held by X"), Bulygin 2015a: 196, Niiniluoto 1991: 368.

3 NORM INDIVIDUATION: A BRIEF SCHEME

Assuming that a legal system is a set of norms implies that each norm is an element of the set and that "a norm" is the unit of the system. Considering that norms are enacted by normative authorities using a natural language and that no match exists between an utterance and a norm, the immediate problem of norm individuation is posed. In simple terms, the problem involves determining what a norm is or, more accurately, what a complete norm is. At stake is not only the issue of how to represent the legal system for some explanatory purposes, but to define under which criteria can one say that there is a norm. In other words, to list the necessary conditions to have a norm.[23]

The relevancy of norm individuation is unquestionable.[24] If it is unavoidable for many tasks performed in legal science, namely, to classify norms or to understand how norms conflict with each other, it is in the field of legal positions that norm individuation becomes decisive: to know which legal positions are given by a norm depends on knowing what a (single) norm is. On the other hand, norm individuation is also a remarkable tool for eliminating usual misunderstandings similar to those of breaching atomicity: withdrawing from one norm, without criteria, several disconnected positions.[25] Individuation thus provides the key to knowing which positions (no less and no more) are conferred by a (single) norm.

It is recognized that norm individuation faces the problem that law has no criteria for such demarcation: normative authorities enact norms without considering norms as units and the written materials they present are solely organized under some linguistic conventions.[26] A single norm sentence matching one norm is, therefore, a matter of chance (under some criterion of individuation). Given that the law has no natural kind serving this specific purpose, it follows that norm individuation has to be constructed as a scientific convention.[27] In other words, only an intersubjective agreement on what a complete norm is (within the scientific community) may allow us to mean the same thing when we speak about a norm.

---

23 Circumscribing norm individuation to those explanatory purposes, D'Almeida 2015: 159. On the broader scope of norm individuation, Bentham 1945: 247, Raz 1980: 74.

24 A relevancy inversely proportional to the attention the topic has deserved so far. On the relevancy of norm individuation, Spaak 2003: 97, James 1973: 359.

25 A good example is the norm in the sentence "human life is inviolable" (included in some constitutions): besides its reading as a prohibition to kill, it is sometimes seen as also including an imposition (directed to the legislator) to not revoke the criminalization of murder. How the very same norm can contain a prohibition regarding two entirely different actions (killing and revoking norms), which are moreover assigned to different addressees, remains, however, unexplainable.

26 On the frame of enacting norms, Frändberg 2018: 7. On its linguistic process, Duarte 2011: 111.

27 Raz 1980: 141. On norm individuation as a task of legal science, Spaak 2003: 98.

Among the criteria already presented to achieve such goal, it seems that the Razian strategy of looking for the minimal notion is by far the best.[28] This is not only because it leads to an individuation closer to its usual understanding within the legal practice, but, and primarily, because it implies all and no more than the necessary conditions for regulating behaviour: it is presented, consequently, as the atomistic kind or, in other words, as the "necessary morphology" when action has to be deontically modalized.[29] Under this approach, a (complete) norm is (or it is suggested to be, for conventional purposes) the sum of the necessary conditions for an action to be permitted, forbidden, or mandatory.

3.1 A norm: Material elements

With this frame, necessary conditions for regulating behaviour are: (i) an action; (ii) a deontic modalization of that action; and (iii) the conditions under which the deontic modalization of the action depend. It follows that regulation of behaviour is impossible if one of these conditions is absent (some explanations for the third will be given later on). These three necessary conditions lead to the known elements of norm structure, which in their conditional order are: (i) antecedent; (ii) deontic operator; and (iii) consequence.[30] For present purposes, the complete analysis of each one is unnecessary. To understand how norms confer legal positions, only some features of those elements have to be considered.

(viii) the norm sentence (NS) "when one loses faith in humanity it is mandatory to listen to Mozart's Magic Flute" has the norm (N) "when one loses faith […]" (antecedent [lfh]), "it is mandatory" (deontic operator [O]) to "listen to Mozart's Magic Flute" (consequence [lmf]): "lfh ⇒ O lmf".

(ix) any change in the content of each element creates a different norm (identity of norms based on the contingency of each element's content); in the antecedent: "wr (when it rains) ⇒ O lmf"; in the deontic operator: "lfh ⇒ F (forbidden) lmf"; or in the consequence: "lfh ⇒ O s (sing)".

Regarding the antecedent, the main point here is that, independently from other conditions expressed by the normative authority, a condition inherent to the possibility of exercising the action foreseen in the consequence has to be therein recognized.[31] This means that, regardless of others (necessarily expressed), all norms contain the (usually unexpressed) condition of the opportunity to perform the action deontically modalized.[32] Thus, when this condition is

28 Raz 1980: 72.

29 Something Raz points out in his relevant third guiding requirement (Raz 1980: 144).

30 Sartor 2009: 36, Nino 2003: 72.

31 von Wright 1963: 73.

32 As von Wright (1963: 73) puts it, it is the condition for performing the corresponding elementary acts (individual acts). On the conditions of the antecedent, Duarte 2012: 38.

not fulfilled (the action is not possible), the norm at hand is not applied, despite being in force like all the others within the set; when the condition is fulfilled (the action is possible), it is a necessary (and possibly sufficient) condition for triggering the consequence.

(x) in "when one loses faith in humanity it is mandatory to listen to Mozart's Magic Flute" (formally, lfh ⇒ O lmf), the antecedent has one expressed condition: "when one loses faith […]"; yet, it also has an opportunity condition (o) inherent to the action "to listen": it has to be read as "o ∧ lfh ⇒ O lmf".

(xi) in "o ∧ lfh ⇒ O lmf", the condition "o" is necessary but not sufficient to the obligation of listening to be applied (given "lfh"); however, in "everyone is allowed to sing" ("o ⇒ P s), the condition "o" is necessary and sufficient: whenever the action is possible, it is (effectively) permitted.

(xii) a N such as "o ⇒ P s" (everyone is allowed to sing), although in force at some point in space and time, it is only applied whenever the condition "o" is filled; there is no opportunity of singing when the addressee is a person in a coma: in such a situation, "o ⇒ P s" is not triggered.

Given its consequences on the analysis of legal positions, providing some precision to what is meant by the "opportunity" condition is of the utmost importance. Rigorously, it is not a mere reference to an external state of affairs where the exercise of the action at hand becomes possible (which is already presupposed). Differently, it is a condition entirely related to the mental and physical possibilities of acting, intrinsically linked to the "ought implies can" that underlies law.[33] Therefore, the deontic modalization of an action is only triggered whenever its performance is, in this sense, "internally possible". Of course, it is not a matter of personal skills as well, but a strict matter of (human) ability.[34]

(xiii) the opportunity condition in "everyone is allowed to sing" (o ⇒ P s) is not a reference to an external context, such as a score to follow (if one wants to sing something not memorized); it is related to the internal possibility of acting (singing): it is, then, an internal possibility condition (ip).

(xiv) the internal possibility condition in "ip ⇒ P s" is not related with personal skills as well; if Josepha is not capable of singing "Der Hölle Rache" as "Queen of the Night", this does not mean that the internal possibility condition is not met: she is nevertheless capable of singing.

Regarding the deontic operator, two points are relevant here. The first point concerns the fact that it is within this element that the deontic status of the ac-

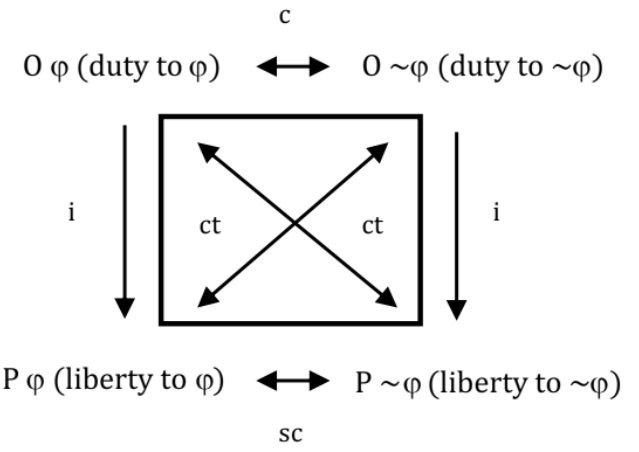
33 On "ought implies can", von Wright 1963: 108, Hintikka 1970: 84.

34 Which means that, from now on, "opportunity" only means "internal possibility". On the topic, von Wright 1963: 50, Nordenfelt 1997: 153.

tion foreseen in the consequence is defined. So, and using the square of deontic modalities, it follows that action φ can be forbidden, mandatory, positively permitted, or negatively permitted.[35] Given the accepted meaning of these words, from a prohibition it follows that the agent has a duty to ~φ; from an obligation, a duty to φ; from a positive permission, a liberty to φ; and from a negative permission, a liberty to ~φ.[36] Of course, action is here always understood both as an action in the strict sense (e.g., singing) and as an omission (e. g., not singing).[37]

(xv) the deontic status of an action φ gives rise to specific legal positions; therefore, obligations to φ and to ~φ confer the duties to φ and to ~φ (contraries [c]) and permissions to φ and to ~φ confer the liberties to φ and to ~φ (implicated [i]).

(xvi) the following square shows the correspondence between the four deontic modalities and the legal positions they confer with regard to some given action φ:



The second point concerns the deontic status of the "contradictory action" (the deontic status of ~φ when only φ is regulated).[38] The point is that there are good arguments to sustain that, like prohibitions and obligations, permissions can also be understood as a complete deontic modality.[39] That is, in the same

35 Alchourrón & Bulygin 1971: 60, Frändberg 2018: 101.

36 O'Reilly 1995: 285, Hurd & Moore 2018: 309.

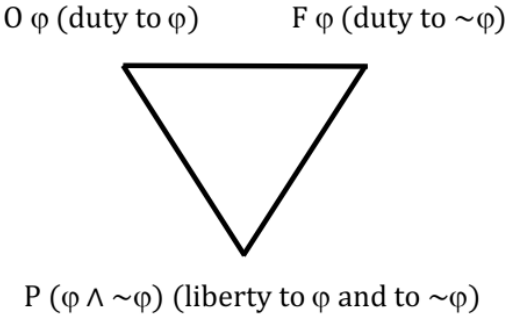
37 Hilpinen 1997: 85, Bach 2010: 50.

38 The predicate "contradictory" is used here because when φ is true ~φ is false. As it is known, the terminology is unstable (namely, "contrary action" or "complementary action"). Alchourrón & Bulygin 1971: 66, Ratti 2018: 87.

39 A complete deontic modality regarding action. It is, then, what can be designated as the "action completeness" of permissions.

way that the prohibition of φ entails ~φ to be mandatory, and the obligation of φ entails ~φ to be forbidden, the permission of φ can also be seen as ~φ to be permitted as well.[40] An understanding of permissions such as this one means that being permitted to φ (or ~φ) entails both φ and ~φ and that the agent has the "privilege" of choice: the agent has to decide her own course of action.[41]

(xvii) a bilateral permission is a complete deontic modality since it aggregates two unilateral permissions: with "everyone is allowed to sing" (ip ⇒ P s), both the act "singing" and the omission "not singing" are permitted; thus, the square of oppositions can be transformed into a triangle:



Two main reasons allow reading permissions as bilateral. The first reason regards the fact that, once the equivalences between O φ and F ~φ and between F φ and O ~φ are assumed, it turns out that permissions also ask for their own completeness. Consequently, one has to know if the permission of φ implies ~φ to be permitted as well or, differently, to be forbidden.[42] However, since when φ is permitted we do not know if ~φ is permitted or forbidden, and it would be rather odd to assume that it is forbidden (because absence about ~φ naturally leads to a weak permission), at least one can say that if the normative authority

40 Manero 2018: 44, Raz 1975: 161.

41 For the following triangle, Halpin 2003: 49. On the "facultative" operator (bilateral permission), Guibourg, Echave & Urquijo 2008: 135.

42 Action completeness is, naturally, relevant: given the unstable and also less informative nature of half permissions (Halpin 2014: 208), the agent has to know the deontic status of ~φ in order to manage her behaviour when under the permission of φ. D'Almeida (2016: 564) has recently criticized the Halpinian reduction (the triangle); as he says: since legal systems may fail to be consistent and that a conflict of legal duties may always arise, half liberties are not less stable or less complete than duties. It seems, though, that he misses the point. Stating the instability and the incompleteness of half permissions is a statement independent from conflicts of legal positions: differently from a duty, a half liberty is unstable and incomplete even if no conflicts arise. At the *prima facie* level, a *prima facie* duty is stable and complete and a *prima facie* half liberty is not.

does not explicitly state the prohibition, then ~φ has to be understood as permitted.[43]

The second reason rests on the undisputed fact that the meaning of the word "permission" (or the meaning of the deontic verbs used to express it), when normative authorities enact norm sentences, is clearly bilateral. In other words, whenever such authority states action φ as permitted, the pragmatic understanding of the community of speakers is that ~φ is permitted as well. Accordingly, since norms are linguistically expressed, it would not make much sense to think that the shared meaning of "permission" could somehow be substituted by its logical significance.[44] Accepting that permissive norm sentences confer bilateral permissions seems to be, then, pragmatically unavoidable.

(xviii) with "everyone is allowed to sing" (ip $\Rightarrow$ P s) there is a permission to carry out the action "to sing"; the norm sentence pragmatically means "P s $\wedge$ P ~s".

(xix) the triangle is now a line of contradiction; each imposition of φ or of ~φ contradicts the permission of φ and~φ; the permission of φ and ~φ contradicts either with the imposition of φ or of ~φ:

$O\ \varphi \veebar \varphi \leftrightarrow P\ (\varphi \wedge \sim\varphi)$

As for the consequence, the initial observation is that it is necessarily related to action, the object of the deontic modalization at hand.[45] Therefore, it makes no difference whether a norm authority simply describes a type of action (ought to do) or a state of affairs to be achieved (ought to be), as it is irrelevant whether it describes a specified action or a set of unspecified ones.[46] The same is even valid for the more distant cases of a "tû-tû" type of consequence: one may find here not only the action of conferring (or protecting) a status, but also the actions foreseen in the (remitted) subset of norms the status contains.[47] So, no matter the description, the consequence always regards action.

43 Ratti 2018: 92. Actually, for ~φ to be forbidden, φ would have to be mandatory, meaning that the normative authority was imposing something with a permissive deontic verb (which is, somehow, non-sensical). On weak and strong permissions, Hansson 2013: 201, Alchourrón & Bulygin 1991: 217.

44 Ratti 2018: 92, Guibourg, Echave & Urquijo 2008: 134.

45 Von Wright 1963: 71, Ross 1968: 107.

46 For the distinction between ought to do and ought to be, Castañeda 1972: 675. For the distinction between specified and unspecified actions, Lopes 2017: 476.

47 On "tû-tû", Ross 1957: 816. Also, Brożek 2015: 16.

(xx) an "ought to do" norm has a consequence about action: in "it is forbidden to lie (l)" (F l), the action is "lying"; an "ought to be" norm has a consequence also about action(s): in "it is mandatory to be virtuous (v)" (O v), "v" amounts to "carry out any act suitable to reach the state of virtuousness".

(xxi) a consequence with a specified action is about action: "everyone is allowed to sing" (P s); but the same is valid with a consequence with unspecified actions: "everyone is allowed to make music (mm)" (P mm) refers to actions (to play the Glockenspiel ∨ to sing "Der Vogelfänger bin ich ja" ∨ …).

(xxii) a "tû-tû" consequence is also about action: "virtuous people have the right to belong to Sarastro's Brotherhood" contains the action of conferring the "status (s)" (O s) and also remits to actions foreseen in the status subset of norms (O to tell the truth ∧ O to act with virtue ∧ …).

Actions foreseen in the consequence of a norm can be divided between deontic and non-deontic. A deontic action is one that produces deontic consequences; that is, the action that, operating at the legal level, changes the law or the existing legal positions (direct legal consequences).[48] A non-deontic action does not produce those consequences: it only works at the level of the empirical world.[49] When legal consequences follow from a non-deontic act, that is due to the fact that such act triggered the consequences foreseen in other norms (indirect legal consequences). Accordingly, and only taking into account what they are, non-deontic acts never imply direct legal consequences.

(xxiii) when a normative authority states that "it is forbidden to sing inside Sarastro's Temple", the law has been changed: a deontic action (to forbid singing inside the Temple) has been carried out; it is an action that directly produces legal consequences (independently from triggering other norms).

(xxiv) when the Three Ladies offer Tamino the Magic Flute, all their legal positions have been changed: a deontic action (transfer of ownership) has been carried out; it is an action that directly produces legal consequences (independently from triggering other norms).

(xxv) when Tamino moves from Java to Egypt and becomes a resident there, he has just carried out a non-deontic act; moving did not produce any direct legal consequences: changes in his legal positions are due to the fact that he now fills the antecedents of several Egyptian norms.

48 A deontic action is, then, the exercise of a competence norm. Ross 1958: 216, Hage 2005: 222.

49 A non-deontic action is the action carried out under any other norm (besides competence norms). This distinction matches the one between "normative action" and "action" in von Wright 1963: 75.

A final observation regarding action is necessary. Regardless of being a general or a particular norm, or containing a specified action or a set of unspecified ones, an action normatively foreseen is always a generic action: that is, it is a category (of action) that can be empirically instantiated (at some point in space and time).[50] So, when a norm modalizes action φ as forbidden, it means that all individual acts of φ-ing are prohibited, no matter other contextual variables or properties. On the other hand, φ being mandatory and doing φ are facts from different worlds: it is only the individual act of φ (as a token) that will contribute to realizing the ideal state of affairs the obligation of φ is.

(xxvi) a NS such as "it is forbidden to lie (l)" expresses a N (ip ⇒ F l) foreseeing in its consequence the generic action of "lying"; whenever Papageno lies (in a space-time uniqueness [when he says that he was the one who killed the serpent]), he is actually instantiating (and violating) "ip ⇒ F l".

(xxvii) "ip ⇒ F l" is an ideal state of affairs: whenever its conditions are met, some act ought to be omitted; realizing such ideal state of affairs depends, however, on a match with the real state of affairs (for instance, when Papageno says that the serpent was effectively killed by the Three Ladies).

3.2 A norm: Subjective components

Any deontic content establishing that an action, under some conditions, is permitted, forbidden, or mandatory is incomplete if it does not demarcate a circle of addressees: someone has to be permitted, prohibited, or obliged to do something. Such triviality points, though, to the relevant fact that norms also have a subjective element or, in other words, that addressees are also a necessary condition for the regulation of behaviour.[51] Independently of its specificities (for now), a set of people has to be identified at the connection between the deontic operator and the consequence: thus, "someone" has the duty to ~φ whenever φ is forbidden. This "someone" set may be designated as "primary addressees".[52]

(xxviii) the NS "it is forbidden to steal the Magic Flute (smf)" contains a N such as "ip ⇒ F smf", a prohibition that seems to be addressed to everyone; however, and regardless of how to delimitate its addressees, this norm foresees a set of primary addressees {PA}.

50 von Wright 1963: 36. Even action foreseen in an individual norm seems to be generic (differently, von Wright 1963: 23). The fact that a "genus" has only one token does not prevent it from being a "genus" (Davidson 2001: 142).

51 Bulygin & Mendonca 2005: 16, Ross 1968: 107.

52 The subsequent notation of norms (and because of addressees) follows the suggestions made in Herrestad & Krogh 1995: 2011 namely to make correlativity more explicit.

(xxix) "ip ⇒ F smf" could be written as "∀x (xsmfip ⇒ F xsmf)" (for all x, if there is an internal possibility to smf to all x, it is forbidden to smf to all x); for the reasons already mentioned, another notation is used : "ip ⇒ F $_{\{PA\}}$ smf", where the brackets stand for the set of primary addressees.

Identifying only a set of addressees is still a reductive understanding of norms. Once correlativity is taken into account, it follows that norms also comprise a second set, specifically, the one containing those holding the correlative position. Recognizing a second set of addressees has various (and complex) consequences on the analysis of norms, which must, however, be seen as an implication of accepting correlativity: if "someone" has the duty to φ (under the imposition of φ) and this means that "someone correlative" has the right to φ, then it follows that two positions are being given by the exact same norm.[53] This "someone correlative" set may be designated as the set of "secondary addressees".

(xxx) in "ip ⇒ F smf" (it is forbidden to steal the Magic Flute), a set of primary addressees was already acknowledged: those that are forbidden from stealing the magical instrument the Three Ladies gave to Tamino; therefore, that N has to be read as "ip ⇒ F $_{\{PA\}}$ smf".

(xxxi) however, once there is a set of persons forbidden from stealing the magical instrument, there must be a second set of people correlatively connected with the prohibition (the owners of the instrument): they are the secondary addressees {SA}; the norm can be formalized as: "ip ⇒ F $_{\{PA\}}$ smf $_{\{SA\}}$".

3.3 A complete norm: Adding up the elements

Adding the previous elements is enough to present what might be seen (for norm individuation purposes) as a complete norm. As just said, it comprises three material elements and two subjective ones, each one of them taken as a necessary condition for the regulation of behaviour. In the former, an action (with the mentioned variations), the conditions under which the deontic modalization depend (omnipresent due to the internal opportunity condition), and the deontic modalization itself. In the latter, the set of primary addressees and, given correlativity, the set of secondary addressees. Accordingly, regulation provided by a norm depends on the specific contents a normative authority assigns to each one of these elements.[54]

53 On addressees and correlativity, Frydrych 2019: 15, Lyons 1970: 54. Also, next point 9.

54 It should be noted that this norm morphology is a suggestion of norm individuation merely regarding legal positions. It is insufficient for broader purposes: known problems of norm individuation remain unconsidered and unexplained. For instance, what to do with exceptions (whether negative conditions are the antecedent of another norm or not), how to deal with disjunctive or conjunctive conditions in the antecedent (besides the internal possibility

(xxxii) the N in "Sarastro's Brotherhood has the duty to provide health care (hc) to citizens" has five elements: in "ip ⇒ O $_{\{Sarastro's\ Brotherhood\}}$ hc $_{\{citizens\}}$", an antecedent, a deontic mode, a consequence, and two sets of addressees are recognizable (however, the antecedent is not expressed).

(xxxiii) the N in "everyone is allowed to sing" has five elements: in "ip ⇒ P $_{\{physical\ persons\}}$ s $_{\{SA\}}$", an antecedent, a deontic operator, a consequence, and two sets of addressees are recognizable (however, one set of addressees and the antecedent are not expressed).

4 FIRST ORDER POSITIONS: LIBERTY AND DUTY NOT TO DEFEAT THE INTERNAL POSSIBILITY

A norm with a permission to carry out an action confers the primary addressee the legal position commonly called a "liberty".[55] Therefore, and regarding an action φ, this means that the addressee is allowed to do φ, which is also valid to the forbearance from acting if the permission is connected with the consequence ~φ. Whenever a permission is understood as bilateral (the common situation in contemporary legal systems, as mentioned above), a liberty comprises both φ or ~φ. In such a normative scenario, holding a permission involves the inherent choice of φ-ing or ~φ-ing. So, a liberty is a legal position of personal autonomy: it is the way to give the agent an option regarding her own course of action.

(xxxiv) in "everyone is allowed to sing" (ip ⇒ P $_{\{PA\}}$ s $_{\{SA\}}$), a primary addressee, for instance Pamina, has the liberty to sing; since it contains a bilateral permission, this norm allows Pamina to sing and not to sing (both are permitted by the same norm).

condition) or whether a consequence with alternative types of action signifies one or more norms (for these and other problems of individuation, D´Almeida 2009: 399, Duarte 2012: 39). However, individuation options such as these are here less relevant: for legal positions, what has been said is enough. On the other hand, it should also be noted that a relevant epistemic value is obtained here by clarifying the methodological presupposition that norm individuation is: it offers the tools to distinguish what regards norms and what regards the positions given by norms. It becomes clear, for instance, that claim-rights including enforcement is a problem of norm individuation and that liberties being the contradictory of duties is just a strict matter of legal positions.

55 For known reasons (Williams 1956: 1131, Wenar 2005: 226), "liberty" is effectively a better designation than the Hohfeldian "privilege" (Hohfeld 1919: 42).

(xxxv) the bilateral permission in "ip ⇒ P $_{\{PA\}}$ s $_{\{SA\}}$" gives each primary addressee a sphere of personal autonomy: thus, as one of them, Pamina may decide her course of action inside the scope of what is being permitted (a choice is given about singing).

The scope of a liberty is entirely demarcated by the generic action foreseen in the consequence. Accordingly, a specific liberty comprises the exercise of all possible variables of the action at hand: notwithstanding the difficulty in qualifying some individual acts as tokens of the generic action foreseen, this does not deny, despite such borderline cases, that to be permitted to do φ is to be permitted to do φ whatever φ-ing can be. No doubt, some variables of φ can intersect the antecedent of other norms and cause a conflict between norms; that is, however, a different problem.[56] At the *prima facie* level of a liberty, what matters is that when φ is permitted, it is permitted regardless of "how" the action is carried out.

(xxxvi) the scope of the liberty conferred by "ip ⇒ P $_{\{PA\}}$ s $_{\{SA\}}$" is demarcated by all variables of the action "to sing": this means that Pamina is allowed to "~s", to "s_1", to "s_2", and so on, or to "s_{1a}" or "s_{1b}", or "s_{2c}" or "s_{2d}", and so forth; given the endless number of variables and their endless possible combinations, variables of the action "to sing" are infinite.

(xxxvii) within that scope, some variables of action may intersect the antecedent of other norms (with their own deontic modalization); thus, if Pamina sings something seriously attacking the honour of Monostatos, then she also triggers the N in "it is forbidden to harm personal reputation"; however, her singing is still a *prima facie* permitted act exclusively under "ip ⇒ P $_{\{PA\}}$ s $_{\{SA\}}$".

Accepting that the exercise of a liberty comprises all variables of the action at hand does not mean that the permissive norm gives a different legal position (a different liberty) for each one of the possible courses of action. Understanding the difference between the legal position itself and the variables of the action foreseen is crucial. While variables of action regard the various ways by which the agent can perform the action, the legal position conferred by the permissive norm is always unique: an agent is always exercising the exact same liberty to φ when she chooses to do φ in one way or another.[57] It nearly goes without saying, then, that variables of action are not averse to the atomicity of a specific liberty.

56 On conflicts and the underlying distinction between *prima facie* and *all norms considered* rights, Borowski 2000: 43, Kumm 2007: 139.

57 Halpin 1997: 120, Ross 1958: 184. On the other hand, this is not to be confused with the Hohfeldian distinction between paucital and multital positions (Hohfeld 1919: 73). While the paucital position refers to the uniqueness of the same position due to a directed correlativity, the premise above refers to the uniqueness of the position despite all the possible tokens

(xxxviii) with "ip ⇒ P $_{\{PA\}}$ s $_{\{SA\}}$", variables such as "~s", "s_1", "s_2", "s_{1a}" "s_{1b}", "s_{2c}", or "s_{2d}", for instance, are just different ways to exercise the liberty to "s"; no matter which is the combination of variables chosen by Pamina in the individual act she always exercises the same atomic position.

As follows from the internal possibility condition, the exercise of a liberty is dependent on such possibility: the holder of the liberty to φ can exercise the legal position if she is in a condition to do so. Such internal possibility is, then, a necessary condition for the exercise of a liberty. However, if an impossibility of exercising that position might arise from some limitations of the holder, it can also arise from the action of third parties whenever they defeat the internal possibility of the liberty holder to act.[58] Accordingly, if in the former there is no connection between the holder and the secondary addressees, in the latter, it is a fact that impossibility is only due to how these behave regarding the holder's act.

(xxxix) with "ip ⇒ P $_{\{PA\}}$ s $_{\{SA\}}$", Pamina has the liberty to sing; if Pamina is in a comatose state, she cannot sing, a scenario preventing the norm from being triggered: although in force, the permission is not applied at all; here, secondary addressees are, however, irrelevant for such effect.

(xl) however, Pamina can be prevented from singing because Monostatos has knocked her unconscious; such scenario prevents the norm from being triggered as well: the permission is not applied to her; this impossibility, however, is totally due to the action of Monostatos.

An internal impossibility due to how secondary addressees act means that they control that condition of the antecedent: if they defeat possibility, there is an impossibility; if they do not defeat it, then the condition can be met and the holder of the liberty can choose whether to act or not. With this scheme, secondary addressees become decisive for the liberty in itself.[59] And when a SA set agent defeats the internal possibility of a liberty holder, she is not just cancelling the exercise; she is, furthermore, denying the deontic fact that the liberty holder is permitted to act. Ultimately, such defeat turns out to be exactly the same as removing that specific liberty holder from the set of PA agents.

---

of the generic action foreseen. On paucital and multital rights in Hohfeld, Barker 2018: 592, Frydrych 2018: 330.

58 Von Wright 1963: 55. Also, Navarro 2019: 69, Spena 2012: 171.

59 It is important to note that defeating the internal possibility is not the result of a conflict between the permission and any other norm. Under the present norm individuation approach, only the permission at hand is being considered: therefore, it is the possibility to *prima facie* exercise the liberty that can be defeated.

(xli) with "ip ⇒ P {PA} s {SA}", Pamina has the liberty to sing; when Monostatos knocks her unconscious, preventing her from singing, he is preventing her from exercising the liberty at hand; however, Monostatos is also preventing "ip ⇒ P {PA} s {SA}" from applying on such occasion.

(xlii) when Monostatos defeats Pamina's internal possibility to sing and, consequently, prevents "ip ⇒ P {PA} s {SA}" to be applied, Monostatos affects much more than her singing; this becomes clear when seeing that his act amounts to changing the norm into "ip ⇒ P {PA unless Pamina} s {SA}".

An example such as this, shows how the Hohfeldian liberty ↔ no-right line of correlativity is incomplete: φ being permitted is not a sufficient condition for the liberty to be applied (for a token of φ to be the case). And it is incomplete because another necessary condition is required: restricting the secondary addressees to not defeat the internal possibility to act.[60] It is only with this imposition that the normative authority is not enacting a "self-defeasible norm": a norm that can be defeated by an agent belonging to the SA set (and without any conflict of norms). The "deontic completeness" of the permission depends, thenceforth, on taking in the duty not to defeat.[61]

(xliii) by defeating Pamina's internal possibility to sing, Monostatos prevents "ip ⇒ P {PA} s {SA}" from being applied; however, by changing that norm into "ip ⇒ P {PA unless Pamina} s {SA}", Monostatos shows the norm at hand as "self-defeasible": it can be defeated by an agent therein foreseen.

(xliv) thus, the completeness of "ip ⇒ P {PA} s {SA}" depends on a duty imposed on SA set agents to not defeat the internal possibility of PA set agents to act; this duty is, then, a necessary condition to such completeness: without it, applying a permission depends on the will of any SA set agent.

An example such as the one above also shows that the Hohfeldian liberty ↔ no-right line of correlativity amounts to a violation of Hume's guillotine: law is effectively changeable (and without power) whenever any member of the SA set wants that to be the case.[62] Any SA set agent is free (apparently under a weak permission) to remove any agent from the PA set, modifying the one originally

60 Which is a way to not accept the strange consequence Sartor (2006:106) seems to accept: "the very fact that an action is permitted is often sufficient to ensure a possibility of performing that action". In other words, it is a way to not accept that a permission sometimes confers a liberty and sometimes it does not.

61 From which it follows that the overall completeness of permissions depends on: (i) being bilateral, the previously mentioned "action completeness", and (ii) being associated with a duty not to defeat, the now mentioned "deontic completeness". Accordingly, the latter is a completeness regarding the sum of the necessary conditions for a permission to be deontically exercisable (and kept as enacted).

62 On Hume's guillotine, Woleński 2008: 21, Black 1969:101.

formulated by the normative authority.[63] The same cannot be said, however, when the liberty correlates with a duty not to defeat: with this correlation, law is not changed by a SA set agent; it is violated. So, when a permission is complete, a SA set agent preventing a PA set agent from exercising her liberty is simply breaching a duty.

(xlv) by changing the norm into "ip ⇒ P $_{\{PA\ unless\ Pamina\}}$ s $_{\{SA\}}$" (or creating the same effect), Monostatos (an agent without power) also shows that the Hohfeldian "no-right" is incompatible with Hume's guillotine: a mere fact (knocking Pamina unconscious) equals changing the law.

(xlvi) such assessment ceases to be valid if "O not to defeat" (addressed to SA set agents) is associated to "ip ⇒ P $_{\{PA\}}$ s $_{\{SA\}}$"; with this duty, Monostatos does not change "ip ⇒ P $_{\{PA\}}$ s $_{\{SA\}}$" when he knocks Pamina unconscious; he is simply violating the duty not to defeat.

All these considerations lead to what can be called "the permissions fork". That is: (i) either it is assumed that normative authorities enact complete permissions (deontic completeness) and the liberty conferred to PA set agents correlates with a duty not to defeat (held by SA set agents); or (ii), contrarywise, and for the reason of being almost deontically irrelevant, it is assumed that permissions are not "regulative norms" at all.[64] This is so since: (i) any SA set agent is free to block or compel the exercise of a liberty (not breaching the law while doing so); and (ii) any SA set agent may effectively change any permission enacted by a normative authority (and without power to carry out such change).

(xlvii) thus, "ip ⇒ P $_{\{PA\}}$ s $_{\{SA\}}$" is either a complete permission (and it is once "O not to defeat" is imposed upon SA set agents) or it is irrelevant regarding the regulation of behaviour: being within the system or not amounts to exactly the same regarding the agents the norm itself foresees.

Therefore, if normative authorities enact complete permissions (actually, mere "regulative permissions"), then it follows that the liberty conferred to PA set agents necessarily correlates with a duty not to defeat the internal possibility (held by SA set agents).[65] So, when the internal possibility condition and the counter-

63 On the no-right as a space of weak permission, Brown 2005: 344, Lindahl 2006: 335.

64 And "almost deontically irrelevant" since a positive permission will always contradict a prohibition and a negative permission will always contradict an imposition (Alchourrón & Bulygin 1991: 229). However, the occurrence of a contradiction is inconsequential for an effective regulation of action.

65 A proposition merely working at the conventional level of norm individuation and not presupposing any logical implication between permissions and "prohibitions to defeat ". On the common *non sequitur* regarding the prohibition of interferences in liberties, Hohfeld 1919: 43, Lyons 1970: 52.

party's co-action are taken into account, it becomes clear that, regarding other agents, tokens of φ are only exercisable if defeating is understood as forbidden.[66] Given the duality of necessity and sufficiency, and being such duty a necessary condition to the deontic completeness of permissions, it follows that a liberty to φ is a sufficient condition for the SA set agents to bear a duty not to defeat.[67]

(xlviii) if "O not to defeat" is a necessary condition to "ip $\Rightarrow$ P $_{\{PA\}}$ s $_{\{SA\}}$" to be applied, then it follows that "ip $\Rightarrow$ P $_{\{PA\}}$ s $_{\{SA\}}$" is a sufficient condition to "O not to defeat"; therefore, "ip $\Rightarrow$ P $_{\{PA\}}$ s $_{\{SA\}}$" implies that SA set agents are under a duty not to defeat the internal possibility of singing.

A scheme such as this has the consequence that a permissive norm, as the basis for a liberty, also has to take into account the deontic modalization governing the behaviour of SA set agents. Therefore, besides the original sequence of an antecedent followed by a deontic operator and a consequence, a norm that confers a permission of φ also entails a sort of "second norm" expressing the (additional) necessary deontic condition for the completeness of the liberty at hand. It is important to note, however, that such complement depends exactly on the same condition: preventing the exercise of a liberty also depends on its own internal possibility and, for this reason, it becomes irrelevant whenever it is impossible.

(xlix) the N in "everyone is allowed to sing" can be formalized, associating the implied "O not to defeat", as "(ip $\Rightarrow$ P $_{\{PA\}}$ s) $\rightarrow$ (ip $\Rightarrow$ O $_{\{SA\}}$ ~dip)", where "dip" stands for "defeat the internal possibility" of exercising the main action (that is, regarding the action of PA set agents).

(l) as co-action, not to defeat also has its own "internal possibility"; when Monostatos is hidden inside the forest, he cannot knock Pamina unconscious (she is elsewhere); therefore, not to defeat is a necessary condition to bring about the result of action only whenever it is possible.

As follows from all these considerations, the position correlated with a liberty is closely connected with how permissive norms are understood. And, once it is assumed that permissions also entail a correlativity line as any other norm, then the facts that the Hohfeldian "no-right" dissolves the difference between strong and weak permissions and presupposes pointless permissive norms must also be acknowledged. Hence, along with the solid reasons that lead to seeing permissions as "action complete", there also seem to be compelling reasons to do the same regarding their "deontic completeness": recognizing a duty not to

66 By "co-action", it is meant the interdependent interaction without which the result of the main action cannot be brought about (not joint action). Tuomela 1984: 270, Pörn 1977: 77.

67 On the necessity-sufficiency duality, Sanford 1989: 179, von Wright 1951: 66.

defeat is the only way to understand permissions as norms effectively regulating behaviour.[68]

(li) one can conceive a legal system where ($time_1$) everything is weakly permitted except singing (forbidden); however, when the normative authority enacts the N expressed by "everyone is allowed to sing" ($time_2$), the forbidden action becomes strongly permitted.

(lii) since the Three Ladies do not want Papageno to sing (in order to punish him for his lies), they are free in $time_1$ to put a padlock on his lips; the problem is that under the liberty ↔ no-right correlativity they are still free to do it in $time_2$; so, the permission enacted is pointless.

(liii) and it is pointless because: (i) a possible revocation of the prohibition (creating a weak permission) would be exactly the same as enacting the strong permission; and (ii) the system shows itself pragmatically identical in $time_1$ and in $time_2$ (it is legitimate to use the padlock in both).

Therefore, a permissive norm creates a line of correlativity connecting a "liberty" to a "duty not to defeat the internal possibility". Within this correlativity, secondary addresses are under such duty, which means that their atomic position also has: (i) a specific content, and (ii) a specific deontic modalization.[69] Regarding the latter, a permission connected to a set of agents puts the agents of the correlative set under the contradictory deontic modality: while members of the PA set are permitted to do φ (and ~φ), members of the SA set are under an obligation not to defeat the internal possibility of φ-ing (and ~φ-ing and even choosing between φ and ~φ).

(liv) the answer to the legal question, "how ought Monostatos behave regarding Pamina's act of singing" is given by the permission itself; from "$(ip \Rightarrow P_{\{PA\}} s) \rightarrow (ip \Rightarrow O_{\{SA\}} \sim dip)$" it follows that Monostatos is under an obligation not to defeat her internal possibility to do so; evidently, all SA set agents are under such obligation (the contradictory of the permission foreseen to PA set agents).

As regards the former (the content of the duty not to defeat), it is worth noting that it is inherently connected with the internal possibility condition

68 The next example is a variation of the famous Guibourg's "Toro Sentado" example (Guibourg, Echave & Urquijo 2008: 155). It is worth to note, though, that the original example seems to be partially misleading: the effect recognized to permissions when Toro Sentado appoints a subordinated Minister (permissions prevent the enactment of contradictory norms by the Minister) actually does not come from the permission in itself. Differently, it comes from the superiority of the permission enacted by Toro Sentado given by the hierarchy between the two bodies. On the original example, Alchourrón & Bulygin 1991: 236, Atienza & Manero 1998: 91.

69 Unveiling the topic (but solving it outside atomicity), Lindahl 1977:126. Also, Sergot 2013: 400.

(understood as above), from which it follows that it is strictly demarcated by the acts that somehow block or compel the liberty holder regarding the exercise of her position (and just that).[70] So, a duty not to defeat, being related to a main action φ only assigned to the first pole of the correlativity line, comprises a variable content (φ´) formed by whatever can cease the mental and physical possibilities of φ-ing and ~φ-ing (and choosing). Understandably, whatever might go beyond such scope has to be seen as already outside the content of this (adaptative) duty.

(lv) "defeating the internal possibility" is merely to defeat the internal possibility condition, which is the same to say that Pamina's mental and physical possibilities to sing have to be kept intact; anything beyond this scope is not within the object of the duty.

(lvi) thus, if Pamina's singing becomes unnoticed because Monostatos is simultaneously singing in a particularly brilliant way, he is not breaching his duty not to defeat her internal possibility; he is just exercising his own permission to sing.

Accordingly, it is totally outside the content of the duty not to defeat the understanding by which this legal position involves the acts suitable to undermine the purposes intended by the liberty holder: conceivable acts that may prevent the success aimed by the holder with the exercise of her liberty have nothing to do with the internal possibility condition.[71] A duty not to defeat is not about making the exercise of the liberty pointless, but making it impossible: it is only in this way that the duty bearer blocks the internal possibility. Therefore, the usual criticism based on examples that merely illustrate possible ways of making the acts of the liberty holder unsuccessful seems totally off target.[72]

(lvii) when Papagena and Papageno both run to pick up the Glockenspiel that fell on the floor, Papagena is not defeating Papageno's internal possibility to run if she runs faster and picks up the Glockenspiel first (under "freedom of movement"); she would be defeating his internal possibility if she grabbed him to a point that he could not effectively run.

70 Defeating the internal possibility comprises both actions and forbearances as it includes them regarding a positive or a negative exercise of the liberty (preventing φ or ~φ). It involves, accordingly, and in Makinson´s terminology, an agent indexed and non-modulated interference (Makinson 1986: 417).

71 Spena 2012: 170 (although regarding the duty of non-interference).

72 Such as running faster (Simmonds 1998: 157) or speaking louder (Kramer 1998: 11). With similar examples, Williams 1956: 1144, Wellman 1997: 3.

4.1 Duty not to defeat and duty not to: Adaptative content

Bearing in mind the content of the duty not to defeat, as was roughly described above, it is important to know whether there is any difference between such duty and the duty not to (correlated with a claim-right). An answer to this question must be clearly affirmative: any confusion between them seems mistaken and no overlapping can be recognized (except, of course, for the mere fact that they are both duties). The first reason is that, within the norm's morphology (the position addressees have), a duty not to defeat is held by SA set agents while the holders of a "normal" duty not to are PA set agents (by definition). Rigorously, a duty not to defeat imposed on primary addressees just does not exist.

(lviii) "everyone is allowed to sing" foresees a duty not to defeat the internal possibility to SA set agents; "it is forbidden to lie" foresees a duty not to assigned to PA set agents; it is never the case that a duty not to defeat is imposed on PA set agents or that a duty not to is imposed on SA set agents.

It could be said that nothing prevents a normative authority from formulating a norm in a way that the duty not to defeat the internal possibility is assigned to PA set agents; for instance, "it is forbidden to interfere in the freedom to φ", an utterance that, moreover, would include a consequence with unspecified actions: to not interfere.[73] However, such an argument seems to confuse the sentence (not written in the conditional order of a norm) and the norm itself: such wording does not prevent the facts that a liberty is being given (a liberty as any other) and that the duty is totally related to a token of φ.[74] Irrespective of how it is written, the norm expressed imposes a duty not to defeat on SA set agents.

(lix) in "it is forbidden to interfere in the freedom to φ", a duty not to defeat the internal possibility is apparently given to PA set agents; however, the wording of the NS does not disturb the conditionality of the N, which effectively is "$(ip \Rightarrow P_{\{PA\}} \varphi) \rightarrow (ip \Rightarrow O_{\{SA\}} \sim\varphi')$"; materially, to not interfere in φ is also a content-adaptative duty dependent on what is (or will be) the PA set agent token of φ.

As follows from the first reason, a second and decisive reason arises from the difference regarding the content of the duty. Accordingly, while a duty not to regards an action somehow foreseen in a consequence, the content of a duty not to defeat the internal possibility is only apprehensible upon the act to be carried out by the liberty holder. It follows, then, that the duty not to defeat has an adaptative

73 The example above is presented as a possible expression of the duty not to defeat imposed on PA set agents; and it is not a strict theoretical hypothesis: for instance, the norm foreseen in article 5/6 of the Brazilian constitution.

74 On mismatches between norm sentences and norms, Grabowski 2009: 130, Schauer 1991: 23.

content, meaning that its scope is dependent on (and conditioned by) the possible individual acts to be taken by the PA set agent.[75] In other words, the content of a duty not to defeat is "content-adaptative" and, for this reason, is shaped by the counterparty's φ-ing or ~φ-ing (which is never the case with a duty not to).

(lx) in "it is forbidden to make music", a duty not to is imposed on PA set agents (norm-shaped duty); its content is to forbear the exercise of the action foreseen (here, unspecified actions); it is not conditioned, though, by the possible course of action to be taken by SA set agents; thus, Papageno omitting to play the Glockenspiel or singing happens irrespective of how third parties act.

(lxi) in "it is allowed to make music", a duty not to defeat is imposed on SA set agents (counterparties-shaped duty); its content regards the internal possibility condition, being adaptative to the PA set agent act; thus, the Three Ladies defeating Papageno's internal possibility depends on his exercise of the liberty: if he sings, putting a padlock on his lips (not successful if he plays the Glockenspiel).

4.2 Liberties are protected: Weak and strong protections

Accepting that a liberty correlates with a duty not to defeat the internal possibility, merely on the basis of a single norm, means that there is no such thing as "naked" (or "unprotected") liberties.[76] As soon as a norm allows action φ, it is immediately the case that the liberty conferred is already protected by a duty not to defeat, preventing the exercise of the liberty to be legitimately disturbed in its internal possibility. It is surely a weak protection, since it merely covers a reduced (although decisive) spectrum of the set of possible accomplishments offered by the position. Nonetheless, beyond that scope, no protection is given by the duty not to defeat (solely from the permission at hand).

(lxii) "$(ip \Rightarrow P_{\{PA\}} s) \rightarrow (ip \Rightarrow O_{\{SA\}} \sim dip)$" stands for the N expressed in "everyone is allowed to sing"; as follows from its content, Papageno has a liberty to sing and all the SA set agents have the duty not to defeat his internal possibility to do so (to not put a padlock on his lips, for instance); evidently, Papageno is not protected (only with that norm) against Papagena not listening to him or against Tamino singing so loud that Papageno actually fails to seduce Papagena with his marvellous voice.

Nothing prevents a normative authority from increasing the protection a liberty already grants by itself and from introducing into the set other norms forbidding specific (and non-adaptative) ways of interference: that is, enacting

75 On the adaptative nature of some interaction, Tuomela 2007: 152. Also, Miller 2004: 5.

76 On naked (or unprotected) liberties, Bentham 1838: 218, Alexy 2002: 144.

prohibitions to act against any of the variables of the action permitted.[77] With such third norms, the degree of protection given to a liberty increases, providing a higher level of protection to the liberty at hand. So, instead of distinguishing between naked and vested liberties (or unprotected and protected), it seems that the proper distinction is between liberties with weak and strong protections: in the latter, other norms reinforce the protection already offered by the duty not to defeat.

(lxiii) by conferring a duty not to defeat, "$(ip \Rightarrow P_{\{PA\}} s) \rightarrow (ip \Rightarrow O_{\{SA\}} \sim dip)$" immediately gives some protection to the liberty: it is a weakly protected liberty; when the normative authority enacts "absolute silence is mandatory when someone sings", Papageno's liberty to sing becomes strongly protected: besides the weak protection (as seen), he now also has the protection given by this latter norm (it becomes a strongly protected liberty [Tamino cannot sing when Papageno is singing]).

Since other legal positions are given by those norms reinforcing the protection the liberty already has, it follows that a strongly protected liberty is actually an aggregate of atomistic legal positions, specifically the liberty in itself and all the claim-rights conferred by each one of the prohibitions. If X has the liberty to φ and Y is forbidden to φ′ (an action against the exercise of that liberty), then the strongly protected liberty X has is the sum of her liberty with the claim-right towards Y not to do φ′. And this seems to be the proper scheme to explain Hart's protective perimeter: its content is just the aggregate of claim-rights that legal systems confer when actions that might trouble liberties become forbidden.[78]

(lxiv) as seen, "everyone is allowed to sing" with "absolute silence is mandatory when someone sings" makes that liberty strongly protected; however, it is an aggregate of atomistic positions: the liberty to sing with the claim right to "absolute silence".

(lxv) Papageno's protective perimeter is formed, regarding his liberty to sing, by a compound of claim-rights coming from, and for instance, "absolute silence is mandatory when someone sings", "it is forbidden to cut one's vocal cords", or "it is forbidden to kill", and so forth.

A unique exception to such a scheme is found in weak permissions: those that pragmatically cover an action not explicitly allowed (not regulated). Without a norm covering an action, it seems that such action may be carried out (operating the absence of law as a pragmatic permission) even though no intrinsic

77 Manero 2018: 45, Ross 1958: 166.

78 Hart 1982: 171. On the other hand, this also shows why Hart's protective perimeter is irrelevant within an atomic approach to legal positions.

protection exists for such exercise.[79] A main reason sustains this "exception" to the correlativity between liberties and duties not to defeat: it would be rather anomalous (and here rather incoherent) to accept that one may have a duty not stated by any norm of the set. Thus, if no duty can follow from the absence of a norm, then these "vacuum liberties" do not even have a weak protection.

(lxvi) within a legal system where no norm allows wearing bird-feather clothes (and no general permission of action exists, of course), Papagena's "liberty" to dress as she does is a "vacuum liberty": she may dress that way only because the absence of a norm stands for pragmatic permission.

(lxvii) Papagena's "liberty" to wear bird-feather clothes, under the conditions now identified, does not correlate with a duty not to defeat: "vacuum liberties" are "empty" in the sense that they are not based on norms that could support the ascription of duties to third parties.

5 FIRST ORDER POSITIONS: DUTY AND CLAIM-RIGHT

When a norm has an imposition or a prohibition, a duty is normatively conferred to agents of the PA set; if it is an imposition, it is duty to φ (duty to), but if it is a prohibition, it is a duty to ~φ (duty not to).[80] Independently of the generic action foreseen in the consequence, the duty is to be exercised through the individual act performed by an agent of the PA set: it is her conduct (an act in the strict sense or an omission) that leads to bringing about a certain result (somehow, the "service" to be provided to the holders of the correlated position ["claim-right" holders]).[81] So, impositions and prohibitions give rise to the correlativity line duty ↔ claim-right (the second one in first order positions).

(lxviii) "it is mandatory to pay 500 florins (£500) per month to personal employees" expresses a N imposing the duty of employers to pay £500 per month and the claim-right of employees to receive that amount of money; this N sustains a duty ↔ claim right correlativity line; so, as an agent of the PA set, Sarastro has the duty to pay £500 per month to Monostatos (his personal employee), who is, as a SA set agent, the (a) claim-right holder.

79 Besides the previous references, Bulygin 2010: 285, Mendonca 2007: 54. On the universal law of liberty, Bentham 1970: 120. On the other hand, it is exactly the presupposition that such universal law gives rise to legal positions that explains the completeness of the Hohfeldian normative system (Biasetti 2015: 955).

80 O'Reilly 1995: 285, Sreenivasan 2010: 466.

81 Borrowing the famous Benthamian expression (Bentham 1970: 57).

(lxix) "it is forbidden to enter into Sarastro's Temple during a solemn assembly of the Brotherhood" expresses a N imposing on everyone the duty not to enter into the Temple during those assemblies and conferring the Brotherhood the claim-right to others to stay out; this N sustains a duty ↔ claim right correlativity line; so, as an agent of the PA set, Papagena has the duty to stay out of the Temple (in the condition mentioned), being the Brotherhood, as the SA set agent, the claim-right holder.

In the structure of imposition or prohibition norms, there is also an antecedent; and, independently of other conditions possibly expressed, there is also an internal possibility condition. As happens with permissive norms, this is a necessary condition for the norm to be applied and, consequently, for the duty to be the case.[82] In the same way as with permissions (as discussed above), the individual act that stands for the compliance of the duty cannot take place (no matter if an imposition or a prohibition) if the duty bearer faces an internal impossibility. It can be said, therefore, that the possibility of a token of the main action is also a necessary condition for the exercise of the duty.

(lxx) the N in "it is mandatory to pay 500 florins (£500) per month to personal employees" can be initially formalized as "ip $\Rightarrow$ O $_{\{PA\}}$ £ 500/month $_{\{SA\}}$"; naturally, if Sarastro has his hands tied when he is going to pay Monostatos, he cannot give the money to his personal employee.

(lxxi) the N in "it is forbidden to enter into Sarastro´s Temple (est) during a solemn assembly (sa) of the Brotherhood" can be initially formalized as "ip $\wedge$ sa $\Rightarrow$ F $_{\{PA\}}$ est $_{\{SA\}}$"; naturally, if Papagena is knocked unconscious and taken into the Temple, she did not enter: her body has been put there.

There is, however, a significant difference in the role played by the internal possibility condition in permissions, on the one hand, and in impositions and prohibitions, on the other. The point is the following: while in permissions such possibility is a necessary condition to bring about the result of action, in impositions and prohibitions it is just a contributory condition; that is, the internal possibility is only a necessary condition to act, which is in itself another necessary condition to bring about the result at hand.[83] Putting differently: in norms that are impositions and prohibitions, the antecedent's internal possibility condition is merely the first step in a chain of necessary conditions.

82 Von Wright 1963: 74.

83 Contributory condition (in causation) as a condition within a set of necessary conditions that are jointly sufficient, von Wright 1951: 148, Broad 1944: 16.

(lxxii) in "(ip ⇒ P $_{\{PA\}}$ s) → (ip ⇒ O $_{\{SA\}}$ ~dip)", not to defeat the internal possibility (not putting a padlock on Papageno's lips) is a necessary condition to bring about the result of action: if Papageno can open his lips, he can chose to sing and effectively sing (or even refraining from singing).

(lxxiii) in "ip ⇒ O $_{\{PA\}}$ £500/month $_{\{SA\}}$", the internal possibility (Sarastro not having his hands tied) is only, however, a necessary condition to another one (in order to bring about the result of action): besides his hands being free, Sarastro only pays Monostatos if he gives him the money.

(lxxiv) in "ip ∧ sa ⇒ F $_{\{PA\}}$ est $_{\{SA\}}$", the internal possibility (Papagena not being knocked unconscious) is only, however, a necessary condition to another one (in order to bring about the result of action): besides being conscious, Papagena only omits entrance if she does not enter.

As a mere contributory condition, the internal possibility loses its relevancy in impositions and prohibitions: given the direction of causation and its asymmetry, the second necessary condition (to act or omit) succeeds the first one (internal possibility), which means that the first condition of the chain is consumed by the exercise of the duty.[84] As is clear in the following examples, any exercise of the duty imposed or prohibited necessarily presupposes the presence of the internal possibility condition. But such causal direction is not inconsequential: it implies to this correlativity line that SA set agents deal specifically with the most proximate condition (in this correlativity line, the individual act under the duty).

(lxxv) in "ip ⇒ O $_{\{PA\}}$ £500/month $_{\{SA\}}$", the result of action is "transferring the money to the SA set agent"; being free to pay is prior to "transferring the money to the SA set agent" (the latter presupposes the former, but not vice-versa); thus, correlativity here connects SA set agents with the most proximate condition: their role in this correlativity line (co-action) directly faces the action foreseen.

(lxxvi) in "ip ∧ sa ⇒ F $_{\{PA\}}$ est $_{\{SA\}}$", the result of action is "staying off the property of the SA set agent"; being conscious is prior to "staying off the property of the SA set agent" (the latter presupposes the former, but not vice-versa); thus, correlativity here connects SA set agents with the most proximate condition: their role in this correlativity line (co-action) directly faces the action foreseen.

84 On the direction of causation and its consequences, Sanford 1984: 57, Mackie 1965: 261.

(lxxvii) in "(ip ⇒ P $_{\{PA\}}$ s) → (ip ⇒ O $_{\{SA\}}$ ~dip)", the result of action is to (choose to) sing; having a padlock on the lips was the obstacle to that result (no other condition is necessary); thus, correlativity here connects SA agents with that condition: the role played by SA set agents in this correlativity line (co-action) directly faces the internal possibility condition (not the main action foreseen).

An analysis of action within the duty ↔ claim-right correlativity line shows that the result of action is also dependent on the specific co-action to be carried out by the holder of the claim-right: irrespective of the type of action foreseen, the result at hand cannot be brought about without the SA set agent interdependent agency.[85] An observation such as this points out that the SA set agent also plays a sort of "constitutive role" in this correlativity line (totally ignored in Hohfeld's scheme): actually, it is a variable contribution to the result that varies from effective cooperation (in which the agent acts by way of response) to mere passive action (in which the agents just accepts some external course of action)[86].

(lxxviii) under "ip ⇒ O $_{\{PA\}}$ £500/month $_{\{SA\}}$", Sarastro has to pay Monostatos £500 this month; for Monostatos to have the money, Monostatos probably has to meet his employer or, at least, if Sarastro goes to meet him, to put the money in his pocket (or under his mattress); if Sarastro pays by bank transfer, Monostatos has the passive action of not cancelling his bank account: he agrees with a state of affairs (have a bank account) in order to have another one (own £500).

(lxxix) under "ip ∧ sa ⇒ F $_{\{PA\}}$ est $_{\{SA\}}$", Papagena has to stay out of Sarastro's Temple; co-action is necessary to bring about the result; if a member of the Brotherhood compels Papagena to enter into the Temple, she will definitely enter (she probably does not if the member refrains from doing it); it is to be considered as well that any member of the Brotherhood might invite her to enter: in such case, and irrespective of anything else, a SA set agent is evidently contributing to prevent the result of action.

As can been seen in these examples, SA set agents must co-act in order to bring about the result of the act carried out by the PA set agent. However, such co-action also depends on its own internal possibility: if the SA set agent cannot co-act, it follows that her contribution to the result is absent.[87] When this is the case, one of two consequences follows: either (i) the duty held by the PA

85 On this interdependency (common effect requirement), Schmid 2009: 229, Pacherie 2011: 174.

86 On cooperative agency (i-intentions), Tuomela 2000: 4, Miller 2004: 5. On passive action, Mele 1997: 137, Zhu 2004: 299.

87 Impossibility to co-act might arise from the most different causes (e.g., the SA set agent is imprisoned or in a coma). However, it is always the case when the PA set agent does not act

set agent is not (fully) complied with, although as a result of the SA set agent's impossibility; or (ii) the result is still achieved despite the impossibility (omission works). Be it as it may, whenever co-action is possible, the SA set agent contribution is decisive. So, and again, it can be said that co-action is necessary whenever it is possible.

(lxxx) under "ip $\Rightarrow$ O $_{\{PA\}}$ £ 500/month $_{\{SA\}}$", Sarastro has to pay Monostatos £ 500 this month; if Sarastro does not meet Monostatos to pay him, it becomes irrelevant what Monostatos does (and he does not receive the money); but if Sarastro pays by bank transfer, impossibility to co-act does not block the result (yet, if there is possibility, Monostatos can always cancel his bank account).

(lxxxi) under "ip $\wedge$ sa $\Rightarrow$ F $_{\{PA\}}$ est $_{\{SA\}}$", Papagena has to stay off Sarastro's Temple; if a member of the Brotherhood cannot compel Papagena to enter into the Temple, she either enters or not only depending on her judgment; however, if a member of the Brotherhood has the possibility to interfere in the compliance of the prohibition, then refraining from doing it is necessary to the result.

As just mentioned, whenever it is possible, SA set agents have to co-act to bring about the result of the (main) action assigned to PA set agents. And in a close parallel with the duty not to defeat (in permissions), the content of their position is also adaptative: it is not normatively foreseen, and it also depends on how the PA set agent exercises her duty.[88] Accordingly, the position held by SA set agents in this correlativity line is only definable by the possible acts that coordinate with the act of the duty bearer when she is complying with her duty. In one way or another, a SA set agent will act or omit as a way to "manage the result of action" that is to be brought about with (and not only by) the duty bearer.[89]

(lxxxii) "ip $\Rightarrow$ O $_{\{PA\}}$ £500/month $_{\{SA\}}$" and "ip $\wedge$ sa $\Rightarrow$ F $_{\{PA\}}$ est $_{\{SA\}}$" both confer a duty $\leftrightarrow$ claim-right correlativity line; to bring about the result of action (to pay and to stay off), SA agents have to co-act in a variation coming from passive action to effective cooperation.

(violating the duty). Given the chain of necessary conditions, not complying with the duty amounts to surpass one (non-final) necessary condition.

88 Unpredictability about these co-acts decreases in proportion to what is normatively foreseen (the more the detail about the compliance of the duty, the less the unpredictability about the SA set agent co-action). Nonetheless, irrespective of the degree of detail, co-action is always adaptative.

89 By "managing the result of action" it is meant the adaptative co-acts carried out by the claim-right holder towards the actual or future exercise of the main action by the duty bearer (regarding the result of such action).

(lxxxiii) with "ip ⇒ O $_{\{PA\}}$ £500/month $_{\{SA\}}$", the claim-right holder (Monostatos) "manages the result of action" by effectively receiving or not receiving the money; as seen, Monostatos can accept the money and put it in his pocket, refuse to accept it, cancel his bank account, and so on.

(lxxxiv) with "ip ∧ sa ⇒ F $_{\{PA\}}$ est $_{\{SA\}}$", the claim-right holder (the Brotherhood) "manages the result of action" by letting Papagena stay out; as seen, any member of the Brotherhood can compel Papagena to enter (or not), might invite her, or even agree with her entrance.

Given that the content of a claim-right is to "manage the result of action" (a structural feature of the whole correlativity line), it seems that the SA set agent is free regarding the possible co-acts that can consubstantiate her contribution to bring about the result of action (either acts or forbearances).[90] And, rigorously, since the SA set agent is under no duty whatsoever (neither enacted, nor implied), it follows that such agent may either co-act to bring about the result of action or may also refrain from doing it. Thus, a duty assigned to a PA set agent correlates with a permission held by the claim-right holder, showing that this correlativity line also presents two contradictory deontic modalizations.

(lxxxv) considering the object and the deontic modalization of the claim-right position, the N expressed by "it is mandatory to pay 500 florins (£500) per month to personal employees" can be formalized as: "(ip ⇒ O $_{\{PA\}}$ £500/month) → (P $_{\{SA\}}$ mra)", where "mra" stands for "manage the result of action"; this means, consequently, that SA agents are *prima facie* allowed "to accept" and "not to accept" the result of the action to be carried out by PA agents.

(lxxxvi) considering the object and the deontic modalization of the claim-right position, the N expressed by "it is forbidden to enter the Sarastro's Temple during a solemn assembly of the Brotherhood" can be formalized as: "(ip ∧ sa ⇒ F $_{\{PA\}}$ est) → (P $_{\{SA\}}$ mra)", where "mra" stands for to "manage the result of action"; this means, consequently, that SA agents are *prima facie* allowed "to accept" and "not to accept" the result of the action to be carried out by PA agents.

5.1 Waiving: Weak and strong waiving and non-waivability

Within the duty ↔ claim-right correlativity line, the term "waiving" has been used with some ambiguity. It seems to be used as meaning either: (i) to authorize the duty bearer not to act (weak-waiving); or (ii) to extinguish the

90 It is relevant to note that omissive co-action is not absence. Since there is always an internal opportunity condition (presupposing an external opportunity), omission has the "factual proximity" that differentiates one from the other (Bernstein 2016: 2577, Clarke 2012: 137). Accordingly, the Brotherhood is not omitting (in its co-action) when Papagena is at the forest with Papageno (the Brotherhood is just doing nothing *simpliciter*).

legal position (strong-waiving).[91] Such ambiguity, along with preventing accuracy and precision, also prevents the identification of a major difference: in fact, allowing not to act is something quite different from extinguishing the position. In the former, the claim-right holder agrees with the non-compliance of a token of the duty, but the position remains totally in force. In the latter, the legal position itself is cancelled, implying a proper and effective modification of the law (the existent positions).

(lxxxvii) under "(ip ∧ sa ⇒ F $_{\{PA\}}$ est) → (P $_{\{SA\}}$ mra)", Sarastro is just excepting her restriction from entering the Temple if he occasionally invites her to enter: such authorization does not mean, naturally, that "(ip ∧ sa ⇒ F $_{\{PA\}}$ est) → (P $_{\{SA\}}$ mra)" is no longer in force and not applicable on other occasions.

(lxxxviii) under "(ip ∧ sa ⇒ F $_{\{PA\}}$ est) → (P $_{\{SA\}}$ mra)", Sarastro is extinguishing Papagena's position (and the position of other SA set agents) if he revokes "(ip ∧ sa ⇒ F $_{\{PA\}}$ est) → (P $_{\{SA\}}$ mra)"; in this case, Papagena (and the other SA set agents) are no longer under any duty to stay out of the Temple.

Accordingly, the tools required to realise each one of these "re-actions" towards the duty are different: while in weak-waiving the claim-right holder is just exercising her correlative permissive position (the deontic modalization governing the claim-right), in strong-waiving the claim right holder is extinguishing the legal position (and effectively changing the law), something she can only accomplish if she has the power to do so.[92] Hence, the duty cannot be extinguished without such power (the law cannot be modified). However, even without it, the claim-right holder may still always weakly waive the PA set agent from her individual act of compliance (as seen, she is permitted to "manage the result of action").

(lxxxix) under "(ip ∧ sa ⇒ F $_{\{PA\}}$ est) → (P $_{\{SA\}}$ mra)", Sarastro is just weak-waiving Papagena from the duty to stay out of the Temple if he occasionally invites her to enter: when Sarastro waives Papagena from her duty, he is merely exercising his permission to manage the result of action.

(xc) under "(ip ∧ sa ⇒ F $_{\{PA\}}$ est) → (P $_{\{SA\}}$ mra)", Sarastro is strong waiving Papagena's position (and the position of other SA set agents) if he revokes "(ip ∧ sa ⇒ F $_{\{PA\}}$ est) → (P $_{\{SA\}}$ mra)"; however, revoking the N at hand presupposes that Sarastro has the power to do so.

This difference is crucial for understanding the waiving of constitutional claim-rights (or even statutory or administrative rights whenever conferred by general norms). Understandably, a SA set agent of a duty given by a constitution-

91 On the difference between waiving and nearby concepts, Wellman 1997: 45. Strictly connecting waiving with power, Kramer 2001: 60, Preda 2015: 410. Differently, Martin 2003: 42.

92 On removing norms from the set (and power), Mendonca 2000: 146, Ferrer 2000: 144.

al norm does not have the power to change the constitution: this competence is usually assigned to parliaments and under very specific and formal procedures.[93] Yet, when the SA set agent waives a fundamental claim-right, she is not extinguishing the legal position in itself; she is merely exercising the permission she holds as a claim-right holder. So, it almost goes without saying that the duty is not extinguished and that it remains exigible in other space and time conditions.

(xci) "access (a) to third parties correspondence (c) is forbidden" is a NS in the constitution expressing the N "(ip $\Rightarrow$ F $_{\{PA\}}$ ac) $\rightarrow$ (P $_{\{SA\}}$ mra)"; when Monostatos and the Queen of the Night allow the Three Ladies to read the letter he wrote to her explaining why he wants now to be at her service, they are not extinguishing the constitutional claim-right to secrecy of correspondence.

(xcii) if "(ip $\Rightarrow$ F $_{\{PA\}}$ ac) $\rightarrow$ (P $_{\{SA\}}$ mra)" is a constitutional norm, it is evident that Monostatos and the Queen of the Night do not have the power to eliminate such a norm from the legal system (and to extinguish this constitutional claim-right); however, if this does not prevent them from weak-waiving, it also does not mean that everyone ceases to be under the duty constitutionally foreseen.

A distinction between weak and strong waiving becomes less clear when the duty is only exercisable by one individual act: that is, when allowing the duty bearer to not exercise a token of the duty simultaneously means that the duty ceases to exist. However, such overlapping between weak and strong waiving does not deny that power is indispensable to changing the law: even if the claim-right holder is free to weak-waive, she cannot extinguish the duty without having the proper power. But this is not particularly complex: an overlap between weak and strong waiving necessarily means the uniqueness of the legal position at hand and this only happens in private law (where power is usually aggregated).[94]

(xciii) when the Three Ladies agree with Papageno that they will give him the Glockenspiel, he is subsequently permitted to not accept the instrument; by doing this, Papageno is weak-waiving the duty the Three Ladies have under such agreement; however, while waiving, he is also extinguishing the Three Ladies' duty as well; anyway, Papageno may waive the duty (and actually extinguish it) only because he has the power to enter into contracts and to cease them (as usually conferred in private law).

93 For instance, Mendonca 2018: 51, Guastini 1993: 72.

94 Since legal systems usually have a general competence norm to "private agents" (Lindahl 2017: 161, Ross 1968: 203).

(xciv) if there was a N imposing that a Glockenspiel be given to people wearing bird-feather clothes, a possible weak-waive would not extinguish the legal position: the claim-right to Glockenspiels would remain in the system; if a public body decided to give Papageno a Glockenspiel, his possible weak-waive would not extinguish the legal position: such donation presupposes a previous (general) norm foreseeing such position (rule of law) and he would be just waiving a token of that duty.

A duty with only one token without a norm conferring power is not the sole normative situation where the claim-right holder is limited regarding her permission to weak-waive: two more normative situations must be taken into account.[95] The second one comes from the normative scenario where the result of the main action is not divisible by each SA set agent. When the result of the action has this conjunctive effect in SA set agents, given that it cannot be individually experienced by them, it follows that only a collective weak-waiving (by the whole set) would be admissible as an exercise of the claim-right holder's position. For this reason, individual weak-waiving by each claim-right holder is inadmissible.

(xcv) with "Sarastro has the duty to promote a healthy environment (he)", the legal system has a N such as "(ip $\Rightarrow$ O $_{\{Sarastro\}}$ he) $\rightarrow$ (P $_{\{SA\}}$ mra)"; this N imposes on Sarastro the adoption of various acts suitable to achieve that result; however, none is individually experienced by each agent of the SA set.

(xcvi) given that the unspecified actions foreseen in "(ip $\Rightarrow$ O $_{\{Sarastro\}}$ he) $\rightarrow$ (P $_{\{SA\}}$ mra)" have this conjunctive effect, only a collective waiving from all the SA set agents would be admissible; it follows, then, that each of the SA set agents may not individually weak-waive Sarastro's duty.

A third normative situation where the claim-right holder is limited to weak-waiving is the one arising from the normative scenario where her permission is in conflict with a prohibition to waive the exact same duty: as a matter of fact, nothing prevents a normative authority from enacting a norm by which SA set agents are forbidden to waive.[96] If a norm such as this is enacted, it follows that a conflict arises between the permission (to weak-waive) and the prohibition (to weak-waive): they have exactly the same object. Accordingly, a balancing has to be carried out and the all norms considered position of SA agents depends on the prevailing norm: if the prohibition prevails, waiving is inadmissible.[97]

95 It seems that theories of rights do not have a systematic enumeration of the conditions by which a right is or becomes unwaivable. As far as it is known, the topic has been treated solely on the basis of specific rights and without any analytical justification. For instance, Cruft 2013: 199.

96 Which is not so unusual (e.g., the minimum wage case). Wenar 2013: 218, Steiner 2013: 241.

97 It is difficult to understand how a prohibition of waiving could lead to a definitive unwaivability: a normative conflict is unavoidable, and the issue is only to know whether it is solved

(xcvii) under "(ip ∧ sa ⇒ F {PA} est) → (P {Sarastro} mra)", Papagena is forbidden to enter into Sarastro's Temple whenever a solemn assembly is going on; however, Sarastro may weak-waive her from her duty; when the normative authority enacts "Sarastro is forbidden to waive (w) entrance into the Temple", a N such as "(ip ⇒ F {Sarastro} w) → (P {SA} mra)" enters into force, conflicting with the first one: Sarastro is simultaneously under a permission to weak-waive and a duty not to weak-waive.

(xcviii) since these norms are deontically incompatible and no norm of conflicts is applicable, only a balancing can provide a solution: if the prohibition prevails, the duty to not enter is unwaivable; one could argue, though, that the second norms is useless: if a SA set agent may waive the prohibition to waive, then it would follow that Sarastro may waive again; however, that seems to be wrong: the second duty is either only collectively waivable or waivable by the State.

6 SECOND ORDER POSITIONS: POWER AND DUTY NOT TO DEFEAT

A competence norm is a norm that foresees in its consequence the (generic) deontic act of "producing deontic consequences". It is an action as any other, as explained above, only with the specificity of being an action that directly modifies the law by introducing or removing norms from the set (thus changing previous legal positions).[98] A competence norm is, therefore, a very specific norm of conduct; besides its regulative component (on the deontic action), it comprises a constitutive one as well: precisely, the bestowing of the possibility to produce deontic consequences (that is, conferring a power to a PA set agent). Without this constitutivity, no agent can act at the ought to be level.[99]

As a consequence of its constitutivity, a norm conferring a power creates an action that did not exist before its enactment: to produce deontic consequences is a generic action (allocated to a person or a body, public or private) beyond human biological capacity.[100] Even if one can express a command, it does not work as such if that utterance is not based on competence (particularly evident when we are dealing with legal systems). A competence norm, accordingly, and besides everything else, also performs the task of conferring possibility to an ac-

by a norm of conflicts or by balancing. Regarding the conditions for these conflicts, Zorrilla 2007: 87, Sardo 2018: 57.

98 Guastini 2016: 108, Frändberg 2018: 44.

99 Ruiter 1998: 474. For competence norms as norms of conduct, despite posterior changes, Alchourrón & Bulygin 1971: 151, Ross 1958: 50.

100 On constitutivity, Searle 1969: 34. In the legal field, Peczenik 2008: 226, Ross 1968: 130.

tion that would otherwise be impossible: with such a norm, it becomes possible for someone, and concerning some topic, to act inside the law.[101]

(xcix) also dependent on an internal possibility condition, a norm of competence confers possibility to the generic action of "producing deontic consequences" (dc); more specifically, such norm does so with regard to some subject matter, be it "everything" or just "padlocks".

(c) the NS "Sarastro is competent with padlocks" expresses the norm of competence (NC) "$ip \wedge p \Rightarrow \Diamond_{\{Sarastro\}} dc_{\{SA\}}$"; this NC makes it possible for Sarastro to exercise the generic deontic action of "producing deontic consequences" on the topic "padlocks".

It seems to make no sense, however, to think that a norm can create a new type of action without allowing such action to be carried out (*prima facie*): although possibility and permission have nothing to do with each other (worlds apart), it would be absurd to not recognize that at least some tokens of such action were effectively permitted.[102] Some justification can sustain this merely intuitive approach. When considering that nothing supports the assumption that producing deontic consequences is a forbidden or a mandatory generic action (given the usual utterances of normative authorities), it follows that, under such absence, the action at hand must be seen, ultimately, as permitted in the weak sense.

(ci) the usual linguistic expression of a competence norm is something as "Sarastro is competent with padlocks" or "the power to regulate padlocks is assigned to Sarastro"; no reasons whatsoever sustain that the generic action is here being forbidden or imposed.

(cii) however, if such action is not forbidden or imposed (and that such sentences refers to an action), it follows that producing deontic consequences (i.e., regulating behaviour) is a generic action that is at least weakly permitted.

Understanding competence norms as creating the weakly permitted generic action of producing deontic consequences does not, however, match with the fact that those norms are effectively enacted, becoming members of the set. For this reason, such understanding implies either that a competence norm is mute regarding its deontic modalization (a peculiar format for a weak permission) or

101 This "possibility" has nothing to do with the internal possibility condition, which is also present in competence norms: while the latter is related to having the mental and physical possibilities to produce individual acts with deontic consequences, the former regards the overall ability to perform a generic action otherwise impossible. On the topic, but on different terms, Lindahl 2017: 165, Spaak 2003: 91.

102 von Wright 1963: 189. On those worlds apart, Johns 2014: 371, von Wright 1951_1: 3.

that we have to reconsider what we mean by strong permissions.[103] However, if the second solution is pointless, the first is no better: if a normative authority enacts a norm with an action that it is weakly permitted, what it is likely really happening is that such authority is just saying that such action is (after all) permitted.[104]

(ciii) when the normative authority enacts the NS "Sarastro is competent with padlocks", a power on a certain topic is assigned to Sarastro; and, if that authority has enacted a norm that turns out to be permissive, that norm is actually a strong permission.

(civ) a competence norm, therefore, is a dual composition of the possibility to act and its own permission; following the same notation used here to formalize norms, Sarastro's power conferring norm can be initially presented as "$ip \wedge p \Rightarrow \Diamond \wedge P_{\{Sarastro\}}\ dc_{\{SA\}}$".

The distinction between the generic action and the individual acts by which the law is effectually changed is, however, decisive to understand a competence norm as a constitutive permission. And this distinction is decisive because being (generically) permitted to produce deontic consequences does not necessarily mean that all the tokens of such action are permitted as well: nothing inhibits the system from having other norms forbidding some exercises of the power at hand. Therefore, if a power conferring norm (generically) allows the production of deontic consequences, each of these consequences can be limited by the eventual existence (within the set) of other norms prohibiting tokens of that action.[105]

103 It goes without saying that conceiving norms of competence (as conceived by Bulygin 1991: 497 and Ross 1968: 130) as norms without any deontic modality (strong or weak) is seen here as leading to an inescapable *cul-de-sac*. It implies discharging the production of deontic consequences as an action, something hardly understandable (when X says to Y "close the window!" she is doing something (Austin 1955: 6)).

104 It follows that a power conferring norm is also a strong permission regarding the (constituted) generic action of producing deontic consequences. Accordingly, written formulas such as "the body X is competent on Y" are linguist expressions to say "the body X on the topic Y can and may produce deontic consequences". Although the conception of competence norms presented here is quite proximate from the one defended by Ferrer (2000: 165), it must be said that his claim that a sentence of competence expresses two norms cannot be accepted. On the one hand, this is because it has no "linguistic resemblance" whatsoever with such sentences, presupposing an uncanny criterion of norm individuation (mainly regarding the constitutive norm); on the other hand, because nothing prevents the combination of analytical and synthetic propositions within a norm structure; that is what happens with a simple normative utterance such as "it is mandatory that $A \equiv A$".

105 Which seems to be the explanation for the "thief example" (Lindahl 2001: 160, Spaak 2009: 74): the following example (cvii) tries to demonstrate why that example is misleading.

(cv) a norm such as "ip $\wedge$ p $\Rightarrow \Diamond \wedge$ P $_{\{Sarastro\}}$ dc $_{\{SA\}}$" gives Sarastro the possibility and the permission to exercise the generic action of producing deontic consequences (here, on padlocks); therefore, he is allowed to "deontically do" whatever he wants on the topic.

(cvi) however, if the system has a norm such as the one in "it is forbidden to put padlocks on people's lips", then Sarastro may not enact a norm allowing padlocks on people's lips: he is forbidden from producing this specific deontic consequence (limiting superior norm).

(cvii) if Sarastro has enacted "everyone can sell padlocks", then the Three Ladies can sell padlocks (they have the power to do so); but they cannot sell the padlock owned by the Queen of the Night if Sarastro also enacted "it is forbidden to sell another's padlocks" (limiting superior norm).

A competence norm gives the PA set agent a position called power, usually inserted, under the Hohfeldian tradition, in a correlativity line with a liability. Correspondingly, a liability is seen as the position of being unshielded from a change in previous legal positions: the liability holder, thus, is subject to the changes realized by the power holder.[106] However, this seems empty. Being exposed to a normative change has no content of its own. It either just describes that a possibility of deontic change exists, or it results from a failure to distinguish competence from what is done with it. In the former, there is no independent content; in the latter, it seems evident that "subjection" comes from the norm enacted.[107]

It is clear that a norm of competence introduced into the system gives its holder a power to produce deontic consequences. For SA set agents, however, it seems that nothing happens besides the mere possibility of a change in their legal positions. So, if a liability stands for this mere possibility, it becomes difficult to unveil how it can be seen as a deontic position in itself: if power is not exercised (and while it is not), SA set agents remain deontically static.[108] With a content such as the mere possibility of change, a liability only expresses what SA set agents already have just for being within the correlativity line: that they correlate with agents that have power over them (there is no independent content).

106 Hohfeld 1919: 50, Kramer 1998: 20. It is worth noting that the notion of liability is strongly dependent on the concept of power adopted. An example is, for instance, the case of X being liable because Y is going to sue her (Kramer 2013: 251). It is quite difficult to understand, though, how suing a counterparty is the exercise of a power since no change is operated until the court decides (and the court can discharge the plaintiff).

107 Using the word "subjection", Celano 2019: 34, Schlag 2015: 202.

108 So, when they were allowed to φ and forbidden to φ ´, they keep on being so. For the Hohfeldian liability, see (Hohfeld 1919: 96). See also Kramer 1998: 20, Markovich 2019: 147.

(cviii) a norm such as "ip $\wedge$ p $\Rightarrow \Diamond \wedge$ P $_{\{Sarastro\}}$ dc $_{\{SA\}}$" gives Sarastro the possibility and the permission to produce deontic consequences regarding padlocks; this means that he can and may change legal positions of others (the Three Ladies' and everybody else's).

(cix) under such a norm, Sarastro can enact "it is forbidden to put padlocks on people's lips"; however, until the utterance of this norm, nothing happens: the Three Ladies (as all the others) remain exactly with the same deontic set of positions as they had before.

(cx) with "ip $\wedge$ p $\Rightarrow \Diamond \wedge$ P $_{\{Sarastro\}}$ dc $_{\{SA\}}$", the Three Ladies (and everybody else) are SA set agents of such norm: enacting that norm gave them a new position; however, describing this new position as "Sarastro has power over them" is merely to describe Sarastro's position.

It is also clear, on the other hand, that a possibility of change signifies that an effective change occurs when power is exercised by its holder, which means that SA set agents are subject to whichever deontic consequences may be produced. However, if being subject is different from being under the mentioned possibility of change, then there is no room for any content other than being under the deontic consequences effectively produced: from this particular angle, subjection is the situation one is in when an action becomes imposed, forbidden, or permitted (and precisely for that reason).[109] From this perspective, a liability would be simply an inaccurate way to describe the deontic consequences produced.

(cxi) under "ip $\wedge$ p $\Rightarrow \Diamond \wedge$ P $_{\{Sarastro\}}$ dc $_{\{SA\}}$", Sarastro enacted "it is forbidden to put padlocks on people's lips"; with this norm, the legal position on the matter held by the Three Ladies ceased to be a liberty and it is now a duty not to: that is, they are now under a prohibition (new duty).

(cxii) being under a prohibition is the result of an exercise of that competence norm; thus, if subjection means the new duty, then a liability would be a confusion between the result of the action foreseen in the competence norm and the position given to SA set agents with the exercise of power.

What has been said is totally valid whenever power is exercised through contracts, dominant in the private sphere, where agents, for the reason of private autonomy, only create deontic consequences through agreements and very

109 Regarding SA set agents of the competence norm, that can also be PA or SA sets agents of the norms produced under the power. The very fact that Hohfeld spoke about favorable liabilities (Hohfeld 1919: 60) is a good piece of evidence that something is wrong here. If a power is correlated with a liability in the way he says, then: (i) either a liability would be the mentioned "standby" position and could not be favorable or unfavorable; (ii) or it would be the result of the exercise of power and would overlap with the (new) positions created with it.

specific unilateral acts.[110] And it is valid because change only occurs with the exercise of power, meaning that nothing happens before and that deontic consequences only come from that exercise. This is immediately visible with a proposal: when an agent makes an offer, she is exercising her power to do so; but she is only creating the self-binding duty to a posterior joint exercise of power on the terms she proposed. Before the proposal there was nothing; afterwards, there are new positions.[111]

(cxiii) under "ip $\Rightarrow \Diamond \wedge$ P $_{\{PA\}}$ dc $_{\{SA\}}$" (a private autonomy general competence norm), Papageno can and may sell his Glockenspiel; when he proposes to sell it to the Three Boys for £50, he is exercising that power and creating a self-duty to jointly exercise the power on the terms of his proposal; naturally, the Three Boys hold the correlated claim-right; the proposal just created these two positions.

An agreement following the acceptance of the proposal is, then, another exercise of power; specifically, a joint exercise of the competence norm that will create different positions from those already given by the offer (and extinguishing these).[112] By concluding the agreement, the parties confer a set of legal positions to each other that did not exist before. And the main point is that there is no room for any sort of liability: the change manifests itself with new positions (duties, liberties, and so forth; or aggregates of them). So, again, no change takes place before the exercise of a private autonomy general competence norm, whether until the enactment of a proposal or, afterwards, until the agreement is concluded.[113]

110 On the private exercise of power, Hage 2018: 98, MacCormick 2005: 250.

111 None of them being a liability. Actually, Hohfeld construction is perplexing here (Hohfeld 1919: 55). In his specific view, X (the offeror) becomes liable with the offer and creates a power to Y (the offeree). However, in order to make the offer, X had to be exercising a power (otherwise X could not change Y's position). But if that is the case, then Y already held a liability correlated with that "original" power. So, and besides presupposing that an agent can confer power to another (which seems to be, in this example, another mistake (Hohfeld 1919: 50)), this leads to the awkward normative scenario where the exercise of power, by definition, puts PA set agents in the position of SA set agents and vice-versa. On the other hand, the text above shows that the usually called "potestative right" is actually a claim-right to a joint exercise of power. For the opposite view, Sartor 2006: 124.

112 On contracting as a case of joint action, Tuomela 2010: 85, Miller 2004: 54.

113 The following example (cxvi) is a remake of the "watch situation" that Hohfeld presented to show another aspect of his conception of liability (Hohfeld 1919: 60). The remake tries to show that a liability is also a wrong shot in such situation.

(cxiv) based on Papageno's proposal (creating a duty and a claim-right to jointly exercise power under the terms of his offer), the subsequent conclusion of the agreement is another (different) exercise of power, leading to new positions: now, Papageno owns £50 (the aggregated positions typical to ownership) and the Three Boys own the Glockenspiel (idem).

(cxv) accordingly, be it the self-duty and its correlated claim-right, resultant from the offer (unilateral exercise of power) or the ownership of £50 and a Glockenspiel, resultant from the agreement (bilateral exercise of power), neither Papageno nor the Three Boys had had any position other than those now described: there is no space for any liability.

(cxvi) if Papageno decides to abandon his Glockenspiel, he exercises his power to extinguish his ownership; but such exercise does not create any liability; first, a *res nullius* Glockenspiel is a mere factual condition to a future ownership; second, if Papageno had the power to abandon his Glockenspiel, all the others would already have a liability before Papageno's exercise of power.

All considered, it seems that a liability cannot be understood as meaning neither the deontic consequences produced under the competence norm nor an alternative way to describe the position held by SA set agents while facing a possible legal change. As a matter of fact, being a power holder is exactly having power over a set of agents, which is precisely what is being designated with a Hohfeldian liability. Accordingly, the correlativity between a power and a liability only works with a conception of correlativity as a material equivalence, something that, as seen before, does not accurately describe the law. As with any norm of the set, the position given to SA set agents in a competence norm also involves some co-action (an independent content), having a specific deontic modalization of its own.

An attentive observation of competence norms shows that they are permissions as any others (under the present approach), except for the fact that those norms additionally confer the possibility of producing deontic consequences. This feature is, however, normatively secondary, since it is not related to the regulation of behaviour: it is strictly linked to the ability to act. It seems, then, that there are no reasons whatsoever to correlate power with a different position than the duty to not defeat the internal possibility (as follows from any permissive norm). Although regarding tokens of a deontic action, SA set agents are here in the exact same position as any SA set agent is within a permission.

(cxvii) under "$ip \wedge p \Rightarrow \Diamond \wedge P_{\{Sarastro\}}\, dc_{\{SA\}}$", Sarastro has the power (possibility and permission) to produce deontic consequences; thus, SA set agents are under a duty not to defeat his internal possibility to produce them: e.g., they may not grab or immobilize him when he is enacting a norm.

(cxviii) the same is valid with the Sarastro's Brotherhood or even Papageno (a body and a private individual) as PA set agents: SA set agents may not prevent the Brotherhood assembly from deliberating just as much as they may not physically block Papageno from abandoning his Glockenspiel.

(cxix) conceiving competence norms as constitutive permissions as any others leads to seeing them as follows: "(ip $\wedge$ e $\Rightarrow \Diamond \wedge$ P $_{\{PA\}}$ dc) $\rightarrow$ (ip $\Rightarrow$ O $_{\{SA\}}$ ~dip)", with "e" for "everything", P regulating PA set agents' deontic action and O regulating the SA set agents' correlated (adaptative) co-action.

6.1 Without power: Disability and immunity are not legal positions

Accepting that power is the position connected with the type of action of producing deontic consequences and that this action is constituted by a competence norm necessarily signifies that no power exists without the latter: such a norm is a necessary and sufficient condition of power.[114] It follows, then, that it is only with a norm of this sort that power is assigned to a PA set agent, giving her a (new) legal position she would not hold without it. From the opposite perspective, it is also clear that a power with a specific content can be legally modified: when the normative authority revokes a power conferring norm or partially derogates its scope, some change occurs and power either disappears or has a new content.

(cxx) when the normative authority enacted "(ip $\wedge$ p $\Rightarrow \Diamond \wedge$ P $_{\{PA\}}$ dc) $\rightarrow$ (ip $\Rightarrow$ O $_{\{SA\}}$ ~dip)", Sarastro became the holder of a power regarding padlocks; now, he can and may produce deontic consequences on the topic, something "inexistent" to him (as the holder of power) before such norm.

(cxxi) if the normative authority revokes that norm, Sarastro returns to the original standpoint: he has no power; if that authority states that Sarastro is only competent with "wood padlocks", his power has been changed; yet, in both these scenarios deontic consequences have been produced.

A totally different scenario occurs when a normative authority enacts what can be wrongly called a "norm of incompetence": when a normative authority

114 Which is, then, a necessary condition for (directly) producing deontic consequences. Actually, deontic consequences produced without a competence norm come from (indirectly) the mere triggering of already existing norms of the set (or from the impossibility of triggering them): that is, those consequences were already within the set. It is for this reason that the expression "quasi-powers" (Kurki 2017: 44) sounds quite unhappy. A flood extinguishing a property right signifies that it is definitely impossible to trigger property norms (or that a norm conferring that effect to natural disasters exists). The same applies to the parallel examples presented by Kramer 2001: 59.

states that a body or a person does not have power (and never did).[115] A significant aspect justifies the said difference: such "norm of incompetence" is not a norm at all. Since no deontic consequences are being produced (and no previous positions are being changed), an enactment of this sort is merely a descriptive sentence about the law: it is saying that the body or the person at hand lacks power.[116] Thus, officially stating "incompetence" is just a descriptive utterance about the absence of a competence norm (signalling "no power").

(cxxii) if the power conferring norm "$(ip \wedge p \Rightarrow \Diamond \wedge P_{\{PA\}} dc) \rightarrow (ip \Rightarrow O_{\{SA\}} \sim dip)$" had never been enacted, Sarastro never had the power on the topic at hand; if, in this scenario, the normative authority enacts "Sarastro has no power regarding padlocks", no norm is being produced.

(cxxiii) therefore, "Sarastro has no power regarding padlocks" is no other than a description of a state of affairs: the normative authority did not change the law, no deontic consequences were produced, and no ideal state of affairs has been conceived (by such authority).

It is precisely for the reason that the absence of power has no normative basis (and cannot be assigned to any legal norm whatsoever) that it is claimed here that Hohfeldian disabilities and immunities are no other than an expression of a confusion between norms and normative propositions: when Hohfeld makes reference to a disability he is not pointing out a legal position, but merely describing its absence (in this case, power).[117] And this seems to be quite clear. If one accepts that there are no positions without norms and that no norm can confer a position opposed to one dependent on constitutivity, one must also accept that the word "disability" just plays the role of a normative proposition.

(cxxiv) if without "$(ip \wedge p \Rightarrow \Diamond \wedge P_{\{PA\}} dc) \rightarrow (ip \Rightarrow O_{\{SA\}} \sim dip)$" Sarastro never had power regarding padlocks, then he (allegedly) has a Hohfeldian disability: he lacks power; lacking power, though, is a legal nothing, from which it follows that the word "disability" is merely a description of such emptiness; and this is so since power is constituted (and if not constituted it just does not exist).

Given Hohfeld's conception of correlativity as a material equivalence, the "disappearance" of disabilities as legal positions has to imply the same consequence to immunities. And such consequence seems to be right. As a matter of fact, it is so deontically empty to not have power as it is to be in the correlative position: there is no possible normative basis regarding not producing and

115 On these "norms", Ferrer 2000: 162. Also, Ruiter 1993: 157.

116 On descriptive enactments, Amselek 1988: 195, Ross 1968: 71.

117 Hohfeld 1919: 60. On Hohfeld's disabilities, Lindahl 1977: 25, Cook 1919: 727.

not being targeted by deontic consequences.[118] It is exactly for this reason that, when some agent claims an inexistent power and allegedly produces deontic consequences, it is common to have a third norm foreseeing a specific sanction for such action: often, it means the immediate removal of those "consequences" from the system.[119]

(cxxv) if Sarastro has no power regarding padlocks, he cannot and may not produce deontic consequences on the matter; consequently, no one can be affected by something he cannot do; regarding power, Sarastro is as relevant to the Three Ladies (and everybody else) as the King of Portugal is.

(cxxvi) if even without power Sarastro enacts "it is forbidden to put padlocks on people's lips", the most probable outcome (contingently depending on the system) is that a norm such as "norms enacted by incompetent bodies or persons are null and void" will be applied.

Accepting that a legal position such as an immunity simply does not exist (because it cannot, for the given reasons) seems to confront its wide usage in the legal field: it is rather recurrent to affirm that an agent has an immunity when she is somehow safeguarded against another agent (a powerless one).[120] This seems to be, however, a confusion either with an effective claim-right or with nothing. Actually, the large majority of the usually called "immunities" are no other than claim-rights coming from prohibitions of exercising competence towards a specific set of persons. And all the remaining ones, on the other hand, are mere external descriptions of someone being outside the scope of a certain power.[121]

(cxxvii) under "$(ip \wedge p \Rightarrow \Diamond \wedge P_{\{PA\}}\, dc) \rightarrow (ip \Rightarrow O_{\{SA\}} \sim dip)$" Sarastro has enacted "it is forbidden to put padlocks on people's lips"; but it turns out that Sarastro also has the power (given by another competence norm) to apply a fine of £300 whenever the prohibition he enacted is breached.

(cxxviii) if the normative authority forbids Sarastro from applying that fine to members of the Queen of the Night's court (forbidding a specific exercise of power), then each member of the court does not have an immunity: each one has a claim-right not to be fined (correlated to the duty; not the power).

118 Kocourek 1921: 34. And this might be, speculatively, the reason why Bentham disregarded these positions (Bentham 1970: 251). On the topic, Hart 1982: 164, Arriagada 2018: 23.

119 On norms with sanctions, Hage 2018: 207, Calsamiglia 1994: 763.

120 Examples of the common usage of immunity in Wellman 2016: 123, Edmundson 2004: 82. With an extremely broad conception of immunities, Zucca 2007: 41.

121 Distinguishing precisely between these two cases (prohibition of exercising competence and not having competence), Mendonca 2000: 137.

(cxxix) if the normative authority enacts "Sarastro's power to apply the £300 fine is partially derogated regarding peasants", then Sarastro's competence has been narrowed; however, peasants do not have immunities: Sarastro is as legally irrelevant for them as the King of Portugal is.

(cxxx) it can be difficult to grasp whether a norm sentence contains a prohibition of exercising competence or a partial derogation of power (a hard case example could be "peasants are exempt from the £300 fine"); however, it is either one or the other and the corresponding consequence follows.

7 A TABLE OF LEGAL POSITIONS: FIVE ATOMIC POSITIONS

A table of atomic legal positions can now be presented. A table with positions that are, moreover, comprehensive, sufficient, and irreducible. Comprehensive since there are no other positions besides these (without aggregation). Sufficient in the sense that there are no positions (with aggregation) that cannot be assigned to a combination of them. And irreducible because there are no positions in which they can be broken into.[122] On the other hand, the present table of atomic legal positions is entirely norm-based: each atomic type follows from a specific deontic modalization of action (or constituted action, in power). Thus, each one has a specific content (independent) and a specific deontic status (autonomous).

As seen, and at the first order level, a permissive norm creates two legal positions: (i) a liberty; and (ii) a duty not to defeat the internal possibility. Since strong permissions have to be understood as bilateral, the former is characterized both by the faculty of exercising or not the main action foreseen and by having the corresponding token of such action as content. On the other side of the correlativity line, the duty not to defeat the internal possibility regards the variable co-acts that can make the exercise of the liberty internally impossible (an adaptative content under an obligation not to). Clearly, these legal positions always follow whenever a permission is enacted by a normative authority.

(cxxxi) a permissive norm confers to PA set agents a liberty to φ and ~φ and to SA set agents (with an obligation) a duty not to defeat the internal possibility of φ and ~φ (co-act: φ′); it is what follows from a norm such as "$(ip \Rightarrow P_{\{PA\}} \varphi) \rightarrow (ip \Rightarrow O_{\{SA\}} \sim\varphi')$"; the first correlativity line is:
$P\varphi \rightarrow$ liberty to $\varphi \wedge \sim\varphi \leftrightarrow O\sim\varphi' \rightarrow$ duty not to dip $\varphi \wedge \sim \varphi$

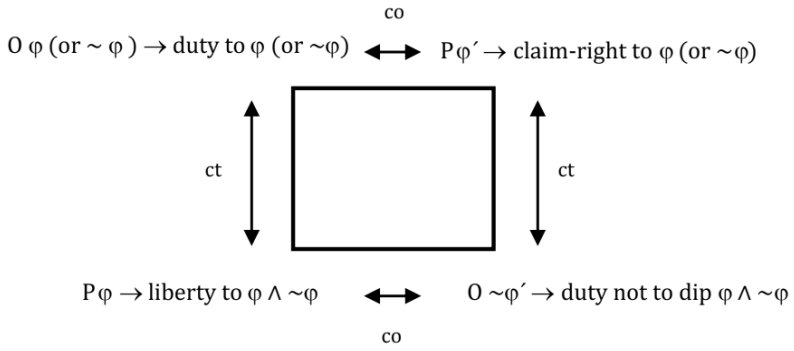
122 Halpin 1985: 436, Hage 2018: 231.

As also seen, and still at the first order level, prohibitions and impositions create two legal positions: (i) a duty; and (ii) a claim-right (negative or positive depending on being given by a prohibitive or a mandatory norm). A duty is the legal position regarding the main action foreseen in the consequence of those norms, having such action as its own content (regardless of being an action in the strict sense or an omission). On the other side, a claim-right is the position formed by the adaptative co-acts (including passive action) that connect the holder to the bringing about of the main action's result. Such co-acts are deontically permitted (since they are in contradiction with the status of the duty bearer).

(cxxxii) a mandatory norm confers to PA set agents a duty to φ (or ~φ) and to SA set agents a claim-right to φ (or to ~φ) under a permission to manage the result of action (co-act: φ´); it is what follows from a norm such as "(ip ⇒ O $_{\{PA\}}$ φ) → (ip ⇒ P $_{\{SA\}}$ φ´)"; the second correlativity line is:

Oφ (or ~ φ) → duty to φ (or ~ φ) ↔ P~φ' → claim-right to φ (or ~ φ)

(cxxxiii) a table of first order legal positions entails two correlatives (co): (i) duty with claim-right; and (ii) liberty with duty not to defeat; it also entails two contradictories (ct): (i) duty with liberty; and (ii) claim right with duty not to defeat; it is as follows:

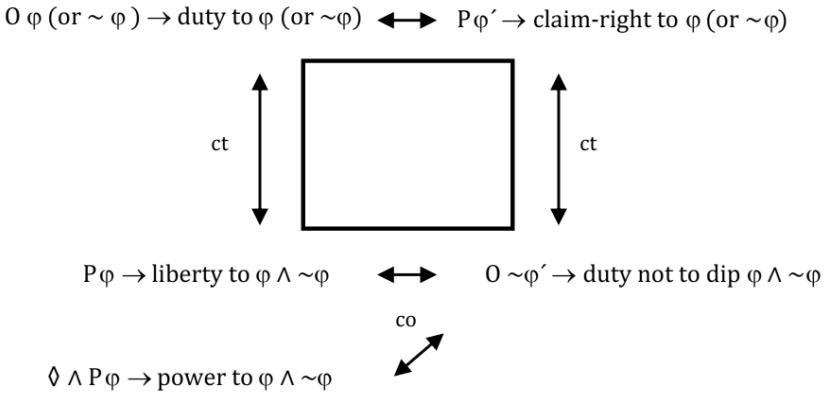


At the second order level (where the dynamic of the system comes from), there are only power conferring norms. Since these norms are permissions as any others, yet with the specificity of constituting a type of action impossible without them, their distinction from first order permissions is only felt in the first position of the correlativity line: precisely the point where the mentioned constitutivity makes some difference. Accordingly, a competence norm creates: (i) a power; and (ii) a duty not to defeat the internal possibility. If the latter has the same adaptative content as in any permission (being under an obligation), the former is the already known (permitted) possibility to produce deontic consequences.

(cxxxiv) a competence norm confers to PA set agents a power to φ and ~φ and to SA set agents (with an obligation) a duty not defeat the internal possibility of φ and ~φ (co-act: φ´); it is what follows from a norm such as "(ip ∧ e ⇒ ◊ ∧ P $_{\{PA\}}$ dc) → (ip ⇒ O $_{\{SA\}}$ φ´)"; the second order correlativity line is:

◊ ∧ P φ → power to φ (or ~ φ) ↔ O~φ'→ duty not to dip φ ∧ ~ φ

(cxxxv) a complete table of legal positions shows the previous four with the single differentiated position given by competence norms: power; since these norms are permissions as any others, it is only on the PA set side that they show that difference; it is as follows:



A table of atomic legal positions entirely norm-based connects such positions with the two sets of addressees included in any norm. A taxonomy of such positions based on that criterion can follow. Therefore, one can distinguish between "primary legal positions", those held by agents of a PA set, and "secondary legal positions", those held by agents of a SA set. In the former we have: (i) liberties; (ii) duties; and (iii) powers. In the latter we have: (i) duties not to defeat the internal possibility; and (ii) claim-rights. As was discussed above, while primary legal positions always regard the main action normatively foreseen, the secondary ones regard the adaptative co-action inherent to the correlativity line.

(cxxxvi) "primary legal positions" are positions held by PA set agents {PA}: liberties, as follows from "(ip ⇒ P $_{\{PA\}}$ φ) → (ip ⇒ O $_{\{SA\}}$ ~φ´)"; duties, as follows from (ip ⇒ O $_{\{PA\}}$ φ) → (ip ⇒ P $_{\{SA\}}$ φ´); and powers, as follows from "(ip ∧ e ⇒ ◊ ∧ P $_{\{PA\}}$ dc) → (ip ⇒ O $_{\{SA\}\ \sim}$φ´)".

(cxxxvii) "secondary legal positions" are positions held by SA set agents {SA}: duties not to defeat the internal possibility, as follows from "(ip ⇒ P $_{\{PA\}}$ φ) → (ip ⇒ O $_{\{SA\}}$ ~φ´)" and from "(ip ∧ e ⇒ ◊ ∧ P $_{\{PA\}}$ dc) → (ip ⇒ O $_{\{SA\}\ \sim}$φ´)"; and claim rights, as follows from (ip ⇒ O $_{\{PA\}}$ φ) → (ip ⇒ P $_{\{SA\}}$ φ´).

Since norms have the dispositional property of being defeasible (at least first order norms), the positions they give, either to agents of the PA set or to agents of the SA set, are only *prima facie* positions: that is, their definitiveness regarding some case depends on an *all norms considered* assessment recognizing the inexistence of a conflict (between two or more norms) or, if such conflict takes place, the prevalence of the norm at hand.[123] And this is valid for both positions of a norm: irrespective of undercutting or rebutting defeasibility, the prevalence of a norm over another (imposed by a norm of conflicts or by balancing) signifies the twofold prevalence of its correlated positions.[124]

(cxxxviii) Sarastro enacted "it is forbidden to put padlocks on people's lips" with {all} in the PA set and "it is allowed to put padlocks on people's lips" with {the Three Ladies} in the PA set; these norms are in conflict: the Three Ladies are forbidden to act by the first norm, but permitted by the second; since the system has *lex specialis*, their *prima facie* liberty prevails over their *prima facie* duty (undercutting defeasibility); but this also means that the correlated duty not to defeat prevails as well.

(cxxxix) Sarastro enacted "everyone is allowed to sing" and "it is forbidden to harm personal reputation"; when Papagena sings something attacking Monostatos' honour, she is *prima facie* permitted by the first norm, but *prima facie* forbidden by the second; since the system has no norm of conflicts applicable (rebutting defeasibility), only a balancing solves the conflict; yet, the prevalence of the liberty also signifies that the correlated duty not to defeat prevails as well.

8 SETS OF ADDRESSEES: WHO, HOW MANY AND HOW

An analysis of norm sentences usually enacted by normative authorities shows that an explicit enunciation of both sets of addressees is uncommon. As a matter of fact, the large majority of norm sentences mention only one set: whether the PA or SA set (but sometimes neither).[125] Although it is of no surprise that normative authorities do not consider correlativity as a criterion for norm sentences drafting (as they could, among others), the fact is that whenever only one set is presented (almost always), a complex problem arises. Since correlativity is not text-dependent, the interpreter has to realize who the agents belonging to the set the normative authority did not make explicit are.

123 On defeasibility as a dispositional property of all norms, Ratti 2013: 122, Brożek 2004: 169.

124 On undercutting and rebutting defeasibility (and the way systems solve the conflicts that give rise to them), Prakken & Sartor 2004: 121, Duarte 2009: 172.

125 On expressing addressees, Frändberg 2018: 86, Pino 2016: 46.

(cxl) the NS "Sarastro's Brotherhood has the duty to provide health care to citizens" is a less usual case of explicit reference to both sets: the PA set {Sarastro's Brotherhood} and the SA set {citizens}; thus: "(ip ⇒ O $_{\{\text{Sarastro's Brotherhood}\}}$ φ) → (ip ⇒ P $_{\{\text{citizens}\}}$ φ′).

(cxli) the NS "everyone is allowed to sing" is an usual case of a NS that only mentions the PA set {everyone}: nothing is written about who belongs to the SA set; on the basis of what is explicit, that NS expresses a N such as "(ip ⇒ P $_{\{\text{everyone}\}}$ φ) → (ip ⇒ O $_{\{\text{SA}\}}$ ~φ′)"; (or $_{\{\text{everyone}\}}$ = $_{\{\text{physical persons}\}}$).

(cxlii) the NS "it is forbidden to harm personal reputation" is an usual case of a NS that only mentions the SA set {people}: nothing is written about who belongs to the PA set; on the basis of what is explicit, the N expressed is: "(ip ⇒ F $_{\{\text{PA}\}}$ φ) → (ip ⇒ P $_{\{\text{people}\}}$ φ′)"; (or $_{\{\text{people}\}}$ = $_{\{\text{physical persons}\}}$).

(cxliii) the NS "it is forbidden to use £1 coins" is a less usual case of a NS that does not mention the PA set nor the SA set: nothing is written about who belongs to each of the sets; on the basis of what is explicit, the N expressed is: "(ip ⇒ F $_{\{\text{PA}\}}$ φ) → (ip ⇒ P $_{\{\text{SA}\}}$ φ′)".

As in many areas of legal knowledge, the task of realizing the members of an unexpressed set can also be an easy or a hard case. When there are some duties imposed on a set of addressees, identifying who the members of the omitted set are might turn out to be a simple task: a norm conferring a claim-right to "employees" (explicitly mentioned) most probably is imposing a duty on the agents belonging to an unwritten set of "employers". It can be said that in such cases both sets are easily conceivable: one because it is explicitly mentioned, the other because it is connected with the first by a clear case of empirical correlativity.[126] Nevertheless, and as usual, things might turn out to be not that easy.

(cxliv) the NS "it is mandatory to pay 500 florins (£500) per month to personal employees" only mentions the SA set {employees}; however, it seems clear that the PA set is {employers}; thus, despite the insufficiency, one may reach "(ip ⇒ O $_{\{\text{employers}\}}$ £500/month) → (ip ⇒ P $_{\{\text{employees}\}}$ φ′)".

(cxlv) the NS "freedom of the press is recognized" may be qualified as a hard case; on the one hand, because neither the PA set nor the SA set are explicitly mentioned; on the other hand, because defining the liberty holders depends on the (complex) open texture of the word "press".

It must be stressed at this point that this is actually an interpretative problem related to the norm sentence (although with some specificities): it can be connected to some semantic indeterminacy of the text ("press" in the last example), but it is mainly an interpretative problem arising from the insufficient informa-

126 On empirical correlativity, Halpin 2019b: 86, Radin 1929: 902.

tion given by the sentence effectively enacted by the normative authority (sets of addressees that are not even mentioned).[127] Therefore, the interpreter must somehow fill those gaps, using the contextual linguistic elements available, inferences to the best explanation about who acts and who faces action, or even consider some pragmatic methodological guidelines.[128]

(cxlvi) "it is forbidden to use £1 coins" mentions neither the PA nor SA set; using the interpretative criterion coming from equality (generality of general norms), it seems that each set should be conceived as extended as it is interpretatively appropriate; since both physical and legal persons can use coins, it seems that the N is: "$(ip \Rightarrow F_{\{all\}}\ \varphi) \rightarrow (ip \Rightarrow P_{\{all\}}\ \varphi')$"; ($_{\{all = physical\ and\ legal\ persons\}}$).

Independent of such epistemic insufficiencies, the fact is that a set of addressees can contain a variable number of elements. On this basis and considering the universe of possible agents within the territorial scope of the norm at hand, they could be measured with the quantifier expressions {all}, {some}, and {one}.[129] Therefore, inside that domain, the set with {all} is the universal one and the sets with {some} and {one} are just proper subsets. In the former, membership to the set is assigned to a category of agents, while in the latter the set is a singleton. So, whichever the way a normative authority designs addressees, they will necessarily amount to one of these three quantifiers: {all}, {some} and {one}.

(cxlvii) with a N such as "$(ip \Rightarrow O_{\{all\}}\ \varphi) \rightarrow (ip \Rightarrow P_{\{all\}}\ \varphi')$" both PA and SA sets contain the whole universe of agents under the present domain; this means that both the PA and SA sets entail all physical and all legal persons covered by the territorial scope of that norm.

(cxlviii) with a N such as "$(ip \Rightarrow O_{\{some\}}\ \varphi) \rightarrow (ip \Rightarrow P_{\{some\}}\ \varphi')$" both PA and SA sets contain a subset category of agents under the present domain; this would be the case of a PA set with {employers} or {legal persons} and a SA set with {employees} or {physical persons}.

(cxlix) with a N such as "$(ip \Rightarrow O_{\{one\}}\ \varphi) \rightarrow (ip \Rightarrow P_{\{one\}}\ \varphi')$" both PA and SA sets contain just one element of the universal set under the present domain; this would be the case of a PA set with {the State} or {Sarastro} and a SA set with {Papagena} or {the Queen of the Night}.

127 On addressees and interpretation, Florczak-Wator 2015: 24, Herrestad 1996: 20.

128 Two methodological guidelines can be proposed. The first regards legal and physical persons: whenever the performance of a generic action is incompatible with the legal personhood, then the members of the unstated set cannot be legal persons (e.g., to marry). The second is of a more general character: since general norms express a formal equality between individuals, a set should be extended as much as is interpretatively appropriate.

129 On these expressions, Iacona 2015: 129, Peters & Westerståhl 2006: 10.

When the PA and the SA sets contain {all} or {some}, each member of each one of those sets is a singular holder of the legal position the set stands for. Consequently, regarding the prohibition of φ, for instance, each member of the PA set is the holder of a duty to ~φ and each member of the SA set is the holder of a claim right to ~φ. Naturally, this also applies to permissions: each agent of the PA set holds a liberty to φ and ~φ and each agent of SA set holds a duty not to defeat the internal possibility of φ and ~φ.[130] When the correlativity line has no other empirical or legal limits, each member of one set holds the position towards each of the agents that belong to the correlated set (under the norm at hand).

(cl) in "$(ip \Rightarrow P_{\{all\}} \varphi) \rightarrow (ip \Rightarrow O_{\{all\}} {\sim}\varphi')$", PA = {u, v, w, x, …} and SA = {u, v, w, x, …}; here, u holds a liberty towards v, and w, and x, and so forth; in the same way, x holds a duty not to defeat towards u, and v, and w, and so forth; in this case, there are as many correlativity lines (tokens) as the possible instantiations of N; the same holds for a norm with {some} instead of {all}.

A setting such as this provides a scheme that must be taken as a mere default, namely since it presupposes that the exercise of the action φ by PA set agents is disjunctive: that is, each member of the PA set, taking into account the type of action foreseen, can exercise it individually. However, it does not have to be so. A norm can foresee a type of action that has to be exercised collectively (joint action): when this is the case, and irrespective of the specific way in which SA set agents perform their position, the exercise of the main action is jointly carried out by all (or a significative number of) the members of the set. As is known, this is one of the many senses in which one speaks about collective rights.[131]

(cli) in "$(ip \Rightarrow P_{\{physical\ persons\}} s) \rightarrow (ip \Rightarrow O_{\{all\}} {\sim}\varphi')$", each physical person is allowed to sing (s); since it is an action that can be exercised individually, the PA set is disjunctive: {∨ physical persons}.

(clii) in "$(ip \Rightarrow P_{\{physical\ persons\}} a) \rightarrow (ip \Rightarrow O_{\{all\}} {\sim}\varphi')$" each physical person is allowed to assemble (a); since it has to be exercised collectively, the PA set is conjunctive: {∧ physical persons}.

(cliii) in "$(ip \Rightarrow F_{\{all\}} k) \rightarrow (ip \Rightarrow P_{\{physical\ persons\}} \varphi')$", everyone is forbidden to kill (k); since it is an action (omission) that can be exercised individually, the PA set is disjunctive: {∨ all}.

130 Which is the (general) normative way to express multitalcity (Hohfeld 1919: 72, Barker 2018: 592). Somehow mixing multitalcity with molecularity, Wellman 1997: 67.

131 When it is a right (in the following examples, with mandatory norms, it is a collective duty). On this kind of collective rights (collectively exercised [joint action]), Jovanović 2012: 115, Miller 2004: 216.

(cliv) in "(ip ⇒ O $_{\{physical\ persons\}}$ snatime$_1$) → (ip ⇒ P $_{\{all\}}$ φ′)", all members of the set are obliged to sing the national anthem at time$_1$ (snatime$_1$); the PA set here is also conjunctive: {∧ physical persons}.

Regarding how the result of action impacts SA set agents' co-action (not the individual or collective way in which it is exercised by PA set agents, as above), an equivalent distinction can be designed within the set of secondary addressees. Hence, it is possible to distinguish between types of (main) actions that imply a disjunctive or a conjunctive co-action from SA set agents. In the latter, it is collective: since the main action is experienced by all once it is experienced by one, SA set agents' co-action has to be common.[132] In the former, the main action is only individually experienced by the members of the SA set: it follows that co-action from SA set agents is an individual task of each member of the set.

(clv) in "(ip ⇒ P $_{\{physical\ persons\}}$ s) → (ip ⇒ O $_{\{all\}}$ ~φ′)", the main action (sing) is experienced by each one within the SA set; SA set agents' co-action is disjunctive: {∨ all}.

(clvi) in "(ip ⇒ F $_{\{all\}}$ k) → (ip ⇒ P $_{\{physical\ persons\}}$ φ′)", the main action (killing) is experienced by each one within the SA set; SA set agents' co-action is disjunctive: {∨ physical persons}.

(clvii) in "(ip ⇒ O $_{\{State\}}$ he) → (ip ⇒ P $_{\{all\}}$ φ′)", the main action (a healthy environment) is experienced by the whole SA set; SA set agents' co-action is conjunctive: {∧ all}.

Since the content of any normative element is entirely dependent on the will of the normative authority, the quantifier {some} reflects the most differentiated kinds of categories. A normative authority can confer liberties or claim-rights to categories as different as "padlock manufacturers", the "Sarastro's Brotherhood", or the "Sumerian speaking minority".[133] And, irrespective of the ties between their members (and their shared beliefs), each of these categories is solely a different configuration of {some}. So, with any of them we can have legal positions that are disjunctive or conjunctive exactly in the same terms as above. Analytically, there seems to be no difference between different possibilities of {some}.[134]

132 Which is another one of the many senses in which we speak about collective rights (related to common goods, as it is usually mentioned (Miller 2004: 217, Newman 2011: 102)).

133 On groups (or collectives) and agency, Tuomela 2010: 13, Schmid 2009: 13.

134 Campbell 1998: 110. Differently, Jovanović 2012: 125, Wall 2007: 235.

(clviii) in "(ip ⇒ P $_{\{\text{Sumerian speaking minority}\}}$ sol) → (ip ⇒ O $_{\{\text{all}\}}$ $_{\sim}\varphi'$)", each physical person member of the PA set is allowed to speak their own language (sol); since it is an action that can be exercised individually, the PA set is disjunctive: {∨ Sumerian speaking minority}.

(clix) in "(ip ⇒ O $_{\{\text{State}\}}$ rds) → (ip ⇒ P $_{\{\text{Sumerian speaking minority}\}}$ φ')", the main action (recognizing the decision to secede) is experienced by the whole SA set; accordingly, SA set agents' co-action is conjunctive: {∧ Sumerian speaking minority}.

On the other hand, the PA and SA sets occupy different locations in the structure of norms, which means that they stand for different legal positions. Taking into account that each set results from a contingent decision taken by the normative authority, it is a matter of mere logic that the PA and SA set can possibly connect as follows: (i) PA and SA have the same agents; (ii) PA and SA do not share agents; (iii) PA is a subset of SA or vice-versa; and (iv) PA intersects with SA.[135] For present purposes, these relations among sets are not relevant: they are purely informative. What is relevant is that, with equality, subsection, or intersection, an agent can be simultaneously a member of the PA and the SA sets.

(clx) if PA = {u, v, w, x} and SA = {u, v, w, x}, then PA = SA; it follows: (u, v, w, x) ∈ (PA ∧ SA).

(clxi) if PA = {v, w, x} and SA = {u, v, w}, then PA ∩ SA; it follows:(v, w) ∈ (PA ∧ SA).

(clxii) if PA = {u, v} and SA = {u, v, w, x}, then PA ⊂ SA; it follows: (u, v) ∈ (PA ∧ SA).

(clxiii) if PA = {u, v} and SA = {w, x}, then PA ∩ SA = Ø; no overlap exists.

In normative situations such as these (when the PA and SA set share agents), it is important to note that the agent does not correlate with herself. Such premise follows from the assumption that a line of correlativity between the same agent leads to a deflation of both legal positions. In a liberty ↔ duty not to defeat the internal possibility, this is because breaching the duty amounts exactly to not exercising the liberty.[136] In a duty ↔ claim right line, it is because

135 When one set is or both sets are {one}, the third and the fourth relations are not possible: subsection presupposes at least a set with two members and intersection presupposes that both sets have at least three members. Nevertheless, for the present purposes, it is assumed that only {all} and {some} are being considered.

136 Which is also valid for a competence norm. However, this is not to be confused with the different case of a power holder inserting herself into the PA or SA sets of the norm she enacts. Actually, this is the very core of the idea of the rule of law (to submit power holders to their own law (MacCormick 2005: 25, Kelsen 2005: 292)).

the (single) holder may weak-waive the duty, and a duty from which one may release cannot be qualified as duty at all.[137] An agent member of both sets, thus, only correlates with other agents of the correlated set (PA to SA and vice-versa).

(clxiv) if PA = {u, v, w, x} and SA = {u, v, w, x}, when u holds a PA position she only correlates with v, w, and x; naturally, when u holds a SA position, u only correlates with v, w, and x.

(clxv) if $u \in PA \wedge u \in SA$, u cannot correlate with herself; if she holds a duty, she may weak waive it; if she holds a liberty, defeating herself is the same as not exercising the liberty.

9 CORRELATIVITY: ASSUMING ASYMMETRY AND DIFFERENTIATING DIRECTEDNESS

As mentioned, Hohfeld conceived correlativity as a necessary reflexive connection between two legal positions (material equivalence): since each of them is just a different perspective of the same ligation, a duty implies a claim-right in the exact same way that the latter implies the former (effective in all correlativity lines).[138] Such conception of correlativity was already criticized here: it is sustained on a reductive understanding of action, from which it follows that, although almost untouchable in its own scheme, it does not describe law correctly: since a duty often requires co-action from the correlated agent (e.g.), positions have different contents. And this is clearly incompatible with Hohfeld's correlativity.

This criticism of Hohfeldian correlativity does not lead, however, to discharging correlativity itself. Quite on the contrary: correlativity is the exact expression for the relation between two poles that can be found in each and every norm of a legal system. Irrespective of which action is regulated, any norm of the system connects a PA set to a SA set. Given that law regulates the behaviour of more than one agent, the deontic modalization of an action gives rise to a position that is necessarily "relative": any action permitted, imposed, or prohibited, if not correlated with {some} or {one}, ultimately expresses the connection an agent has (or a set of agents have) with all the others or the community as a whole {all}.[139]

137 Singer 1959: 203. With a different account, Hills 2003:135.

138 Hohfeld 1919: 36. Also, Kramer 1998: 26. It should be said, nonetheless, that Kramer´s slope metaphor (as an illustration to apparently point out a symmetric correlativity) is quite disputable: since only one of the correlated positions has the burden of action, it seems that Hohfeldian correlativity shows itself as asymmetric (Halpin 2019a: 230).

139 Even though this {all} can also be a very specific case of {one} (the State {State}) or an extended version of {some}, such as {physical persons}. In the final instance, and regarding norms

Correlativity has been challenged, particularly in the duty ↔ claim-right line. However, and as Kramer has exemplarily shown, there is no single case that cannot be explained under a correlativity scheme.[140] In fact, the main problem related to such challenges is that most of the examples presented are cases where quantifiers of the SA set are not taken into account. Norms of criminal or administrative law confer duties that, if not correlated with {one} or {some}, necessarily correlate with {all}.[141] Regardless of how difficult it can be to grasp who SA set agents are, the fact is that to impose a duty on an agent would be pointless if even the community were not to experience the result of action.[142]

(clxvi) Sarastro enacted "$(ip \Rightarrow F_{\{PA\}}\ pl) \rightarrow (ip \Rightarrow P_{\{SA\}}\ \varphi')$", a prohibition to put padlocks on people's lips; the duty everyone has to refrain from doing it correlates with a claim-right every physical person has (disjunctively): therefore, Sarastro enacted "$(ip \Rightarrow F_{\{\vee\ all\}}\ pl) \rightarrow (ip \Rightarrow P_{\{\vee\ physical\ persons\}}\ \varphi')$".

(clxvii) Sarastro also enacted "$(ip \wedge bpp \Rightarrow O_{\{breachers\}}\ pay\ £300) \rightarrow (ip \Rightarrow P_{\{SA\}}\ \varphi')$", a £300 fine on whoever breaches the prohibition ("bpp" as breaching the padlock prohibition); the duty correlates with a claim-right held by all (conjunctively): "$(ip \wedge bpp \Rightarrow O_{\{\vee\ breachers\}}\ pay\ £300) \rightarrow (ip \Rightarrow P_{\{\wedge\ all\}}\ \varphi')$".

(clxviii) both in the first N "$(ip \Rightarrow F_{\{\vee\ all\}}\ pl) \rightarrow (ip \Rightarrow P_{\{\vee\ physical\ persons\}}\ \varphi')$" and in the second one "$(ip \wedge bpp \Rightarrow O_{\{\vee\ breachers\}}\ pay\ £\ 300) \rightarrow (ip \Rightarrow P_{\{\wedge\ all\}}\ \varphi')$" there is an asymmetric correlativity: the mere adaptative content of the positions given to SA set agents is enough to verify it.

An asymmetric correlativity is recognized here, then, as inherent to any norm of the system, which is enough to claim it as a universal proposition. However, and given the way in which it is conceived, such asymmetric correlativity also provides an answer to a very inconsequential topic: to know if duties are prior to rights or the other way around.[143] Actually, and coherently with the normative structure that sustains each type of right, as seen before, it depends exactly on the right at hand: rights do not have or lack "priority" over duties just for being rights. So, while it seems clear that liberties and powers are prior to duties, claim-rights are duty-based and thus only justified on their basis.

---

enacted by normative authorities, there is always a relation between the State (as norm-giver) and the position wanted for an agent.

140 Kramer 1998: 58.

141 On those norms as denying correlativity, Hart 1982: 185, D'Almeida 2016: 560.

142 So, any norm correlates a primary position (main action) with a secondary one (co-action), a proposition about the law considered here as universal (valid to all norms of a system) and meaning that: (i) correlativity is recognizable in the four categories of norms that exhaust the deontic realm (permissions, obligations, prohibitions, and competence norms); and that (ii) correlativity is asymmetric (since both poles do not mirror each other).

143 Discussing the topic, MacCormick 1977: 200, Raz 1984: 211. Generally, Penner 1997: 304.

(clxix) in "$(ip \Rightarrow P_{\{PA\}} \varphi) \rightarrow (ip \Rightarrow O_{\{SA\}} \sim\varphi')$", the right (liberty) is prior to the duty: the main action is assigned to the liberty holder (PA set).

(clxx) in "$(ip \Rightarrow O_{\{PA\}} \varphi) \rightarrow (ip \Rightarrow P_{\{SA\}} \varphi')$", the right (claim-right) is not prior to the duty: the main action is assigned to the duty bearer (SA set).

(clxxi) in "$(ip \wedge e \Rightarrow \Diamond \wedge P_{\{PA\}} dc) \rightarrow (ip \Rightarrow O_{\{SA\}\ \sim}\varphi')$", the right (power) is prior to the duty: the main action is assigned to the power holder (PA set).

Still within the present context, mixing correlativity with directedness seems to be heuristically pointless, at least once correlativity is accepted as universal.[144] This is to say that there is no other conceptual space for "directedness" than to stick to the determinability of the correlated agent: using the duty ↔ claim-right correlativity line, a duty is directed when who the SA set agent is, is known (or, more precisely, determinable).[145] So, if with the quantifier {one} the addressee is most probably determinable, with the quantifiers {some} and {all} determinability of the addressees is only the case if, for some reason, the norm at hand restrains its applicability to a specific occasion.[146]

(clxxii) in "$(ip \Rightarrow O_{\{Sarastro's\ Brotherhood\}} hc) \rightarrow (ip \Rightarrow P_{\{citizens\}} \varphi')$, where "hc" stands for health care, the duty is not directed: the claim-right holder is indeterminable.

(clxxiii) in "$(ip \Rightarrow O_{\{Sarastro's\ Brotherhood\}} hc) \rightarrow (ip \Rightarrow P_{\{Pamina\}} \varphi')$, the duty is directed to Pamina: the claim-right holder is determinable (and it would also be with {the Queen of the Night's daughter}).

10 THE FORMALITY OF RIGHTS: COMBINING NORMATIVE VARIABLES

As Hohfeld's table of atomic legal positions already did, the table presented here also shows that the word "right" is used with different meanings; specifically, one of the following four: (i) a liberty; a (ii) a claim-right; (iii) a power; and (iv) an aggregate of atomic positions including at least one of the previous three. As is well known, Hohfeld's initial purpose was, precisely, to "grasp the irreduc-

144 For instance, Sreenivasan 2010: 467. For various conceptions of directedness, Hedahl 2013: 24, Steiner 2013: 232, Múrias 2018: 26.

145 Thus, "determinable" means here what Bentham meant with "assignable" (Bentham 1970: 313). Also, Hart 1982: 178. On the determinability of addressees, Nino 2003: 77.

146 With the quantifier {one} indeterminability is only the case if just one unknown person can match a specific condition (e.g., the winner of a competition before its end); on the other hand, with the quantifiers {some} and {all}, determinability depends on a given space-time uniqueness (naturally, determinability with {all} is particularly rare).

ible" by drawing the differences between those rights.[147] His table provided the means to understand, for instance, that holding a liberty or a power is to hold entirely different legal positions (even though both are usually called rights). And clarifying those differences is, undeniably, a purpose that Hohfeld fully achieved.

However, a norm-based approach to atomic legal positions seems to be able to unveil a little bit more; specifically, that to hold a right (no matter if a liberty or any other) is solely to be in a particular position given by a specific combination of normative variables. Since each one of the three atomic kinds of rights has a specific design in the structure of norms, precisely the one provided by the connection between the deontic modality and the membership to the PA or SA sets, it turns out that a right is no other than a formal "standpoint" in a norm: irrespective of what is the substantive content given to such norm, a legal right is a position resultant from a combination of variables within the norm's structure.[148]

Thus, to hold a liberty is just to be a member of the PA set in a norm that deontically modalizes the main action as permitted: in a permissive norm, anyone belonging to that set holds the right we call a "liberty". In the same way, to be the claim-right holder immediately follows from being a member of the SA set in a norm that deontically modalizes the main action as mandatory (or forbidden): here, anyone belonging to such set holds the right we call a "claim-right". This is also the case for legal power: anyone (a body or a person) belonging to the PA set in a constitutive permission (a permission regarding the action of producing deontic consequences) is the holder of a "power".

(clxxiv) a PA set agent of a permissive norm is the holder of a liberty: irrespective of its content, in "$(ip \Rightarrow P_{\{PA\}} \varphi) \rightarrow (ip \Rightarrow O_{\{SA\}} \sim\varphi')$" such PA set agent always holds a liberty.

(clxxv) a SA set agent of a mandatory norm (or a prohibition) is the holder of a claim-right: irrespective of its content, in "$(ip \Rightarrow O_{\{PA\}} \varphi) \rightarrow (ip \Rightarrow P_{\{SA\}} \varphi')$" such SA agent always holds a claim-right.

(clxxvi) a PA set agent of a competence norm is the holder of a power: irrespective of its content, in "$(ip \Rightarrow \Diamond \wedge P_{\{PA\}} dc) \rightarrow (ip \Rightarrow O_{\{SA\}} \sim\varphi')$" such PA agent always holds a power.

A norm-based approach to atomic legal positions leads, consequently, to a completely formal conception of rights, which is even more evident when considering that the content of norms is strictly contingent: the way the different elements of a norm are filled with some content is totally dependent on the will

147 Hohfeld 1919: 28.

148 Specifically, the variables related to: (i) the sets of addressees (which are the PA and the SA sets members); (ii) the deontic modality (if it is a permission, an imposition or a prohibition); and (iii) the type of action foreseen.

of a normative authority.[149] Therefore, and irrespective of other norms that may constrain the exercise of power, it is totally up to that authority to establish not only the main action and how it is deontically modalized, but also who belongs and does not belong to the PA and SA sets. By doing so, that authority is conferring rights regardless of the content inserted in the norm's elements.

(clxxvii) the norm structure has to be filled by the normative authority when enacting any norm: "(ip $\Rightarrow$ DM $_{\{PA\}}$ φ) $\rightarrow$ (ip $\Rightarrow$ DM $_{\{SA\}}$ φ´); accordingly, such authority has: (i) to select a type of action (if it is to "produce deontic consequences", it also gives the possibility to act); (ii) to choose how such action is deontically modalized (DM), from which follows the deontic modalization for the correlated co-action (φ´); (iii) to choose the PA set members; and (iv) to choose the SA set members.

The understanding of rights as a mere formal combination of normative variables, sustained under the present norm-based approach to atomic legal positions, also shows that any right (no matter if a liberty or any other) is completely value-free: since it is a strictly contingent matter, a right in a legal system is not necessarily an expression of a moral quality, or an interest of the holder, or whatever might provide it a metaphysical ground.[150] So, in the same way that a normative authority can confer rights "favourable" (to the holder), nothing prevents that authority (besides other norms limiting its power) from conceiving rights that are "unfavourable". In sum, legal rights (*per se*) do not have any axiological rationale.

(clxxviii) when the normative authority enacts "(ip $\Rightarrow$ O $_{\{Monostatos\}}$ t) $\rightarrow$ (ip $\Rightarrow$ P $_{\{Pamina\}}$ φ´)", expressed by "Pamina has the right to be tortured (t) by Monostatos", it follows that Pamina has a very clear claim-right to be tortured by the Moor; being tortured by Monostatos is obviously "unfavorable" to Pamina, it is repugnant to the community and it does not protect any aspect of Pamina's situation (or of any typical bearer); however, her claim-right is a claim-right as any other.

149 Qualifying a theory of rights as formal just for their formalization, Herrestad 1996: 6.

150 Which has been the consolidated tradition in legal science. For instance, to Bentham, the benefit conferred (Bentham 1970: 56); to Austin, an advantage given (Austin 1875: 193); to Salmond, an interest recognized and protected (Salmond 1913: 181); to Hart, an exclusive control over another, the small-scale sovereignty (Hart 1982: 183); to Raz, the individual well-being (Raz 1984: 195); to Sumner, the protection of individual autonomy and welfare (Sumner 1987: 98); to Wellman, a domain of dominion (Wellman 1997: 213); to Kramer, to protect some aspects (typically beneficial) of the holder´s situation (Kramer 2013: 246).

(clxxix) an example such as this cannot be confused, however, with the distinct case of a norm sentence like "Monostatos is under the duty to torture Pamina (tP)", expressing a norm such as "(ip ⇒ O $_{\{Monostatos\}}$ tP) → (ip ⇒ P $_{\{State\}}$ φ´)" in which the claim-right holder is the State and Pamina is only the object of the main action; this second example shows, though, that the previous one refers to a norm that effectively confers an "unfavourable" claim-right (contrary to any interest whatsoever).

10.1 Why theories of rights are almost useless: Facing epistemic insufficiency

In an imaginary legal system where the normative authority would enact norms with all the information needed to fully understand the rights given by its norms, theories of rights would be somehow useless. Such uselessness would be the result of norm sentences explicitly showing the conditions, the members of PA and SA sets of addressees, or the conjunctive or disjunctive exercise of a right. With this data, there would be no doubts about who faces the liberty holder or who holds a claim-right when only the duty bearer is known (doubts that are, actually, *la raison d´être* of such theories).[151] In other words, there would be no room for theories of rights because no epistemic insufficiency existed as well.

This is so because the main purpose of those theories, while attempting to provide an explanation of rights, is to offer the data that was omitted by the normative authority in the norm sentence: theories of rights live from epistemic insufficiency and such epistemic insufficiency is what makes them continually alive. Excluding some minor details, decades of confrontation between interest and will theories have been all about their degree of explanatory power, measured by how much they answer such questions.[152] Yet, the assessment of epistemic insufficiency may have some value for both theories of rights: it provides a frame for what to expect from those theories and shows how viable each one can be.

It seems clear that the will theory faces serious problems. The main reason being that its explanatory power is low (or even null). Assuming that a theory is an answer to a "why-question" formulated regarding some reliable data, the problems undermining the will theory reveal themselves instantly by offering answers that contradict what we already know. For instance, that a right being enforceable depends on a norm conferring enforceability, that there are unwaivable rights and, mainly, that a right is not necessarily an aggregate of

151 Kramer has explicitly exposed this when he stated that "accounting for the directionality of legal duties is precisely what the Interest Theory and Will Theory seek to do" (Kramer 2013: 246), an answer to Sreenivasan's statement by which "almost no one goes on to raise the question of what accounts for the direction of these duties" (Sreenivasan 2010: 467).

152 On the (endless) debate, Weissinger 2019: 200, Cruft 2019: 170.

atomic positions.[153] And these contradictions with how the law is, as becomes visible with a norm-based approach, seem to be fatal to the will theory.

On the other hand, the interest theory, although much more equipped to face the mentioned scenario of epistemic insufficiency, has to deal with the fact that such a scenario is, all things considered, an interpretative problem: epistemic insufficiency is given by the incompleteness of norm sentences, being strictly connected, therefore, with how normative authorities (or any agent exercising power) use language. A possible move to be taken by proponents of the interest theory is, correspondingly, to rethink the theory within the broader frame of interpretation and, in such a way, to conceive its explanatory purposes within the processes any agent carries out in order to withdraw meaningful norms from norm sentences.

It must be said, though, that the interest theory faces an additional (and somehow unexpected) problem; specifically, its inconsistency with positivism (the separation thesis and the inherent assumption that, irrespective of content, norms belong to the set since they are produced under the system's criteria of identification).[154] As the previous (clxxviii) example shows, the interest theory fails to explain norms that confer claim-rights (or liberties) without serving the interest of the holder (or of any typical bearer). So, while not recognizing such rights as "rights", the interest theory is either (i) distorting those criteria, or (ii) imposing the (moral) interest of the (typical) bearer as a criterion of validity.

Bibliography

Alchourrón, C., & Bulygin, E. (1971). *Normative Systems*. Springer Verlag.

Alchourrón, C., & Bulygin, E. (1991). Permisos y Normas Permisivas. In C. Alchourrón & E. Bulygin, *Análisis Lógico y Derecho* (pp. 215-238). Centro de Estudios Constitucionales.

Alexy, R. (2002). *A Theory of Constitutional Rights*. Oxford University. Press.

Amselek, P. (1988). Philosophy of Law and the Theory of Speech Acts. *Ratio Juris, 1* (3), 187-223.

Atienza, M., & Manero, J. (1998). *A Theory of Legal Sentences*. Dordrecht: Springer.

Arriagada, M. B. (2018). Fundamentality, Interdefinability, and Circularity Three Ideas on Hohfeld Examined. *Revus*. 35. 1-37.

Austin, J. (1875). *Lectures on Jurisprudence. The Philosophy of Positive Law*. Henry Holt And Company.

Austin, J. L. (1955). *How To Do Things with Words*. Clarendon Press.

Bach, K. (2010). Refraining, Omitting, and Negative Acts. In T. O'Connor & C. Sandis (eds.), *A Companion to the Philosophy of Action* (pp. 50-57). Wiley-Blackwell.

Barker, K. (2018). Private Law, Analytical Philosophy and The Modern Value of Wesley Newcomb Hohfeld: A Centennial Appraisal. *Oxford Journal of Legal Studies*, *38* (3), 585-612.

Bentham, J. (1970). *Of Laws in General*. The Athlone Press.

Bentham, J. (1838). *The Works Of Jeremy Bentham. Volume III*. William Tait.

Bentham, J. (1945). *The Limits of Jurisprudence Defined*. Columbia University Press.

Bernstein, S. (2016). Omission. Impossible. *Philosophical Studies*, 173, 2575-2589.

Biasetti, P. (2015). Hohfeldian Normative Systems. *Philosophia,* 43, 951-959.

Black, M. (1969). The Gap Between "Is" and "Should". In W. Hudson, *The Is/Ought Question* (pp. 99-112). MacMillan.

153 On the other hand, if the will theory is just a terminological claim, then it is pointless to discuss it. On the criticism regarding the will theory, Kramer 2013: 262, MacCormick 1982: 157. On theories and "why-questions", Hempel 1965: 335.

154 Pino 2014: 200, Guastini 1994: 224.

Borowski, M. (2000). La Restricción de los Derechos Fundamentales. *Revista Española De Derecho Constitucional*, *20,* 29-56.

Broad, C. (1944). Von Wright on the Logic of Induction. *Mind, 53,* 1-24.

Brown, V. (2005). Rights, Liberties and Duties: Reformulating Hohfeld's Scheme of Legal Relations? *Current Legal Problems*, *58,* 343-367.

Brożek, B. (2015). On Tû–Tû. *Revus, 27,* 15-23.

Brożek, B. (2004). *Defeasibility of Legal Reasoning.* Zakamycze.

Bulygin, E. (2015a). Norms, Normative Propositions and Legal Statements. In C. Bernal, C. Ochoa & others, *Essays in Legal Philosophy* (pp. 188-206). Oxford University Press.

Bulygin, E. (2015b). Kelsen on the Completeness and Consistency Of Law. In C. Bernal, C. Ochoa & others, *Essays in Legal Philosophy* (pp. 337-353). Oxford University Press.

Bulygin, E. (2010). Sobre la Equivalencia Pragmática Entre Permiso y No Prohibición. *Doxa*, *33,* 283-296.

Bulygin, E. (1991). Sobre las Normas de Competencia. In C. Alchourrón & E. Bulygin, *Análisis Lógico y Derecho* (pp. 485-498). Centro de Estúdios Constitucionales.

Bulygin, E. & Mendonca, D. (2005). *Normas y Sistemas Normativos*. Marcial Pons.

Calsamiglia, A. (1994). Geografia de las Normas de Competencia. *Doxa, 15/16,* 747-767.

Campbell, C. (1996). *The Myth of Social Action*. Cambridge University Press.

Caracciolo, R. (1986). *La Noción de Sistema en la Teoría del Derecho*. Fontanamara.

Castañeda, H-N. (1972). On the Semantics of the Ought-To-Do. In D. Davidson & G. Harman, *Semantics of Natural Languages* (pp. 675-694). Reidel Publishing.

Celano, B. (2019). *Los Derechos en el Estado Constitucional.* Palestra Editores.

Clarke, R. (2012). What Is an Omission? *Philosophical Issues, 22,* 127-143.

Cook, W. (1919). Hohfeld's Contribution to the Science of Law. *The Yale Law Journal, 28*, 721-738.

Corbin, A (1919). Legal Analysis and Terminology. *The Yale Law Journal, 29,* 163-173.

Cruft, R. (2019). The Circularity of the Interest and the Will Theories of Rights. In M. McBride, *New Essays in the Nature of Rights* (pp. 169-186). Hart Publishing.

Cruft, R. (2013). Rights and the Direction of Duties. *Ethics, 123,* 195-201.

Cruft, R. (2004). Beyond Interest Theory and Will Theory ? *Law and Philosophy, 23* (4), 347-397.

D'Almeida, L. D. (2016). Fundamental Legal Concepts: The Hohfeldian Framework. Phil*osophy Compass, 11,* 554-569.

D'Almeida, L. D. (2015). *Allowing For Exceptions.* Oxford University Press.

D'Almeida, L. D. (2009). Normas Jurídicas Completas. In *Liber Amicorum Sousa Brito* (pp. 395-410). Almedina.

Davidson, D. (2001). Individuation of Events. *In Essays on Actions and Events* (pp. 137-151). Oxford University Press.

Duarte, D (2012). An Experimental Essay on the Antecedent and Its Formulation. *I-Lex, Rivista Di Scienze Giuridiche, Scienze Cognitive Ed Intelligenza Artificiale*, *16,* 37-60.

Duarte, D. (2011). Linguistic Objectivity in Norm Sentences: Alternatives in Literal Meaning. *Ratio Juris, 24* (2), 111-138.

Duarte, D. (2009). Rebutting Defeasibility as Operative Normative Defeasibility. In *Liber Amicorum Sousa Brito* (pp. 161-174). Almedina.

Edmundson, W. (2004). *An Introduction to Rights.* Cambridge University Press.

Eleftheriadis, P. (2008). *Legal Rights.* Oxford University Press.

Ferrer, J. (2000). *Las Normas de Competencia. Un Aspecto de la Dinámica Jurídica.* Marcial Pons.

Finnis, J. (2011). Rights: their logic restated. *Philosophy of Law. Collected Essays, Volume 4* (375-388).

Florczak-Wator, M. (2015). *Applying the Constitution of the Republic of Poland in Horizontal Relations.* Jagellonian University Press.

Frändberg, Å. (2018). *The Legal Order.* Springer.

Frydrych, D. (2019). Rights Correlativity. In S. Balganesh, T. Sichelman & H. Smith, *The Legacy of Wesley Hohfeld: Edited Major Works, Selected Personal Papers, and Original Commentaries* (pp. 1-35). Cambridge University Press.

Frydrych, D. (2018). Hohfeld vs. The Legal Realists. *Legal Theory, 24,* 291-344.

Grabowski, P. (2009). Enactment, Provision, Norm: Reflections on the Normativeness of Provisions Regulating the Process of Legislation. *Investigationes Linguisticae*, *XVII,* 129-140.

Guastini, R. (2016). *La Sintaxis del Derecho.* Marcial Pons.

Guastini, R. (1999). *Distinguiendo.* Barcelona: Gedisa.

Guastini, R. (1994). Invalidity. *Ratio Juris, 7* (2), 212-226.

Guastini, R. (1993). *Le Fonti Del Diritto e L'Interpretazione*. Giuffrè.

Guibourg, R., Echave, D. & Urquijo, M. (2008). *Lógica, Proposición y Norma*. Astrea.

Hage, J. (2018). *Foundations and Building Blocks of Law.* Eleven International Publishing

Hage, J. (2005). *Studies on Legal Logic.* Springer

Halpin, A. (2019a). Choosing Axioms of Correlativity. *The American Journal of Jurisprudence, 64* (2), 225–258.

Halpin, A. (2019b). Correlativity and Its Logic:

Asymmetry Not Equality in the Law. *Canadian Journal of Law and Jurisprudence, 32* (1), 83-108.
Halpin, A. (2014). Bentham's Limits and Hohfeld. In Guillaume Tusseau, *The Legal Philosophy And Influence Of Jeremy Bentham* (pp. 196-223). Routledge.
Halpin, A. (2007). Rights, Duties, Liabilities, and Hohfeld. *Legal Theory, 13,* 23-29.
Halpin, A. (2003). Fundamental Legal Concepts Reconsidered. *Canadian Journal of Law and Jurisprudence, 16* (1), 41-54.
Halpin, A. (1997). *Rights and Law Analysis and Theory.* Hart Publishing.
Halpin, A. (1985). Hohfeld's Conceptions: From Eight to Two. *Cambridge Law Journal, 44* (3), 435-457.
Hansson, S. (2013). The Varieties of Permission. In D. Gabbay, J. Horty & others, *Handbook of Deontic Logic and Normative Systems* (pp. 195-240). College Publications.
Hart, H. (1994). T*he Concept of Law* (2nd edition). Oxford University Press.
Hart, H. (1982). Legal Rights. In *Essays on Bentham* (pp. 162-193). Oxford University Press.
Hedahl, M. (2013) The Significance of a Duty's Direction: Claiming Priority Rather Than Prioritizing Claims. *Journal of Ethics & Social Philosophy, 7* (3), 1-29.
Hempel, C. (1965). *Aspects of Scientific Explanation.* The Free Press.
Herrestad, H. (1996). *Formal Theories of Rights.* Juristforbundets Forlag.
Herrestad, H., & Krogh, C. (1995). Obligations Directed from Bearers to Counterparties. In *Proceedings From Icail'95* (pp. 210-218). ACM Press.
Hilpinen, R. (1997). On States, Actions, Omissions and Norms. In G. Holmström-Hintikka & R. Tuomela, *Contemporary Action Theory*, I (pp. 83-107). Springer.
Hintikka, J. (1970). Some Main Problems of Deontic Logic. In R. Hilpinen, *Deontic Logic: Introductory and Systematic Readings* (pp. 59-104). Reidel Publishing.
Hills, A. (1003). Duties and Duties to the Self. *American Philosophical Quarterly, 40* (2), 131-142.
Hohfeld, W. (1919). *Fundamental Legal Concepts.* Yale University Press.
Hornsby, J. (2004). Agency and Actions. In J. Hyman & H. Steward, *Agency and Action* (pp. 1-24). Cambridge University Press.
Heidi Hurd, H., & Moore, M. (2018). The Hohfeldian Analysis of Rights. *The American Journal of Jurisprudence, 63* (2), 295-354.
Iacona, A. (2015). Quantification and Logical Form. In A. Torza, *Quantifiers, Quantifiers, Quantifiers: Themes in Logics, Metaphysics, and Language* (pp. 125-141). Springer.
Jaffey, P. (2006). Duties and Liabilities in Private Law. *Legal Theory, 12,* 137-156.
James, M. H. (1973). Bentham on the Individuation of Laws. *Northern Ireland Legal Quarterly, 24,* 357-382.
Johns, C. (2014). Leibniz and the Square: A Deontic Logic for the Vir Bonus. *History And Philosophy of Logic, 35* (4), 369-376.
Jovanović, M. (2012). *Collective Rights. A Legal Theory.* Cambridge University Press.
Kelsen, H. (2005). *Pure Theory of Law (*2nd edition). The Lawbook Exchange.
Kocourek, A. (1923). Non-Legal Content Relations Recombated. *Illinois Law Quarterly, 5* (3), 150-159.
Kocourek, A (1921). The Hohfeld System of Fundamental Legal Concepts. *Illinois Law Review, 15,* 24-39.
Kramer, M. (2019). On No-Rights and No Rights. *The American Journal of Jurisprudence, 64* (2), 213-223.
Kramer, M. (2013). Some Doubts About Alternatives to the Interest Theory of Rights. *Ethics, 123* (2), 245-263.
Kramer, M. (2001). Getting Rights Right. In M. Kramer, *Rights, Wrongs And Responsibilities* (pp. 28-95). Palgrave.
Kramer, M. (1998). Rights Without Trimmings. In *A Debate Over Rights* (pp. 7-111). Oxford University Press.
Kumm, M. (2007). Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement. In George Pavlakos, *Law, Rights And Discourse* (pp. 109-129). Hart Publishing.
Kurki, V. (2017). Legal Competence and Legal Power. In Mark McBride, *New Essays In The Nature Of Rights* (pp. 31-48). Hart Publishing.
Lindhal, L. (2017). Legal Power: The Basic Definition. *Ratio Juris, 30* (2), 158-185.
Lindhal, L. (2006). Hohfeld Relations and Spielraum for Action. *Análisis Filosófico, 26* (2), 325-355.
Lindhal, L. (1977). *Position and Change. A Study in Law and Logic.* Reidel Publishing Company.
Lopes, P. M. (2017). The Syntax of Principles: Genericity as a Logical Distinction Between Rules and Principles. *Ratio Juris, 30* (4), 471-490.
Lyons, D. (1970). Correlativity of Rights and Duties. *Noûs, 4* (1), 45-55.
MacCormick, N. (2005). *Rhetoric And the Rule of Law.* Oxford University Press.
MacCormick, N. (1982). Children's Rights: A Test-Case for Theories of Rights. In *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (pp. 154-166). Oxford University Press.
MacCormick, N. (1977). Rights in Legislation. In P. Hacker & J. Raz, *Law, Morality, and Society.*

Essays in Honour of Herbert Hart (pp. 189-209). Clarendon Press.
Mackie, J. (1965). Causes and Conditions. *American Philosophical Quarterly, 2* (4), 245-264.
Makinson, D. (1986). On the Formal Representation of Rights Relation: Remarks on the Work of Stig Kanger and Lars Lindahl. *Journal of Philosophical Logic*, *15* (4), 403-425.
Manero, J. (2018). Diez Observaciones y un Quadro Final Sobre Permisos y Normas Permisivas. *Revus,* 36, 43-54.
Markovich, R. (2019). Understanding Hohfeld and Formalizing Legal Rights: The Hohfeldian Conceptions and Their Conditional Consequences. *Studia Logica*, 108, 129-158.
Marmor, A. (1997). On the Limits of Rights. *Law and Philosophy, 16* (1), 1-18.
Martin, R. (1993). *A System of Rights.* Clarendon Press.
Mele, A. (1997). Passive Action. In G. Holmström-Hintikka & R. Tuomela, *Contemporary Action Theory*, I (pp. 135-144). Springer.
Mendonca, D. (2018). *Análisis Constitucional. Una Introducción.* Centro de Estudios Constitucionales.
Mendonca, D. (2007). Sobre el Princípio de Permisión. In J. J. Moreso & C. Redondo, *Un Diálogo Con la Teoría del Derecho de Eugenio Bulygin* (pp. 57-60). Marcial Pons.
Mendonca, D. (2000). *Las Claves del Derecho.* Gedisa.
Miller, S. (2004). *Social Action. A Teleological Account*. Cambridge University Press.
Moreso, J. J., & Navarro, P. (1998). The Reception of Norms and Open Legal Systems. In S. Paulson & B. Paulson, *Normativity and Norms* (pp. 273-291). Oxford University Press.
Múrias, P. (2018). Personal Value in the Analysis of Rights. *Católica Law Review, 2* (2), 25-40.
Navarro, P. (2019). Tipos de Permisos y Discreción Judicial. In E. Bulygin, *El Libro De Los Permisos* (pp. 61-85). Marcial Pons.
Navarro, P., & Rodríguez, R. (2004). *Deontic Logic and Legal Systems.* Cambridge University Press.
Newman, D. (2011). *Community and Collective Rights.* Hart Publishing.
Niiniluoto, I. (1991). Norm Propositions Defended. *Ratio Juris, 4,* 367-373.
Nino, C. S. (2003). *Introducción Al Análisis Del Derecho (*13ª edición). Ariel.
Nordenfelt, L. (1997). On Ability, Opportunity and Competence: An Inquiry Into People's Possibility for Action. In G. Holmström-Hintikka & R. Tuomela, *Contemporary Action Theory*, I (pp. 145-158). Springer.
Nyquist, C. (2002). Teaching Wesley Hohfeld's Theory of Legal Relations. *Journal of Legal Education, 52,* 238-257.
O'Reilly, D. (1999). Are There Any Fundamental Legal Conceptions? *University of Toronto Law Journal, 49* (2), 271-279.
O'Reilly, D. (1995). Using The Square of Opposition to Illustrate the Deontic and Alethic Relations Constituting Rights. *University of Toronto Law Journal*, *45* (3), 279-310.
Pacherie, E. (2011). Framing Joint Action. *Review of Philosophy and Psychology, 2,* 173-192.
Peczenik, A. (2008). *On Law and Reason.* Springer.
Penner, P. (1997). The Analysis of Rights. *Ratio Juris, 10* (3), 300-315
Peters, S., & Westerståhl, D. (2006). *Quantifiers in Language and Logic.* Clarendon Press.
Pino, G. (2016). *Teoria Analítica del Diritto I. La Norma Jurídica.* Edizione ETS.
Pino, G. (2014). Positivism, Legal Validity, and the Separation of Law and Morals. *Ratio Juris, 27* (2), 190-217.
Pörn, I. (1977). *Action Theory and Social Science.* Reidel Publishing Company.
Prakken, H., & Sartor, G. (2004). The Three Faces of Defeasibility in the Law. *Ratio Juris, 17* (1), 118-139.
Preda, A. (2015). Rights: Concept and Justification. *Ratio Juris, 28* (3), 408-415.
Radin, M. (1929). Correlation. *Columbia Law Review, 29* (7), 901-905.
Ratti, G. (2018). Tres Addenda a Sistemas Normativos. *Doxa, 41,* 85-99.
Ratti, G. (2013). *El Gobierno de las Normas.* Marcial Pons.
Raz, J. (1984). On the Nature of Rights. *Mind, 93,* 194-214.
Raz, J. (1980). *The Concept of a Legal System* (2ª edition). Clarendon Press.
Raz, J. (1975). Permissions and Supererogation. *American Philosophical Quarterly, 12* (2), 161-168.
Robinson, R., Coval, S., & Smith, J. (1983). The Logic of Rights. *The University of Toronto Law Journal, 33* (3), 267-278.
Ross, A. (1968). *Directives and Norms.* Routledge & Kegan Paul.
Ross, A. (1958). *On Law and Justice.* Stevens and Sons.
Ross, A. (1957). Tû-Tû. *Harvard Law Review, 70,* 812-825.
Ruiter, D. (1998). Legal Powers. In S. Paulson & B. Paulson, *Normativity and Norms* (pp. 471-491). Clarendon Press.
Ruiter, D. (1993). *Institutional Legal Facts. Legal Powers and their Effects.* Springer.
Sanford, D. (1989). *If P, then Q: Conditionals and the Foundations of Reasoning*. Routledge.
Sanford, D. (1984). The Direction of Causation and the Direction of Time. *Midwest Studies In Philosophy, 40,* 53-75.
Salmond, J. (1913). *Jurisprudence* (4th edition). Stevens and Haynes.

Sardo, A. (2018). Let's Talk About Antinomies. Normative Systems Reloaded. *Revus, 36*, 53-79.
Sartor, G. (2009). Understanding and Applying Legal Concepts: An Inquiry on Inferential Meaning. In J. Hage & D. Pforden, *Concepts in Law* (pp. 35-54). Springer.
Sartor, G. (2006). Fundamental Legal Concepts. *Artificial Intelligence and Law*, *14,* 101-142.
Searle, J. (1969). *Speech Acts. An Essay in the Philosophy of Language*. Cambridge University Press.
Sergot, M. (2013). Normative Positions. In D. Gabbay, J. Horty & others, *Handbook Of Deontic Logic And Normative Systems* (pp. 353-405). College Publications.
Schauer, F. (1991). *Playing by the Rules*. Clarendon Press.
Schlag, P. (2015). How To Do Things with Hohfeld. *Law And Contemporary Problems, 78,* 185-233.
Schmid, H. (2009). *Plural Action*. Springer.
Simmonds, N. (1998). Rights at the Cutting Edge. In *A Debate Over Rights* (pp. 113-231). Oxford University Press.
Singer, M. (1959). On Duties to Oneself. *Ethics, 69*(3), 202-205.
Spaak, T. (2009). Explicating the Concept of Competence. In J. Hage & D. Pforden, *Concepts in Law* (pp. 67-80). Springer.
Spaak, T. (2003). Norms That Confer Competence. *Ratio Juris, 16* (1), 89-104.
Spena, A. (2012). The Strange Case of the Protective Perimeter: Liberties and Claims to Non-Interference. *Law and Philosophy, 31,* 161-184.
Sreenivasan, G. (2010). Duties and Their Direction. *Ethics, 120* (3), 465-494.
Sreenivasan, G. (2005). A Hybrid Theory of Claim-Rights. *Oxford Journal of Legal Studies, 25* (2), 257-274.
Steiner, H. (2013). Directed Duties and Inalienable Rights. *Ethics, 123* (2), 230-244.
Steiner, H. (1994). *An Essay on Rights*. Blackwell.
Sumner, L. (1987). *The Moral Foundations of Rights*. Clarendon Press.
Tuomela, R. (2010). *The Philosophy of Sociality*. Oxford University Press.
Tuomela, R. (2000). *Cooperation. A Philosophical Study*. Springer.
Tuomela, R. (1984). *A Theory of Social Action*. Reidel Publishing Company.
Wall, S. (2007). Collective Rights and Individual Autonomy. *Ethics, 117* (2), 234-264
Weissinger, J. (2019). *Content and Competence. A Descriptive Approach to the Concept of Rights*. Mohr Siebeck.
Wellman, C. (2016). *Constitutional Rights. What They Are and What They Ought to Be*. Springer.
Wellman, C. (1997). *An Approach to Rights*. Springer.
Wenar, L. (2013). The Nature of Claim-Rights. *Ethics, 123* (2), 202-229.
Wenar, L. (2005). The Nature of Rights. *Philosophy & Public Affairs, 33* (3), 223-252.
Williams, G. (1956). The Concept of Legal Liberty. *Columbia Law Review, 56* (8), 1129-1150.
Woleński, J. (2008). Applications of Squares of Oppositions and their Generalizations in Philosophical Analysis. *Logica Universalis, 2,* 13-29.
Wright, G. von (1963). *Norm and Action*. Routledge & Kegan Paul.
Wright, G. von (1951_1). *An Essay in Modal Logic*. North-Holland Publishing Company.
Wright, G. von (1951_2). *A Treatise on Induction and Probability*. Harcourt, Brace & Co.
Zhu, J (2004). Passive Action and Causalism. *Philosophical Studies*, *119,* 295-314.
Zorrilla, D. (2007). *Conflictos Constitucionales, Ponderación y Indeterminación Normativa*. Madrid: Marcial Pons.
Zucca, L. (2007). *Constitutional Dilemmas. Conflicts of Fundamental Rights in Europe and the USA*. Oxford University Press.

Miklós Könczöl*

Parental proxy voting and political representation

This paper reviews the proposal to give parents extra votes that they can cast as proxies on behalf of their children. Justifications of parental proxy voting (PPV) are examined with a focus on various interpretations of the concept of 'proxy'. The first part of the paper assesses the notion that PPV does not violate the principles of equal and direct suffrage. Contrary to proponents of PPV, I argue that parents voting on behalf of their children cannot be considered as merely expressing children's political preferences, and that persons who are taken to be unable to make a decision themselves cannot be represented in this way. Thus, PPV actually allocates extra voting rights to parents, giving additional weight to their preferences in decision-making. The second part turns to parents as possible proxies for children's interests, with their extra votes being meant to overweigh those of the elderly or of non-parents. PPV thus understood could be supported by the claim that parents are better situated to represent their children's interests than the average voter. Proposals of PPV usually refer to parents' better access to information, their shared interests with their children, and/or their selflessness. These arguments are, however, either irrelevant or questionable, and do not therefore actually speak in favour of the introduction of PPV. In conclusion, while PPV is usually depicted as making political decisions simultaneously more democratic and more prudent, it does neither. Since these aims cannot be achieved through a single institution, different methods to achieve each aim need to be explored.

Keywords: political representation, voting, suffrage, age discrimination, parental proxy voting

1 INTRODUCTION

This paper deals with a proposal, formulated repeatedly in several countries (but most prominently in Germany) since the 1970s,[1] to have parents vote as

* konczol.miklos@jak.ppke.hu | Research fellow at the Centre for Social Sciences, Institute for Legal Studies, and associate professor at Pázmány Péter Catholic University, Faculty of Law, Budapest (Hungary). This paper summarises research undertaken within two projects, 'Taking Age Discrimination Seriously' (grant ID: 17–26629S) at the Institute of State and Law of the Academy of Sciences of the Czech Republic, Centre for Law and Public Affairs (CeLAPA), and 'Institutional Reforms in Ageing Societies: Legal and Political Perspectives' (grant ID: OTKA K 112900) at the Centre for Social Sciences, Budapest.

1 First by Löw 1974. On the subsequent debate, see the overview by Westle 2006. While the idea has found support across German parliamentary factions (cf. Jesse 2003: 8–9), such a reform has never been adopted. The discussion continues, however (see, more recently, Adrian 2016). In Hungary, the proposal has been formulated several times since the democratic transition (for a brief overview, see Reimer & Schanda 2016: 70). In 2011, shortly before enacting the new constitution, the government sent questionnaires to the electorate, which included a question about parental proxy votes. The majority of the respondents rejected the idea. For

proxies on behalf of their children until they become of legal voting age. While the proxy proposal is part of efforts to find institutional solutions for problems related to sustainability,[2] the arguments formulated in the discourse go beyond the question of efficiency, i.e., whether the proposed reform could contribute to more sustainable policies, and raise fundamental problems of constitutional law, as well as legal and political theory.

While its supporters tend to regard it as a kind of panacea for several issues concerning sustainability and democracy, the proposal has provoked quite some controversy. It has been challenged from at least three perspectives: first, as violating the democratic (and constitutional) principles of equal and direct (personal) suffrage;[3] second, as unnecessary, since the lack of suffrage does not mean a lack of representation for children;[4] and third, as unhelpful, either because extra parental votes may not, or at least not only, be used to promote sustainability or children's interests,[5] or because these votes may not suffice to make a difference in terms of voting outcomes.[6] Related to this latter point, a 'reform paradox' may arise in the sense that wherever such an institution would receive the necessary support within the electorate to be enacted, it would not be necessary.[7]

The arguments anticipating or in response to the above objections can be classified as either 'deontological' or 'consequentialist'.[8] While a clear distinction be-

---

the discussion in constitutional scholarship since 2011, see Fröhlich 2011 and Schanda 2012 who are in favour of the proposal, Jakab (2017, 2020) who maintains some practical reservations, and Bodnár 2014, M. Balázs (2017, 2018) and Kurunczi 2018 who are against it. For an overview of similar proposals in other countries, see van Parijs 1998: 309–310 and Reimer & Schanda 2016: 63–64, as well as de Briey, Héraut & Ottaviani 2009 on the Belgian plural voting system at the turn of the 19th and 20th centuries, and Bertaux 2011: 126–127 on the proposal for a family vote in France in the 1910s and 1920s.

2 Cf. van Parijs (1998), Jakab (2019, 2020). Sustainability is used rather broadly in the related literature, including environmental, financial, and demographic aspects. A natalist perspective seems to play an important role in many proposals (cf. van Parijs 1998: 314, and, for a more recent example, Löw 2005), with a clear focus on fertility rates in the works of Paul Demeny (see e.g., Demeny 1986, 2012), after whom the term 'Demeny voting' is used for PPV (cf. Sanderson & Scherbov 2007: 548).

3 See, within the context of German constitutional law, Müller-Franken 2013, with further references.

4 See, e.g., Müller-Franken 2013: 59, with reference to Pechstein 1996: 84–85.

5 See, e.g., de Briey 2007.

6 On the lack of convincing empirical arguments, see Müller-Franken 2013: 104, quoting Westle 2006, and Kahl 2009. See also Goerres & Tiemann 2009, based on data from German general elections, arguing that while age may be relevant for voting behaviour, the introduction of PPV would not have made any considerable difference for the election results between 1994 and 2005. The possibility of conflicts of interests even among the group of parents is emphasised by Wernsmann 2005: 66.

7 Cf. Offe 1994, quoted by Goerres & Tiemann 2009: 58.

8 For that usage, see, e.g., Reimer 2004, de Briey 2007, Goerres & Tiemann 2009, and Reimer & Schanda 2016. In addition to these two groups, Westle 2006 distinguishes constitutional

tween the two may be difficult to make in some cases, they do clearly differ in their scope in that the former are meant to explain why *children* should *have suffrage*,[9] whereas the latter are aimed at justifying *parental voting* on behalf of children.

In what follows, I focus on the concept of, and justifications offered for, *parental* proxy voting (PPV). In doing so, I shall distinguish between what seem to me two different sets of arguments and examine each in turn. The first, the 'Equal Suffrage Account', sticks to the notion that PPV actually means suffrage for children, yet with their right to vote being exerted by their parents on their behalf. The second, the 'Unequal Suffrage Account', is meant to provide justification for the extra votes that are to be cast by parents. While most proponents of PPV combine these in some form, the two sets seem to be relatively independent, at least in the sense that arguments used to support the Unequal Suffrage Account may work even if those formulated in favour of the Equal Suffrage Account do not hold.[10]

I am going to tackle each of the accounts by looking at the interpretations of 'proxy voting' they are (or could be) based on. In the case of the Equal Suffrage Account, neither of the possible interpretations seems to be adequate for defending PPV, for conceptual reasons. While there is a different interpretation underlying the Unequal Suffrage Account that may provide strong arguments for some kind of a proxy, it does not work for parental proxies specifically. What follows for children's representation in political decision-making is that they either ought to be able to participate directly, or their interests should be represented by a more reliable proxy. These two possibilities do not exclude one another, but their functions cannot be merged in one institution, and certainly not in PPV.

2 THE EQUAL SUFFRAGE ACCOUNT

Given that children under a certain age do not currently have suffrage, an argument for PPV requires at least the following steps:

(1) Children should be enfranchised.

(2) Children cannot cast votes.

(3) Parents should vote on behalf of their children.

arguments.

9 There may be at least one exception to that, in case one regards suffrage as a good (see Hermann 2011: 44–45) and argues that parents deserve the extra votes (as they produce public goods from private goods). A similar argument (among others) is put forth by Vanhuysse 2013. I am not going to address that kind of claim directly here, but it seems to be countered by the argument that on the same account, parents may not be the only candidates for allocating extra votes (see Westle 2006).

10 As a parallel, see the well-known proposal to abandon equality for proportionality in democratic decision-making by Brighouse & Fleurbaey 2010.

The proposal, in its above form, presupposes that the vote belongs to the child. Children, *qua* citizens, are regarded as having the right to vote (1),[11] but also as needing a proxy to cast the vote for them (2). This solution is often commended as being in line with the constitutional principle of 'one person, one vote'.[12] Proponents of PPV stress that even though parents would be able to cast more than one vote this way, the additional votes would not be their own.[13] This is important, since the most obvious objection to PPV, already mentioned above, is that it actually amounts to plural vote.[14]

As mentioned above, my focus is on the justification of (3), i.e., the question of whether it is the parents, rather than either average voters or experts, who should act as proxies for their children in a political decision-making process. Thus, I am not dealing here with the validity of either (1) or (2), but accept them for the sake of argument, and confine myself to examining what interpretations of 'proxy' can be used to support arguments in favour of (3). It seems that there are two such conceptions, which I discuss in turn below. The first regards the proxy as someone who merely expresses the child voter's decision (1.1), whereas in the second, the proxy makes the decision on behalf of the child (1.2).

2.1 Casting the vote

To counter the objection that PPV would violate the principle of direct suffrage,[15] the institution of voting by intermediary is often mentioned, e.g., the British and French solutions of 'voting by proxy' or 'vote par procuration', which are offered as an alternative to voting by mail for people who are unable to attend voting in person.[16] One has to apply for proxy voting, and entrust someone who has the right to vote to cast one's vote.[17] In that usage, then, a 'proxy' is an intermediary for performing the physical actions related to voting. It is im-

11 This claim is most often supported by referencing the concept of popular sovereignty: since children are part of the people, so the argument goes, they should not be excluded from the exertion of sovereignty through suffrage (see e.g., Peschel-Gutzeit 1999: 560, Merk 2009: 531–534, Schanda 2012: 81, Reimer & Schanda 2016: 73). A similar argument links suffrage to the recognition of human dignity (see e.g., Knödler 1996: 559–561, Schreiber 2004: 1344, Löw 2005: 34–35, Merk 2009: 534).

12 See e.g., Reimer & Schanda 2016: 64.

13 That is why the institution is sometimes referred to as 'children's vote vicariously exercised' (abbreviated as ChiVi/KiVi, see e.g., de Briey 2007), or as 'Stellvertreterwahlrecht' (see e.g., Müller-Franken 2013: 6–7). I am going to use the term 'parental proxy voting' to emphasise the role of parents, which is the focus of the following arguments.

14 See e.g., de Briey, Héraut, & Ottaviani 2009. For the same reason, opponents of PPV argue that there is no practical difference between parents casting their own extra votes or those of their children, see e.g. Wernsmann 2005: 54–55.

15 Cf. Art. 38(1) of the *Grundgesetz*.

16 See e.g., Löw 2002, Fröhlich 2011.

17 See *Representation of People Act 2000*, section 12(1), and *Code électoral*, article 147bis, respectively.

portant to see here, however, that the parallel with PPV is not a very close one. Voting by proxy is reserved for persons who would be able to cast a vote at the time were it not for their specific conditions,[18] while proponents of PPV assume that children *qua* children cannot vote themselves, other conditions aside (that is, children who would be able to attend voting are equally excluded).

In the above case, unlike the person entitled to the vote, a reliable proxy would be both physically and legally able to cast the vote and be expected to cast the actual vote of the incapable voter, i.e., the vote expressing the decision of the latter, similar to an agent acting on behalf of a principal. The 'principal voter', to be sure, can instruct the proxy to cast the vote according to her own best judgement.[19] The institution nevertheless requires that the former *can* at least make a decision to be expressed through the vote cast by the latter. Thus, in the case of PPV, acting as a proxy seems to refer not only to the actual casting of the vote (in the sense of placing the ballot into the box or performing a similar action), but to include the moment of decision-making too.[20] Apparently, even proponents of PPV focus on that latter interpretation, using the parallel of 'voting by proxy' only to argue that direct suffrage does not require that the vote be cast personally.[21] Yet, in the case of children, it is not their presence that is lacking, but, arguably, their capability to make a decision.

2.2 Making the decision

The idea of PPV implies, by definition, that children (or at least some children) cannot make the decision themselves, but also that someone else can do so on their behalf. The question is, again, whether that departs from the principle of direct suffrage. A parallel with marriage is sometimes drawn here. Those opposing PPV argue that there are certain highly personal decisions that cannot be made by any other than those concerned. In modern times, so the argument goes, both marriage and electoral votes belong to this category.[22] In response, proponents of PPV claim that the nature of voting differs from marriage, since the latter is a personal decision with consequences that affect one's personal life to a definitive extent, while the consequences of one's vote appear in a very dif-

18 Cf. Müller-Franken 2013: 78, also pointing out that 'proxy voting' in the above sense depends on the explicit will of the voter, with the law only providing for the possibility to have a proxy cast the vote on one's behalf.

19 See Löw 2005: 38–39, quoting the example of Lionel Jospin, who, having failed to receive enough votes to enter the second round of the 2002 presidential elections, was reported to say he would have one of his friends vote for him, as he could not decide which one of his competitors to support.

20 Cf. Gaa 1997: 345.

21 E.g., Reimer & Schanda 2016: 182.

22 See, e.g., Gaa 1997: 345, Hinrichs 2002: 52.

ferent way.[23] For proponents of PPV, what needs to be expressed is one's interests. Even if one does not believe, unlike people across many historical periods and many cultures, that one's spouse could adequately be chosen by someone else, we have good reason to think that one's interests related to political decision-making can be fully taken into account by another person.

On this account, what makes parents not only suitable proxies but the best possible candidates to act as proxies, is their closeness to the person they are representing. They are close to their children both in terms of information and motivation. They may be best situated to know their children's personal interests not only due to the fact that they spend a considerable amount of time with them, but also because they are emotionally motivated to take interest in considering the possible effects that public decisions would have on their children. Thus, in case their children do actually have some kind of electoral preference, they may be both able and willing to discuss the matter with them. A possible parallel here may be decisions concerning children's education. Although parents choose their children's schools, they are meant to, and possibly do, take their children's opinion into account.[24] That motivation can also extend to the act of voting: even though there may be conflicts of interests between parents and children, parents are the most likely to act selflessly, or at least to pay due respect to their children's interest, even by splitting the votes they cast.[25]

A similar argument highlights that the special link between parents and children is appreciated by most modern legal systems, which make parents the guardians of their children's financial and other rights. Children actually do have rights they cannot exert themselves, as well as duties they cannot fulfil by their own actions.[26] They may have the legal capacity to acquire property, e.g., by inheritance, but the related decisions are beyond that capacity. It is parents who have the legal power, and duty, to decide and act in the best interest of their children.[27] Thus, the argument is not just one of consistency (voting rights should be regulated in the same way as property rights, or educational rights, etc.), but also one of analogy: legislators, on this account, express their trust in parents as proxies for their children's interests and preferences in a number of contexts, which should be followed for voting as well.[28]

23 See Hattenhauer 1996: 16, Reimer 2004, also Schanda 2012: 83, pointing out that the *personal* character of suffrage is not among the constitutional requirements.

24 See, in general, *UN Convention on the Rights of the Child*, Art. 12(1) on the right of the child to 'express [his or her own] views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child'.

25 Cf. Schanda 2012: 83, Reimer & Schanda 2016: 68.

26 Cf. Steffani 1999: 792.

27 Cf. Merk 2009: 535.

28 See e.g., Nopper 1999: 151.

Leaving a more detailed discussion of the above considerations concerning the suitability of parents as proxy voters to the next section, it is worth mentioning that the idea of PPV entails regarding parents as proxies in terms of making, rather than just expressing, voting decisions on behalf of children. The latter interpretation of 'proxy' is only mentioned to show already existing and constitutionally admissible parallels for the institution proposed. Yet, the notion that parents make decisions on behalf of their children raises the question of whether (2) and (3) are compatible, i.e., whether it is at all possible to make decisions on behalf of persons who are assumed not to be capable of making those decisions themselves.

PPV is usually argued for by saying that it improves the political representation of children. Yet, it seems there are at least two different interpretations of representation at play here. If one urges that it is the suffrage of the child that is exerted by the parent, then the parent must do more than just take into account the interests or preferences of the child. Within the limits of the Equal Suffrage Account, which is meant to comply with the principles of equal and direct suffrage, the proxy voter would be expected to represent the child in a substantive way, such as by making the decision the child would make, reflecting their exact preferences.[29] Here, the problem may be that children may not be interested in making political decisions at all. Even though they may have preferences in terms of, e.g., schools or religion at a relatively early age,[30] that may not be the case with politics. Yet, if one assumes that children in general start having political preferences at an earlier stage than acknowledged by current regulation, for instance at 14 or 16 rather than 18 years, then, in the absence of compelling arguments against extending suffrage, a lowering of the voting age limit would seem adequate.[31] If, however, there are children who can be safely assumed on the basis of their age not to have political preferences,[32] that leaves no place for proxy voting in the former sense either.

Most proponents of PPV, however, do not seem to conceive of voting as the expression of individual decisions, but concentrate on the effects of the proposed changes on the composition of the electorate, and consequently on voting outcomes. For that reason, their actual focus is not on the equality of suffrage but the inequality of voting power. Such an inequality is necessary, they argue,

29 For the distinction between formal and substantive representation, see Böckenförde 1982: 318–322.

30 In terms of religion, the German *Act on the Religious Education of Children*, Art. 5 provides that children above 12 can decide on denominational changes in their education, and above 14 they are completely free to choose their religion.

31 On the proposal to lower the age limit for suffrage at the German federal elections, see e.g., Knödler 1996, and Hoffmann-Lange & De Rijke 1996. See, more recently, Lőrincz 2018 on the relationship between age and rational deliberation.

32 See e.g., Rosenberg 2016 on the justification of exclusion due to inability.

for the sake of an adequate representation of children's interests (i.e., making decisions favourable for them and their future perspectives), and for public decisions supporting more sustainable policies. We shall now turn to this claim.

3 THE UNEQUAL SUFFRAGE ACCOUNT

An interpretation of 'parental proxies' as proxies of interests thus requires a different argument, replacing (1) and (3) as follows:

(1') The interests of children should be taken into account with a greater weight than is currently given at elections/referenda.

(3') Parents should have additional votes to be able to represent these interests more efficiently.

(1') is actually the assumption underlying most proposals for PPV, and does not in itself contradict the Equal Suffrage Account either. (3'), in turn, is a more explicit (and therefore less frequent) formulation of the claim regarding the desirable outcome. What is more important for us here, however, is that the arguments supporting parental proxies (3), mentioned briefly in section 1.2 above, can be used to support that reformulated proposal (3') as well. I shall now examine these in turn: first the 'access to information' argument, then the one of 'altruism'. I then turn to a third possible argument, according to which even without being particularly well-informed or selfless, parents may represent children's interests better than other candidates since they share much of these.

3.1 Information

As for the first argument, we need to ask what makes parents better informed in terms of their children's interests than other possible candidates (such as teachers, NGOs, or experts in various fields). Starting from their closeness, the obvious answer seems to be that they have direct access to a wide array of information concerning the personal needs of their children. Even if it is not parents who spend the greatest average amount of time with their children, they spend time together in a range of situations. Moreover, their attention may be less divided than that of, e.g., teachers, who usually need to pay attention to several children at the same time. Similarly, it is parents who may best know their children's preferences, especially political preferences, as these are most often shaped by parental influence rather than by peer groups (who could not, according to the proposal, act as proxies anyway).

Here we may have another look at the possible parallels for parental decision-making mentioned above. Schooling choices, for one, can be made by parents because they are best situated to take the child's individual needs and

preferences as well as the available options into account. The same may be said, albeit less cogently, about financial decisions. A common feature of these parallels is that the decisions are made in situations that are intimately related to the personal future of individual children: their physical and intellectual development, health, social network, financial situation, etc. With respect to the alleged parallel with marriage, however, the objection is made that it differs from voting, since the impact of voting is not linked to the personality of the decision-maker.

Once we regard parents as proxies for children's interests, i.e., as decision-makers rather than decision-expressers, the represented preferences and interests lose their strictly personal character. Moreover, political decision-making, as conceptualised by proponents of PPV, is impersonal in the sense that even though voting is motivated by personal interests, what the votes express is the voters' preferences informed by the perceived interests of specific groups to which the represented individuals belong. Although such a claim is controversial in itself, more important for us is that while parents as proxies may have privileged access to information regarding the personal interests of their children, they cannot be expected to perform above the average when it comes to representing the best interests of children *qua* children (as opposed to the elderly). They may, of course, be competent voters, but that is not due to their personal links to their own children. In other words, if one claims that PPV does not violate the principle of personal suffrage and wishes to promote children's group interests by way of giving extra votes to parents, then the kind of information necessary to become a competent proxy voter is not what parents *qua* parents have access to. Indeed, other possible proxies with access to expert information may seem to be stronger candidates.

3.2 Altruism

The second argument is based on the notion that parents would make better proxies than other people by virtue of being more altruistic towards their children.[33] In general, the problem of generational egoism seems to be at the very source of the proposal. Gerontocracy has no inherent negative connotations and has even been praised by several authors addressing the history of political ideas.[34] It becomes problematic only if one looks at the relation between generations as a conflictual one. In this section, I first consider whether the conflictual approach is adequate, before raising the question of whether PPV can actually build on parental selflessness.

Speaking of an opposition of generations may seem justified based on changes in age-specific policies on the one hand, and political attitudes on the other. As for age-specific policies, the diverging trends in child poverty and the

33 Cf. Reimer & Schanda 2016: 182.

34 Cf. Cupti 1998, Palmore 1999: 45.

poverty of the elderly are often highlighted,[35] together with the impacts of austerity measures on pensions as opposed to education. Attitude surveys further show a difference in support for pro-elderly and pro-youth policies among different age groups.[36]

Yet, such data are often far from unequivocal, leaving them open to various interpretations. Moreover, arguments based on them are criticised because they fail to take private transfers into account. Grandparents, for instance, may support their children and grandchildren financially, thus spending part of the pro-elderly expenditure in a pro-youth way, which, however, remain invisible if one only focuses on state policies. A more careful survey of transfers would suggest a more nuanced picture of inter-generational relations. Further, in terms of attitudes, it is less than evident that elderly people would lack intimate relationships with younger age groups, through their children and grandchildren for instance. This makes such a clear-cut opposition, as suggested by the frequent use of the concept of 'gerontocracy', difficult to support.

Now, even if one accepts that there is a conflict of interests between different age groups, there are problems that result from the above considerations. PPV gives extra votes to *parents*, and the most common justifications for that refer to their broader time horizon, due to the links they have to their children. That constructs a twofold opposition: (1) parents versus the elderly, and (2) parents versus non-parents. The problem here is that if the elderly are regarded as having a less future-oriented perspective, and if PPV is meant to remedy gerontocracy, then it is hardly more than just a second-best option to disenfranchising the elderly. In the sense of (1), the extra votes go to parents not *qua* parents but as presumably younger people. In that case, however, inequality is created, in the sense of (2), among people belonging to the same age group: those who have children can cast more votes than those who do not.

As for the selflessness of parents as proxies of their children, the first thing to note is the difference between altruism towards one's children and altruism towards younger age groups in general. Parental partiality towards their children is indeed legitimate,[37] but if amplified through extra votes, it may bring about inequality among children, as the burdens of political decisions may not be evenly distributed within the same cohort. The same applies to differences among families: parents with many children would have more votes than those with say one or two, in which case their extra votes may lead to family policies favouring larger families to a disproportionate degree. While the chances of such outcomes depend on the actual demographic situation of the given society,

35 See, e.g., Peterson 1992, Hinrichs 2002.

36 Cf. Gründinger 2014, quoted by Schickhardt 2015: 192.

37 Cf. Brighouse & Swift 2009.

they cannot be neglected in assessing the power of arguments yielded by the Unequal Suffrage Account.

Second, due to the fact that they have to care for their children and not just themselves, average per-capita family income may be considerably lower for parents than non-parents in the same age group.[38] That may shorten their time horizon, if not in terms of attitudes, then in practice, as they may not be able to afford being selfless[39] in terms of social sustainability. Moreover, in comparison to elderly people, young parents may have more to expect from generous pro-elderly policies in the present as well as the future. On the one hand, public support for older age groups alleviates the individual burden of looking after one's own parents. On the other hand, younger people may have more years left to spend being supported themselves, especially given the increasing life expectancy in Western societies.[40]

The question of egoism and altruism can also be raised from a different perspective. It has been argued that the current system of voting, which assumes that each voter takes the interests of non-voters into account, raises too high of a moral standard for those not having emotional ties to non-voters as in the case of non-parents. PPV would then absolve voters, at least in terms of children's interests, from the moral burden attached to voting in an egoistic way.[41] From the above considerations it seems clear that parents may have such a burden themselves, as they may have competing interests[42] or emotional ties that point in different directions when it comes to political decision-making.

Finally, there is a more practical, and perhaps weightier, caveat against labelling groups of voters as egoistic or generationally short-sighted. On the one hand, such a distinction weakens the sense of moral equality among the members of the political community. On the other hand, and perhaps even more importantly, such a perceived discrimination (be it age-based or status-based) may provoke a bloc voting behaviour in groups that are now diverse regarding their political preferences.[43]

The 'selfless proxy' argument, as we have seen, presupposes a clear distinction and a conflict between the interests (and corresponding attitudes) of different (age) groups. While the grounds and practical consequences of that conception may be open to doubt themselves, we have also seen that parents' interpersonal altruism may not easily translate into an intergenerational one. In the last

38 Schreiber 2004: 1344 and Vanhuysse 2013 regard that as something that should be compensated for by means of giving them extra votes.

39 See Weber 1958, quoted by de Briey 2007.

40 See Van Parijs 1999, p. 323, quoting Andrew Williams ibid., n. 72.

41 Adrian 2016.

42 As taken into account by dual-interest approaches to parental rights (see e.g. Brighouse & Swift 2006, Shields 2019).

43 De Briey 2007.

part of this section, I look at a possible counterargument, according to which parents may not need to have access to information concerning children's interests or to be particularly altruistic.

3.3 Shared interests

The above considerations notwithstanding, one may still argue that parents make the best proxies available, not because of their ability to know their children better or because of their altruistic motivations, but because of their situational proximity to their children's interests. Their interests may be the closest to their children's from some relevant perspective, either because they share the same interests or because their interests are somehow related to (or derived from) those of their children.[44] An example for the former may be family allowances: both parents and children benefit from these, hence their interests coincide, and, one may add, that is what separates them from other groups not receiving such benefits. Thus, parents need neither specific information nor a selfless attitude when deciding about a policy affecting family benefits, since by following their own interests they also advocate those of their children. What needs to be made sure is only that they use those resources properly. The latter kind of case is where there is no coincidence but rather some close relation between parents' and children's interests. Educational spending may be an example, as it later results in higher payments for pensioners.

While such an argument may succeed in raising doubt about whether parents need to know children's specific interests and to have an altruistic attitude, it seems that some kind of general information may nevertheless be necessary. For such an 'invisible hand' to work, parents need knowledge not (only) of children's interests but their own (as well). Part of today's sustainability issues result not from generational egoism, but from shortsightedness regarding one's own interests: one may think of ill-advised and yet popular policies, the sustainability of which does not go beyond electoral cycles. Moreover, shared interests are not limited to parents: any person belonging to an older generation may profit from higher pensions and, consequently, may regard the public financing of education as an investment. The same applies to emotional ties, which may similarly exist in relationships beyond those between parents and children. Thus, while parents do not seem to be in a privileged position in terms of motivation, one cannot argue, either, that shared interests can compensate for the lack of competence.

44 De Briey 2007 rightly opposes this argument to the 'selfless proxy' one, arguing that the former is preferable to the latter.

4 CONCLUSION

In this paper I discussed arguments for and against parental proxy voting (PPV), trying to shed light on the logical relations between these, while critically examining them. In doing so, I did not follow the usual division of deontological and consequentialist arguments, but instead distinguished between arguments remaining within the framework of equal suffrage, and those not grounded in it. Equal-suffrage arguments emphasise the constitutional construction underlying PPV, according to which parents, when acting as proxy voters, cast the votes of their children, meaning they do not have a plural vote. That interpretation, however, is difficult to maintain, and proponents of PPV often bring in unequal-suffrage arguments as well. Within the latter group, I distinguished three types of arguments: those related to the notion that parents would make informed proxies, those based on the assumption that they would use their extra votes in a selfless manner, and, third, that shared interests make parents capable of representing children's interests, even if they do not know it. I have argued that each of these arguments is open to doubt and some important objections.

Without repeating what has been said on the preceding pages, it seems important to note that my observations regarding the two lines of argument have different consequences. The conceptual problems resulting from the two interpretations of proxy voting within the Equal Suffrage Account suggest that there is no way to defend PPV against the charge of violating the principle of equal suffrage. Not all proponents of PPV are, however, equally sensitive to that kind of objection, and some may contend that the adequate representation of children's interests should prevail over currently held constitutional principles. In the second part of the paper, an examination of arguments in favour of parents' (as proxies of interests) having extra votes has shown that these, too, are open to serious objections. Thus, even if one would be willing to favour some kind of plural vote, parents may not be the strongest candidates for allocating the additional votes. Yet, perhaps in trying to address the perceived inadequacy of political decision-making, one should focus less on the issue of voting power, together with the underlying decisionist image of the political process, and instead focus more on how to make political deliberation more robust, with long-term perspectives receiving due consideration.

From the perspective of children's political representation, proposals of PPV indirectly highlight a dilemma. The Equal Suffrage Account is partly based on arguments in favour of extending suffrage to children, which is then bracketed by the claim that children cannot be expected to contribute to political decision-making. Taking the conceptual problems discussed above seriously, a more convincing version of that approach would examine the possibility of actually having children vote. Even though an age limit may be in order, a small extension of genuine suffrage seems a more important step here than giving adults

plural votes. As for the Unequal Suffrage Account, it is based, partly again, on a negative assessment of the quality of decisions. Here, my argument points towards different ways of introducing checks into the procedure of decision-making. The dilemma is due to the fact that the first way, extending suffrage, would allow for a more democratic model, while the latter, building in checks, would make it more aristocratic. That said, the dilemma only emerges if one promises, as most proponents of PPV, to make political decision-making both better informed and more democratic at the same time. Apart from such pretences, the two ways are not exclusive. Indeed, the one may compensate for the other, both in terms of quality and democratic legitimacy.

Bibliography

Adrian, A. (2016). *Grundsatzfragen zu Staat und Gesellschaft am Beispiel des Kinder-/Stellvertreterwahlrechts: Eine rechtliche Untersuchung mit Bezügen zu Demographie, Demoskopie, Psychologie und Philosophie.* Duncker & Humblot.

Bertaux, S. (2011). Reproduce or Perish? The Artefact of the Fertility Concept and the French School of Demography. *Historical Social Research*, *36*(2), 120–139. https://doi.org/10.12759/hsr.36.2011.2.120-139

Bodnár, E. (2014). *A választójog alapjogi tartalma* és *korlátai [The Content and Limits of Suffrage as a Fundamental Right]*. HVG-Orac.

Böckenförde, E-W. (1982). Mittelbare/repräsentative Demokratie als eigentliche Form der Demokratie: Bemerkungen zu Begriff und Verwirklichungsproblemen der Demokratie als Staats- und Regierungsform. In G. Müller (Ed.), *Staatsorganisation und Staatsfunktionen im Wandel: Festschrift für Kurt Eichenberger zum 60. Geburtstag* (pp. 301–328). Helbing & Lichtenhahn.

Brighouse, H., & Swift, A. (2006). Parents' Rights and the Value of the Family. *Ethics*, *117*(1), 80–108. https://doi.org/10.1086/508034

Brighouse, H., & Swift, A. (2009). Legitimate Parental Partiality. *Philosophy and Public Affairs*, *37*(1), 43–80. https://doi.org/10.1111/j.1088-4963.2008.01145.x

Brighouse, H., & Fleurbaey, M. (2010). Democracy and Proportionality. *Journal of Political Philosophy*, *18*(2), 137–155. https://doi.org/10.1111/j.1467-9760.2008.00316.x

Cupit, G. (1998). Justice, Age, and Veneration. *Ethics*, *108*(4), 702–718. https://doi.org/10.1086/233848

De Briey, L. (2007). Droit de vote des enfants par procuration. In *DicoPo: Dictionnaire de théorie politique*. https://www.dicopo.org/spip_article88.html

De Briey, L., Héraut, A., & Ottaviani, E. (2009). On Behalf of Children? The Plural Voting System in Belgium – from 1893 to 1919. *Intergenerational Justice Review*, *9*(4), 144–145. https://doi.org/10.24357/igjr.4.4.512

Demeny, P. (1986). Pronatalist Policies in Low-Fertility Countries: Patterns, Performance, and Prospects. *Population and Development Review*, *12*(Suppl.), 335–358. https://doi.org/10.2307/2807916

Demeny, P. (2012). Geopolitical Aspects of Population in the Twenty-First Century. *Population and Development Review*, *38*(4), 685–705. https://doi.org/10.1111/j.1728-4457.2012.00532.x

Fröhlich, J. (2011). Alapkérdések a családi választójog vitájában [Some Fundamental Questions in the Debate on Family Suffrage]. *Pázmány Law Working Papers*, 2011/20. https://plwp.eu/docs/wp/2012/2011-20.pdf

Gaa, M. (1997). Familienwahlrecht bei den nächsten Bundestagswahlen? *Zeitschrift für Rechtspolitik*, *30*(8), 345–346.

Goerres, A., & Tiemann, G. (2009). Kinder an die Macht? Die politische Konsequenzen des Stellvertretenden Elternwahlrechts. *Politische Vierteljahresschrift*, *50*(1), 50–74. https://doi.org/10.1007/s11615-009-0125-6

Gründinger, W. (2014). Scheinargumente gegen das Kinderwahlrecht. In K. Hurrelmann & T. Schulz (Eds.), *Wahlrecht für Kinder? Politische Bildung und die Mobilisierung der Jugend* (pp. 24–36). Beltz Juventa.

Hattenhauer, H. (1996). Über das Minderjährigenwahlrecht. *JuristenZeitung*, *51*(1), 9–16. [Repr. in Chr. Palentien & K. Hurrellmann (Eds.), *Jugend und Politik: Ein Handbuch für Forschung, Lehre und Praxis* (pp. 238–259). Luchterhand.]

Hermann, U. (2011). Ökonomische *Analyse eines Kinderwahlrechts*. Doctoral dissertation, Freie Universität Berlin. http://www.diss.fu-berlin.de/diss/servlets/MCRFileNodeServlet/FUDISS_derivate_000000015340/veroeffentlichung_hermann_online.pdf

Hinrichs, K. (2002). Do the Old Exploit the Young? Is Enfranchising Children a Good Idea? *European Journal of Sociology*, 43(1), 35–58. https://doi.org/10.1017/S0003975602001017

Hoffmann-Lange, U., & de Rijke, J. (1996). 16jährige Wähler – erwachsen genug? Die empirischen Befunde. *Zeitschrift für Parlamentsfragen*, *27*(4), 572–585.

Hurrellmann, K. (1997). Für eine Herabsetzung des Wahlalters. In Chr. Palentien & K. Hurrellmann (Eds.*), Jugend und Politik: Ein Handbuch für Forschung, Lehre und Praxis* (pp. 280–289). Luchterhand.

Jakab, A. (2020). Kinderwahlrecht für Nachhaltigkeit? Rechtsdogmatische Einordnung und rechtspolitische Effektivität. *Journal für Rechtspolitik*, *28*(1), 27–37. https://doi.org/10.33196/jrp202001002701

Jakab, A. (2019). An Emerging Key Concept in European Constitutional Law: Sustainability. *Hungarian Journal of Legal Studies*, *60*(4), 332–365. https://doi.org/10.1556/2052.2019.00020

Jakab, A. (2017). Is Suffrage for Children the Constitutional Solution for the Sustainability Challenge Faced by Democracies? In I. Motoc, P. De Pinto de Albuquerque, & K. Wojtyczek (Eds.), *New Developments in Constitutional Law: Essays in Honour of András Sajó* (pp. 213–224). Eleven.

Jesse, E. (2003). Reformvorschläge zur Änderung des Wahlrechts. *Aus Politik- und Zeitgeschichte*, *52*(22 December), 3–11.

Kahl, W. (2009). Staatsziel Nachhaltigkeit und Generationengerechtigkeit. *Die* Öffentliche *Verwaltung*, *62* (1), 2–13.

Kiesewetter, B. (2009). Dürfen wir Kindern das Wahlrecht vorenthalten? *Archiv für Rechts- und Sozialphilosophie*, 95(2), *252–273*. https://doi.org/10.25162/arsp-2009-0018

Knödler, Chr. (1996). Wahlrecht für Minderjährige – eine gute Wahl? *Zeitschrift für Parlamentsfragen*, *27*(4), 553–571.

Kurunczi, G. (2018). Az általános választójog elvének aktuális kihívásai [Current Challenges to the Principle of Universal Suffrage]. Államtudományi *Műhelytanulmányok*, 2018/3. http://hdl.handle.net/20.500.12944/7296

Kymlicka, W., & Donaldson, S. (2017). Inclusive Citizenship Beyond the Capacity Contract. In A. Schachar, R. Bauböck, I. Bloemraad, & M. Vink (Eds.), *The Oxford Handbook of Citizenship* (pp. 838–859). Oxford University Press.

Lőrincz, V. (2018). Fenntarthatóság, életkor és cselekvőképesség – néhány döntéselméleti és pszichológiai szempont [Sustainability, Age and Capacity – Some Viewpoints of Decision Theory and Psychology]. *Magyar Tudomány*, *179*(3), 383–393. https://doi.org/10.1556/2065.179.2018.3.8

Löw, K. (1974). Das Selbstverständnis des Grundgesetzes und wirklich allgemeine Wahlen. *Politische Studien*, *25*(213), 19–29.

Löw, K. (2002a). Kinder und Wahlrecht. *Zeitschrift für Rechtspolitik*, *35*(10), 448–450.

Löw, K. (2002b). Ist das Wahlrecht übertragbar? Beispiele europäischer Nachbarstaaten. *Das Parliament*, *37–38*(17–23 September).

Löw, K. (2005). Kann ein allgemeines Wahlrecht die demographische Katastrophe abbremsen? *Medizin und Ideologie*, *27*(4), 34–41.

M. Balázs, Á. (2017). Családi választójog és fenntarthatóság [Family Suffrage and Sustainability], *Parlamenti Szemle*, *2*(1), 47–65.

M. Balázs, Á. (2018). A plurális választójog fogalma és megengedhetősége napjainkban [The Concept and Permissibility of Plural Vote Today]. Államtudományi *Műhelytanulmányok*, 2018/6. http://hdl.handle.net/20.500.12944/7299

Marschall, St. (2000). Wer vertritt wen? Volksentscheide und die Funktionslogik parlamentarischer Repräsentation. Kritische Anmerkungen zu einem Beitrag von Winfried Steffani in Heft 3/99 der ZParl. *Zeitschrift für Parlamentsfragen*, *31*(1), 182–187.

Meixner, G. (2013). Plädoyer für ein „höchstpersönliches Elternwahlrecht zugunsten der Kinder". *Zeitschrift für Parlamentsfragen*, *44*(2), 419–426.

Merk, P. (1997). Wahlrecht ohne Altersgrenze? In Chr. Palentien & K. Hurrellmann (Eds.), *Jugend und Politik: Ein Handbuch für Forschung, Lehre und Praxis* (pp. 260–279). Luchterhand.

Merk, K.-P. (2009). Das Wahlrecht von Geburt an und seine politische Bedeutung. *Diskurs Kindheits- und Jugendforschung*, *4*(4), 525–538.

Müller-Franken, S. (2013). *Familienwahlrecht und Verfassung: Veränderungen des Wahlrechts zugunsten von Familien als Reaktion auf den demographischen Wandel auf dem Prüfstand des Verfassungsrechts*. Mohr Siebeck.

Niebel, D., & Zypries, B. (2008). Wahlrecht für Kinder? *Zeitschrift für Rechtspolitik*, *41*(8), 271.

Nopper, K. M. A. (1999). *Minderjährigenwahlrecht: Hirngespinst oder verfassungsrechtliches Gebot in einer grundlegend gewandelten Gesellschaft?* Köhler.

Offe, C. (1994), Zusatzstimmen für Eltern – ein Beitrag zur wünschenswerten Reform von Demokratie und Wahlrecht? In G. Grözinger & H. Geiger (Eds.), *Zukunft wählen: Zusatzstimmen für Eltern?* (pp. 1–21). Evangelische Akademie Bad Boll.

Palentien, Chr., & Hurrellmann, K. (Eds.) (1997). Jugend und Politik: Ein *Handbuch für Forschung, Lehre und Praxis*. Luchterhand.

Palentien, Chr. (1997). Pro- und Contra-Diskussion zu einer Veränderung des Wahlrechts. In Chr. Palentien & K. Hurrellmann (Eds.), *Jugend und*

Politik: Ein Handbuch für Forschung, Lehre und Praxis (pp. 290–299). Luchterhand.

Palmore, E. B. (1999). *Ageism: Negative and Positive* (2nd ed.). Springer.

Pechstein, M. (1996). Diskussionsbeitrag. In K. H. Fell & B. Jans (Eds.), *Familienwahrecht – pro und contra* (p. 84). Vektor.

Peschel-Gutzeit, L. M. (1999). Das Wahlrecht von Geburt an: Ein Plädoyer für den Erhalt unserer Demokratie. *Zeitschrift für Parlamentsfragen*, *30*(2), 556–563.

Peterson, P. E. (1992). *An Immodest Proposal*. Daedalus, *121*(4), 151–174.

Rehfeld, A. (2011). The Child as Democratic Citizen. *Annals of the American Academy of Political and Social Science*, 633, 141–166. https://doi.org/10.1177/0002716210383656

Reimer, F. (2004). Nachhaltigkeit durch Wahlrecht? Verfassungsrechtliche Möglichkeiten und Grenzen eines „Wahlrechts von Geburt an". *Zeitschrift für Parlamentsfragen*, *35*(2), 322–339.

Reimer, F., & Schanda, B. (2016). Improving Representation by Parental Proxy Voting? In L. Komáromi & Z. T. Pállinger (Eds.), *Good Governance – Enhancing Representation* (pp. 63–74). Pázmány Press.

Rosenberg, J. H. (2016). *The All-Affected Principle and its Critics: A Study on Democratic Inclusion*. Acta Universitatis Upsaliensis.

Sanderson, W. C., & Scherbov, S. (2007). A Near Electoral Majority of Pensioners: Prospects and Policies. *Population and Development Review*, *33*(3), 543–554. https://doi.org/10.1111/j.1728-4457.2007.00184.x

Schanda, B. (2012). A jog lehetőségei a család védelmére [The Means of Law for Protecting Families]. *Iustum Aequum Salutare*, *8*(2), 77–88.

Schickhardt, C. (2015). Kinder im Wahlrecht und in Demokratien. Für eine elterliche Stellvertreterwahlpflicht. *Zeitschrift für Praktische Philosophie*, 2(1), 191–248. https://doi.org/10.22613/zfpp/2.1.7

Schreiber, W. (2004). Wahlrecht von Geburt an – Ende der Diskussion? *Deutsches Verwaltungsblatt*, *119*(21), 1341–1348.

Schroeder, W. (2003). Familienwahlrecht und Grundgesetz. *JuristenZeitung*, *58*(19), 917–922.

Shields, L. (2019). Parental rights and the importance of being parents. *Critical Review of International Social and Political Philosophy*, *22*(2), 119–133. https://doi.org/10.1080/13698230.2016.1262316

Steffani, W. (1999). Das magische Dreieck demokratischer Repräsentation: Volk, Wähler und Abgeordnete. *Zeitschrift für Parlamentsfragen*, *30*(3), 772–793.

Toulemon, A. (1948). Influence du vieillissement de la population sur la composition du corps electoral. In *Actes des journées pour l'étude scientifique du vieillisement da la population* (pp. 107–115). Alliance nationale contre la dépopulation.

Vanhuysse, P. (2013). Measuring Intergenerational Justice – Toward a Synthetic Index for OECD Countries. In D. Schraad-Tischler & N. Azahaf (Eds.), *Intergenerational Justice in Aging Societies: A Cross-national Comparison of 29 OECD Countries* (pp. 10–61). Bertelsmann Stiftung.

Van Parijs, Ph. (1998). The Disfranchisement of the Elderly, and Other Attempts to Secure Intergenerational Justice. *Philosophy and Public Affairs*, *27*(4), 292–333. https://doi.org/10.1111/j.1088-4963.1998.tb00072.x

Weber, M. (1958). Wahlrecht und Demokratie in Deutschland. In *Gesammelte politische Schriften* (pp. 233–279). Winckelmann.

Wernsmann, R. (2005). Das demokratische Prinzip und der demographische Wandel: Brauchen wir ein Familienwahlrecht? *Der Staat*, *44*(1), 43–66.

Westle, B. (2006). „Wahlrecht von Geburt an" – Rettung der Demokratie oder Irrweg? *Zeitschrift für Parlamentsfragen*, *37*(1), 96–114.

Bartosz Brożek*

Ciencia cognitiva y naturaleza del derecho

El objetivo del trabajo es considerar el posible impacto en la ontología jurídica de los descubrimientos en la ciencia cognitiva. Empiezo refutando el argumento de que nuestro esquema conceptual —y por tanto nuestra ontología básica— es *a priori* en relación con cualquier teoría científica. Luego esbozo una imagen del surgimiento de la cultura, tal como se encuentra en los escenarios evolutivos recientes y las teorías neurocientíficas. En este contexto, sostengo que no hay, y no puede haber, una comprensión correcta de lo que es el derecho, lo que explica por qué es posible desarrollar distintas ontologías jurídicas que sean igualmente aceptables.

Parablas claves: derecho, ciencia cognitiva, ontología del derecho, imitación, naturaleza del derecho, actuar según las reglas

1 INTRODUCCIÓN

Los recientes avances en la ciencia cognitiva han reformado en gran medida nuestra comprensión del comportamiento humano.[1] Por lo tanto, no es de sorprenderse que los abogados hayan estado estudiando los hallazgos de la neurociencia[2] y las disciplinas relacionadas, para determinar si la nueva ciencia de la mente[3] puede contribuir al funcionamiento del derecho.[4] Este proceso culminó en el establecimiento de una nueva disciplina jurídica, usualmente referida como 'neuroderecho' o 'derecho y neurociencia'.[5] Hasta ahora, los intereses de los 'neuroabogados' han sido más prácticos que teóricos o filosóficos.[6] Según un artículo basado en un reciente sondeo, las principales áreas del 'derecho y

* bbroze@yahoo.com | Professor of Law and Philosophy, Jagiellonian University, Krakow (Poland). Translated by Francisco J. Campos Zamora and Alejandro Guevara Arroyo.

1 Este artículo es una traducción de un original inglés, escrito y publicado hace varios años. Como no he alterado considerablemente mis puntos de vista, solo he introducido pequeños cambios para que el argumento sea más fácil de seguir. Por ello, no he actualizado (con una excepción) la bibliografía, que ha crecido en los últimos años. Sin embargo, la investigación más reciente no influye en el eje central del argumento que aquí ofrezco.

2 El término 'neurociencia' se entiende aquí de manera muy amplia y se refiere a todo tipo de estudio interdisciplinario del sistema nervioso, abarcando varios aspectos del mismo, desde el molecular al conductual, e incluyendo, entre otros, neurociencia del comportamiento, neurociencia celular, neurociencia clínica, neurociencia cognitiva, neurociencia computacional, neurociencia cultural, neurociencia del desarrollo, neurociencia molecular, neuroimagen, neuroingeniería, neuroinformática, neurolingüística, neurociencia social y neurociencia de sistemas.

3 Tomo prestada esta frase de Rowlands 2010.

4 Cf. Garland 2004. Para una descripción crítica véase Pardo & Patterson 2013.

5 Cf. Spranger 2012.

6 Algunas excepciones pueden encontrarse en Brożek, Hage & Vincent 2021.

neurociencia' incluyen cuestiones jurídicamente relevantes como la muerte cerebral, las lesiones cerebrales, el dolor y la angustia, la memoria, las emociones, la detección de mentiras, el juzgar, el desarrollo del cerebro y las adicciones.[7]

Estos problemas no son meramente interesantes desde el punto de vista jurídico: cualquier enfoque razonable del derecho requiere tener una comprensión actualizada y científicamente sólida de los temas antes mencionados. Sin embargo, también hay estudios que sugieren que la neurociencia (y la ciencia cognitiva en general) puede contribuir al desarrollo de teorías doctrinales pertenecientes a la responsabilidad penal o al derecho contractual.[8] Sin duda, tal enfoque es mucho más complejo y está conectado a numerosas trampas metodológicas. El derecho opera dentro de un cierto esquema conceptual que es bastante diferente del aparato conceptual de la ciencia cognitiva.[9]

La ontología jurídica se encuentra aún más arriba en la escala de la abstracción—entendida aquí como la cuestión de la naturaleza del derecho y de la existencia de diversos fenómenos relacionados con el derecho— y de ahí surge la pregunta de si los descubrimientos de la ciencia cognitiva pueden de alguna manera concebible informar la investigación ontológica. Mi objetivo en este trabajo es considerar este problema. Empiezo refutando un argumento de Maxwell Bennett y Peter Hacker en el sentido de que nuestro esquema conceptual —y por tanto nuestra ontología básica— es *a priori* en relación con cualquier teoría científica. Luego esbozo una imagen del surgimiento de la cultura, tal como se encuentra en los escenarios evolutivos recientes y las teorías neurocientíficas. En este contexto, sostengo que no hay, y no puede haber, una comprensión correcta de lo que es el derecho, lo que explica por qué es posible desarrollar distintas ontologías jurídicas que sean igualmente aceptables.

2 LA ONTOLOGÍA JURÍDICA SE ENCUENTRA CON LA CIENCIA COGNITIVA

Cuando se considera la relación entre ciencia cognitiva y ontología, el primer problema a abordar es si los hallazgos de la ciencia cognitiva u otras disciplinas relacionadas tienen alguna relevancia para la investigación ontológica. Quizás la respuesta más famosa a esta pregunta la dieron Maxwell Bennett y Peter Hacker en su célebre libro *Philosophical Foundation of Neuroscience*.[10] Bennett y Hacker insisten, en primer lugar, en que uno debe distinguir claramente entre dos tipos de preguntas, conceptual y empírica:

7 Cf. Jones, Schall & Shen 2014: 12-14.

8 Cf. Pardo & Patterson 2013.

9 Cf. Pardo & Patterson 2013.

10 Bennett & Hacker 2003. Esta sección se encuentra basada parcialmente en Brożek 2013a.

> El distinguir las cuestiones conceptuales de las empíricas es de suma importancia (...) Las cuestiones conceptuales anteceden a las cuestiones de verdad y falsedad. Son cuestiones relativas a nuestras formas de representación, no cuestiones relativas a la verdad o falsedad de los enunciados empíricos. Estas formas se encuentran presupuestas por proposiciones científicas verdaderas (y falsas) y por teorías científicas correctas (e incorrectas). No determinan qué es empíricamente verdadero o falso, sino qué tiene y qué no tiene sentido. Por tanto, las cuestiones conceptuales no son susceptibles de investigación y experimentación científica ni de teorizaciones científicas. Porque los conceptos y las relaciones conceptuales en cuestión son presupuestos por tales investigaciones y teorizaciones (Bennett, Dennett, Hacker & Searle 2007: 4).

La frase final del pasaje citado es de especial interés. Bennett y Hacker afirman que los conceptos son *a priori* a cualquier investigación científica. Creen, además, que el hecho de no darse cuenta de este hecho conduce a menudo a graves errores, y en particular a la llamada falacia mereológica, común —como subrayan— en la ciencia cognitiva contemporánea. Esta consiste en referirse al cerebro o sus partes mediante conceptos que son correctamente aplicables solo a una persona en su conjunto. Observan:

> [hablando] de lo que el cerebro percibe, piensa, adivina o cree, o de que un hemisferio del cerebro sabe cosas que el otro hemisferio ignora, está muy extendido entre los neurocientíficos contemporáneos. Esto a veces se defiende como si no fuera más que una trivial *façon de parler*, pero es un grave error. Pues la forma característica de explicación en la neurociencia cognitiva contemporánea consiste en adscribir atributos psicológicos al cerebro y sus partes para explicar la posesión de atributos psicológicos y el ejercicio (y deficiencias en el ejercicio) de los poderes cognitivos por parte de los seres humanos (Bennett, Dennett, Hacker & Searle 2007: 7).

Cabe preguntarse si el problema que identifican Bennett y Hacker es real. Se puede argumentar, por ejemplo, que afirmaciones como 'el cerebro piensa' o 'el hemisferio derecho es responsable de la toma de decisiones' no deben tomarse literalmente. Algunas intuiciones lingüísticas fundamentales y el conocimiento básico del lenguaje son suficientes para darse cuenta de que tal utilización de las palabras 'pensar' o 'decidir' es metafórica o analógica. Bennett y Hacker son plenamente conscientes de esta estrategia para defender el lenguaje científico existente y aclaran que la evidencia de que los científicos cognitivos cometen la falacia mereológica no reside en el hecho de que en ocasiones utilizan términos psicológicos 'inadecuados' para describir el funcionamiento del cerebro, lo que fácilmente puede entenderse como aprovechar la analogía, la metáfora, el homónimo o el uso de un concepto con un significado derivado. La falacia mereológica se produce cuando los científicos cognitivos transfieren complejos enteros de conceptos del 'discurso psicológico' al 'neurocientífico' y, sobre la base de atribuciones tan inadecuadas, extraen conclusiones.

¿Es sostenible el argumento de Bennett y Hacker? Yo creo que no, y la razón es su visión fundacional del conocimiento. Hay dos interpretaciones del fundacionalismo de Bennett y Hacker. La interpretación más fuerte, que John Searle

les atribuye, es que creen que el lenguaje natural determina la única ontología aceptable. Searle dice que cometen una falacia al confundir las reglas para usar las palabras con la ontología. Así como el antiguo conductismo confundía la evidencia de los estados mentales con la ontología de los estados mentales, este conductismo criterial wittgensteiniano construye los fundamentos para hacer la atribución con el hecho que se atribuye. Es una falacia decir que las condiciones para el exitoso funcionamiento del juego del lenguaje son las condiciones para la existencia del fenómeno en cuestión.[11]

Esta lectura encuentra alguna evidencia textual. Curiosamente, al elaborar la doctrina de la falacia mereológica, Bennett y Hacker citan a Aristóteles como uno de los primeros en condenar este modo de pensar erróneo. Aristóteles observó que 'señalar que el alma está enojada es como si se dijera que el alma teje o construye, porque seguramente es mejor no decir que el alma se compadece, aprende o piensa, sino que un hombre hace esto con su alma'. Sin embargo, es necesario recordar que hay una cierta visión metafísica detrás de esta afirmación. La metafísica de Aristóteles es esencialista: cree que toda entidad pertenece a alguna categoría natural, determinada por la esencia (forma) de la entidad; además, cree que las esencias pueden ser captadas por las denominadas definiciones esenciales.[12] Por lo tanto, el uso incorrecto o metafórico de las palabras no es un mero error, sino uno que puede arruinar nuestros intentos de construir los fundamentos del conocimiento, capturado por las definiciones esenciales. Esta doctrina está, por supuesto, lejos de la práctica científica actual. La historia de la ciencia muestra claramente que no deben asumirse tales fundamentos, ya que es muy probable que prohíban el progreso científico. Pero si es así, lo mismo vale para el punto de vista de Bennett y Hacker: si realmente creen que el esquema conceptual del lenguaje ordinario determina 'la única' ontología, su concepción es irremediablemente defectuosa.

También es posible leer a Bennett y Hacker de una manera más moderada; esta interpretación más débil consiste en solo subrayar que el esquema conceptual que constituye el marco del lenguaje ordinario no determina ninguna ontología única, pero que, sin embargo, es independiente de cualquier práctica científica, en el sentido de que para comunicar cualquier descubrimiento científico se necesita emplear conceptos de acuerdo con algunos criterios preexistentes. Si no lo hace, se corre el riesgo de seguir caminos equivocados y de pronunciar declaraciones sin sentido: el uso incorrecto del lenguaje puede llevarnos por mal camino. El esquema conceptual del lenguaje ordinario constituye, como mínimo, la base para comunicar las teorías científicas.

Esta opinión, incluso en la lectura moderada, es problemática. En primer lugar, y lo que es menos importante, Bennett y Hacker se equivocan cuando

11 Bennett, Dennett, Hacker & Searle 2007: 105.

12 Véase Popper 1966.

afirman que un uso excesivo de metáforas, y en particular grupos de metáforas, es destructivo para cualquier esfuerzo neurocientífico. Ciertamente, puede conducir a callejones sin salida, pero hay poco peligro de que las consecuencias de tal forma de expresión sean perjudiciales. La razón es que la ciencia cognitiva, como cualquier otra ciencia, tiene algunos mecanismos correctivos incorporados que en última instancia nos ayudan a distinguir el progreso y las hipótesis fructíferas de los meros errores y conjeturas inútiles. La presencia de este mecanismo es evidente una vez que se consideran los recientes éxitos de la ciencia cognitiva, y de la neurociencia en particular. Una ciencia que hace un uso excesivo de las metáforas y no conduce a predicciones o explicaciones serias es simplemente una mala ciencia; el mero hecho de cometer u omitir la falacia mereológica no posee aquí ninguna importancia.

En segundo lugar, debemos considerar el panorama más amplio, que se resume en la afirmación de Bennett y Hacker de que el esquema conceptual del lenguaje ordinario es *a priori* en relación con la práctica científica. Esta es particularmente problemática con respecto a la neurociencia. Debe tenerse en cuenta que el idioma psicológico, característico del lenguaje ordinario, no solo está conformado por nuestra experiencia interior, sino también por las teorías desarrolladas a lo largo de la historia que pretendían capturar conceptualmente los fenómenos mentales. El problema es que el esquema conceptual del lenguaje ordinario se caracteriza por cierta inercia: las concepciones científicas actuales necesitan mucho tiempo para 'infiltrarse' en nuestro esquema conceptual ordinario. Por lo tanto, es seguro asumir que el lenguaje ordinario de hoy 'abraza' algunas teorías psicológicas de ayer, o mejor aún: una mezcla de esas teorías e ideas de sentido común. Ahora bien, decir que los conceptos ordinarios son *a priori* relativos a la neurociencia equivale a decir que la psicología popular es *a priori* a las teorías neurocientíficas, lo cual es un sinsentido total: es uno de los principales objetivos de la neurociencia contemporánea, uno que cumple con vigor y con mucho éxito, el revisar nuestras viejas nociones psicológicas de sentido común.

Esto muestra claramente que el fundacionalismo conceptual de Bennett y Hacker no es fiel ni a los mecanismos de la práctica científica ni a la forma en que evolucionan nuestros esquemas conceptuales: estos nunca son definitivos ni independientes de las teorías que desarrollamos. Este punto es bastante general y pertenece a cualquier proyecto filosófico fundacional: las fuentes de la reflexión filosófica se basan siempre, al menos parcialmente, en algunas concepciones científicas, aunque a menudo obsoletas. En el caso del tomismo, la visión aristotélica del mundo —o la ciencia aristotélica— constituye el fundamento del esquema conceptual. De manera similar, en el caso de aquellas filosofías que encuentran confirmaciones o refutaciones en el funcionamiento del lenguaje ordinario, es el conocimiento encapsulado allí (por ejemplo, una especie de psicología popular que mezcla las observaciones del sentido común

y algunas teorías psicológicas antiguas) lo que determina en última instancia las doctrinas filosóficas de los seguidores de Austin y Strawson. En otros proyectos fundacionales, como la fenomenología, el conocimiento científico internalizado por una persona determina de manera crucial sus experiencias y, por tanto, sus puntos de vista filosóficos. Con todo, no existe una fuente de conocimiento filosófico que sea independiente de algún tipo de ciencia, y el punto clave es que esta 'ciencia oculta' puede estar en desacuerdo con lo que la ciencia contemporánea tiene que decir. El espléndido aislamiento de los filósofos del lenguaje común es una ilusión: no hay escapatoria al enfrentamiento con los bárbaros del otro lado del Canal.

Por supuesto, esto no significa que las interacciones mutuas entre la ciencia cognitiva y la ontología sean sencillas y se encuentren libres de problemas. Es difícil imaginar que algún descubrimiento o teoría científica pueda tener una relación directa con las deliberaciones ontológicas. En este sentido, Hacker y Bennett plantean un punto válido: la filosofía y la ciencia cognitiva utilizan diferentes métodos, diferentes esquemas conceptuales, además de abordar diferentes tipos de problemas. Sin embargo, como intenté enfatizar, esos diferentes discursos no están aislados unos de otros; más bien, interactúan de muchas formas. Es difícil mapear esas interacciones con precisión y aún más difícil descubrir su estructura. Tienen lugar en varios niveles: conceptual (los conceptos migran de la filosofía a la ciencia y viceversa, a menudo alterando su significado), presuposicional (las teorías y métodos científicos a menudo presuponen tesis estrictamente filosóficas), del problema (la filosofía y la ciencia a menudo abordan problemas similares) y funcionales (por ejemplo, las teorías científicas pueden en algunos contextos reemplazar las teorías filosóficas, mientras que las doctrinas filosóficas pueden desempeñar un papel heurístico en la ciencia).[13] El alcance del presente artículo es demasiado limitado para proporcionar una descripción más completa de estas interacciones.[14] La moraleja es, sin embargo, que dada la existencia de tales interacciones, es posible relacionar ontologías con teorías desarrolladas en las ciencias cognitivas.

Las ontologías que se desarrollan pueden ser más o menos coherentes con determinadas concepciones de la ciencia cognitiva. Por ejemplo: si una teoría científica presupone alguna forma de reduccionismo fuerte (es decir, la tesis de que todos los fenómenos mentales pueden explicarse completamente por la actividad cerebral), entonces dicha teoría es más coherente con alguna versión del materialismo que con una ontología dualista, la que subraya la estricta separación entre mente y cuerpo. La concepción aristotélica de la mente es más coherente con el paradigma de la mente encarnada que con la opinión de que la mente es una especie de máquina de Turing. Estos atrevidos ejemplos muestran

13 Analizo con más detalle los cuatro niveles en Brożek 2011.

14 Para más detalles Brożek en manuscrito.

que la ontología y la ciencia cognitiva no son completamente ajenas entre sí. Si uno adopta el estricto dualismo mente-cuerpo en su concepción ontológica, mientras cree en el reduccionismo estricto subyacente a sus consideraciones científicas, simplemente sería incoherente en sus creencias. Nuestro conocimiento no consiste en 'islas' aisladas: la de la ontología y la de la ciencia cognitiva; más bien se parece a la red de creencias de Quine, donde las concepciones ontológicas y científicas están interconectadas de diversas formas.

Al investigar la relación entre la ciencia cognitiva y la ontología jurídica, uno tiene al menos dos estrategias a mano. La primera puede denominarse como *análisis de presuposiciones*. Consiste en descubrir las presuposiciones relevantes de una ontología dada y comprobar si son coherentes con las teorías de la ciencia cognitiva. Por ejemplo, la visión del derecho propuesta por Thomas Hobbes asume una visión peculiar de la naturaleza humana, según la cual los humanos actúan de una manera puramente egoísta. Esto es incompatible con los hallazgos de la teoría evolutiva y la neurociencia contemporáneas. Al mismo tiempo, la visión de John Locke de la naturaleza humana, que sirve de base a su concepción del derecho, es mucho más coherente con la imagen de los mecanismos motivacionales humanos que se encuentran en la literatura científica. Por tanto, se puede concluir que la teoría del derecho de Locke es más coherente con los puntos de vista adoptados por las ciencias cognitivas contemporáneas que la concepción de Hobbes.[15]

La segunda estrategia es *genealógica*. Aquí, uno no comienza con una ontología, sino reconstruyendo la historia evolutiva del desarrollo de las habilidades relevantes de la especie humana. Consideremos el derecho o cualquier otra institución social. Una narrativa genealógica no conduce a una ontología del derecho en particular, sino que descubre los mecanismos que hicieron posible el surgimiento del derecho en primer lugar. Pero esta es una idea importante, una que excluye ciertas ontologías sociales (como incoherentes con el escenario evolutivo reconstruido), mientras que permite una serie de otras posturas ontológicas (como coherentes con el escenario en mayor o menor grado).

En lo que sigue, adopto la segunda estrategia.

3 EL SURGIMIENTO DE LA CULTURA

Con miras a investigar los orígenes del derecho —o, para ponerlo en otros términos, para responder la pregunta '¿qué hace posible al derecho?'— uno debe tener en cuenta dos preceptos metodológicos. Primero, no tiene sentido limitar el análisis sólo a los descubrimientos de las ciencias cognitivas. Por un lado, la ciencia cognitiva es difícil de definir en forma tal que pueda ser distinguida níti-

15 Cf. Załuski 2009.

damente de ciencias emparentadas (v.g. teoría evolucionista, primatología, psicología del desarrollo, etc.). Por otro lado, tal limitación haría mucho más débil nuestra búsqueda de una teoría de los orígenes del derecho. Entre más argumentos desde distintas disciplinas puedan formularse en favor de un cierto escenario evolutivo, estará mejor justificado.[16] El segundo precepto es el siguiente: no tiene sentido investigar *per se* en los orígenes del derecho, como si estuvieran completamente separados de otras formas de comportamiento cultural. No parece posible que el derecho evolucionara separadamente de la moralidad y otras instituciones sociales. La pregunta '¿cómo es posible el derecho?' es sólo un aspecto pequeño de una pregunta más general: '¿cómo es posible la cultura?'

El surgimiento de la cultura es un enigma por una simple razón. Michael Tomasello señala:

> Los 6 millones de años que separan al ser humano de los grandes simios es, evolutivamente, un periodo muy corto de tiempo, con los humanos modernos y los chimpancés compartiendo más o menos un 99 por ciento de su material genético – es el mismo grado de parentesco que otros géneros hermanos como leones y tigres, caballos y cebras y ratas y ratones. Nuestro problema es, por ende, uno de tiempo. El hecho es que simplemente no ha habido suficiente tiempo para un proceso normal de evolución biológica que involucre variación genética y selección natural para crear, una por una, cada una de las habilidades cognitivas necesarias para que los humanos modernos inventen y mantenga complejas industrias y tecnologías que utilizan herramientas, complejas formas de comunicación y representación simbólica y complejas organizaciones e instituciones sociales (Tomasello 2019: 2).

Y agrega:

> Sólo hay una solución posible a este enigma. Esto es, hay únicamente un mecanismo biológico conocido que podría llevar a esta clase de cambios en el comportamiento y en la cognición en un tiempo tan corto (…). Este mecanismo biológico es la transmisión social o cultural, que trabaja en escala de tiempo más rápidamente en órdenes de magnitud que aquellos de la evolución biológica (Tomasello 2019: 4).

Así, Tomasello afirma que la riqueza y complejidad de la cultura humana no puede ser explicada sólo por los mecanismos de la evolución biológica; en cambio, uno necesita postular que en nuestro pasado filogenético algunas adaptaciones biológicas relativamente menores pavimentaron la vía para el surgimiento del mecanismo de evolución cultural. El aspecto crucial de este mecanismo es lo que Tomasello llama el efecto trinquete cultural [*cultural ratchet*]: la transmisión cultural es acumulativa, i.e. los patrones comportamentales descubiertos por una generación son transmitidos a las subsiguientes generaciones. Por esto, no hay necesidad de 'reinventar la rueda'– nacemos en una sociedad que ya posee un arsenal sustancial de formas de conceptualizar la experiencia, de patrones de comportamiento y de herramientas.

16 Brożek 2015a.

La pregunta esencial es: ¿cuáles son las habilidades condicionadas biológicamente de la especie humana que permiten la transmisión cultural? Una respuesta bien fundamentada apunta hacia el mecanismo de aprendizaje social de la imitación.

Robin Dunbar nota:

> Los bebes humanos son máquinas imitativas que parece absorber cualquier cosa y todo lo que se encuentren que involucre el imitar el comportamiento de otro individuo. La enseñanza ayuda a guiar esta absorción, pero sin la aparentemente infinita capacidad de imitar de los niños humanos, es dudoso que cualquier cantidad de enseñanza de parte del progenitor ayudaría en la absorción de tanto comportamiento en un periodo tan corto de tiempo. En contraste, jóvenes chimpancés parecen más proactivos y avispados encontrando cosas por sí mismos (Dunbar 2004: 159).

Es común el diferenciar diversos mecanismos de aprendizaje social. Dado el objetivo de este artículo, es importante distinguir entre imitación y emulación. La imitación consiste en copiar tanto el objetivo (el cambio en el ambiente) del comportamiento de alguien, así como la forma de actuar, mientras que la emulación se circunscribe a intentar alcanzar el mismo objetivo. Los primatólogos están de acuerdo en que los primates no humanos emulan más que imitan. Por ejemplo, en un experimento conducido por Tomasello, Nagel y Olguin, a dos grupos de chimpancés y dos grupos de infantes de dos años, se les mostró dos formas de utilizar una herramienta semejante a un rastrillo, para alcanzar comida, de las cuales una era más eficiente que la otra. Cada grupo vio sólo uno de los métodos. Resulta que los chimpancés de ambos grupos no replicaron exactamente el comportamiento de los instructores, sino que utilizaron el rastrillo de diversas formas. Según Tomasello, esto puede interpretarse como una muestra de que los chimpancés aprenden por emulación: la forma de utilizar la herramienta no es importante, mientras que sí lo es el cambio en el ambiente —alcanzar la comida—. Mientras tanto, los infantes humanos que participaron en el experimento, repitieron las acciones de la persona instructora, incluso si seguían el método menos eficiente de utilizar el rastrillo. Tomasello cree que esto es evidencia de que los humanos –en contraste con lo grandes simios- no aprenden por medio de la emulación, sino a través de la imitación. Agrega, que el aprendizaje por medio de la emulación puede ser en algunas circunstancias ser más eficiente que la imitación; no obstante, esta última tiene una importancia social potencial, pues la imitación requiere prestar atención no sólo a los cambios en el ambiente exterior, sino también en el comportamiento de los otros.[17]

Las ventajas evolutivas de la imitación sobre la emulación y otras estrategias de aprendizaje social se vuelven claras si se consideran los siguientes hechos. Primero, la imitación es un mecanismo que lleva a la acumulación de conocimiento sobre patrones de comportamiento. La emulación o el aprendizaje in-

17 Cf. Tomasello 1999.

dividual por prueba y error no garantizan la transmisión intergeneracional de las formas de actuar compartidas comunitariamente. Segundo, la imitación es menos costosa comparada con el aprendizaje individual. Tercero, es el único mecanismo de aprendizaje social que admite la recombinación, i.e. utilizar los mismos medios para alcanzar objetivos distintos o lograr el mismo fin con medios distintos. En otras palabras, la imitación lleva a una especie de 'explosión combinatoria', aumentando considerablemente el conjunto de las herramientas comportamentales que un individuo posee. Cuarto, la imitación admite modificaciones sencillas: debido al hecho de que requiere que aprendamos el modo de actuar, abre el camino para introducir modificaciones en los patrones de comportamiento existentes. Quinto, la imitación es finamente detallada [*fine-grained*], i.e. es el único mecanismo que habilita la existencia de patrones de conducta muy similares, aunque distintos. Consideremos el lenguaje: con frecuencia utilizamos expresiones muy similares, aunque para alcanzar objetivos completamente distintos. Si la emulación constituyera la estrategia de aprendizaje responsable por la comunicación, el lenguaje sería imposible.[18]

¿Cuáles son las adaptaciones biológicas que permiten la imitación? Es habitual el hablar sobre la habilidad humana para imitar y su tendencia a imitar: aquella es cognitiva y esta un mecanismo motivacional. El aspecto cognitivo de la imitación está fundamentalmente conectado con la habilidad de *mindreading*,[19] i.e. adscribir creencias e intenciones a otros (este mecanismo es frecuentemente llamado 'teoría de la mente'). Para distinguir entre la forma del acto y el objetivo de la acción, uno necesita entender lo que el otro individuo estaba tratado de hacer. Hay dos abordajes principales sobre cómo trabaja el *mindreading*: la teoría de la teoría y la teoría de simulación. De acuerdo con la primera, la adscripción de estados mentales o intenciones a otros procede por medio de una especie de razonamiento, desde relaciones en primera persona a relaciones en tercera persona está basada en el esquema: 'Me comporto de la forma x si siento dolor; por ende, si otro se comporta de la forma x, quiere decir que siente dolor'.[20] La teoría de la simulación, por otro lado, sugiere el funcionamiento de un mecanismo distinto. Por ejemplo, Alvin Goldman afirma que la adscripción de estados mentales a otros procede de la siguiente forma. En la primera etapa, a través de '*mindreading*' sobre el estado mental de otra persona, el cerebro genera estados similares al estado de la mente de la otra persona. La segunda etapa consiste en procesar los datos obtenidos, con el uso del sistema neuronal propio, pero trabajando 'fuera de línea' [*off-line*]. Goldman cree que

18 Brożek 2015b.

19 *Nota de los traductores*: "Mindreading" es un concepto complejo que implica la capacidad de atribuir estados mentales, predecir y explicar el comportamiento y pensamiento propio y ajeno a partir de tales atribuciones. Es por ello que, según los especialistas, en textos en español se utiliza en inglés por lo difícil de su traducción.

20 Cf. Meltzof 2005: 55-77.

el cerebro utiliza los mismos circuitos cuando uno experimenta algo y cuando uno lee algo similar en las experiencias de otros. El resultado de la simulación fuera de línea es adscrito, en la última etapa, a la persona observada. Por ende, de acuerdo con la teoría de la simulación, el *mindreading* no requiere la realización de razonamiento alguno.[21] Curiosamente, en la primera etapa del modelo de Goldman, ocurre alguna forma muy básica de imitación (generación de un estado mental similar al estado mental de la otra persona). Esto lleva a la pregunta, qué es filogenética y ontogenéticamente anterior –*mindreading* o la imitación. Susan Gurley y Nick Chater sugieren que puede que la cuestión esté mal planteada: *mindreading* y la imitación son dos habilidades que se desarrollan simultáneamente– la imitación requiere capacidades plenamente desarrolladas de *mindreading*, y viceversa. Pero ambas capacidades están construidas sobre algunas habilidades rudimentarias: la muy temprana imitación puede que muestre una semejanza fundamental: yo-otro, mientras que la capacidad distintivamente humana de aprendizaje mediante interpretación, con su estructura flexible: medio-fines, a su vez contribuye al desarrollo de la distinción yo-otro y a capacidades más avanzadas de *mindreading*. [22]

El descubrimiento más importante que nos acerca a entender cómo la imitación y el *mindreading* son posibles es posiblemente el hallazgo de las neuronas espejo. por parte de neurocientíficos de Parma a principios de la década de los noventa.[23] Las neuronas espejo se activan tanto cuando una acción es ejecutada como cuando es observada.[24] Desde entonces, han provisto algún apoyo a la teoría de la simulación: hay mecanismos neuronales que involucran los mismos circuitos cerebrales cuando una acción es realizada y cuando es sólo observada. De esta forma, no es necesario ningún razonamiento de primera persona a tercera persona para comprender la acción de alguien más, dado que su acción es automáticamente *simulada* por el cerebro del observador. De forma similar, la existencia del sistema espejo podría contribuir a la explicación del mecanismo de la imitación. Por ejemplo, Giacomo Rizolatti afirma que hay dos tipos de resonancia de las neuronas espejo y, como resultado, dos clases de imitación. El nivel alto de resonancia es utilizado por reflejar el objetivo de una acción, mientras que el nivel bajo de resonancia copia la forma de actuar. Según Rizolatti, únicamente el cerebro humano saca provecho de ambos mecanismos, lo que habilita la imitación. En simios y (posiblemente) otros animales sólo la resonancia de nivel alto es utilizada y esto explica la habilidad de los simios para aprender sólo mediante emulación.[25]

21 Cf. Meltzof 2005: 55-77.

22 Hurley & Chater 2005: 33.

23 Cf. Di Pellegrino, Fadiga, Fogassi, Gallese & Rizolatti 1991: 176–180.

24 Hay, sin embargo, algunas reservas sobre el significado real del sistema espejo véase Hickok 2014.

25 Cf. Rizolatti 2005: 55-76.

Prestemos ahora atención a la tendencia humana a imitar. Se insiste frecuentemente que mientras los primates no-humanos muestran alguna capacidad para la imitación, muy raramente imitan debido a la ausencia de mecanismos emocionales y motivacionales relevantes. Michael Tomasello nota:

> Hay algún paso inicial en la evolución humana separándose de los grandes simios, que involucra el lado emocional y motivacional de la experiencia, que propulsó a los humanos hacia un nuevo espacio adaptativo en el cual pudieron ser seleccionadas complejas capacidades y motivaciones para la actividad colaborativa y la intencionalidad compartida (Tomasello 2009: 85).

Tomasello, incluso, afirma que la disposición humana para cooperar e imitar a otros es solo una manifestación de una adaptación biológica más básica: el mutualismo.[26] Él observa que la cooperación entre simios está usualmente basada en parentesco y reciprocidad. El pasaje evolutivo desde estas dos formas de comportamiento a las capacidades cooperativas humanas fue condicionado por tres procesos: el desarrollo de la cognición social y los mecanismos motivacionales, habilitando la coordinación de actividades cooperativas y comunicación compleja; el incremento de la tolerancia y la confianza en relación con otros, primordialmente en el contexto de obtención de alimento; y el desarrollo de un grupo de prácticas institucionales basadas en normas sociales.[27]

En el final neurocientífico de la historia, se especula que los mecanismos motivacionales y emocionales requeridos para generar comportamiento humano colaborativo son también condicionados por la existencia del sistema espejo. Por ejemplo, Marco Iacoboni observa —basándose en hechos anatómicos y datos obtenidos mediante neuroimagen— que una parte de la ínsula, el campo *disgranural* [*dysgranural field*], está conectado tanto con el sistema límbico, como con el parietal posterior, inferior y frontal y con el cortex superior temporal. Esto lleva a la hipótesis que es la ínsula la que provee a las áreas límbicas, responsables de la respuesta emocional, con la información sobre la acción observada y ejecutada. La hipótesis recibe más apoyo por descubrimientos experimentales que indican que el proceso de imitar una expresión facial *emocional* aumenta la actividad de la amígdala, i.e. la parte del sistema límbico que juega un rol crucial en los procesos emocionales.[28]

Estas y otras observaciones llevaban a Iacoboni a la conclusión de que el sistema neuronal espejo —y la imitación— son necesarias para experimentar empatía:

> Entendemos los sentimientos de otros por medio de un mecanismo de acción-representación que da forma al contenido emocional, de tal manera que nuestra resonancia

26 Tomasello 2009: 85.

27 Silk afirma que el altruismo es anterior al mutualismo; véanse sus comentarios en Tomasello 2009: 111–124.

28 Cf. Iacoboni 2005: 95.

> empática se basa en la experiencia de nuestro cuerpo en acción y en las emociones asociadas a movimientos específicos. (…) Para empatizar, dependemos de la mediación de la representación de las acciones asociadas con las emociones que estamos presenciando y en la red cerebral que incluye estructuras que apoyan la comunicación entre los circuitos de acción representación y los circuitos dedicados al procesamiento emocional. (Iaboconi 2005: 98).

Una posición semejante adopta Vittorio Gallese, quien remarca:

> El descubrimiento de neuronas espejo en los individuos adultos muestra que el mismo sustrato neuronal se activa cuando algunos de estos actos expresivos son tanto ejecutados como percibidos. Así, tenemos un espacio común instanciado subpersonalmente. Depende de los circuitos neuronales involucrados en el control de acciones. La hipótesis que presento aquí es que un mecanismo similar podría apuntalar nuestra capacidad de compartir sentimientos y emociones con otros. Mi propuesta es que las sensaciones y emociones exhibidas por otros pueden también ser empatizadas con, y por ende implícitamente entendidas, un mecanismo espejo de coincidencia (Gallese 2005: 133).

La habilidad humana de imitar, en conjunto con nuestra tendencia de ser como los otros e imitarlos, condicionan el surgimiento de patrones comportamentales compartidos dentro de las comunidades humanas y transmitidos de generación en generación. Ya en esta etapa de la filogénesis humana, uno puede hablar del desarrollo de alguna forma rudimentaria de práctica de seguimiento de normas.[29] Los patrones de comportamiento que emergen espontáneamente, propagados a través de los mecanismos de imitación y compartidos por la comunidad, tienen cierto nivel de objetividad. Es más, fueron aplicados colectivamente: los trasgresores fueron castigados o corregidos por otros miembros de la comunidad. Notablemente, este marco cognitivo y motivacional también constituye una plataforma para el surgimiento del lenguaje. Tomasello apunta:

> La comunicación cooperativa humana (…) evolucionó primero porque estas actividades proveen de la base necesaria para establecer temas conjuntos, y porque generaron los motivos cooperativos.[30]

Hay un número de escenarios evolutivos que subrayan que las fuentes de las habilidades lingüísticas yacen en la tendencia humana a cooperar, y están basadas en último término en la estructura neuronal provista por las neuronas espejo. Por ejemplo, Merlin Donald identifica cuatro tipos principales de representación mimética, que son la clave para la transmisión y propagación de la cultura: (1) *mímica reenactiva* [reenactive mime], característica del juego de roles; (2) la imitación precisa medios-fines (como en el aprendizaje de cómo freír un huevo); (3) la práctica y refinamiento sistemático de una habilidad (como al aprender cómo manejar un auto); y (4) gestos no-lingüíticos (como al aprender

29 Brożek 2013b.

30 Tomasello 2009: 73.

cómo bailar).[31] Además, afirma que estas habilidades miméticas fueron el fundamento para el surgimiento del lenguaje y todas las otras formas de cultura. Enfatiza que su propuesta difiere de los escenarios tradicionales que condicionan el surgimiento de la cultura en el surgimiento previo del lenguaje (la teoría del lenguaje primero). De acuerdo con Donald, algunas formas de culturas, basadas en habilidades miméticas, deben haber precedido al lenguaje y habilitado su evolución (la teoría de la cultura primero).[32]

La teoría de Donald conlleva consecuencias profundas. Primero, afirma que la mente humana está íntimamente conectada con la sociedad en la cual florece. Uno puede decir incluso que es cocreada por la comunidad. Las prácticas comunales son constitutivas de la mente humana, tanto en su dimensión filogenética como en la ontogenética. Segundo, el lenguaje no es un individuo, sino un fenómeno de nivel de red: su evolución se asemeja a la evolución de un ecosistema en vez de un único organismo. Tercero, se sigue que "es poco probable que los neurocientíficos cognitivos encuentren un dispositivo innato de adquisición del lenguaje, y deben redirigir sus investigaciones hacia los potentes sistemas de procesamiento analógico de los cuales el lenguaje puede emerger en la interacción grupal".[33]

El surgimiento del lenguaje consolida aún más las prácticas humanas de seguimiento de reglas. Con el tiempo, también habilita la formulación lingüística de reglas de conducta y abre el camino para discutirlos críticamente. Por esta vía, la humanidad alcanzó la etapa en la cual hizo posible el desarrollo de sistemas morales y jurídicos, propiamente dichos.

4 LA ILUSORIA NATURALEZA DEL DERECHO

Para relacionar la imagen esbozada arriba sobre el surgimiento de la cultura con los problemas de la ontología jurídica, permítasenos introducir una distinción heurística entre reglas rudimentarias y reglas abstractas. Al calificar la distinción como *heurística* deseo enfatizar que esta puede representar solo una visión simplificada de las prácticas del seguimiento de reglas Al mismo tiempo, creo que es compatible con el escenario evolutivo delineado arriba, y también es altamente instructiva: incluso si una ontología compleja de las reglas requiriera distinciones conceptuales mucho más complejas, las categorías de las reglas rudimentarias y abstractas capturan algunos aspectos cruciales de cualquier ontología bien desarrollada.[34]

31 Cf. Donald 2005: 283-300.

32 Cf. Donald 2005: 283-300

33 Donald 2005: 294.

34 Esta distinción es desarrollada y defendida en Brożek 2013b: capítulo 2.

Las reglas rudimentarias pueden ser caracterizadas como: (a) independientes del lenguaje (un lenguaje completamente desarrollado, i.e. un sistema consistente en un vocabulario bien definido y en reglas gramaticales es dependiente tanto evolucionaria como lógicamente, de la existencia de reglas rudimentarias); (b) son simples y concretas (las reglas rudimentarias pertenecen a formas relativamente simples y concretas de comportamiento); (c) son normativamente unificadas (las reglas rudimentarias no pueden dividirse en clases – en el nivel rudimentario no hay reglas matemáticas, lingüísticas, morales o jurídicas); (d) son multiaspecto y no modales (las reglas rudimentarias pertenecen a alguna forma de comportamiento como un todo, ellas dicen que debe hacerse dadas ciertas circunstancias y no involucran operadores deónticos tales como *obligatorio, prohibido* o *permitido*).

Las reglas abstractas, por otro lado, dependen de la existencia de las reglas rudimentarias. Sin la forma rudimentaria de seguimiento de reglas sería difícil imaginar cómo emergieron las reglas abstractas: hubiera sido una especie de milagro. Si no es por las reglas rudimentarias, nuestros sistemas normativos tales como el lenguaje, la moralidad o el derecho se convertirían en un enigma evolutivo, y un logro tan único y cualitativamente diferente de la *cultura* de otros primates que cualquier intento de explicarlos estaría destinado al fracaso. Las reglas abstractas fueron desarrolladas a través de formulación lingüística y reflexión sobre las formas rudimentarias de seguimiento de reglas. En contraste con las reglas rudimentarias, ellas: (a) dependen del lenguaje (deben ser formuladas en lenguaje); (b) puede ser complejas (i.e. puede referir a complejos patrones de comportamiento) y generales (i.e. pueden referir a acciones definidas con generalidad, no concretamente); (c) son normativamente diferenciadas (i.e. ellas puede dividirse en clases: lingüísticas, morales, jurídicas); y (d) son aspectualizadas y modalizadas (i.e. pueden pertenecer sólo a ciertos aspectos de acciones, y ser expresadas con el uso de operadores deónticos).

Las reglas abstractas son por ende el resultado de teorizar algunos aspectos de las reglas rudimentarias. Para ilustrar este punto, consideremos el lenguaje. Lo que uno encuentra en diccionarios y libros de gramática es una imagen del lenguaje como un sistema aislado de reglas sintácticas y semánticas; pero esto es ya una consecuencia de desarrollar un abordaje teorético sobre el lenguaje. Pidiendo prestada una frase de los realistas jurídicos estadounidenses: el lenguaje en los libros es un sistema de reglas que se comporta bien, mientras que el lenguaje en acción está constituido por una multiplicidad de patrones de comportamiento en los que aspectos lingüísticos, morales, matemáticos y de otras clases están íntimamente conectados entre sí. Cuando uno describe a alguien como culpable, uno puede decir que sigue una regla rudimentaria (uno hace lo que hace en circunstancias similares de su comunidad), pero desde una perspectiva más teórica puede concebirse como observando simultáneamente una

regla lingüística, moral, prudencial o jurídica. Crucialmente, la misma amalgama de las reglas rudimentarias puede dar lugar a reconstrucciones teóricas diferentes en el nivel de las reglas abstractas, y por ende uno puede tener abordajes divergentes del lenguaje, la prudencia o la moralidad.

Aun así, las reglas abstractas —i.e. los sistemas normativos que formulamos en lenguaje, discutimos, criticamos y cambiamos— en efecto, influencian nuestro comportamiento. La influencia es directa, cuando uno conscientemente aplica una regla abstracta, o (más frecuentemente) indirecta, cuando los patrones de comportamiento prescritos por algunas reglas abstractas se vuelven *fibras* en la amalgama de las reglas rudimentarias. En otras palabras, las reglas abstractas pueden informar las prácticas rudimentarias de seguimiento de reglas. Este bucle de retroalimentación –la dependencia de las reglas abstractas en la existencia de reglas rudimentarias y la influencia que aquellas tienen sobre las prácticas rudimentarias de seguimiento de reglas– destaca el carácter heurístico de la distinción entre reglas rudimentarias y abstractas: es una herramienta analítica útil para capturar algunos aspectos importantes del seguimiento de reglas, pero no nos ofrece una imagen completamente adecuada de la complejidad del fenómeno en cuestión.

Estas observaciones tienen una relevancia directa con el problema de la naturaleza del derecho, o al menos eso sostengo. La naturaleza del derecho —o la correcta definición del derecho— ha sido desde hace mucho el santo grial de las personas dedicadas a la filosofía del derecho. Es sintomático, sin embargo, que hayan fracasado los repetidos esfuerzos por desarrollar una teoría del derecho comúnmente aceptada. Ya a inicios del siglo XX, Leon Petrażycki escribió:

> El hecho de que hasta el día de hoy se haya probado imposible definir el derecho, aun a pesar del mucho esfuerzo dedicado a la tarea y que fueron propuestos –con el pasar del tiempo- innumerables intentos más o menos ingeniosos y fundamentales de caracterizar la esencia del derecho, ha conducido recientemente a dudas sobre si del todo la tarea puede ser completada, y a aceptar definiciones que son claramente deficientes, así como evitar la cuestión sobre la esencia del derecho, para lograr así alguna paz (Petrażycki 1959: 25).

50 años después, H. L. A. Hart hizo una observación casi idéntica:

> Pocas preguntas relacionadas con la sociedad humana han sido formuladas con tanta persistencia y respondidas por pensadores serios de formas tan diversas, extrañas e incluso paradójicas como la pregunta '¿qué es el Derecho?'. Incluso si confinamos nuestra atención a la teoría del derecho de los últimos 50 años y descuidamos la especulación clásica y medieval sobre la 'naturaleza' del derecho, nos encontraremos en una situación sin paralelos en ningún otro asunto sistemáticamente estudiado en una disciplina académica separada (Hart 2012: 1).

Las observaciones de Petrażycki y Hart se mantienen vigentes hasta hoy. Este hecho sorprendente puede llevar a la conclusión de que quizás hay 'algo malo' en el proyecto mismo de brindar una caracterización de la esencia del

derecho o en la búsqueda de la naturaleza del derecho. Los fracasos recurrentes en el proyecto sugieren que puede que se base en supuestos falsos.

Creo que los análisis presentados en las secciones precedentes arrojan alguna luz sobre este problema. Toda concepción del derecho es un abordaje teórico de aspectos seleccionados de las reglas rudimentarias. En otras palabras, toda concepción del derecho es una reconstrucción de las prácticas sociales reales, y las prácticas en sí mismas no caen bajo ninguna categoría natural preteórica. Las reglas rudimentarias no son jurídicas, morales o prudenciales: sólo son patrones de conducta que son seguidos por una comunidad dada. Solo tras teorizar en algunos de sus aspectos puede uno construir un sistema jurídico o moral. Esta imagen se complica aún más debido al hecho de que nuestros esfuerzos teóricos, i.e. los sistemas normativos que desarrollamos, así como los abordajes del derecho o la moralidad que construimos, conllevan cierta influencia sobre las prácticas rudimentarias del seguimiento de reglas. Para una persona educada del medioevo, el derecho era algo diferente que, para un positivista de inicios del siglo XX no sólo porque ellos adoptaron concepciones distintas del derecho, sino también debido al hecho de que esas concepciones (por un lado, la teoría del derecho natural, por el otro, el positivismo jurídico) influyeron [*informed*] en gran medida las prácticas sociales relevantes.

Así, si el escenario evolutivo sobre el surgimiento de la cultura que he bosquejado arriba es al menos a grandes rasgos correcto, uno no debería esperar capturar la *naturaleza real del derecho*. en ninguna definición. Esta conclusión es verdadera sin consideración a si uno entiende *la naturaleza del derecho* como refiriéndose a algo *ahí afuera*, i.e. algún elemento de la estructura de la realidad (como en el caso de las teorías del derecho natural sustantivas), o perteneciendo a condiciones necesarias y/o suficientes para aplicar el predicado *derecho* (como en el caso de algunas teorías contemporáneas positivistas del derecho). No existe una naturaleza del derecho en el sentido sustantivo de la palabra, ya que el derecho es el resultado de nuestros esfuerzos conjuntos prácticos y teóricos (reflexivos). Por la misma razón, no hay una naturaleza del derecho entendida como ciertos criterios para distinguir el derecho de otros fenómenos. Por supuesto, tales criterios pueden ser propuestos, pero uno no debe esperar encontrarlos fijados de una vez y para siempre o sin una alternativa sostenible. En cierta forma, en la reconstrucción teórica del derecho uno nunca puede adoptar un punto de vista totalmente externo: al desarrollar una teoría del derecho uno *eo ipso* participa en el discurso jurídico (y al menos potencialmente) influencia las formas de las prácticas sociales relevantes, aun si la influencia es muy limitada. Esto no significa, por supuesto, que nuestra empresa teórica en busca de la naturaleza del derecho sea completamente fútil: al menos ella informa nuestro entendimiento del derecho, y ayuda a mejorar, nuestra práctica jurídica. Pero esto no cambia el hecho de que no hay *una imagen verdadera del derecho*, así como no hay una imagen verdadera de la moralidad o el lenguaje.

Por supuesto, se puede insistir en que la concepción que he esbozado más arriba no muestra la inutilidad de buscar la naturaleza del derecho, sino que -un tanto paradójicamente- es en sí misma una exposición de lo que es la naturaleza del derecho. No tengo ningún problema en aceptar tal conclusión, siempre que se admita que la naturaleza del derecho no puede establecerse ni proporcionando una definición esencial ni indicando condiciones (suficientes y/o necesarias) para la aplicación del concepto de derecho. Desde este punto de vista, desvelar la naturaleza del derecho se reduce a desarrollar una teoría que describa el mecanismo que subyace a las prácticas sociales jurídicas de seguir las normas jurídicas, reflexionar sobre estas prácticas y teorizar sobre los aspectos jurídicamente relevantes de la experiencia. En este sentido, cualquier teoría científica que proporcione una explicación mecanicista trata sobre la "naturaleza" de algo: la mente, el lenguaje, la visión, las emociones, la inflación o la intuición. Si uno desea seguir este lenguaje, sin duda puede hacerlo, pero, personalmente, lo encuentro algo engañoso.

Bibliografía

Bennett, M.R. & Hacker, P.M.S. (2003). *Philosophical Foundations of Neuroscience*, Wiley Blackwell.

Brożek, B. (2011). Philosophy in Neuroscience, en B. Brożek, J. Mączka, W. Grygiel (eds.), *Philosophy in Science. Methods and Applications*, Copernicus Copernicus Center Press.

Brożek, B. (2013a). Philosophy and Neuroscience. Three Modes of Interaction, en J. Stelmach, B. Brożek, Ł. Kurek (eds.), *Philosophy in Neuroscience*, Copernicus Center Press.

Brożek, B. (2013b). *Rule-following. From Imitation to the Normative Mind*, Copernicus Center Press.

Brożek, B. (2015a). Explanation and Understanding, en B. Brożek, J. Stelmach, M. Hohol (eds.), *The Concept of Explanation*, Copernicus Center Press.

Brożek, B. (2015b). Imitation and the Emergence of Normative Orders, en B. Brożek, J. Stelmach, Ł. Kurek (eds.), *The Emergence of Normative Orders*, Copernicus Center Press.

Brożek, B., Hage, J., & Vincent, N. (eds.) (2021). *Law and Mind. A Survey of Law and the Cognitive Sciences*, Cambridge University Press.

Brożek, B. (s.f.) *Models of Naturalizing Jurisprudence*, en manuscrito.

Di Pellegrino, G., Fadiga, L., Fogassi, L., Gallese, V. & Rizolatti, G. (1991). Understanding Motor Events: A Neuropsychological Study, *Experimental Brain Research* 91(1), 176–180.

Donald, M. (2005). Imitation and Mimesis, en S. Hurley, N. Chater, (eds.), *Perspectives on Imitation vol. 2*, (pp. 283-300). MIT Press.

Garland, B. (2004). *Neuroscience and the Law*. Dana Press.

Hickok, G. (2014). *The Myth of Mirror Neurons*, W.W. Norton & Company.

Hurley, S. & Chater, N. (2005). Introduction: The Importance of Imitation, en S. Hurley, N. Chater (eds.), *Perspectives on Imitation vol. 2* (pp. 1-52). MIT Press.

Iacoboni, M. (2005). Understanding Others: Imitation, Language and Empathy, en S. Hurley, N. Chater (eds.), *Perspectives on Imitation vol. 1* (pp. 77-100). MIT Press.

Jones, O.D., Schall, J.D. & Shen, F.X. (2014). Law and Neuroscience, Vanderbilt University Law School, *Public Law and Legal Theory Working Paper,* 12-14.

Meltzof, A.N. (2005). Imitation and Other Minds: The "Like me" Hypothesis, en S. Hurley, N. Chater (eds.), *Perspectives on Imitation vol. 2* (pp. 55-77) MIT Press.

Pardo, M. & Patterson, D. (2013). *Minds, Brain, and Law*. Oxford University Press.

Popper, K. (1966). *The Open Society and Its Enemies*, II, Princeton University Press.

Rizolatti, G. (2005). The Mirror Neuron System and Imitation, en S. Hurley, N. Chater (eds.), *Perspectives on Imitation vol. 1* (pp. 55-76). MIT Press.

Rowlands, M. (2010). *The New Science of the Mind*, MIT Press.

Silk, J. (2009). Forum, en M. Tomasello, *Why we cooperate*, (pp. 111-124). MIT Press.

Spranger, T. M. (ed.) (2012). *International Neurolaw*, Springer.

Tomasello, M. (1999). *Cultural Origins of Human Cognition*, Harvard University Press.

Tomasello, M. (2009). *Why we cooperate*, MIT Press.

Załuski, W. (2009). *Evolutionary Theory and Legal Philosophy,* Edward Elgar Publishing.

Johan Hermansson*

Structuring concepts of legal personhood

On legal personhood as a cluster property

Legal persons have traditionally been understood as entities with legal rights and/or duties. This traditional concept of legal personhood has been challenged during the last decades: in legal practice through the global development in law where previous legal non-persons such as different non-human natural entities, non-human animals, fetuses and artificial intelligences have been ascribed, or been proposed to be ascribed, legal rights and/or status as legal persons; in legal theory through, inter alia, Visa Kurki's Bundle Theory of Legal Personhood. The purpose of this paper is to critically assess the concept of legal personhood proposed in the Bundle Theory. After discussing the definitional structured traditional concepts of legal personhood and Kurki's argument against them, I will focus on the first main tenet of the Bundle Theory: that legal personhood is a prototype structured cluster property which consists of incidents which are separate but interconnected. I will argue that such a concept is untenable since the legal personhood of legal persons in positive law is not structured in this way. Lastly, I will suggest the use of a dual structured concept of legal personhood that maintains the benefits of previous concepts but avoids their major deficiencies.

Keywords: legal person, legal personhood, the bundle theory of legal personhood, Kurki (Visa), conceptual structure

1 INTRODUCTION

Legal persons and legal personhood[1] have received renewed attention within legal science during the first decades of the new millennia. Legal persons have traditionally been understood simply as entities with, or sometimes consisting of, legal rights and/or duties.[2] These traditional concepts have been challenged during the last decades through the global development in positive law extending legal personhood to new kinds of entities: to previous legal non-persons who are now ascribed legal rights and/or status as legal persons.

The most frequent of these new kinds of entities in positive legal provisions so far are the different examples of non-human nature ascribed legal personhood

* johan.hermansson@jur.lu.se | Department of Law, Lund University (Sweden). I would like to thank Matilda Bergström, Christian Dahlman, Eduardo Gill-Pedro, Ellika Sevelin, Lena Wahlberg and all the participants at my first seminar at the Faculty of Law at Lund University for comments on earlier drafts of this paper. I would also like to thank the two anonymous reviewers for their percipient observations and constructive critique.

1 With the term legal personhood, I refer to a certain set of legal positions and with legal person to the entity that has the capacity for, holds or consists in these positions. In English-language legal theory the terms are sometimes used interchangeably.

2 This is further developed in section 3.1 below.

in different legal orders across the world.[3] Although these provisions sometimes differ considerably from one another they are often labeled under the catch-all phrase rights of nature.[4] Some of the more studied examples are the rights of nature under the 2008 constitution of Ecuador[5] and the granting of status as legal persons or legal subjects to rivers in New Zealand[6], India[7] and Colombia.[8] Less successful, at least in practice, are the attempts to ascribe legal rights or status as legal person to non-human animals.[9] Monkeys and apes have, however, been recognized as legal persons, or at least legal subjects (sujetos de derecho), in judgments from both Argentinian and Ecuadorian courts.[10] The possible legal personhood of artificial intelligence has also caused recent legal disputes, for example regarding the patent applications tried before the Legal Board of Appeal of the European Patent Office naming the AI DABUS as inventor.[11]

The legal doctrine treating, as well as anticipating, the development sketched in the previous paragraph is already vast.[12] What unites most legal scholars writing on the subject, including legal philosophers, is, however, their adherence to the traditional concepts of legal personhood, according to which legal persons are entities with legal rights and/or duties. This equation of legal per-

3 An overview of legal initiatives can for example be found in the Eco Jurisprudence Monitor. This database has so far registered around 80 approved legislative provisions concerning the rights of nature at municipal, national and constitutional level and around 80 cases concerning rights of nature approved in courts. The database is largely based on the careful mapping of rights of nature initiatives carried out by Putzer e.al., see Putzer et al. 2022.

4 For a recent overview from a political science perspective, see Tanasescu 2022.

5 Constitución de la República del Ecuador 2008, in particular articles 71 to 74.

6 Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 section 14(1). It should be noted that, according to the actual phrasing of the provision, it is not the Whanganui River in itself that is constituted as a legal person, but an entity called Te Awa Tupua. This entity incorporates all the rivers physical and meta-physical elements, see section 12.

7 The very first example being the judgment from the High Court of Uttarakhand declaring rivers Ganga and Yamuna as legal persons. See Mohd Salim v State of Uttarakhand & others, WP (PIL) 126/2014 (High Court of Uttarakhand) 2017 p. 19. It should be noted that the judgment have been stayed and is awaiting the ruling of the Supreme Court of India, see O'Donnell 2018: 143.

8 Constitutional Court of Colombia, judgment T-622/16.

9 Attempts to grant non-human animals status as legal persons through litigation are for example being carried out by the U.S.-based Non-Human Rights Project, compare Kurki 2021a: 47–48.

10 Final Judgment No. 253-20-JH/22 from the Constitutional Court of Ecuador. The Argentinian cases, recognizing the orangutang Sandra and the chimpanzee Cecilia as sujetos de derecho, are refereed in Kurki 2019: 198–199.

11 Case no. J 0009/20 (2021-12-21) Legal Board of Appeal of the European Patent Office. The application was rejected on the basis that DABUS was not a "person with legal capacity", see section 4.3.1 of the judgment.

12 For example, a search on "rights of nature" in the LUBsearch research database of Lund university libraries alone on September 22, 2023 resulted in 2 154 results.

sonhood with a general holding of rights and/or duties in legal theory have largely remained unquestioned throughout the decades.

Finnish legal philosopher Visa Kurki has recently challenged the traditional legal personhood concepts in his book, *A Theory of Legal Personhood*.[13] In the book Kurki introduces his own theory, *the Bundle Theory of Legal Personhood* (the Bundle Theory), according to which no singular legal positions constitute necessary or sufficient parts of legal personhood and no exact border between legal personhood and non-legal personhood exists.[14] Since its release in 2019 the book has been recognized as an important contribution to legal theory by reviewers,[15] and is frequently quoted in new works on the subject.[16] However, many works referring to the Bundle Theory so far do so briefly, and/or without fully adopting its original concept of legal personhood.[17] Critique of the Bundle Theory has also so far been scarce, with the notable exception of a series of articles on the theory published as a part of a symposium in the 44th issue of the international philosophy of law journal *Revus*.[18]

I find the Bundle Theory to be an interesting contribution to the development of legal theory in general and theory on legal personhood in particular. I will show, however, that the definition of legal personhood as a cluster property in the first main tenet of the theory, which Kurki himself have described as the most original part of the theory,[19] is untenable. I will both present relevant counterarguments to the concept of legal personhood proposed in the Bundle Theory and sketch a tenable alternative.

The paper is structured as follows: I will first elaborate on how I understand concepts as Fregean senses with different possible structures, before addressing the traditional concepts of legal personhood and Kurki's argument for refuting them: the extension, or discrepancy, problem. In short, the extension problem relates to the fact that entities that are not considered legal persons in legal doctrine and positive law still holds certain legal positions. This creates a discrepancy between the extension of the legal personhood concepts of traditional theory (all entities with legal positions are legal persons) and the extension of the legal personhood concepts in positive law (some entities with legal positions are not legal persons). I conclude the section by arguing that this argument for

13 Kurki 2019.

14 Kurki 2019: 93–94.

15 See for example Afrouzi 2020:1354–1358. Pratama & Rizkiyah 2022: 157–166.

16 Google Scholar lists 204 texts in which the book is quoted as of September 22, 2023.

17 Many scholars tend to refer to the theory for alternative views or for an overview of the literature on the topic, see for example Worthington & Spender 2021: 3. Of course, there are also examples of scholars applying the theory to a certain extent, see for example Mocanu 2022.

18 Stancioli 2021, Fasel 2021, Naffine 2021, Siltala 2021, Aalto-Heinilä & Karhu 2021, Banaś 2021, Kurki 2021b.

19 Kurki 2021b: 185 (online § 43).

a revised legal personhood concept is tenable but to a large extent dependent on marginal examples. In the next section I will focus on the legal personhood concept of the Bundle Theory and its first tenet, the claim that legal personhood is a prototype structured cluster property. I will argue that this is not a tenable theoretical concept of legal personhood since the legal personhood concepts of positive law necessarily includes certain legal positions, which cannot be the case if legal personhood would be a cluster property. In the last section, I suggest an alternative structure for a tenable concept of legal personhood. This concept of legal personhood combines the certainty of the definitional structured concepts of traditional theory with the flexibility and richness of the prototype structured concept of the Bundle Theory into a dual structured concept that more accurately captures the legal personhood concepts of positive law.

2 THREE WAYS OF STRUCTURING (LEGAL) CONCEPTS

In order to clarify my critique of the concepts of legal personhood that are the topic of this paper some points regarding conceptual theory should firstly be made. Since Frege's distinction between sign, sense, and referent,[20] it has become common to separate the term, concept, and referent of a word in analytical philosophy. According to this understanding, that I will adopt, a word (term) expresses a certain meaning in a certain context (concept) which refers to a certain object (referent).[21]

I will also distinguish between the extension and intension of a concept. By the extension of a concept, I refer to the group or class of entities described by the concept, and with the intension of a concept I refer to the conditions an entity must satisfy to fall within this class of entities.[22]

I will finally assume that the intension of concepts can be structured in different ways. There are many theories on the structure of concepts, but for my present argument it is sufficient to mention three of these. According to the *classical theory of concepts*, the intension of concepts has a definitional structure: they encode necessary and sufficient conditions for their application.[23] According to its main rival, the *prototype theory of concepts*, the intension of concepts has a prototype structure: their application is dependent on the holding of a sufficient number of statistically prominent (typical) components, where some may be more significant than others.[24] Finally, according to what might be called a *dual*

20 Frege 1948: 27.

21 Margolis & Laurence 1999: 5–7; compare Zalta 2023.

22 Compare 'Extension/Intension' in Blackburn 2016. I do not, however, use referent and extension as synonymous terms, which sometimes is the case.

23 Margolis & Laurence 1999: 8–10.

24 Margolis & Laurence 1999: 27.

theory of concepts, concepts have a definitional structured core of necessary and sufficient conditions and an additional prototype structured bundle of statistically prominent components that alone are neither necessary nor sufficient.[25]

In the following, it will be evident that the legal personhood concepts of traditional theory have a definitional structure since they set up necessary and sufficient conditions for their application: the holding of rights and/or duties, or capacity for this. Kurki's argument against the concepts of traditional theory, as I would rephrase it, is that the extension of these theoretical concepts differs from the extension of its referent, the actual concepts of legal personhood in positive law.[26] Kurki's alternative concept of legal personhood avoids this problem by proposing a prototype structured concept, where the holding of no single legal positions alone constitute necessary or sufficient conditions. This, however, causes other problems and more importantly does not seem to align to how legal personhood actually is structured in positive law. Instead, it seems likely that there exist necessary and together sufficient conditions for legal personhood in positive law, which, however, are different than the ones assumed in traditional legal theory, in addition to legal positions that are commonly but not necessarily held by legal persons. In the last section I present an alternative dual structured legal personhood concept that utilizes these observations and whose extension better aligns to the extension of the legal personhood concepts of positive law.

3 THE TRADITIONAL CONCEPTS OF LEGAL PERSONHOOD

3.1 The orthodox view of the traditional concepts

Legal persons are commonly understood as entities with legal rights and/or duties, as already mentioned in the introduction. Kurki dedicates the first third of his book to this group of traditional concepts of legal personhood, their history, and their deficiencies.[27] He calls them *the orthodox view* of legal personhood,[28] a term I will also use in this section to refer to the concepts of legal personhood in traditional theory.

25 Compare Margolis & Laurence 1999: 42–43.

26 I think that one, in accordance with Frändberg, carefully should distinguish between legal concepts with a law-stating function (stating the material legal content) and a juridical-operative function (concept for juridical handling of legal content), see Frändberg 2009: 2. The confusion on these two kinds of legal concepts can sometimes lead to confusion when the latter wrongly is used as an authoritative source in legal argumentation, compare Lindahl 1985: 37–39.

27 Kurki 2019: 29.

28 See for example Kurki 2019: vii.

After explaining how understanding legal personhood as the holding of rights and/or the bearing of duties became the dominant view in Western legal theory Kurki distinguish five regularly occurring formulations of the orthodox view:[29]

- The definition of a legal person as an entity that holds at least one right or bear at least one duty is called the *Rights-or-Duties* position.
- The definition of a legal person as an entity that holds at least one right and bears at least one duty is called the *Rights-and-Duties* position.
- The definition of a legal person as an entity with the legal capacity to hold rights and bear duties is called the *Capacity-for-Rights* position.
- The definition of a legal person as an entity with the capacity to be a party to legal relations is called the *Capacity-for-Legal-Relations* view.
- Lastly, a fifth definition is mentioned but not named, the definition of legal persons as simply a bundle of rights and duties.[30]

Many existing definitions of legal persons, and hence different concepts of legal personhood, fit quite neatly into this systematization of the orthodox view. Some definitions of legal persons, however, also explicitly mention legal persons' capacity for standing, in addition to rights and duties.[31] It should also be noted that there exists a fundamental metaphysical division in legal personhood theory which Kurki does not address in this systematization: Some scholars understands legal persons as entities existing in the physical world *holding legal positions* and other scholars understand legal persons as purely legal entities *consisting of legal positions* and not existing (independently) in the physical world.[32] The common denominator for both positions is, however, the equation of legal personhood with rights and duties, independent of which rights or duties that a legal person is holding, or consisting in. Because of the definitional structure (necessary and sufficient conditions) given to their respective versions of the concept of legal personhood, the adherents of the orthodox view are thus logically forced to conclude that an entity has legal personhood (and conse-

29 Kurki 2019: 55.

30 Kurki 2019: 55–56. It should be noted that the Capacity-for-Rights position, despite its name, includes both the capacity to hold rights *and* to bear duties.

31 This is at least common in Swedish legal theory and in provision defining the legal personhood of artificial legal persons. See for example the Swedish Foundations Act (1994:1220) chapter 1 section 4 that states that a foundation can acquire rights, take on obligations and bring actions (föra talan) before courts and other authorities. Compare for example Agell et al 2010: 51–52; Grauers 2017: 47. It should be noted that legal personhood still is defined as a capacity for rights and duties in general, although a capacity for standing also is included. These versions of the orthodox view thus differ from the alternative legal personhood concept proposed in section 5 since the latter connects legal personhood to capacity for specific rights and duties, including standing.

32 The most well-known proponent of the latter position is probably Kelsen. Kelsen 2009: 173–174. Kurki addresses this position in a later section of the book. Kurki 2019: 133, 137–138.

quently also is a legal person) if this entity is deemed to have a right, a right and a duty, capacity for rights, etc.

3.2 The extension/discrepancy problem

Kurki's main argument for revising the legal personhood concepts of the orthodox view is what in later articles has been called the extension problem of the orthodox view,[33] or the discrepancy argument:[34] *the orthodox view comes into conflict with commonly held beliefs about the extension of the concept of legal personhood when combined with modern theories of rights*.[35] This needs elaboration.

The intension of the concept of legal person according to the orthodox view could be summarized as an entity with rights and/or duties, or the capacity to have rights and/or duties, as described in the previous subsection. In addition to these *intensional beliefs* Kurki identifies a number of *extensional beliefs* commonly held by jurists in Western legal systems: beliefs regarding which entities that are commonly perceived to fall within the class of legal persons. A number of these extensional beliefs are discussed in the book, but the more central beliefs for the extension problem are summarized in two convictions:

(i) Human beings who are born, currently alive and sentient are legal persons.

(ii) Animals and fetuses are not legal persons, and slaves were not legal persons.[36]

These convictions indeed seem to be generally held by jurists, at least they are regularly mentioned in connection with the orthodox view.[37] They also seem to be generally compatible with positive legal norms (with the possible exception of sentience). That is, in Western legal systems humans are generally ascribed the status of legal person from birth to death, independent of their other abilities (and thus also legal personhood),[38] while animals and fetuses are not ascribed the status of legal person.[39] It is therefore possible to rephrase the

33 Kurki 2021a: 51.

34 Aalto-Heinilä & Karhu 2021: 154 (online §§ 18–20).

35 Kurki 2019: 55 compare 15–19.

36 Kurki 2019: 14 compare 8–10 and 55.

37 For some examples from Swedish legal theory, see Håstad et al. 2016: 50; Ramberg and Malmström 2016: 54)

38 This is sometimes explicitly stated in statues, sometimes not. Furthermore, the exact criteria for ascription of legal personhood at birth and its disappearance at death varies between legal systems. For a comparative overview, see Chloros, Rheinstein & Glendon 2007, 2–2 and 2–8.

39 It should be noted, however, that fetuses often are considered to be able to have limited legal rights on the condition that they are later born alive, see Chloros, Rheinstein & Glendon 2007: 2-3, 2-4 and 2-5. That animals are not legal person is usually neither stated explicitly. That animals are not things, and indirectly neither persons, is, however, explicitly stated in several civil codes in Europe: section 285 a of the Civil Code of Austria; Article 3.38 of the

argument based on positive legal provisions: the extension of the concepts of legal personhood in traditional legal theory differs from the extension of the concepts of legal personhood in positive law in Western legal systems when combined with modern theories of rights.

3.3 The orthodox view and theories of rights

As long as humans fulfilling the above-mentioned criteria can have legal rights and duties, and animals and fetuses cannot, there is no discrepancy between the extension of the concepts of the orthodox view and the extension of the concepts in positive law. How legal rights are understood is thus fundamental for Kurki´s argument.

The Hohfeldian analytic structure of rights, that someone's right necessarily correlates to someone else's duty,[40] is widely accepted within legal philosophy.[41] The function of rights, what it means for a right holder to have a right, is, however, heavily debated.[42] The two main competing theories on how the function of rights should be understood are the interest theory and the will theory.[43] Interest theorists generally hold that a duty borne by X constitutes a right for Y if Y's interests are typically served by the performance of the duty. Will theorists on the other hand generally hold that Y's holding of a right consists in Y's control over X's duty: whether Y can, for instance, choose to demand the enforcement of X's duty or not.[44] So, while interest theorists tend to see rights as legally protected interests, will theorists tend to see rights as legally protected choices. Interest theories, furthermore, tend to be quite extensive and ascribe rights to both children, animals, and fetuses, while will theories tend to be more restrictive and only ascribe rights to adult human beings with sufficient mental abilities.

Belgian Civil Code; section 494 of the Czech Civil Code; Section 90 a of the German Civil Code (BGB); Article 287 of Moldovan Civil Code; Book 3 Article 2a of the Dutch Civil Code; Article 333 of the Spanish Civil Code; Article 511-1(3) of the Civil Code of Catalonia; Article 641a of the Swiss Civil Code. For an overview of some of these provisions, see Kempers 2021.

40 See generally Hohfeld 1913: 30 and onwards.

41 See Wenar 2021. For an overview on how Hohfeld's theses has been developed in legal theory, see Arriagada Cáceres 2018.

42 For a general overview, see Wenar 2021: section 2. It should be noted that these theories not solely are used for explaining the function of rights as positive norms in the Hohfeldian analytic structure but also, inter alia, as *reasons for rules*, both as outside or extra-legal reasons and as inside or intra-legal reasons (such as rights often are understood in constitutional law). See Kennedy 2002: 185–187.

43 It should be noted that these consists of a great number of similar theories on rights, that, however, often are grouped together for pedagogical purposes.

44 This is Kurki's own summary, see Kurki 2019: 61. A will-interest right could naturally also involve the choice to unilaterally change Y's own position, for example through a gift. This would, however, also change the duties of X in relation to Y if X would be liable to such a change. The right would thus still be partially constituted by Y's control over X's duty.

This brings us back to the core of the extension problem. The extension of the concept of legal personhood is either *too wide* (animals and fetuses are legal persons since they have interest-based rights), or *too narrow* (children and adult humans with insufficient mental abilities are not legal persons since they lack will-based rights) in relation to extensional beliefs or positive law when the different concepts of the orthodox view are combined with modern right theories such as the interest or will theory.[45]

3.4 Assessing the extension problem

If the different concepts of legal personhood of the orthodox view fail to accurately capture the extension of legal personhood in positive law (or common extensional beliefs) in the way described above this would be a strong argument for abandoning the traditional concepts of legal personhood. To summarize my view, I consider the argument tenable but weak, since it relies on rather marginal examples when some versions of the orthodox view are combined with some versions of the rights theories.

Kurki´s counterexample against a tenable combination of the interest theory and the Rights-and-Duties position is that slaves in the antebellum U.S.A. bore duties while at the same time holding some limited interest-based rights and that infants are considered legal persons, and yet they bear no duties.[46] His counterexample against a tenable combination of a soft version of the will theory (according to which rights can be held through representants)[47] and the Rights-or-Duties and Rights-and-Duties positions is that this relation resembles a trustee rather than an agent relation, allowing for animals being the beneficiaries of pet trusts[48] to be considered legal persons (this is also an argument against the combination of the interest theory and Rights-and-Duties position). Many versions of the will theory would also ascribe rights to slaves in the antebellum U.S.A. since they had the right to appeal criminal convictions.[49]

If one accepts that rights and duties can be carried out by representants, which after all is the case for all legal persons but none (or few) legal non-persons in positive law, Kurki's extension problem is dependent on two relatively marginal examples: U.S. antebellum slaves and U.S. pet trusts. It could be questioned if these examples are relevant for explaining contemporary legal personhood in Western legal orders in general. It thus appears as if the extension problem is not so problematic for some versions of the orthodox view combined

45 Compare Kurki 2019: 61.

46 Kurki 2019: 71.

47 Hart 1982: 184 footnote 86.

48 A trust is commonly defined as "an equitable estate committed to the care of a fiduciary (trustee) for a beneficiary", see 'Trust' in Garner 2011.

49 Kurki 2019: 67–68.

with some versions of the rights theories as it appeared prima facie, at least if one is satisfied with a legal personhood concept that captures most but not all instances of what is considered legal personhood in positive law.

As stressed above, I do not find this argument untenable in itself: it is hard, probably impossible, to explain the extension of the concepts of legal personhood in positive law when understanding the holding of legal rights and/or duties as necessary and sufficient conditions for legal personhood. For practical reasons legal non-persons are sometimes ascribed rights and duties.

In Sweden, limited liability corporations (aktiebolag) have been deemed to be able to hold rights and bear duties under certain circumstances before their registration, despite the Swedish Companies Act clearly stating this not being possible.[50] In a similar manner limited liability corporations can exercise rights and bear duties under certain circumstances also after being dissolved, despite the main rule stating that the companies lose their capacity for rights and duties as well as standing after being dissolved.[51] Thus traditional non-legal persons, not yet registered and dissolved corporations, are able to hold both interest and will based rights as well as duties in accordance with Swedish positive law.[52] Another Swedish example of non-legal persons previously holding rights and bearing duties are investment funds not considered legal persons but still having rights and duties under Swedish tax law.[53]

The above-mentioned examples do not make the extension argument stronger. On the contrary, it underlines that this argument, at least presently, relies on marginal cases, which by some might be regarded as exceptions or anomalies. It is also clear, however, that non-legal persons sometimes are ascribed both rights and duties. One thus has a good reason to separate the general holding of legal positions from legal personhood, as suggested by Kurki. And the legal personhood concepts of traditional theory consequently work less well for explaining the exact extension of the legal personhood concepts in positive law.

50 See Lehrberg 2016: 73–75, compare NJA 1984 s 495 and chapter 2 section 25 in the Swedish companies act (2005:551). The Swedish legal philosopher Karl Olivecrona early observed the paradox that corporations need legal capacity to acquire legal capacity according to the law, see Olivecrona 1928: 136.

51 This follows from a judgment of the Swedish supreme court, see NJA 1979 s 700, and has been confirmed in later case law. For an overview, see Lehrberg 2016: 394 and subsequent pages. See also generally Lehrberg 1990.

52 This is not only the case in Sweden, for example similar constructions of preliminary companies in Germany and Romania award partial legal capacity to not yet formed companies, this is mentioned in Mocanu 2022: 7.

53 Two kinds of special investment funds (värdepappersfonder and specialfonder) are not considered legal persons in accordance with chapter 4 section 1 and chapter 12 section 1 in the statues regulating them (2004:46 and 2013:561). Despite this they previously had rights and obligations as subjects of tax law (skattesubjekt), this is stated explicitly in the preparatory works, see prop. 2011/21:1 p. 400.

4 LEGAL PERSONHOOD AS A CLUSTER PROPERTY

4.2 The legal personhood concept of the Bundle Theory and its incidents

In this section I will examine Kurki's proposed solution to the extension problem: the alternative legal personhood concept of the Bundle Theory. According to the first main tenet of the theory, which is central for his concept of legal personhood, *the legal personhood of X is a cluster property and consists of incidents which are separate but interconnected.*[54] Somewhat simplified, legal personhood is understood not as a general holding of legal positions but as a bundle of legal position that varies from person to person and from one legal context to another. But to fully grasp his legal personhood concept it is necessary to understand what Kurki means with both cluster property and incidents.

I will start with cluster property. Kurki is not the first to define legal personhood as a bundle of legal positions. The previous understandings of legal personhood as a bundle have, however, rested on the definitional structured concepts of legal personhood of traditional theory according to which the holding of rights and/or duties are necessary and sufficient criteria for legal personhood.[55] In the Bundle Theory on the other hand, the claim is made that legal personhood is a bundle in the form of a cluster property in accordance with what Kurki calls the standard sense of the concept: "a property whose extension is determined based on a weighted list of criteria, none of which alone is necessary or sufficient."[56]

In other words (that Kurki does not employ himself), the legal personhood concept of the Bundle Theory is given a prototype structure: its application is dependent on the holding of a sufficient number of typical components (incidents of legal personhood) of which some may be more significant than others, but none alone is necessary or sufficient. This definition of legal personhood as a cluster property is, as mentioned in the introduction, the truly novel invention of the Bundle Theory. It also has two major implications: (1) that none of the incidents of legal personhood identified by the theory *alone are necessary or sufficient* for an entity to have legal personhood and (2) that *no exact border exist* between legal personhood and non-legal personhood.

54 Kurki 2019: 5.

55 Kurki mentions Ngaire Naffine, Richard Tur and Jens David Ohlin as examples of this, Kurki 2019: 93–94. Similar accounts for the relativity of legal personhood is evident also in Kelsen's Pure Theory of Law, even if he uses the term complex instead, see Kelsen 2002: 173.

56 Kurki 2019: 93.

To assess whether the claim that legal personhood is a cluster property is tenable one next has to examine the incidents[57] of legal personhood identified in the theory. As I understand the term in the context of the Bundle Theory, it denotes a particular group of legal positions, rights and/or duties, that can be held by legal persons or legal non-persons ascribed limited legal personhood. It is not necessary for my argument to describe all of the different incidents in detail, but it should be relatively apparent from their names and groupings approximately what kind of legal positions they involve. See Table 1 for an overview of the incidents of legal personhood according to the Bundle Theory. I will address three of the incidents in detail shortly.

Table 1: The incidents of legal personhood according to the Bundle Theory[58]

Passive incidents	
Substantive incidents	Remedy incidents
- Fundamental protections: protection of life, liberty, and bodily integrity	- Standing
- Capacity to be the beneficiary of or party to special rights[59]	- Victim status in criminal law
- Capacity to own property	- Capacity to undergo legal harms
- Insusceptibility to being owned	
Active incidents	
Substantive incidents	Remedy incidents
- Legal competences	- Onerous legal personhood (legal responsibility)

57 The term incident is borrowed from Anthony Honoré's division of ideal liberal ownership into eleven standard incidents. Honoré 1961: 107. In the *Oxford Dictionary of English* an incident is defined as "a privilege, burden or right attaching to an office, estate, or other holding", see 'Incident' in *Oxford Dictionary of English*, 3 ed., online-version. Oxford University Press, 2015.

58 Compare Kurki 2019: 95–96.

59 Both formulations are used in the book.

Since legal personhood is defined as a cluster property, none of the incidents of legal personhood identified by the Bundle Theory can alone be necessary or sufficient for legal personhood. This implies (1) that holding a single one of these incidents is not sufficient for having legal personhood, which seems plausible. And (2) that there are, or at least could be, *legal persons without each one of these different incidents* since none of them are necessary parts of legal personhood. This second implication I find questionable. While some of these incidents are currently held by some legal persons in positive law but not by other legal persons, this does not seem to be the case for others of the incidents. I will now examine three of these, potentially necessary incidents of legal personhood, to assess whether the concept of legal personhood of the Bundle Theory is a tenable description of legal personhood in positive law.

4.2 Standing as a non-necessary and non-sufficient incident of legal personhood

I will start with the passive remedy incident of standing as an example. Being a passive incident, this incident can be held by both passive and active legal persons: both by persons exercising their legal personhood through a representative (such as infants and small children) and persons exercising it themselves (adults of sound mind and to a varying extent older children).[60]

The standing incident of legal personhood involves several different aspects of an entity's capacity to be part of legal proceedings and enforce its rights through legal proceedings. Kurki makes a distinction both between the *invested aspect of standing* and the *competence-related aspect of standing*, and between *abstract standing* and *standing in casu*. This needs some clarification.

The invested aspect of standing concerns whether an entitlement of an entity X is recognized by the legal system as enforceable in court. If not recognized, the claims of X are either (1) unenforceable in courts or (2) enforced only when they happen to coincide with someone else's enforceable rights. The competence-related aspect of standing concerns X's legal competence to pursue the case in court, to initiate legal proceedings by itself.[61]

For example, in Swedish administrative law a decision by a public authority, as the main rule, can be appealed if it affects someone's situation in a not insignificant way. The decision can furthermore be appealed by those that the decision concerns, if the decision is to their disadvantage.[62] The extension of the concepts of "someone's" and "those that the decision concerns" thus delimit the number of entities that holds an *invested aspect of standing* in the decision. Other entities could of course be both affected and concerned by the decision,

60 Kurki 2019: 95.

61 Kurki 2019: 108.

62 See section 41 and 42 of the Swedish Administrative Procedure Act (2017:900).

but their entitlements are not independently recognized by the legal system. In addition, not all of those with an invested aspect of standing have *a competence-related aspect of standing*: an adult human can normally initiate the appellation procedure herself, thus having the competence-related aspect of standing, while an infant normally would have to do this through a representative, thus lacking the competence-related aspect of standing.

Abstract standing on the other hand concerns whether an entity X has any kind of standing (invested or competence-related) at all in a legal system, whether an entity has the possibility to be a party to legal proceedings at all, while standing in casu refers to X' standing in a particular case.[63]

Although other aspects of standing are mentioned, no exhaustive account of the different legal positions included in the standing incident of legal personhood is given.[64] It is quite clear, however, that the aim has been to include most of the different legal positions that can be held by an entity in legal proceedings when recognized as a legal person in the particular legal system.

It seems plausible that this incident alone is not sufficient for legal personhood: Entities considered legal non-persons in positive law are occasionally recognized with different aspects of standing. Kurki himself mentions the occasional considering of the merits of cases with animal plaintiffs in the U.S.[65] While I am personally unaware of cases where non-legal persons in Swedish positive law have been recognized as a party in legal proceedings, claims of non-legal persons are occasionally upheld or enforced with reference to their specific interests, giving them something resembling what the Bundle Theory describes as the invested aspect of standing. One recent example of this is the different decisions regarding the now deceased accused murderer of former Swedish prime minister Olof Palme, the so-called Skandia-man.[66]

There are apparently occasional cases of legal non-persons with standing, but it is hard to find examples of legal persons entirely *without standing* in positive law. Kurki himself gives no examples of this when discussing the incident of standing. Furthermore, the examples of legal persons in accordance with the extensional beliefs he builds his theory on, human beings who are born, currently alive and sentient and artificial persons such as corporations, are all

63 Kurki 2019: 109.

64 Kurki 2019: 110. This was, according to Kurki, motivated by the fact that not all features of standing had much bearing on the questions that his investigation sought to understand.

65 Kurki 2019: 107.

66 See especially the decision from the ombudsman of the Swedish parliament (JO) regarding the Skandia-man's right to be presumed innocent, JO Beslut dnr 6673-2020. See also the administrative court of appeals in Stockholm's decision on the 22 of December 2020 in cases number 5005-20, 5077-20 and 5079-20. The Skandia-man also figures in two preliminary investigations regarding defamation, of which one is now closed, see decision AM-86565-20 from the Swedish Prosecution Authority (Åklagarmyndigheten).

acknowledged some, although not all, of the aspects of standing. Indeed, according to positive law as far as I know and according to widely held extensional beliefs, standing seems to be a necessary, if not alone sufficient, condition for legal personhood.[67] As mentioned above, there cannot exist any necessary conditions for being a legal person if legal personhood is a cluster property in the way claimed in the Bundle Theory. It thus seems like the legal personhood concept of the Bundle Theory does not capture the legal personhood concepts of positive law very accurately.

4.3 Beneficiary of special rights and ownership of property as non-necessary or non-sufficient incidents of legal personhood

The same objection as above can be raised in relation to other incidents of legal personhood identified in the Bundle Theory. For example, the incident capacity to be the beneficiary of, or the party to, special rights and the incident capacity to own property.

Special rights are described as rights that follow from the exercise of legal competences and that are limited to the parties who partake in a special agreement or transaction, alone or through a representant: claims held against specific entities rather than against the world in general.[68] What the capacity to own property concerns is rather evident, one or more of the different aspects of owning property: the rights to possess, use, manage, destroy, transfer property, etc.[69]

Similar to the incident of standing, one can find examples of aspects of these incidents being held by entities considered legal non-persons in positive law. As I mentioned when discussing the extension problem of legal personhood, pet trusts in the U.S. can be said to ascribe pets who are beneficiaries of these trusts both some kind of special rights against the trustees as well as some aspects of ownership. In Swedish law, limited liability companies also hold these incidents to a limited extent before and after their registration. Likely other examples could be found, allowing one to conclude that holding these incidents alone are not sufficient for having legal personhood. Again, however, it is hard to find examples of legal persons in positive law not holding some aspects of these incidents. In general, at least in Swedish law, both all natural and all artificial persons have the capacity to hold special rights and to own property. Kurki dis-

67 It could of course be argued that standing is a commonly reoccurring but not conceptually necessary component of legal personhood, I will address this later.

68 Kurki 2019: 102.

69 Kurki never specificizes which aspects of owning that is sufficient or necessary for an entity to have the incident capacity to own. Kurki 2019: 103–106. Although this is not mentioned explicitly, this is probably due to the cluster property structure that Kurki seems to assume ownership has. I suspect, however, that the incident of transmissibility (capacity to transfer ownership) is a necessary incident of ownership.

cusses a potential full legal personhood of animals that does not involve ownership, but instead fundamental protection accompanied by penal law regulations and some aspects of standing.[70] Something resembling this have actually already been applied in cases from South America regarding apes and monkeys, but these are still rare cases. You can furthermore question whether these primates should be considered legal persons, they are at least not described as such in the verdicts.[71] While new kinds of legal personhood could be constructed in the future, current legal persons seem to have capacity for special rights as well as capacity to own property. To hold the incidents of being the beneficiary of special rights and the capacity to own thus also (currently) seem to be necessary, although not sufficient, conditions for having legal personhood.

4.4 Three possible arguments in defense of a cluster property legal personhood concept

To summarize my assessment so far, the cluster property legal personhood concept proposed in the Bundle Theory, implicating that no incidents of legal personhood alone are necessary or sufficient, is hard to defend; some of the incidents of legal personhood indeed seems to be necessary since they are held by all legal persons in positive law. It is unclear what kind of legal person in positive law, if any, that satisfies the variable in the first tenet of the theory (that the legal personhood of x is a cluster property and consists of incidents which are separate but interconnected). Before concluding this part of the paper, I will discuss three possible arguments in defense of constructing a cluster property legal personhood concept.

One could argue that emphasizing the entities that are deemed as legal persons in accordance with positive law or widely held extensional beliefs is not necessary, and that all entities with some sort of legal position could be considered as a kind of legal person. With such an understanding of legal persons it would be possible to identify legal persons in positive law with legal positions but without any aspects of the incident of standing. This would consequently support the claim that legal personhood should be understood as a cluster property. While it is possible to revise the theory in this way, it is quite clear that this is not Kurki's intention in the Bundle Theory. He makes a clear distinction between the *paradigmatic examples of legal persons or legal personhood "tout court",* entities being endowed with significant (but unspecified) numbers of incidents of legal personhood, and something called *legal subjects and legal subjecthood,* referring to the status of an entity within a specific field of law or with

70 Kurki 2019: 121.

71 See footnote 10 above for references. To my knowledge three successful cases exist. The expression *sujetos de derecho* rather than *personas naturales* or *personas jurídicas*, the usual equivalents of legal person, is used by the courts.

regard to a specific legal institution. In accordance with this distinction, animals can be seen as subjects of animal welfare law, being legally protected from certain forms of maltreatment through animal welfare acts, without being legal persons in general or legal subjects in other legal fields.[72] Even if *legal subjecthood* might be understood as a cluster property, without necessary or sufficient conditions, support for defining *legal personhood* as a cluster concept is harder to find in positive law. And more importantly, if legal personhood was defined in this way, it would fall back into the equation in traditional theory of legal personhood with the general holding of rights and/or duties, precisely what Kurki wants to avoid with his alternative concept.

A second possible argument for a cluster property concept of legal personhood could be to argue that while it indeed might be so that all legal persons currently have capacity for specific legal positions, or incidents, this does not have to be the case in the future. No explicit claim in this direction is made, but Kurki mentions it indirectly when giving the above-mentioned example of the potential legal personhood of animals not including capacity for owning property.[73] One could firstly object that not much is gained by adopting a theory to potential examples if this forces the theory to obscure how legal personhood currently works. Secondly, one could object that even if future legal personhood might be structured differently, it seems rather implausible that there would exist a legal person entirely without the capacity for any of the legal positions included in the standing incident of legal personhood. This would be a legal person not only lacking the competence to initiate legal proceedings (competence-related aspect of standing) and being the party in a legal proceeding overall (abstract standing), but also completely lacking rights enforceable in courts or just having rights enforced only when they happen to coincide with someone else's enforceable rights (the invested aspect of standing). It is rather hard to see the purpose of creating a legal person with certain legal positions (such as rights) but not giving this person or any other persons any legal possibilities to uphold them. This is radically different from the legal personhood of existing legal persons.

A third possible argument for defining legal personhood as a cluster property could be that even if all current legal persons hold certain legal position and that future legal persons probably would as well, legal personhood is still theoretically best understood as a cluster property within legal science. But even if this would be supported by the extension of the concept in positive law in the future (some legal concepts are after all partly structured as prototypes)[74],

72 Kurki 2019: 121–124.

73 Kurki 2019: 121.

74 An example of this is the concept of employee in Swedish private law. This concept is not defined in any statue, but instead an overall assessment of criteria developed in case law and preparatory works is made. These criteria include factors such as whether the person has a personal duty to perform work according to a contract, whether the work tasks are predeter-

such a concept would still be problematic. This is evident if one considers the general deficiencies that necessarily follows when concepts are structured as prototypes.[75] Most importantly for the present argument prototype structured concepts cause problems with extension determination and accommodating analytical inferences: one can neither determine exactly which or how many components that are sufficient for determining that an entity falls within the extension of the concept, nor can inferences be drawn from the fact that an entity falls within or without the extension of the concept, or possess some of the common components of the concept.[76] Thus, if one defines legal personhood as a prototype structured cluster property one cannot determine which entities that have or does not have legal personhood nor can one conclude that a legal person holds certain legal positions since it is a legal person. These implications cannot be avoided since they follow from how the concept is structured. If necessary or sufficient conditions where provided the concept would have a definitional structure instead. I see few, if any, theoretical advantages of adopting such a descriptive[77] concept of legal personhood if not supported in positive law.

5 STRUCTURING CONCEPTS OF LEGAL PERSONHOOD

5.1 A dual structured concept of legal personhood

I have so far concluded that the concepts of legal personhood of traditional theory (the orthodox view) are problematic, since the extension of these concepts differs from the extension of legal personhood concepts in positive law, its referent. The alternative concept proposed by Kurki in the Bundle Theory likewise seems to be empirically untenable, since some of the incidents of legal personhood that should be non-necessary in fact are held by all legal persons in positive law. This does not mean that the concepts of legal personhood assessed so far are entirely mistaken. Legal persons do have rights and duties, even if legal non-persons also do occasionally. And these rights and duties do vary, but not to the extreme extent suggested in the Bundle Theory. I will in this final sec-

mined, whether the person is prevented from performing similar work for other persons, and so on. However, none of these criteria are alone necessary or sufficient for a person being an employee, and some of them are considered as more important than others for the outcome of the assessment. For an overview in English, see generally Rönnmar 2004.

75 For an overview, see Margolis & Laurence, 1999, pp. 32–43.

76 A similar objection is raised by Mocanu when discussing the application of the Bundle Theory. See Mocanu 2022: 8–9.

77 It is of course possible that Kurki´s intention with constructing his legal personhood concept is not descriptive but normative, this is, however, not what is implied by his argumentation.

tion suggest how a concept of legal personhood that incorporates the benefits but avoids the deficiencies of these concepts can be structured.

Instead of constructing a concept with a traditional definitional structure, like the legal personhood concept of traditional theory, or a concept with a prototype structure, like the legal persons concept of the Bundle Theory, I suggest a dual structured concept of legal personhood. This concept has a core of necessary legal positions, although different from the ones traditionally assumed, and an additional bundle of typical but non-necessary legal positions. And while this might have to be determined after further studies, it seems that the necessary legal positions of this core together also are sufficient for legal personhood in contemporary positive legal orders.

If one analyzes the entities referred to as legal persons (and equivalent terms) in law, that is, all the entities acknowledged the status of legal person in positive law in all the different legal systems, one will find a common core consisting in capacity for a certain number of legal positions: a group of legal positions that are a *common denominator* for all entities with this status.[78] These positions are potentially held by, or included in, all kinds of legal persons, from classic instances such as humans that are born and currently alive, corporations and public legal persons (states and municipalities) to newer instances such as the rivers[79] declared as legal persons mentioned in the introduction. These legal positions are the legal positions required for an entity to function as a legal person in *property law*, understood in a very wide sense. This includes at least legal positions pertaining to the (relatively) free acquisition, transfer and holding of property through agreements (contracts) and other kinds of transactions, liability for violations of such agreements, liability for other kinds of damages to the property of others, and the procedural capacities required for protecting and upholding the rights and duties following from these positions. The exact scope of this common core of legal personhood will vary between different legal orders, and potentially also among legal persons in the same legal order, but a common core could probably be identified that roughly corresponds to the above-mentioned legal positions pertaining to property law understood in this very wide sense.[80]

78 It is possible that these legal positions are given to these entities since they are held as legal persons, but also that they are held legal persons since they have these legal positions. I believe the former to be correct rather than the latter.

79 It should be noted that it, so far, only are human individuals that are exercising the rights and fulfilling the obligations of these legal persons as their guardians. No 'behaviour' of the rivers (floods or droughts etc.) is imputed to the legal person bearing their name.

80 This observation is in fact rather common in older legal theory, especially regarding artificial persons. Savigny considered artificial persons as an "artificially created subject having legal capacity under property law". Translated and referred in Beran 2020: 68. The connection between commodity ownership and the legal subject is also an important aspect of Pashukanis commodity exchange theory of law, see Milanovic´s introduction in Pashukanis 2002: 14–15.

In addition to this core of necessary and sufficient positions legal personhood can, but does not have to, be composed of other kinds of legal positions, some more statistically common than others. Such positions are for example fundamental legal protection, victim status in criminal law and criminal-law responsibility, to borrow some examples from the Bundle Theory. Legal positions pertaining to family law institutions such as marriage or parenthood could also be mentioned. The proposed legal personhood concept can thus also come in thicker and thinner bundles of legal position. These bundles of characteristic legal positions attaching to the core of legal personhood indeed seems to have a prototype-like structure, with none of these additional positions alone being necessary conditions of legal personhood but some of them being more typical and important than others.

5.2 Benefits of the proposed concept

The proposed concept of legal personhood would solve the extension problem of the concepts of traditional theory since it can account for the extension of the concept according to both positive law and widely held beliefs when combined with the modern right theories. It can explain why fetuses and animals do not have legal personhood and why born and alive humans do: neither fetuses nor animals can own property, enter into agreements, be parties to legal proceedings, and so on, while all humans can, although some through representatives. It can also explain more marginal cases of legal personhood such as the ascription of legal personhood to idols in India or to ships, both have the capacity to own property through representatives,[81] as well as the (alleged) ascription of legal personhood to non-human nature and animals mentioned in the introduction. It can furthermore explain why slaves did not have legal personhood: they did not possess these legal positions, and if they did only to a limited extent. The same applies for other marginal examples discussed above, such as limited liability companies before registration and after dissolvement. These cannot hold these positions in general, only for the limited purposes deemed necessary.

Since this concept, with its definitional structured core, allows for determination of the proper extension of legal personhood and legal inferences, jurists could with support of such a concept explain the consequences of being a legal person and that legal personhood necessarily entails some fundamental legal positions. The additional legal positions of the prototype structured bundle would serve as a basis for further investigation or examination. The

81 For an overview on legal personhood of artificial persons and ships in general and Indian idols in particular see the lengthy reasoning of the Supreme Court of India, which clearly connects (artificial) legal personality to holding of property, in the 2019 Supreme Court verdict on Ayodhya dispute, *M. Siddiq v. Mahant Suresh Das*, Judgment of the Supreme Court of India dated 09.11.2019 in Civil Appeals No. 10866-10867 of 2010, paragraphs 86 to 124.

division in a definitional structured core and a prototype structured bundle would also be helpful in illuminating why or why not juristic persons should be acknowledged certain legal positions natural persons have, and the other way around. Finally, the proposed concept is neutral to the interest and will theories of rights: it allows for interest theorists to recognize rights for any entity they deem morally relevant without necessarily concluding that these entities have legal personhood; the will theorists could likewise continue to refuse to recognize the rights of infants as long as they accept that they function as legal persons through representatives with the relevant legal positions. An equation of legal personhood with a specific set of legal positions rather than legal positions in general thus makes the debate between will and interest theorists less relevant for legal personhood theory.

To conclude my argument: There are good reasons to separate the general holding of legal positions and legal personhood, as argued for in the Bundle Theory. The extension of the concepts of legal personhood in traditional theory differs from the extension of the concepts of legal personhood in positive law. But there are also good reasons not to adopt the alternative concept of legal personhood of the Bundle Theory. Some legal positions, such as standing, are held by all legal persons in positive law and thus likely necessary, contrary to what would be the case if legal personhood was a cluster property consisting of non-necessary and alone non-sufficient incidents. And even if legal personhood in positive law would change in the future, prototype structured concepts are still problematic since they do not allow for clear extension determination or analytical inferences. Unless support for the claim that legal personhood in positive law actually is structured as a cluster property, I think such concepts should be avoided. Both the disadvantages of the rigid definitional structured legal personhood concepts of traditional theory and of the overly flexible prototype structured legal personhood concept of the Bundle Theory can be averted through a dual structured legal personhood concept. The concept of legal personhood proposed in this final section of the paper combines the clarity of definitional structured concepts with the flexibility of prototype structured concepts. The proposed concept is in need of further development, but it is my hope that this paper might benefit the development of legal personhood theory and thus the understanding of one of the fundamental structures of law.

Bibliography

Aalto-Heinilä, M., & Karhu, J. (2021). Animals, slaves, and beyond. *Revus. Journal for Constitutional Theory and Philosophy of Law*, *44*, 147–162. https://doi.org/10.4000/revus.7004

Agell, A., Malmström, Å., Ramberg, C., & Sigeman, T. (2010). *Civilrätt*. Liber.

Arriagada Cáceres, M. B. (2018). Fundamentality, interdefinability, and circularity. *Revus. Journal for Constitutional Theory and Philosophy of Law*, *35*, 45–84. https://doi.org/10.4000/revus.4173

Banaś, P. (2021). Why cannot anything be a legal person? A critique of Visa Kurki's Theory of Legal Personhood. *Revus. Journal for Constitutional Theory and Philosophy of Law*, 44, 163–171. https://

doi.org/10.4000/revus.7335

Beran, K. (2020). *The Concept of Juristic Person*. Wolters Kluwer Czech Republic.

Blackburn, S. (2016). Extension/intension. In *A Dictionary of Philosophy*. Oxford University Press. https://www.oxfordreference.com/view/10.1093/acref/9780198735304.001.0001/acref-9780198735304-e-1203

Chloros, A., Rheinstein, M., & Glendon, M. A. (2007). *International encyclopedia of comparative law. Vol. 4, Persons and family*. Mohr.

Ebrahimi Afrouzi, A. (2020). Visa A.J. Kurki, A Theory of Legal Personhood, Oxford: Oxford University Press, 2019, 240 pp, hb £70.00. *The Modern Law Review*, *83*(6), 1354–1358. https://doi.org/10.1111/1468-2230.12531

Fasel, R. N. (2021). Shaving Ockham. A review of Visa Kurki's 'A Theory of Legal Personhood' *Revus. Journal for Constitutional Theory and Philosophy of Law*, 44, 113–126. https://doi.org/10.4000/revus.6921

Frege, G. (1948). Sense and Reference. *The Philosophical Review*, *57*(3), 209–230. https://doi.org/10.2307/2181485

Garner, B. A. (2011). *Garner's dictionary of legal usage*. Oxford University Press.

Grauers, P. H. (2017). *Person och avtal: En kortfattad inledning till person- och avtalsrätten*. Liber.

Hage, J. C., & Pfordten, D. von der (Eds.). (2009). *Concepts in law*. Springer.

Hart, H. L. A. (1982). Legal Rights. In H. L. A. Hart (Ed.), *Essays on Bentham: Jurisprudence and Political Philosophy* (pp. 162–193). Oxford University Press. https://doi.org/10.1093/acprof:oso/9780198254683.003.0008

Håstad, T., Björkdahl, E. P., Brattström, M., & Zackariasson, L. (2016). *Civilrättens grunder*. Iustus.

Hohfeld, W. N. (1913). Some Fundamental Legal Conceptions as Applied in Judicial Reasoning. *The Yale Law Journal*, *23*(1), 16–59. https://doi.org/10.2307/785533

Kelsen, H. (2002). *Pure theory of law* (M. Knight, Trans.). Lawbook Exchange.

Kempers, E. B. (2021). Neither Persons nor Things: The Changing Status of Animals in Private Law. *European Review of Private Law*, *29*(1), 39–70.

Kurki, V. A. J. (2019). *A Theory of legal personhood*. Oxford University Press.

Kurki, V. (2021a). Legal Personhood and Animal Rights. *Journal of Animal Ethics*, *11*(1), 47–62.

Kurki, V. A. (2021b). On legal personhood: Rejoinders, reflections and restatements. *Revus. Journal for Constitutional Theory and Philosophy of Law*, 44, 173–194. https://doi.org/10.4000/revus.7425

Lehrberg, B. (1990). *I aktiebolagens skymningsland: En studie rörande upplösta aktiebolags rättskapacitet, med beaktande även av rättsläget vid handlande för ett nybildat, ännu ej registrerat aktiebolag*. Iustus.

Lehrberg, B. (2016). *Aktiebolagsrätt*. Iusté.

Lindahl, L. (1985). Definitioner, begreppsanalys och mellanbegrepp i juridiken. (Definitions, Conceptual Analysis and Intermediate Concepts in the Law.). In *Rationalitet och empiri i rättsvetenskapen* (pp. 37–62). Juristförlaget vid Stockholms universitet.

Margolis, E., & Laurence, S. (1999). *Concepts: Core readings*. MIT Press.

Mocanu, D. M. (2022). Gradient Legal Personhood for AI Systems—Painting Continental Legal Shapes Made to Fit Analytical Molds. *Frontiers in Robotics and AI*, *8*, Article 788179.

Naffine, N. (2021). Hidden presuppositions and the problem of paradigm persons. Visa AJ Kurki's 'A Theory of Legal Personhood'. *Revus. Journal for Constitutional Theory and Philosophy of Law*, 44, 127–135. https://doi.org/10.4000/revus.6953

O'Donnell, E. (2018). At the intersection of the sacred and the legal: Rights for nature in Uttarakhand, India. *Journal of Environmental Law*, *30*, 135–144. https://doi.org/10.1093/jel/eqx026/4364852/At-the-Intersection-of-the-Sacred-and-the-Legal

Olivecrona, K. (1928). *Studier över begreppet juridisk person i romersk och modern rätt*. Appelbergs boktryckeri.

Pashukanis, E. B. (2002). *The general theory of law and Marxism* (B. Einhom, Trans.). Transaction Publishers.

Pratama, M. A., & Rizkiyah, E. L. (2022). A Theory of Legal Personhood by Visa A.J. Kurki. *Indonesian Journal of Law and Society*, *3*(1), 157–166. DOI: 10.19184/ijls.v3i1.28220

Putzer, A., Lambooy, T., Jeurissen, R., & Kim, E. (2022). Putting the rights of nature on the map. A quantitative analysis of rights of nature initiatives across the world. *Journal of Maps*, *18*(1), 89–96. https://doi.org/10.1080/17445647.2022.2079432

Ramberg, C., & Malmström, Å. (2016). *Malmströms civilrätt*. Liber.

Siltala, R. (2021). Earth, Wind, and Fire, and other dilemmas in *A Theory of Legal Personhood* - a vindication of legal conventionalism. *Revus. Journal for Constitutional Theory and Philosophy of Law*, 44, 137–146. https://doi.org/10.4000/revus.6974

Stancioli, B. (2021). A bundle of rights and Pachamama: Visa Kurki's theory of legal personhood. *Revus. Journal for Constitutional Theory and Philosophy of Law*, 44, 103–112. https://doi.org/10.4000/revus.6893

Tanasescu, M. (2022). *Understanding the Rights of Nature: A Critical Introduction* (1st ed., Vol. 6). transcript Verlag. https://doi.org/10.14361/9783839454312

Wenar, L. (2021). Rights. In E. N. Zalta (Ed.), *The*

Stanford Encyclopedia of Philosophy (Spring 2021). Metaphysics Research Lab, Stanford University. https://plato.stanford.edu/archives/spr2021/entries/rights/

Worthington, M., & Spender, P. (2021). Constructing legal personhood: Corporate law's legacy. *Griffith Law Review*, *30*(3), 348–373. https://doi.org/10.1080/10383441.2021.2003742

Zalta, E. N. (2023). Gottlob Frege. In E. N. Zalta & U. Nodelman (Eds.), *The Stanford Encyclopedia of Philosophy* (Summer 2023). Metaphysics Research Lab, Stanford University. https://plato.stanford.edu/archives/sum2023/entries/frege/

Ana Lúcia Costa*

Vulnerability, sexual violence and the law
A conceptual analysis

This article examines the concept of vulnerability and is envisioned as a reply to the work of Susanna Pozzolo. Although agreeing with the author on the usefulness of vulnerability as a heuristic instrument to make visible the flaws on the laws on sexual violence, I differ from her in rejecting to consider the body as a source of women's vulnerability to sexual violence and in considering the non-mutually exclusive relation between vulnerability and autonomy relevant in what regards sexual violence. I further discuss the polysemic nature of vulnerability and the difficulties with the use of the concept in cases of sexual violence, which arise from that nature. I finish with a note of hope by considering the feminist political struggle over the meaning of vulnerability.

Keywords: vulnerability, sexual violence, women, autonomy, consent, female stereotypes

1 INTRODUCTION

Echoing calls for the use of vulnerability as an epistemological framework for understanding sexual violence against women,[1] Susanna Pozzolo defends the idea of vulnerability as a useful heuristic instrument for its capacity to make visible the flaws in the laws on sexual violence.[2]

Such a position, however, does not underestimate the difficulties arising from the use of this concept. Pozzolo rightly notes the discriminatory effects and paternalistic measures usually associated with it.[3] The solution proposed is twofold.[4] On the one hand, the author advocates an understanding of vulnerability contextually rather than corporeally.[5] In her view, in determining if someone is vulnerable, one should look at "the (cultural and/or legal) context"

* analucia.correiadacosta@gmail.com | Margarita Salas Postdoctoral Fellow, Law and Philosophy Research Group, Law Department, Pompeu Fabra University, Barcelona, Spain.

1 Bergoffen 2003, 2009, 2011; Code 2009, Gilson 2016.

2 Pozzolo 2020: 16.

3 Pozzolo 2020: 2, 9, 11.

4 Pozzolo 2020: 2.

5 As expressly stated, Pozzolo bases her proposal in Catriona Mackenzie's classification of the sources of vulnerability, which she reinterprets (Pozzolo 2020: 3). As such, whereas Mackenzie proposes a taxonomy that distinguishes between inherent, situational, and pathogenic vulnerability, Pozzolo speaks of corporeal, contextual, and pathogenic vulnerability. As I see it, there is at least one important difference. I am referring to inherent and corporeal vulnerability, as inherent vulnerability refers to much more than just the body, such as human beings' social, affective, and political nature which makes us "emotionally and psychological vulnerable", in addition to making us vulnerable to "exploitation, manipulation, political violence, and rights abuses." (Mackenzie et al. 2014: 1).

in virtue of which vulnerability arises, "instead of looking for something 'weak' in the person herself."[6] On the other side, Pozzolo highlights the importance of understanding vulnerability and autonomy not as mutually exclusive but rather as terms whose oppositional relationship is a matter of degree: although it is true that the more vulnerable someone is the less autonomy and freedom of choice she has, the mere presence of vulnerability does not determine the total absence of autonomy and vice versa.[7]

Reading Pozzolo together with Catriona Mackenzie's work on vulnerability and relational autonomy (which Pozzolo expressly refers to[8]), I interpret the reasoning behind her twofold proposal as follows. First, in addition to a more accurate description of the reality of (gender) oppression, the concept of vulnerability is aimed at capturing and disconnecting the source of vulnerability from the vulnerable person and locating it at the level of context, society, and institutions, offering a suitable solution for the discriminatory effects vulnerability often gives rise to. Second, understanding vulnerability and autonomy not as mutually exclusive is aimed at avoiding paternalistic measures that assume vulnerable people's incapacity to give true consent and protect their own interests in virtue of their lack of autonomy.

Whereas I agree with Pozzolo's proposal at a general level, I see problems in its application to sexual violence against women. Problems that have to do with the specific nature of the topic at hand and the specific type of state responses to it. And so, problems that need to be properly identified and dealt with if vulnerability is to constitute a "useful heuristic instrument that allows us to identify the flaws in the laws [on sexual violence]".[9]

My argument is that those problems are inextricably related with the concept of vulnerability. On the one hand, the concept needs to capture and refer to the relevant circumstances of sexual violence against women, the circumstances that make women vulnerable to this kind of aggression. On the other, it is fundamental to identify the different uses of the concept at work in the legal system that rather than protecting women, make them more vulnerable. As a result, the methodology adopted is conceptual analysis. Following Kenneth Himma's definition of conceptual analysis, my aim is to "locate [the concept of vulnerability] among a general conceptual framework that [can guide] both our linguistic practices regarding the relevant concept-words and our legal practices themselves."[10]

6 Pozzolo 2020: 14, own translation.
7 Pozzolo 2020: 5.
8 Pozzolo 2020: 3, 6, 9.
9 Pozzolo 2020: 16, own translation.
10 Himma 2015: 67.

My argument will unfold as follows. Section 2 addresses the relevance of the body for a proper understanding of women's vulnerability in the context of sexual aggression. Section 3 delves into the relationship between vulnerability and autonomy, arguing that, contrary to other contexts, what is needed regarding sexual violence is a greater focus on the oppositional relationship between vulnerability and autonomy. Section 4 examines the polysemic nature of vulnerability, claiming that such nature is what lies at the root of the discriminatory potential of vulnerability in what regards the laws on sexual violence. Subsection 4.1 analyses the binary structure of female stereotypes, divided into opposing representations of "good" and "bad" women. Subsection 4.2 asserts the correspondence between the "good woman" stereotype and the ideal victim of rape, whereas subsection 4.3 contends that women whose behaviour does not conform with the "good woman" stereotype are framed as bad women and, consequently, become "bad victims", victims whose sexual aggression is often denied by the judicial system. Subsection 4.4 concludes by affirming that it is not the idea of women's vulnerability but rather the perception of women as active agents, perfectly capable of resistance to sexual aggression, that leads to the effacement of countless cases of sexual violence by law. The paper finishes with a note of hope by considering, in its concluding remarks, the feminist political struggle over the meaning of vulnerability.

2 THE BODY

In her analysis of the "Manada" case,[11] Pozzolo excludes the general difference in strength between men and women as a source of women's vulnerability to sexual violence.[12] As said before, this exclusion is related to an understanding of vulnerability in terms of context rather than corporeality. Hence, regarding the "Manada" case, the author states: "what can be seen, at a closer look, is *situational* vulnerability, that is, vulnerability caused by the particular context – without a necessary connection with the body (…)."[13] As I interpret Pozzolo, this exclusion is, as previously mentioned, related with the intent of avoiding discriminatory effects against people considered vulnerable: "[to] qualify someone as vulnerable becomes potentially discriminatory due to the insistence in

11 The case that became known as "la Manada" refers to a rape of an 18-year-old woman by five men on the 7th of July 2016 during the San Fermín Festival, that takes place annually in Pamplona, Spain. The attackers, that included a member of the Civil Guard and another of the Spanish Army, made several videos of the attack, which took place in a vestibule of an apartment building. The case drew intensive public attention and was at the center of an exhaustive public debate concerning the definition of rape and its differentiation from sexual abuse. It eventually led to an important change in the law, that ended the distinction between both crimes.

12 Pozzolo 2020: 12.

13 Pozzolo 2020: 13, own translation.

anchoring vulnerability in her being – her lack of [something]".[14] In my understanding, however, such effects emerge precisely out of the lack of consideration of the corporeal element or, more accurately, the general difference in strength between men and women. Let me explain.

In the Manada case, the first instance court[15] ruled it to be a case of sexual abuse and not rape.[16] The reason was the lack of violence and intimidation on the part of the aggressors and the lack of resistance on the part of the victim from which (vitiated) consent[17] was inferred.[18] Given that this is a case of a sexual aggression by five men, the difference in strength between the victim and the aggressors seems to be of essence in the consideration of the reason and meaning of the lack of resistance on the part of the victim. The same can, in my view, be said of cases where there is only one aggressor with a superior physical strength. The probability of success when fighting someone with a superior strength, as well as the level of intimidation, is definitely not the same as when fighting someone of equal or inferior physical strength. Hence, the likeliness of the perception on the part of the victim that resistance is both pointless and dangerous. Not to consider this factor can be seen as a form of discrimination against women masked as gender neutrality. A preference for formal equality to the detriment of substantial equality.

I would like to make clear, however, that I am not defending that the only source of women's vulnerability in cases of sexual aggression is the body, women's body – neither at a concrete case level, nor at an abstract/group one. There is no doubt in my mind over the fact that the source needs to be located fundamentally at the level of the patriarchal social relations of gender and sexuality, and that this, therefore, is a type of situational or, more accurately, pathogenic

14 Pozzolo 2020: 8, own translation.

15 Decision No. 000038/2018 of the Second Section of the *Audiencia Provincial de Navarra*.

16 A clarification concerning terminology is in order here. At the time of the ruling, Spanish law differentiated between the crime of sexual aggression and the crime of sexual abuse, the former but not the latter being a synonym of rape. I will use the word "rape" to refer to what the Spanish law used to name sexual aggression ("agresión sexual") and use "sexual aggression" as a general term to refer to sexual violence, sexual attack and sexual assault, and so, as including both rape and sexual abuse.

17 At that moment, Spanish law differentiated between "lack of consent" and "vitiated consent". Whereas lack of consent was a constitutive element of the crime of rape, vitiated consent was constitutive of the crime of sexual abuse. The decision under analysis defines vitiated consent in opposition to free consent and as synonym of consent that is "coerced or pressured by [the] situation." (SAP NA 38/2018: 99, own translation).

18 At the time when the events took place, Spanish law defined rape as involving violence or intimidation. Even though the first instance ruling on the "Manada" case expressly states that the legal qualification of the facts as rape depends exclusively on the conduct of the aggressor and not the victim's (SAP NA 38/2018: 98), the decision also refers to the requirement of resistance on the part of the victim not having "to be desperate, but real, true, determined, continued and that unequivocally expresses a will contrary to the sexual act." (SAP NA 38/2018: 95, own translation).

vulnerability: a subset of situational vulnerability that arises out of "morally dysfunctional or abusive interpersonal and social relationships and sociopolitical oppression or injustice."[19] Nonetheless, the difference in strength between a man and a woman cannot be discarded as irrelevant to the concrete situation of vulnerability – and thus diminished autonomy – a female victim is in at the time of a sexual aggression. This is particularly so when the law directly or indirectly establishes the requirement of resistance on the part of the victim to frame the aggression as rape. Doing so constitutes, in my view, a form of pathogenic vulnerability.

Concerning the relevance of the corporeal factor in cases of sexual aggression against women and the type of vulnerability at stake in this kind of case, I would like to call attention to the relationship between inherent and situational vulnerability. When proposing a taxonomy of sources of vulnerability, Mackenzie, Rogers, and Dodds highlight the fact that those two sources "are not categorically distinct".[20] As Mackenzie further elaborates:

> The distinction between inherent and situational vulnerability is not categorical, as these two sources of vulnerability can be causally interconnected. Situational vulnerability can give rise to inherent vulnerability (…). And some kinds of inherent vulnerability will render people more liable to situational vulnerability (…). (Mackenzie 2014: 39)

Let me apply this idea to sexual violence against women. Were it not for the patriarchal social relations of gender, the difference in strength between men and women would not, by itself, make women vulnerable to sexual aggression, at a general, group level. The same observation can be made in relation to concrete cases of sexual attack: were it not for that specific context, the difference in strength would not, by itself, make women vulnerable. Yet, given those relations and specific contexts of sexual aggression, the difference in strength between victim and attacker in concrete situations needs to be taken into account, as such difference is *causally interconnected* with the context in making women vulnerable to sexual aggression and in explaining their lack of resistance to the attack.

3 VULNERABILITY AND AUTONOMY

As rightly noted by Susanna Pozzolo, the classification of a group as vulnerable frequently motivates paternalistic measures towards those groups.[21] As I interpret her, this is one of the reasons why the author defends that vulnerability and autonomy should *not* be understood as mutually exclusive.[22] Her rea-

19 Mackenzie et al. 2014: 9.

20 Mackenzie et al. 2014: 8.

21 Pozzolo 2020: 9.

22 Pozzolo 2020: 5, 6.

soning seems to follow Catriona Mackenzie's, who Pozzolo quotes when referring to the relationship between vulnerability and paternalism.[23] As Mackenzie explains,

> (…) notions of vulnerability and protection can be, and historically have been, used to justify coercive or objectionably paternalistic social relations, policies, and institutions, which often function to compound rather than ameliorate the vulnerability of the persons or groups they are designed to assist. (Mackenzie 2014: 35)

In her view, the reason lies in the conceptualization of vulnerability and autonomy in oppositional terms – by which Mackenzie means mutually exclusive terms –[24] as, in her understanding, such a conceptualization implies that "there is a tension between responding to human vulnerability and promoting autonomy".[25] I.e., in the author's view, protecting vulnerable people from harm and protecting their autonomy are mutually exclusive.

Although I agree with Mackenzie and Pozzolo on a general level, I fail to see the relevance of this remark regarding sexual violence against women and the specificity of the law's flaws in this context. As I see it, there are two important differences between the cases on which Pozzolo bases her reasoning and cases of sexual violence against women. The first is related to what is disputed, that is, what is at stake in these two different kinds of cases, and the second concerns the (problematic) measures typically applied by the state in both types of cases.

The cases brought up by Pozzolo are cases in which what is at stake is the capacity of an individual or group, and particularly the capacity to consent. As the author tells us, in those cases:

> […] vulnerability indicates precisely a lack of power – a deficiency in control. It indicates, ultimately, an insufficiency at the level of autonomy, of freedom of election and action. More precisely, I would say that [the idea of vulnerability] indicates a reduction at the decisional level, because, when a person is classified as vulnerable, that means

23 Pozzolo 2020: 9.

24 Mackenzie does not hesitate to acknowledge the oppositional relation of degree between vulnerability and autonomy when affirming that "some social relationships and environments provide hostile conditions for autonomy. Environments characterized by corrosive disadvantage (social, political, economic, educational) or social relationships characterized by abuse, coercion, violence, or disrespect [– environments and social relationships, therefore, that correspond to situations of pathogenic vulnerability –] may seriously thwart the development of many of the skills and competences required for self-determination or may constrain their exercise." (Mackenzie 2014)»abstract»:»This chapter discusses a number of issues related to measuring poverty over time. It highlights some of the key normative decisions that have to be taken, in particular, the role of compensation over time (whether poverty spells can be compensated for by non-poverty spells In addition, when writing with Wendy Rogers and Susan Doods, Mackenzie expressly refers to the undermining of autonomy or the exacerbation "of the sense of powerlessness engendered by vulnerability in general" as one of pathogenic vulnerability's key features (Mackenzie et al. 2014: 9).

25 Mackenzie 2014: 34.

> that she has a characteristic that situates her at an inferior level than the average [human being]. (Pozzolo 2020: 3-4, own translation)

Pozzolo is not alone. The literature on vulnerability largely emerged from contexts in which the capacity to consent is at stake. Bioethics and disabilities studies are probably the best examples,[26] the latter being expressly referred to by Pozzolo.[27] There the idea of vulnerability was meant to signal a special obligation from the state to protect those who are not able to make choices on their own, thus requiring a special state intervention aimed at protecting them from harm – a harm caused by the choices vulnerable people supposedly have no capacity to make.[28]

But the capacity to consent is not at all what is usually at stake in cases of female rape. In cases where a woman claims to have been raped, what is often put into question is not whether or not she has the capacity to consent, to make a choice, but rather consent itself, that is, the content of her choice: if she indeed agreed to the sexual interaction or not. This is important because of the type of problems one encounters in relation to state intervention in cases of rape: the issue here is not the paternalistic measures through which the state impedes the vulnerable person to make choices or invalidate them, but rather the ample denial that there was a lack of consent. Therefore, in cases of sexual violence the problem is not paternalism, but exactly the opposite: a lack of protection.

Now, if the understanding of vulnerability and autonomy not as mutually exclusive but rather in terms of an inverse relationship of degree is an important instrument against paternalism, and paternalism is not the problem in cases of sexual violence, then, although true and generally very important, such an understanding does not illuminate or contribute to the correction of law's flaws in these types of cases. In fact, in cases of sexual violence what is needed, instead, is a greater focus on the oppositional relationship between vulnerability and autonomy, in addition to a greater awareness that cases of sexual aggression are frequently ones where the degree of vulnerability is closer to its highest and, thus, the degree of autonomy closer to its lowest. Only this focus and awareness can help law enforcers to reconceptualize the lack of resistance on the part of a victim of sexual aggression: not as consent, as is too often the case, but rather as a lack thereof.

Let me apply this reasoning to the Manada case. The case was not framed as rape because of the absence of violence on the part of the aggressors. Such a requirement translates into one of resistance on the part of the victim – since often violence is exerted as an instrument against the resistance of the victim to a sexual interaction. This latter requirement assumes that resistance was a

26 Mackenzie et al, 2014:2.

27 Pozzolo 2020: 21-23, notes 5, 6, 7, 12.

28 Rogers 2014: 64-66.

possibility, disregarding the situation of reduced alternatives the victim had at the time of the attack. It disregards, therefore, the victim's situation of extreme vulnerability – vulnerability defined as the condition of "increased risk of harm or […] reduced capacity or power to protect one's interests" –[29] and its oppositional relationship with autonomy. Due to the difference in strength between the attackers and the victim, and so the possible risk to her physical integrity and life, resistance was not a real possibility, and so, from its absence, consent cannot be inferred.

Summarising my position on the topic, I would like to say that I am in total agreement with Pozzolo when she says that the legal requirement of a violent reaction on the part of the victim for the typification of the facts of the Manada case as rape configures pathogenic vulnerability: "here it is obvious that it is the law that makes women vulnerable."[30] In my view, however, the source of that specific cause of vulnerability is not only the fact that such requirement has a masculine character disguised as neutral.[31] My suggestion is that, in addition, (1) this requirement is discriminatory because it ignores the frequent difference in strength between victim and attacker(s), (2) equals a demand that victims endure further danger to their physical integrity and life, and/or (3) translates into a lack of recognition that in cases such as this, because of that danger, resistance is not a real possibility for the victim. It ultimately amounts to a lack of acknowledgement of the situation the victim is in with a constrained set of options, as it does not shelter the oppositional view on the relationship between vulnerability and autonomy, thus, not recognizing the lack of autonomy that such a situation of extreme vulnerability implies.

4 THE POLYSEMIC NATURE OF VULNERABILITY

While defending vulnerability as a useful heuristic instrument to make the flaws in the laws on sexual violence visible,[32] Susanna Pozzolo does not underestimate its discriminatory effects. Nonetheless, in my understanding, she does not fully account for the discriminatory potential of the concept, thus missing out on some important reasons for the law's overall lack of protection of women in this context. The aim of the present section is to elaborate on some fundamental challenges the idea of vulnerability poses in the context of sexual violence against women. It is my belief that a proper understanding of those challenges might illuminate and neutralize the discriminatory potential of this concept.

29 Mackenzie 2014: 33-34.

30 Pozzolo 2020: 15.

31 Pozzolo 2020: 15.

32 Pozzolo 2020: 16.

While Pozzolo associates the discriminatory potential of vulnerability with the idea that the source of vulnerability is a woman's body, I believe such potential is grounded in vulnerability's polysemy. In understanding this argument, Erinn Gilson provides us with a good starting point: "a particular understanding of vulnerability dominates the sociocultural imaginary of the industrialised, capitalist Western parts of the world".[33] Such understanding associates vulnerability with "weakness, dependency, incapacity, incapability, and powerlessness",[34] and, in turn, all those ideas with women. The result is the femininisation of vulnerability: vulnerability is a "feminised concept".[35] From a feminist point of view, the problem with this is the "vulnerabilisation" of women or, more accurately, the invocation and perpetuation of a female stereotype that represents women's nature as vulnerable in a specific sense. A stereotype, which, in turn, is strongly associated with women's discrimination and repression.

This idea strongly resonates with the debate on victimhood and agency fought over in the 1980s and 1990s within feminism. At the time, it was argued that the dominant feminist focus on sexual violence against women depicted "women as shaped by pervasive male sexual coercion [and that] was to tell a partial, and potentially injurious, story."[36] As Kathryn Abrams explains, the focus on sexual violence was said to assign women a "victim status" that encouraged a "wounded passivity on the part of women and a repressive regulatory urge on the part of state authorities."[37] Instead, those critical voices claimed for a greater emphasis on women's agency, assuming a mutually exclusive relationship between victimhood and agency.

I would like to bring the idea that depicting women as victims is potentially injurious into the debate on the dangers of using vulnerability as a framework through which to analyse rape and complement it with the suggestion that vulnerability mobilises female stereotypes. Here is my proposal: female stereotypes lie at the heart of women's vulnerability to sexual violence, and that is the case in at least two senses. First, they are directly connected with the acts of sexual violence perpetrated by men against women; and second, they are central to the law's lack of protection of women in cases of rape. My focus here is on the latter connection. However, going into the specifics of the law's flaws requires a previous digression into the content of women's stereotypes.

33 Gilson 2016: 74.
34 Gilson 2016: 74.
35 Gilson 2016: 71.
36 Abrams 1995: 305.
37 Abrams 1995: 305.

4.1 Female stereotypes

Stereotypes about women have historically been organized around a binary opposition, which divides women into two types. There are different designations for them: the good and the bad woman, the virtuous and the fallen, and the Madonna and the whore, just to mention some of the most popular ones. In my view, this dualism is based on three criteria, the first being sexuality, the second being morality, and the third being what some call potency or power. Accordingly, women have been perceived as either 1) desexualized, good, and powerless, or 2) sexualized, evil, and powerful.

The extensive work that has been done over the last decades on stereotypes might help us to better understand this. Stereotypes seem to work in the same way our perception of other people does. We perceive people along two dimensions. Some call it intellectual and social,[38] others competence and warmth,[39] and further there are those that refer to it as power/potency and morality.[40] Concerning stereotypes of out-groups, Susan Fiske and her colleagues have shown a prevalent inverse relationship between those two dimensions: where there is a positive regard of one of the dimensions, there is a negative assessment of the other.[41] In terms of gender, this is exactly what happens. But when it comes to women, a further dimension enters the equation: sexuality.[42] And when it comes to sexuality, women are again divided into opposing types, some with favourable connotations and others with highly negative ones.[43] It is important to note how the morality and sexuality dimensions seem to vary in the same direction: a sexually virtuous woman is usually perceived as morally virtuous too.[44]

Allow me to make an attempt to synthesise the content of the good and the bad woman stereotypes. The good woman is chaste. She is sexually innocent, pure, and passive.[45] The bad woman, instead, is sexually active: a seductor, a provocateur, and a temptress.[46] But, as previously said, the opposition in stereotypes of women is not restricted to their sexuality – even if, at least in the case of rape, sexuality can be seen as a starting point in the framing of women into one or the other stereotype. Morality is also of essence in such opposition. Women are, thus, divided into angels and devils, Marys and Eves. Historically, it can be observed as, from modernity onwards, the figure of the wife/mother

38 Rosenberg et al. 1968.

39 Fiske et al. 2002.

40 Jasper et al. 2020.

41 Fiske et al. 2002.

42 Clifton et al. 1976; Noseworthy & Loth 1984; Six & Eckes 1991.

43 Six & Eckes 1991; Vonk & Ashmore 2003.

44 For this reason Dewall et al. (2005) propose to unite morality and sexuality into one single category which they designate as virtue.

45 Cott 1978; Trudgill 1976: 56-57; Welter, 1966: 154-158.

46 Higgins 1976.

has epitomised the former side of this dichotomy, with married women being represented and perceived as kind and completely selfless, entirely devoted to their children and their husbands, whom they often saved from immorality.[47] They were supposedly connected with God, religion, and charity.[48] In opposition, promiscuous women were perceived as endowed with evilness and selfishness, capable of deceit, revenge, and whatever necessary to achieve their aims.[49] This brings us to the final element in the opposition between the good and the bad woman stereotypes: what I have referred to as power/potency. Whereas bad women have been associated with all the necessary capacities for evilness,[50] good women have often been perceived as naïve, incompetent, and even idiots, uncapable, therefore, of protecting themselves or their interests.[51]

The idea of vulnerability is strongly associated with this latter characteristic of the good woman. But not exclusively so. All the three elements in the dichotomy contribute to an opposing placement of the good and the bad woman in terms of vulnerability to danger: whereas innocent and respectable women are seen as vulnerable to sexual attack and ill-intended male seduction, promiscuous women are depicted as active seductresses who bring destruction and all kinds of harms upon themselves and everyone that surrounds them. Bad women, are thus, not perceived as vulnerable to danger but rather as a source of danger. Glick and Fiske, for instance, have shown how sexually "bad" women are perceived as threatening to men because of the idea that they can use men's attraction to them to manipulate them.[52] Such an idea is of essence in the context of rape and the judicial system's failure to acknowledge and punish it. The idea of the "ideal victim" might help us to see why.

4.2 The ideal victim

Nils Christie has famously defined the ideal victim as "a person or a category of individuals who – when hit by crime – most readily are given the complete and legitimate status of being a victim."[53] According to the author, being framed as an ideal victim requires that the victim, the circumstances of the crime, and the offender be endowed with certain attributes: 1) the victim must be weak, 2) she must have been carrying out a respectable project at the time of the crime, 3) she must have been in a place where she could not possibly be blamed for being, 4) the offender must be big and bad, and also 5) unknown and in no

47 Trudgill 1976: 70-71, 76-77, 78-80.
48 Welter 1966: 152-154.
49 Higgins 1976; Lombroso & Ferrero 2004: 183.
50 Lombroso & Ferrero 2004: 83.
51 Trudgill 1976: 66.
52 Glick & Fiske 1996: 509.
53 Christie 1986: 18.

personal relationship to the victim.[54] There is also a sixth attribute that I will keep for now in order to make the following point: in relation to sexual violence against women, the ideal victim is the good (vulnerable) woman. Christie confirms this. According to him, in rape cases, the ideal scenario:

> is the young virgin on her way home from visiting sick relatives, severely beaten or threatened before she gives in. … [She] is weak compared to the unrelated offender, as well as having put a reasonable energy into protecting herself … against becoming a victim. (Christie 1986: 19)

As it can be noted, then, the ideal victim of rape needs to be more than weak: she needs to be chaste. The ideal victim therefore, is sexually innocent, pure, and passive. This means that, in the context of rape, the second and third characteristics of the ideal victim are translated into the requirements that, at the time of the crime, the victim is not involved in any potentially sex-related activity or at a place prone to or associated with such types of activities. In my view, however, chastity adds further conditions to the ideal victim of rape, conditions that go beyond the time and the place of the crime. What is required is not only a chaste behaviour at the time of the crime, but instead a chaste character. This appears to be confirmed by Christie's examples of the non-ideal victim in rape cases.

So, who is the non-ideal victim? Christie refers to "the experienced lady on her way home from a restaurant, not to talk about the prostitute who attempts to activate the police in a rape case."[55] I would briefly translate it as the bad woman: the non-ideal victim is framed within the stereotype of the bad woman. In fact, due to the binary character of the stereotypes of the good and bad women, it can succinctly be said that anyone who does not completely fit the good woman stereotype is framed as a bad woman.

After this brief digression into the content of female stereotypes and the concept of the ideal victim of rape, I will now come back to the idea that motivated it: the dangers of the use of vulnerability in relation to rape.

4.3 Bad women, non-ideal victims, and the denial of rape

The problem with vulnerability is that it has always been associated with a particular stereotype of woman – the good woman –, which, in turn, corresponds to the ideal victim of rape. What is problematic about this is that, in most cases, real victims do not match the stereotype of the good (vulnerable) woman with regard to chastity. As a result, they are framed as "bad women" and as "non-ideal victims", and this has disastrous consequences in terms of victim blaming. Bad women are generally perceived as responsible for the rape, and that is far from being uncommon. In fact, victim blaming is a huge problem with regard to complaints of sexual aggression: "[u]nlike many other interpersonal crimes

54 Christie 1986: 19.

55 Christie 1986: 19.

such as robberies or muggings, victims of sexual assault are particularly vulnerable to being blamed for their attack".[56] As is extensively documented,[57] the main reason for victim blaming is the violation of the good/vulnerable woman stereotype, and, hence, the framing of the victim as the bad woman.

A brief look into the factors that influence victim blaming in rape cases should be enough to prove this point. The very first is "social respectability," or the victim's sexual behaviour.[58] As a result:

> both legal practitioners and laypersons attribute blame to rape victims on the basis of extralegal factors such as clothing (Johnson, 1995; Vali & Rizzo, 1991), alcohol consumption (Corcoran & Thomas, 1991; Scronce & Corcoran, 1995), and whether the victim has had multiple sex partners in the past (Marx & Gross, 1995). (Abrams et al. 2003: 113.)

Another key example of the importance of sexual respectability on the attribution of blame to the victim is the higher rate of victim blaming in acquaintance rape. As Abrams et al. tell us,[59] the reason for this is that acquaintance rape victims are perceived "as having behaved in a manner that is inappropriate for a woman". Behind this idea lies the stereotype of the good woman and its binary character. Someone who does not behave as a good woman is framed as a bad woman. An important characteristic of the binary opposition between good and bad women is that the first is perceived as the norm in its descriptive and normative senses – how women normally act and how they should act – and the second as a deviation from it. "[A] woman who invites a relationship with a man" is violating that norm and is, therefore, perceived as "responsible for anything unfortunate that may happen to her."[60]

It should be noted, however, that what is at stake is not merely a matter of victim blaming, at least not explicitly. Adherence to female stereotypes leads to more restrictive rape definitions, which translates into the denial of many actual rapes.[61] The central piece here is, of course, consent. Martha Burt and Rochelle Albin make this connection clear:

> women with certain reputations and identities … are stereotypically assumed to consent more readily, to more men, in more situations. Having assumed a generalized propensity to consent and attached it to whole classes of women, this line of reasoning then particularizes the argument to *this* woman (victim) in *this* situation (alleged rape) and infers consent to *this* man (alleged assailant). Therefore, following this reasoning, this situation is not a rape. (Burt & Albin 1981: 214)

56 Gravelin, Biernat, & Bucher 2019: 2.

57 Pedersen & Strömwall 2013; Persson et al. 2018; Viki & Abrams 2002; Yamawaki et al. 2007.

58 Krahé 1991: 282.

59 Abrams et al. 2003: 121.

60 Abrams et al. 2003: 121.

61 Burt & Albin 1981: 213.

Accordingly, my point is that unchaste sexual behaviour leads to the framing of the victim as a bad woman and such framing, in turn, translates not only into the idea that the victim is the one to blame for the assault, but further into the idea that there was no assault at all. The reason is that bad women are perceived as always "ready to go", which is seen as incompatible with the absence of consent. The result is the denial of rape at all.

To this, I would like to add a last element in the stereotype of the bad woman, which I believe is at work in the pervasive denial of rape by the judicial system. It concerns the widespread suspicion that victims are lying about the occurrence of a sexual aggression. Such suspicion, I propose, is related to the bad woman stereotype, which depicts women as evil and vengeful, and which relates to the widespread rape myth that "women 'cry rape' only when they have been jilted or have something to cover up"[62] and that women are prone to making false allegations out of spite, revenge, or fantasy.

4.4 Vulnerability and the law

At the start of Section 4 I defended that the discriminatory potential of vulnerability goes beyond the idea that the source of women's vulnerability to sexual violence is our body, an idea I interpret Susanna Pozzolo's argument to presume. I pointed out the polysemic nature of vulnerability to call attention to a particularly dominant understanding of vulnerability that associates it with "weakness, dependency, incapacity, incapability, and powerlessness" and, in turn, all those ideas with women.[63] I then suggested that understanding mobilises female stereotypes that lie at the heart of the law's failure in acknowledging and punishing sexual aggression against women. I was referring to the dichotomy of the good/bad woman which I then attempted to show is incorporated by laws and judicial practices on sexual violence: the good woman becomes the norm with which every victim needs to comply in order to become an "ideal victim" and to have the sexual violence against her acknowledged and punished by the system. As a result, a lack of conformity on the part of victim leads to her framing as bad woman and the consequent unrecognition of the sexual assault by the judicial system.

As also stated before, vulnerability seems to constitute a new chapter in the feminist debate on victimhood and agency that started in the 1980s and 1990s. As Rebecca Stringer has summarised, many have accused feminist rape law reform efforts at reinscribing "patriarchal constructions of femininity as embodied vulnerability, perpetuating a sexist linking of femininity with victimhood rather than agency."[64] At first sight, there seems to be something right with this idea. By posing the good woman stereotype as the norm with which victims of

62 Burt 1980: 217.

63 Gilson 2016: 74.

64 Stringer 2013: 148-149.

sexual violence need to conform with, law does seem to adopt a language that, as Sharon Marcus puts it, "solicits women to position ourselves as endangered, violable, and fearful"[65] and excludes "women's will, agency, and capacity for violence".[66] If that would be true, then, the feminist use of vulnerability in the context of sexual violence - even if with a very different meaning – would likely serve to reinforce and perpetuate patriarchal constructions of femininity that hinder the law's capacity to acknowledge and punish rape, due to the polysemic nature of vulnerability.

Yet, at a closer look, what can be observed is exactly the opposite. As Stringer notes, "rape law typically figures femininity not as embodied vulnerability but as responsible agency".[67] Rather than an expectation and demand of women's passivity, "modern rape law has typically represented women as capable of resisting rape, invoking images of women as agents in order to deny that sexual victimization has taken place."[68] In other words, the resistance requirement is evidence of the law's perception of women as active agents,[69] and this – and not the idea of women's vulnerability – is precisely what leads to the effacement of countless cases of sexual violence.

Furthermore, there is a second way in which the agency of women is presumed in cases of sexual violence. Stringer refers to it as "bad agency". As she explains, "[i]n addition to the good agency ascribed to the ideal victim by the resistance requirement, there is the bad agency ascribed"[70] to non-ideal victims. Here I will slightly depart from Stringer's view to suggest that "bad agency" is ascribed to victims of sexual violence framed as "bad women". It is not vulnerability but agency that stands at the core of victim blaming. Moreover, it is specifically sexual agency that lies behind the stereotypical assumption of consent by women with certain (unchaste) reputations and identities. Finally, it is agency once again and in no way vulnerability that grounds the commonplace idea that women are prone to make false allegations out of spite, revenge, or fantasy.

As a result, one might conclude that if the legal system is too often "a notorious site of incredulity" [71] – to use Lorraine Code's brilliant expression – with regards to women's claims of sexual violence, this is certainly not related with vulnerability or, more accurately, a construction of femininity as vulnerable in the sense of weakness, passivity, incapability, and powerlessness. Since, when understood in this sense, vulnerability is too often imagined as opposite to agency, it is possible to say that, in fact, just the contrary is true. What lies at the

65 Marcus 2013: 390.
66 Marcus 2013: 393.
67 Stringer 2013: 149.
68 Stringer 2013: 149.
69 Stringer 2013: 153.
70 Stringer 2013: 161.
71 Code 2009: 336.

heart of the law's flaws regarding sexual violence against women is the demand and assumption of our agency.

5 CONCLUSION

Vulnerability is a challenging concept. Its polysemic nature presents us with important difficulties arising from its "ambiguities, complexities, and tensions".[72] Understood in one sense, vulnerability captures the condition of "contingent susceptibility of particular persons or groups to specific kinds of harm or threat by others",[73] thus, helping to shed light on the state's special moral and justice obligations towards those considered vulnerable. Understood in another sense, vulnerability mobilises female stereotypes that are at the origin of the state's failure in acknowledging and punishing sexual violence against women. As such, vulnerability is both potentially apt to illuminate women's sexual oppression and perpetuate such a condition, both resistant and complicit, both emancipatory and oppressive.

Given such ambiguity, doubts arise concerning the usefulness of vulnerability as an epistemological framework for understanding sexual violence against women as endemic to male-female relations. Despite its vexing nature, I side with those who defend vulnerability as a lens through which to (re)conceptualize rape and sexual aggression more broadly. As Susanna Pozzolo, I too argue in favour of vulnerability's value as a heuristic instrument capable of rendering intelligible the law's flaws in this regard. The reason is my firm commitment to the belief in the transformative power of language: "(…) behind every word there is a history, just as behind every history there is a struggle to fix or change the meaning of words."[74] As Joan Scott tells us, "words, like the ideas and things they are meant to signify, have a history."[75] That history is political, as the meaning of words shapes and is shaped by power. For all this, language is a privileged locus of political action and resistance.[76] I would like to bring this insight concerning the changing and political nature of language to the present reflection on vulnerability.

Nils Christie added to the already mentioned five conditions to be an ideal victim, a sixth one: be "powerful enough to make your case known and successfully claim the status of an ideal victim."[77] He arrived at this condition precisely by looking at the feminist fights and achievements on rape. Writing in the 1980s, he argued:

72 Gilson 2016: 73.
73 Mackenzie et al. 2014: 6.
74 Preciado 2009: 14, own translation.
75 Scott 1986: 1035.
76 Preciado 2009: 16.
77 Christie 1986: 21.

> Wives are not "ideal victims." Not yet. But they are approaching that status. They are more ideal today than yesterday. (…) They are also closer to a position where they can claim that their definition of the situation is the valid one. They can make the political claim of being real victims. (Christie 1986: 20)

When Christie talked of a position of power, he was exclusively referring to material conditions. However, in achieving a position of power, in being able to claim to be a real victim, the struggle over words and their meaning is of absolute essence. As Linda Alcoff puts it, language is "part of what gives people ideas of what they can do and of what they have just experienced."[78] Marital rape is a prime example of this, as before feminists started talking about rape in marriage, not only was this rarely acknowledged by law, but the victims themselves did not recognize either the rape or their own victimization.[79] It was by naming marital rape that both marriage and rape were redefined. Such a redefinition occurred within a wider process of meaning mutability in which new ideas became possible and others came to be contested. What made this process possible was the political struggle over the meaning of words.

In more general terms, Rebecca Stringer refers to "feminist efforts to reform rape law" as a "political work that endeavours to counter the linguistic, cultural, and legal effacement of particular forms of suffering, through the invention of new idioms that give suffering visibility."[80] Not only do I completely agree with her as, for me, her words shed light on what is often a vexed point in the conceptualisation of vulnerability: its relation to resistance. As Judith Butler, Zeynep Gambetti, and Leticia Sabsay point out, several popular and theoretical discourses assume vulnerability and resistance to be mutually opposite.[81] Yet, as the feminist work on sexual violence has been witness to vulnerability, and more specifically the consciousness of group vulnerability to certain harms, it "is one of the conditions of the very possibility of resistance".[82] The political struggle over the meaning of words is a crucial mode of resistance that both emerges out of and allows for the visibility of a group's vulnerability.

As I see it, the feminist struggle over the meaning of the word vulnerability in relation to sexual violence against women is on the right path. Both the theoretical discussions on the matter and the public mobilisations against decisions and trials such as the "Manada" case are the best evidence of just that, as is the final decision on this case.[83] Such a struggle, however, cannot remain blind

78 Alcoff 2018: 3.

79 For a detailed account of the impact of the feminist movement on the marital rape exemption in US Law, see Ryan 1995.

80 Stringer 2013: 148.

81 Butler et al. 2016: 1.

82 Butler et al. 2016: 1.

83 Spain's Supreme Court found the five men involved in the case guilty of gang rape, overruling previous decisions that had convicted them of the offence of sexual abuse. In its ruling, the

to the semantic difficulties vulnerability is associated with. It needs to be very aware of them, to understand their workings, and to be ready to identify them when they are at stake both in concrete cases and general doctrines. For the rest, the most important change has already started to happen. As Paul Beatriz Preciado tells us in relation to the transformation in the meaning of the word queer, what changed was the uttering subject.[84] In relation to vulnerability and sexual violence against women, that subject is no longer (exclusively) the sexist male judicial operator, but feminists who are transforming the meaning of vulnerability and, with it, its role: from an instrument of social oppression to one of political resistance and social transformation.

Bibliography:

Abrams, D., Viki, G. T., Masser, B., & Bohner, G. (2003). Perceptions of Stranger and Acquaintance Rape: The Role of Benevolent and Hostile Sexism in Victim Blame and Rape Proclivity. *Journal of Personality and Social Psychology*, *84*(1), 111–123. https://doi.org/10.1037/0022-3514.84.1.111

Abrams, K. (1995). Sex Wars Redux: Agency and Coercion in Feminist Legal Theory. *Columbia Law Review*, *95*(2), 304–376. https://doi.org/10.2307/1123232

Alcoff, L. M. (2018). *Rape and Resistance: Understanding the Complexities of Sexual Violation*. Polity Press. ISBN 9780745691916

Bergoffen, D. (2003). February 22, 2001: Toward a Politics of the Vulnerable Body. *Hypatia*, *18*(1), 116–134. https://doi.org/10.1111/j.1527-2001.2003.tb00782.x

Bergoffen, D. (2009). Exploiting the Dignity of the Vulnerable Body: Rape as a Weapon of War. *Philosophical Papers*, *38*(3), 307–325. https://doi.org/10.1163/9789004259782_007

Bergoffen, D. (2011). *Contesting the Politics of Genocidal Rape: Affirming the Dignity of the Vulnerable Body*. Routledge. https://doi.org/10.4324/9780203340134

Burt, M. R., & Albin, R. S. (1981). Rape Myths, Rape Definitions, and Probability of Conviction. *Journal of Applied Social Psychology*, *11*(3), 212–230. https://doi.org/10.1111/j.1559-1816.1981.tb00739.x

Burt R., M. (1980). Cultural Myths and Supports for Rape. *Journal of Personality and Social Psychology*, *38*(2), 217–230. https://doi.org/10.1037/0022-3514.38.2.217

Butler, J., Gambetti, Z., & Sabsay, L. (2016). Introduction. In J. Butler, Z. Gambetti, & L. Sabsay (Eds.), *Vulnerability in Resistance* (pp. 1–11). Duke University Press. https://doi.org/10.2307/j.ctv11vc78r.5 9780822362791

Christie, N. (1986). The Ideal Victim. In E. A. Fattah (Ed.), *From Crime Policy to Victim Policy: Reorienting the Justice System* (pp. 17–31). Macmillan Press. https://doi.org/10.1007/978-1-349-08305-3

Clifton, A. K., McGrath, D., & Wick, B. (1976). Stereotypes of Woman: A Single Category? *Sex Roles*, *2*(2), 135-148. https://doi.org/10.1007/BF00287246

Code, L. (2009). A New Epistemology of Rape? *Philosophical Papers*, *38*(3), 327-345. https://doi.org/10.1080/05568640903420897

Cott, N. F. (1978). Passionless: An Interpretation of Victorian Sexual Ideology, 1790-1850. *Signs*, *4*(2), 219–236. https://doi.org/10.1086/493603

Fiske, S. T., Cuddy, A. J. C., Glick, P., & Xu, J. (2002). A Model of (Often Mixed) Stereotype Content: Competence and Warmth Respectively Follow From Perceived Status and Competition. *Journal of Personality and Social Psychology*, *82*(6), 878-902. https://doi.org/10.1037/0022-3514.82.6.878

Gilson, E. C. (2016). Vulnerability and Victimization: Rethinking Key Concepts in Feminist Discourses on Sexual Violence. *Signs*, *42*(1), 71–98. https://doi.org/10.1086/686753

Glick, P., & Fiske, S. T. (1996). The Ambivalent Sexism Inventory: Differentiating Hostile and Benevolent Sexism. *Journal of Personality and Social Psychology*, *70*(3), 491-512. https://doi.org/10.1037/0022-3514.70.3.491

Gravelin, C. R., Biernat, M., & Bucher, C. E. (2019). Blaming the Victim of Acquaintance Rape: Individual, Situational, and Sociocultural factors. In *Frontiers in Psychology, 9* (Jan), 1–22). https://doi.org/10.3389/fpsyg.2018.02422

court considered that there was a genuine scenario of intimidation in which the victim never consented to the sexual acts performed by the accused (STS 344/2019).

84 Preciado 2009: 16, own translation.

Higgins, J. M. (1976). The Myth of Eve: The Temptress. *Journal of the American Academy of Religion*, *44*(4), 639–647. https://doi.org/10.1093/jaarel/XLIV.4.639

Himma, K. E. (2015). Conceptual Jurisprudence: An Introduction to Conceptual Analysis and Methodology in Legal Theory. *Revus*, *26*, 65-92. https://doi.org/10.4000/revus.3351

Jasper, J. M., Young, M. P., & Zuern, E. (2020). *Public Characters*. Oxford University Press. https://doi.org/10.1093/oso/9780190050047.001.0001

Krahé, B. (1991). Social Psychological Issues in the Study of Rape. *European Review of Social Psychology*, *2*(1), 279–309. https://doi.org/10.1080/14792779143000097

Lombroso, C., & Ferrero, G. (2004). *Criminal Woman, the Prostitute, and the Normal Woman*. Duke University Press. https://doi.org/10.1215/9780822385592

Mackenzie, C. (2014). The Importance of Relational Autonomy and Capabilities for an Ethics of Vulnerability. In C. Mackenzie, W. Rogers, & S. Dodds (Eds.), *Vulnerability: New Essays in Ethics and and Feminist Philosophy* (pp. 33–59). Oxford University Press. https://doi.org/10.1093/acprof:oso/9780199316649.003.0002

Mackenzie, C., Rogers, W., & Dodds, S. (2014). Introduction: What Is Vulnerability, and Why Does It Matter for Moral Theory? In C. Mackenzie, W. Rogers, & S. Dodds (Eds.), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (pp. 1–29). Oxford University Press. https://doi.org/10.1093/acprof:oso/9780199316649.003.0001

Marcus, S. (2013). Fighting Bodies, Fighting Words: A Theory and Politics of Rape Prevention. In J. Butler & J. Scott (eds.), *Feminists Theorize the Political* (pp. 385-204). Routledge. https://doi.org/10.4324/9780203723999

Nathan Dewall, C., William Altermatt, T., & Thompson, H. (2005). Understanding the Structure of Stereotypes of Women: Virtue and Agency as Dimensions Distinguishing Female Subgroups. *Psychology of Women Quarterly*, *29*(4), 396–405. https://doi.org/10.1111/j.1471-6402.2005.00239.x

Noseworthy, C. M.; Loth, A. J. (1984). The Cognitive Organization of Gender Stereotypes. *Personality and Social Psychology Bulletin*, *10*(3), 474–481. https://doi.org/10.1177/0146167284103016

Pedersen, S. H., & Strömwall, L. A. (2013). Victim Blame, Sexism and Just-World Beliefs: A Cross-Cultural Comparison. *Psychiatry, Psychology and Law*, *20*(6), 932-941. https://doi.org/10.1080/13218719.2013.770715

Persson, S., Dhingra, K., & Grogan, S. (2018). Attributions of Victim Blame in Stranger and Acquaintance Rape: A Quantitative Study. *Journal of Clinical Nursing*, *27*(13–14), 2640–2649. https://doi.org/10.1111/jocn.14351

Pozzolo, S. (2020). ¿Vulnerabilidad Personal o Contextual? Aproximaciones al Análisis de Derecho en Perspectiva de Género. *Isonomía - Revista de Teoría y Filosofía Del Derecho*, *51*, 1–28. https://doi.org/10.5347/isonomia.v0i51.226

Preciado, P. B. (2009). Historia de una Palabra: Queer. *Parole de Queer*, *1*, 14–17. Available at https://es.scribd.com/fullscreen/79992238?access_key=key-2l64jqncgcgodxmcd3jr

Rogers, W. (2014). Vulnerability and Bioethics. In C. Mackenzie, W. Rogers, & S. Dodds (Eds.), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (pp. 60–87). Oxford University Press. https://doi.org/10.1093/acprof:oso/9780199316649.003.0003

Rosenberg, S., Nelson, C., & Vivekananthan, P.rogers S. (1968). A Multidimension Approach to the Structure of Personality Impressions. *Journal of Personality and Social Psychology*, *9*(4), 283-294. https://doi.org/10.1037/h0026086

Ryan, R. M. (1995). The Sex Right: A Legal History of the Marital Rape Exemption. *Law & Social Inquiry*, *20*(4), 941–1001. https://doi.org/10.1111/j.1747-4469.1995.tb00697

Scott, J. W. (1986). Gender : A Useful Category of Historical Analysis. *The American Historical Review*, *91*(5), 1053–1075. https://doi.org/10.2307/1864376

Six, B., & Eckes, T. (1991). A Closer Look at the Complex Structure of Gender Stereotypes. *Sex Roles*, *24*(1–2). https://doi.org/10.1007/BF00288703

Stringer, R. (2013). Vulnerability After Wounding: Feminism, Rape Law, and the Differend. *Sub-Stance*, *42*(3), 148–168. https://doi.org/10.1353/sub.2013.0031

Trudgill, E. (1976). *Madonnas and Magdalens: The Origins and Development of Victorian Sexual Attitudes* (First Edit). Heinemann. ISBN 9780434794621

Viki, G. T., & Abrams, D. (2002). But She Was Unfaithful: Benevolent Sexism and Reactions to Rape Victims Who Violate Traditional Gender Role Expectations. *Sex Roles*, *47*(5–6), 289-293. https://doi.org/10.1023/A:1021342912248

Vonk, R., & Ashmore, R. D. (2003). Thinking About Gender Types: Cognitive Organization of Female and Male Types. *British Journal of Social Psychology*, *42*(2), 257–280. https://doi.org/10.1348/014466603322127247

Welter, B. (1966). The Cult of True Womanhood: 1820-1860. *American Quarterly*, *18*(2), 151–174. https://doi.org/10.2307/2711179

Yamawaki, N., Darby, R., & Queiroz, A. (2007). The Moderating Role of Ambivalent Aexism: The Influence of Power Status on Perception of Rape

Victim and Rapist. *Journal of Social Psychology*, *147*(1), 41–56. https://doi.org/10.3200/SOCP.147.1.41-56

Spanish caselaw

Sección Segunda de la Audiencia Provincial de Navarra, Decision nº 38, 20th March 2018. Available at: https://www.diariodesevilla.es/2018/04/26/SENTENCIA_SUMARIO_426_DE_2016_cen.pdf?hash=e20ec174f9f8f973713214dc7e6703d33861d342

Tribunal Supremo, Decision nº 344, 4th July 2019. Available at: https://www.diariodesevilla.es/2019/07/05/Sentencia_Sala_Segunda_caso_La_Manada_JG.pdf?hash=c2bc31bd7c438c8d4dc829a6b2d4e4c79cb3e064

Kenneth Einar Himma*

In defence of the Coercion Thesis and modest conceptual methodology

A reply to critics

This is the author's reply to a book symposium on law and coercion. Himma's book – *Coercion and the Nature of Law* (OUP 2020) – had two principal objectives. The first was to show it is a necessary condition for a normative system to count as one of law that it includes prohibitions on violence and theft that are backed by detriment that counts as a sanction in virtue of being reasonably contrived to deter enough noncompliance to enable the system to minimally achieve its function of keeping the peace (the Coercion Thesis). The second was to defend and illustrate the methodology of modest conceptual analysis as defined by Frank Jackson. The book was critically discussed by Brian Bix, Thomas Bustamante, Frank Jackson, Paolo Di Lucia and Lorenzo Passerini Glazel, Anna Pintore, Pablo Rapetti and Kara Woodbury-Smith in the 45th issue of *Revus*.

Keywords: law, coercion, sanction, modest conceptual analysis, normativity, law's function

The book had two principal objectives. The first was to show it is a necessary condition for a normative system to count as one of law that it includes prohibitions on violence and theft that are backed by detriment that counts as a sanction in virtue of being reasonably contrived to deter enough noncompliance to enable the system to minimally achieve its function of keeping the peace (the Coercion Thesis). The second was to defend and illustrate the methodology of modest conceptual analysis (MCA). MCA explicates the nature of a kind as it is determined by *our* semantic conventions for using the corresponding term as qualified in hard cases by certain shared philosophical assumptions about its nature – i.e. as it is determined by *our* conceptual practices. Immodest conceptual analysis (ICA) explicates the nature of a kind as it is determined by objective considerations that are utterly independent of anything we do with words – i.e., as it is determined independently of our conceptual practices.

The book adopts MCA because it is the only epistemically viable methodology for conceptual analysis; it seems clear to me that no ordinary human being has reliable epistemic access to the nature of a kind as it is determined independently of our conceptual practices by purely objective considerations. To do ICA, one would need something akin to a God's-eye view of the nature of kinds that none of us can plausibly claim to have. We have, after all, little reason

* khimma@gmail.com | Faculty of Law, University of Zagreb (Croatia). I want to thank the editors of Revus for sponsoring this symposium on Coercion and the Nature of Law (OUP 2020). I am deeply indebted to each of the philosophers who honoured me with their thoughtful reviews of the book. I apologize to all for my delay in replying.

to believe our basic perceptions of the objective material world *mirror* what it is actually like — though they clearly enable us to thrive in this world. But we have even less reason to believe that we have insight into the nature of a kind as it is determined independently of anything we do with words. I adopt MCA, then, because it is, as far as I can tell, the only game in town.

It bears noting that each of the reviewers accepts some version of the claim that law is, by nature, coercive in the sense it is a necessary condition for a *system* to count as one of law that some of its norms are backed by the threat of a sanction. And I surmise some would go further, as I would, and argue that it is a necessary condition for a mandatory *norm* to count as one of law that it is backed by a sanction. In this respect, each of the reviews vindicates the Coercion Thesis.

1 REPLY TO BRIAN BIX

Bix's review begins with an exposition of the book's methodology and arguments and then criticizes it for not engaging more directly with the various criticisms of the project of conceptual analysis.[1] As Bix (2019: 32) describes Brian Leiter's criticisms, conceptual analysis is "an outdated 'armchair' view to do philosophy, an approach that other philosophical disciplines have abandoned". Leiter and others argue that conceptual analysis should not be done because, among other reasons, it is "uninteresting" and has no normative implications that would enable us to improve our legal practices.

I don't know whether Bix is endorsing these criticisms. Either way, however, they are important enough to warrant a response. To begin, it is not true that philosophers have abandoned conceptual analysis. Philosophers specializing in metaphysics (which concerns, among other things, the nature of time, space, free will, causation, etc.) or metaethics (which concerns, among other things, the nature of good, right, wrong, morality, etc.) continue to pursue conceptual analysis. Visit any accredited philosophy department and you will find someone competent with metaphysics and someone competent with metaethics.

Indeed, and on the contrary, the project of conceptual analysis is enjoying a philosophical resurgence — and one, moreover, that highlights the ascendency of MCA. The projects of experimental philosophy and conceptual engineering are becoming increasingly influential: experimental methods are deployed to ascertain the intuitions of competent speakers pertaining to hard cases so as to better understand our conceptual practices. Similarly, conceptual engineering is concerned with understanding and evaluating our conceptual practices so as to revise them to eliminate perceived problems.

1 I address these criticisms in Section 4 of Chapter 1 of Himma 2019.

Bix also worries about my apparent lack of engagement with John Finnis's substantive views, but I do not engage his natural law theory for two reasons. First, with one crucial exception discussed below, the arguments I make in the book are non-partisan in the sense they do not presuppose the truth of legal positivism. Second, and more importantly, Finnis (1996: 203, 204) makes clear he accepts positivism's separability thesis:

> 'There is no necessary or conceptual connection between positive law and morality.' True, for there are immoral positive laws; 'there are two broad categories (with many sub-classes) of unjust laws…'. And a conceptual distinction or disconnection is effortlessly established by the move made in the *Summa*, of taking human positive law as a subject for consideration in its own right (and its own name), a topic readily identifiable and identified *prior* to any question about its relation to morality.… 'The identification of the existence and content of law does not require resort to any moral argument.' True, for how else could one identify wicked laws such as Israel's prophet denounced in words so often quoted by Aquinas: 'Woe to those who make unfair laws [*leges iniquas*] who draw up instruments imposing injustice [*iniustitiam*], and who give judgments oppressing the poor'?

As I argue in *Morality and the Nature of Law*,[2] Finnis's natural law theory is intended to explicate an evaluative usage of *law* – i.e., law in its ideal sense or law as it *should* be, and he believes that positivism's separability thesis is true of the descriptive usage of *law* because that thesis cannot be plausibly disputed: it is simply undeniable, on the descriptive usage *we construct with our conceptual practices*, that there can be wicked law.

My concern in the book was to explicate the descriptive usage, which is the only one reported in mainstream dictionaries.[3] While law in its ideal sense might have a moral purpose (e.g., to do justice, as determined by substantive natural law theory), there is no reason to think law in its descriptive sense has such a purpose; and the idea that the basic purpose of law is the purely descriptive one of maintaining order has an impressive pedigree that goes back as far as Locke, Hobbes, Blackstone, Aquinas. There is, of course, obvious moral value in keeping the peace (war is bad). However, we are motivated, first and foremost, by the prudential value of keeping the peace; if there is no objective morality, we would still be motivated to create some sort of normative system contrived to keep the peace. Few people would be willing to try to live together without the coercive mechanisms of law.

2 Himma 2019.

3 Dictionaries are compiled by lexicographers who ground their definitions in scientifically rigorous polls of competent speakers that are designed to identify our semantic conventions regarding the relevant terms. They have epistemic authority over philosophers with respect to the content of our semantic conventions in virtue of having formal training in the empirical methods of the social sciences — which we philosophers lack. Our expertise is relevant in applying philosophical methods to extract the underlying assumptions (and their entailments) that qualify these conventions in hard cases.

As for the worry that it is not desirable to focus on conceptual analysis without worrying about the moral evaluation of law, my voice is certainly not needed to contribute to the moral evaluation of law. There are, after all, vastly more theorists evaluating our legal practices than there are theorists addressing conceptual problems. And I would be stunned if I have anything new or worthwhile to contribute to that discussion.

2 REPLY TO THOMAS BUSTAMANTE

Bustamante is a Dworkinian who, like Dworkin, accepts the Coercion Thesis. However, he believes that law's coercive nature cannot be satisfactorily grounded in MCA. As he expresses the matter, "other methodologies, like Dworkin's interpretivism (if interpreted as endorsing an inferentialist theory of meaning), can provide a more plausible account of the coercive nature of law".[4]

Three observations might be helpful here. First, Dworkin accepts the Coercion Thesis but gives no argument for it; he simply builds it into his analysis of the concept of law, which holds that the law of a community includes not only those rules enacted by the relevant authoritative body but also those moral principles that justify the use of coercive enforcement mechanisms. Second, there is nothing in any of my arguments that Dworkin is committed to rejecting. Indeed, he could adopt any of them without even prima facie inconsistency. Third, and most importantly, Dworkin (1986: 103–104), like Finnis,[5] makes clear he is concerned with explicating an evaluative – or "preinterpretive" – concept of law and that he believes positivism is consistent with his analysis:

> We need not deny that the Nazi system was an example of law … because *there is an available sense in which it plainly was law*. But we have no difficulty in understanding someone who does say that *Nazi law was not really law, or was law in a degenerate sense, or was less than fully law.* For he is not then using 'law' in that sense; he is not making that sort of preinterpretive judgment but a skeptical interpretive judgment that Nazi law lacked features crucial to flourishing legal systems whose rules and procedures do justify coercion.

Though there are clearly some differences between Dworkin and positivists,[6] the misunderstanding that Dworkin's mature theory of law in *Law's Empire* is inconsistent with the basics of positivism continues to persist despite the unambiguous character of these remarks.

4 Bustamante 2021: 39.

5 See above for Finnis's views on the matter.

6 Dworkin is critical of the view that the criteria of validity are necessarily exhausted by a rule of recognition that counts as conventional; this — and not the idea law is a social artifact — is the target of his semantic sting argument.

Much of what Bustamante says in his review of my book is less concerned with my views than with mounting a defence of the Coercion Thesis grounded in the evaluative methodology that Dworkin deploys in defence of his interpretivism. Indeed, and somewhat oddly, Bustamante never offers a reason to think Dworkin would reject the use of MCA in defending the claim that the Nazis had a legal system; and I see no other reasons to think Dworkin is committed to rejecting any of the substantive claims I make in the book in defence of the Coercion Thesis.

Bustamante argues that those arguments count as pragmatic in character because they are grounded in claims about our *practices*. In particular, he argues that Hart's remark that *The Concept of Law* is "an essay in descriptive sociology" shows he intends his arguments as pragmatic. But a consideration of the full context of those remarks makes clear Hart (2012: vi) is concerned to give an analysis of what we do with words:

> The lawyer will regard the book as an essay in analytic jurisprudence, for it is concerned with the clarification of the general framework of legal thought, rather than with the criticism of law or legal thought. *Moreover, at many points, I have raised questions which may well be said to be about the meanings of words.*… Notwithstanding its concern with analysis the book may also be regarded as an essay in descriptive sociology; for the suggestion that inquiries into the meanings of words merely throw light on words is false. *Many important distinctions, which are not immediately obvious, between types of social situations or relationships may best be brought to light by an examination of the standard uses of the relevant expressions and of the way in which these depend on a social context, itself left unstated* (Emphasis added).

Although my argument relies on the claim law has a basic function, this does not constitute the strategy as pragmatic. It is an uncontentious conceptual truth that every artifact performs some task we want or need it to do; it is nearly universally accepted among artifact theorists that an artifact is, by nature, contrived to perform some basic function – i.e., one it needs to be able to perform in order to do anything else it is standardly used to do.[7] If law counts as an artifact, it is partly because it has a basic function.

It should be clear that both the Coercion Thesis and its supporting arguments are conceptual in character. To begin, it is worth noting that *Oxford English Dictionary* defines *law* as "the system of rules which a particular country or community recognizes as regulating the actions of its members and which *it may enforce by the imposition of penalties.*" Further, Chapters 4 through 8 are all aimed at vindicating the *conceptual truism* that law is normative in the sense that it is a necessary condition for a system to count as one of law that its mandatory norms give rise to reasons to comply. The point of the last two chapters discussing international law and the society of angels is to show that neither is a counterexample to the Coercion Thesis.

7 See, e.g., Preston 2022: sec. 2.3 and Burazin 2023: 1846.

Bustamante (2021: 43) accepts my conclusions but argues "they are based on *empirical claims*." That is true, but inconsequential because those claims describe our conceptual practices and hence count as metaphysical in virtue of purporting, as every conceptual claim does, to be necessarily true. There are no other empirical observations that could justify a necessary truth about the nature of a kind.[8] It is a necessary truth *on our conceptual practices* that every bachelor is an unmarried man because — and only because — we converge in using the term *bachelor*, as a contingent empirical matter, to refer only to unmarried men.

3 REPLY TO PAOLO DI LUCIA AND LORENZO PASSERINI GLAZEL

Di Lucia and Glazel focus on what they deem to be "risks" of MCA, which, they argue, illegitimately grounds substantive conclusions about the nature of law in "the canons or ordinary usage and on the philosophical assumptions of an *undefined and contingent linguistic and cultural community*".[9]

It is worth noting they do not try to show that ICA is epistemically viable. Instead, they describe the following four problems with MCA. The first is that, "among people who construct definitions for a living, there is no single, generally accepted *cognitive model,* even for such common concepts as 'mother'".[10] The second is that there are "divergent" or "alternative" usages of the term *law*.[11] The third is that "linguistic analysis [is] … not merely *descriptive* or *explicative* but *critical* [in the sense] … [o]rdinary language is rendered more rigorous and less flexible, or indeed entirely supplanted by, scientific language".[12] The fourth is that "it is unclear whom the adjective 'ours' refers to [in *our conceptual practices*] – except for the exclusion of the academic philosophical community".[13]

I begin with the fourth: the term "our" refers to the community of competent speakers of our language, which does not exclude members of the academic community; the intuitions they have about the nature of law are also obviously conditioned by their competence with the term *law*. The relevant point is simply that we philosophers are constrained in giving an account of the nature of law by our conventions for using the term. That seems indisputable because any theory of law inconsistent with the idea that law consists of norms can be

8 They can, of course, help us to identify counterexamples to a claim purporting to be necessarily true. But that is a different matter.

9 Di Lucia & Glazel 2021: 57.

10 Di Lucia & Glazel 2021: 62.

11 Di Lucia & Glazel 2021: 62.

12 Di Lucia & Glazel 2021: 63 (emphasis added).

13 Di Lucia & Glazel 2021: 63.

rejected – and conclusively – for that reason. It would, for example, be obviously preposterous to claim that law is, by nature, composed of H_2O molecules.

As to the third criticism that what they characterize as *linguistic analysis* is "critical" in the sense described above: that might be true, but that's not inconsistent with anything I say because I do not claim to be doing *that kind* of linguistic analysis. Philosophers are free, of course, to pick out aspects of *our* usage that are problematic and recommend changes. This is being done with great success by those engaged in the project of conceptual engineering. One could group the two projects together, but I see no reason to do so. The projects of describing our conceptual practices and evaluating them might be related, but they are also clearly distinct, and it accomplishes nothing of value to suggest otherwise.

Further, it is false that the *point* of analysing our conceptual practices is necessarily to replace ordinary language with more rigorous scientific language. The physical sciences have contributed to improving our conceptual practices, as they did in leading us to revise the term *water* to refer only to liquids composed of H_20 molecules. But that doesn't change the fact that description/explication and evaluation/revision are different projects.

As to the second criticism that there are different usages of "law": that is true but irrelevant. There are usages that refer to the propositions that purport to describe causal regularities in the universe (the so-called *laws* of nature) and to morality. But the Coercion Thesis is concerned by its own terms with only the usage that refers to what John Austin and Jeremy Bentham describe as "positive" or "posited law" and there is no reason to think my focus on that usage is problematic.

It is worth noting the descriptive usage with which my book is concerned is the only one recognized by mainstream dictionaries because that is the only one we use in ordinary contexts. When one travels to a foreign country and wants to know whether, say, the law prohibits use of cannabis, one is asking whether there is a legal prohibition that is *enforced* in that country, which is all that really matters as a prudential matter.

Indeed, the only competent speakers I have ever encountered who use the term in an evaluative sense are legal philosophers, such as Finnis and Dworkin. However, this technical evaluative use does not, as far as I can tell, enable us to do anything we cannot do more clearly by simply thinking in terms of the moral principles governing legitimate authority. I would hypothesize that the reason the evaluative usage has not gained currency in ordinary usage is that it is just not needed to discuss anything we need to worry about when it comes to law.

Finally, as to the first criticism that there is no commonly accepted "cognitive model" for ordinary concepts: that might be true, but it is clear that there is core content to the relevant usage of the term "law" that every speaker who

counts as competent with the term would accept in virtue of being competent with that term — such as the claim that law consists of norms.

And it is not the business of descriptive conceptual analysis to produce cognitive models. "Cognitive model" as defined by the *American Psychological Association Dictionary of Psychology*, means "a theoretical view of thought and mental observations, which provides explanations for observed phenomena and makes predictions about an unknown future." There is a trivial sense in which MCA is concerned with explaining an observed phenomena (i.e., our conceptual practices for using words) and making predictions about an unknown future (i.e., that we will continue to use words in this way), but it distorts the idea of conceptual analysis beyond recognition to describe it as a "psychological theory" and it distorts the idea of a cognitive model as much to suggest it is concerned with our conventions for using words.

4 REPLY TO FRANK JACKSON

Jackson's comments are sympathetic to both the Coercion Thesis and the arguments of the book. He says, for instance, "I am no philosopher of law, but [Himma] convinced me (a task made easier by the fact that I was antecedently disposed to accept something like the Coercion Thesis)".[14] Although he observes that my views about MCA diverge in some particulars from his, he defends the methodology as I have articulated it: "Himma's methodology in defence of the Coercion Thesis is just fine, or so I will argue".[15]

Jackson has two principal worries. While I characterize the Coercion Thesis as a purely descriptive claim, he argues certain remarks I make express a normative claim — namely that "it would be good to make the possibility of punishment for breaking its law a necessary condition for being a legal system, for it is part of the essential rationale for having legal systems".[16] He points to the following remarks I made as evidence the Coercion Thesis expresses a normative claim:

> All that stands between civilisation and the state of nature is an institutional normative system that backs mandatory norms prohibiting certain assaults on persons or property with the threat of severe detriment; this is why every existing system of our world … backs mandatory norms prohibiting acts likely to lead to breaches of the peace with the threat of incarceration – or worse (Himma 2020: 24).

I was not intending to make a normative claim in that passage; however, my language invites that interpretation. This text occurs in a chapter of the book where I was making an empirical argument that the Coercion Thesis coheres

14 Jackson 2021: 71.

15 Jackson 2021: 72.

16 Jackson 2021: 73.

with existing legal practice because every system in our world that counts as one of law backs mandatory prohibitions on acts likely to lead to a breach of the peace with something that counts as a sanction. But that claim about existing legal systems should be distinguished from the conceptual claim about the nature of law: the empirical claim is that without law we would likely fall into a state of nature; the conceptual claim is that the Coercion Thesis is true because we have adopted the term "law" to refer only to systems that are minimally efficacious in keeping the peace in virtue of backing those prohibitions with a sanction.

Jackson's methodological concern is that I give MCA too large a role in structuring the world. On his view, the problem is that:

> There is a sense in which we create the classifications and a sense in which we do not. The items to be found in our world are alike and unalike in their many ways, independently of us, or so we realists insist… What we create are the classifications we choose, implicitly or explicitly, to employ in making sense of the world, and not whether some item falls under some classification…. Anthropologists decided that it would be good to classify people together in terms of whether or not they have a parent in common, co-opting the term "sibling" to do the job in language…. They created the term and the classification, but they did not thereby create any siblings. Parents do that.[17]

Jackson is correct, and I did not mean to suggest otherwise. As I typically put the matter, what we do with words structures the world of our experience by organizing kinds and their instances into an ontology. But those conceptual practices assume the things we name already exist in the world of our experience. Indeed, it is the fact that we notice they exist and are salient that explains why we adopt words to talk about them. Our conceptual practices structure the world, as I intend that idea, only in the limited sense that they create a framework that assigns words to the various kinds we experience so we can talk about those kinds.

Jackson worries that this claim is incompatible with ontological realism, but I disagree. It is, as far as I can tell, compatible not only with realism but also with antirealism. That I consistently speak in terms of the world of *our experience* or *our* world was intended to acknowledge that what we perceive might not be *really* true; but that latter claim is compatible with the realist view the world really exists *and* with the antirealist view that it doesn't really exist. Those perceptual beliefs might be false because the world doesn't exist, or they might be false because our perceptions systematically misrepresent what the world really looks like. The Coercion Thesis and supporting arguments are compatible with both ontological views.

This is as it should be. A modest conceptual theory of law should not make any assumptions about whether the world as we perceive it exists in some immodest sense. Since our conceptual practices are what they are regardless of whether realism or antirealism is true, an account of those practices should be

17 Jackson 2021: 73.

agnostic about the disputes between realism and antirealism. Our conceptual practices structure the world of our experience, and, for all we can be certain of, our beliefs about the mind-independent world might be systematically mistaken.

5 REPLY TO ANNA PINTORE

Pintore's review (2021: 79) begins with a strikingly aggressive remark: "To dispel any doubt, I will say immediately that there are very few points in the book that I agree with, notwithstanding the fact that I believe, like its author, that coercion plays a crucial and ineluctable role in the legal world".[18] Ouch.

Unfortunately, Pintore's review tends to meander, so it is not always easy to understand. However, her principal complaints seem to be that my analysis: (1) "equat[es] legal coercion with authorization to impose sanctions," (2) "oscilat[es] between law in general and law here and now," (3) relies on a concept of normativity that is either unclear or nonstandard, and (4) "reduce[s] the motives for law-abidance to a single one – the desire to avoid a sanction."

I am baffled by these claims. I have no idea why, to begin, she thinks (1) is problematic, since she accepts the Coercion Thesis. It is an obvious truism that one can *coerce* only by threatening detriment. If the relevant norms are coercive in the relevant sense, it is because they are backed by the *threat* of a sanction. While Pintore points out law is not the only normative system that backs its prescriptions with a sanction, there is nothing in the book inconsistent with that claim; the Coercion Thesis is, after all, limited by its own clear terms to systems of *law*.[19]

Similarly, I do not understand which elements of my argument Pintore believes "oscillate" in an objectionable way between law in general and particular instances of legal systems. If one wants to show, for instance, that international

18 She is not shy about expressing her disdain for the concerns of the "Anglo-American" world of legal philosophers. She writes, "At the risk of seeming to be the proverbial bull in a china shop, I confess that I cannot get excited about the discussion of the normativity of law, *which so absorbs the Anglo-American world and also Himma*" (Pintore 2021: 87). Her tone certainly invites a reaction, but not because she comes across as a bull in a china shop.

19 She also points out (Pintore 2021: 82), first, that "not all sanctions are *penal* sanctions" and, second, not all penal sanctions … presuppose culpability". As to the first point, there is nothing in my explanation of a sanction that presupposes all sanctions are penal in the sense they are *intended* to punish. I claim only that detriment counts as a sanction if reasonably likely — and thus reasonably contrived — to deter noncompliance to the requisite extent. As to the second, there is nothing in the Coercion Thesis or my analysis of a sanction that entails all penal sanctions presuppose culpability. However, that claim is obviously true: even a law that imposes strict liability presupposes that the commission of some acts are inherently culpable because of the likelihood that they result in grievous harm. It is the law itself that defines standards of *legal* culpability. If there is an existing system of criminal law that does not require a showing of what it deems culpable intent on the part of a subject to justify imposing a sanction, I would like to see it.

law is not a counterexample to the Coercion Thesis, as I argued in Chapter 9 of the book, one must discuss the particular system of international law governed by the U.N. Charter. I suppose that might count in some literal sense as "oscillating," but that is part of what *must* be done to show a claim is true as a matter of conceptual necessity.

Pintore's concerns about the concept of normativity are just as confusing ("which normativity?" she asks in the title to her review). Much of the analysis in the central part of my book is concerned with defending the claim that law is conceptually normative *in the sense that* it is part of the nature of a legal system that at least some of its norms create reasons to comply. The book argues that *if* law is conceptually normative *in that sense*, the Coercion Thesis uniquely vindicates its conceptual normativity; and that cannot be plausibly denied. Since there can be wicked systems that count as law, not every legal system creates moral reasons to comply. But if that is correct, then the only reasons a system of law could create as a matter of conceptual necessity are prudential and the Coercion Thesis provides the only remotely plausible explanation of how it can create such reasons as a matter of conceptual necessity.

As to her final concern, there is nothing in either the book or the Coercion Thesis that "reduce[s] the motives for law-abidance to a single one – the desire to avoid a sanction." Indeed, I *explicitly reject* that claim *in the very first chapter of the book*: "but none of this implies it is a conceptual truth that people whose behavior complies with the law must be motivated, even in part, by a desire to avoid the sanctions judges are authorized to impose on subjects for non-compliance." What I claim — a few sentences later — is that the prospect of incurring a sanction is normatively relevant even for those who comply for other reasons:

> While there are some legally prohibited acts from which I abstain, such as jaywalking in front of a police officer, only out of a desire to avoid the sanctions, the fact that I have never intentionally killed someone is not at all explained by the fact that murder is punishable by a long term of incarceration; however, if I am ever tempted to do so, I would certainly regard the fact that I would likely be sentenced to prison as normatively relevant (Himma 2020: 19).

What law does, on the Coercion Thesis, is provide an incentive to comply in the form of a deterrent to noncompliance for those not antecedently inclined to comply.

6 REPLY TO PABLO RAPETTI

Pablo Rapetti's review expresses a number of interesting concerns, but his two main worries seem to be that despite my remarks to the contrary (1) the analysis is positivist in character, and (2) my methodology is normative insofar as I claim the basic function of law is to keep the peace.

As to (1), there is only one place where I make an argument that presupposes a positivist view — i.e., in defence of the claim that only the Coercion Thesis can vindicate the truism that it is a constitutive property of a legal system that some of its norms create reasons to comply.[20] In particular, Chapter 6 argues that if law is conceptually normative *in that sense*, those reasons must be prudential because a wicked legal norm obviously cannot create a moral reason to comply (which presupposes the falsity of natural law theories construed as anti-positivist). The relevant reasons would have to be prudential, as those are the only remaining reasons relevant in explaining law's conceptual normativity.

As to (2), there is nowhere in the book that deploys a normative methodology. Rapetti (2021: 98) grounds his belief to the contrary in my claim that law, like any other artifact, has a basic function, which is to keep the peace:

> [Himma's] account on law's "conceptual function" raises the first suspicion [that he is making normative claims in addition to purely descriptive claims]…. Himma states that we do not *value* the regulation of behaviour for its own sake, that his argument borrows a device belonging to *normative* political philosophy, that the function of keeping the peace is morally valuable, and that such a function grants the law a claim to *moral legitimacy*. Whereas these two latter statements can be taken as mere side comments, the former two cannot, for they have heavy bearing on the argument he deploys to establish a conceptual connection between law and coercion, i.e. the Coercion Thesis".

It is crucial to note here that the conceptual claim that a necessary condition for something to count as an artifact is that it is contrived to do certain things is a purely descriptive claim — and one that is uncontentious among artifact theorists.[21] Indeed, even art has a basic function: its point, on the prevailing conceptual theory of art, is to induce an aesthetic experience.[22] If, for instance, I throw some logs in a pile, the pile counts as *artificial* but not as *artifactual,* unless I have created it to perform some task or function.

I argued that (1) a normative system cannot count as one of law unless it is reasonably contrived to perform law's basic function of keeping the peace, which is the function it must succeed in performing, at least minimally, to do anything else it can be used to do, and that (2) a normative system is not reasonably contrived to keep the peace among rational self-interested beings like us who inhabit a world of acute material scarcity, where we must compete for everything we need or want, unless some of its norms are backed by the threat of a sanction.

---

20 As discussed above in my replies to Brian Bix and Thomas Bustamante, both Finnis and Dworkin concede that positivism's separability thesis is true of the descriptive use of law. See above for quotes.

21 See note 7, above.

22 See, e.g., Beardsley 1982.

Both of these claims are descriptive. The attribution of a basic function to something is wholly descriptive and does not entail that one *should* use it to perform that function. It is clear that guns have a basic function, namely, to propel a small metallic object at speeds sufficient to pierce bodies and other material objects;[23] but that is obviously consistent with the altogether sensible view that the possession of assault weapons by ordinary citizens should be criminalized. While it is equally clear that nuclear bombs have a basic function ("to cause an explosion"[24]), it is obvious they should not be used except to deter, or defend against, a nuclear attack. These conceptual claims are all purely descriptive.

Rapetti also argues that I make no argument supporting the claim that the basic function of law is to keep the peace, but that is the point of invoking the state-of-nature device. While Hobbes might have been too pessimistic about how bad a state of nature would be, it would nonetheless be bad enough that the vast majority of us would oppose, and vehemently, just repealing the use of enforcement mechanisms. Even libertarians like Robert Nozick[25] do not oppose the existence of the state; they simply claim its only legitimate function, which is a necessary one, is to keep the peace. I see no reason to take a poll to establish something so obvious. I think it fair to say that the evidentiary burden rests with Rapetti to make a case to the contrary if he believes this is false.

Finally, Rapetti (2021: 101) argues "the conclusion that – as a matter of contingent social fact – we are inclined to do as the law commands if it backs its commands with threat of sanctions is drawn by Himma from the fact … that – as a matter of normative objective rationality – we should do so", which Rapetti takes to be normative in character.

There are two problems with this concern: first, I never claim "we are inclined to do as the law commands if … back[ed] … with threat of sanctions." As I indicate in my response to Pintore, I acknowledge in the book that most people do not refrain from murder only— or even primarily — because they do not want to incur a sanction. What I claim — and this is not only a purely descriptive claim but one that strikes me as obvious — is that rational self-interested beings like us who live in a world of acute material scarcity like ours are, all else being equal, are *more likely* to comply with norms prohibiting violence and theft if backed by a sanction than if not backed by a sanction. And that claim/prediction, like the others discussed above, strikes me as obvious enough not to need empirical confirmation in the form of a poll.

Second, the claim that we are more likely to comply with a norm if backed by a sanction than if not backed by a sanction because we converge in believing

23 As *Oxford English Dictionary* defines the term *gun*, it means a "weapon incorporating a metal tube from which bullets, shells, or other missiles are propelled by explosive force."

24 *Oxford English Dictionary*.

25 Nozick 1974.

that we should treat that as an additional reason to comply, has no normative implications. The claim that *we converge in believing* objective norms of practical reasoning requires us to treat a sanction as an additional reason to comply is also a purely descriptive claim with no normative implications. I am merely describing what I take to be our shared beliefs about the matter; I am not making claims about what we should do because it might be good for us.

Accordingly, there is nothing in my defence of the purely descriptive Coercion Thesis that relies either on normative claims or presupposes a normative methodology. Indeed, this should surprise no one. One reason many theorists believe conceptual analysis should not be done is that it has no normative implications. As Richard Posner (1996: 3) expresses the complaint:

> I have nothing against philosophical speculation. But one would like it to have some pay-off; *something* ought to turn on the answer to the question 'What is law?' if the question is to be worth asking by people who could use their time in other socially valuable ways. Nothing does turn on it…. [T]he central task of analytic jurisprudence is, or at least ought to be, not to answer the question 'What is law?' but to show that it should not be asked, because it only confuses matters.

Obviously, I disagree, but not because I think conceptual analysis has normative implications. I disagree because I see no reason to believe that the only theories that are legitimately pursued are those with obvious normative implications. If that were true, then mathematicians should not have pursued, for instance, the theory of imaginary numbers[26] or non-Euclidian geometries that had no such applications before Einstein invented his theories of relativity.[27] It stuns me that Posner's anti-intellectual views here have gained so much traction among legal theorists trained in philosophy.

7 REPLY TO KARA WOODBURY-SMITH

Woodbury-Smith expresses a number of concerns about the arguments in *Coercion and the Nature of Law*, one of which pertains to methodology while the others pertain to substantive claims of the book. As she expresses the methodological concern:

> Engagement with [the book], and with Himma's other writings on legal normativity, is particularly difficult because … we mean different things when we think and write about the conceptual analysis of law as such. I think a conceptual theory of law ought to account for law at its most general, and I mean this in the Hartian sense that it can

26 Imaginary numbers are formed by taking the square root of -1.

27 Non-Euclidean geometries deny Euclid's parallel postulate, which holds that given a line and a point off that line, there is one and only one line passing through that point parallel to the given line.

account for all instances of law anywhere – including Twin Earth, or Heaven. Himma, however, argues that *such a project cannot be done*.[28]

I don't see anything in MCA that entails this. Though I regard MCA as the only viable approach to conceptual analysis, this is consistent with Woodbury-Smith's description of the project. Regardless of how the nature of a kind is determined, the locution *nature of a kind*, as discussed in Chapter 2, refers to those properties that constitute something as an instance of that kind; these properties account "for all instances of law anywhere." The epistemological claim I make should thus be construed as asserting nothing stronger than that the only conditions explaining all instances of law *to which we have epistemic access* are those entailed by *our* conceptual practices.

Indeed, it is crucial to note in this connection that both Raz and Hart adopt a modest methodology. Since I have already reproduced Hart's remarks on the matter in my reply to Pintore, I will confine myself here to what Raz has said:

> The notion of law as designating a type of social institution is not, however, part of the scholarly apparatus of any learned discipline. It is *not* a concept introduced by academics to help with explaining some social phenomena. Rather it is a concept entrenched in our society's self-understanding. It is a common concept in our society and one which is not a preserve of any specialized discipline …. It occupies a central role in our understanding of society, our own as well other societies. In large measure what we study when we study the nature of law is the nature of *our* self-understanding …. It is part of our self-consciousness, of the way we conceive and understand our society.… That consciousness is part of what we study when we inquire into the nature of law.[29]

Raz is also clear in the last sentence of his discussion on the society of angels that his analysis is concerned with our conceptual practices. He says of the normative system of the angels, "If such a normative system has all the features of a legal system described above, then *it would be recognized as one by all* despite its lack of sanctions."[30]

Woodbury-Smith's second worry has to do with my view of what the conceptual normativity of law amounts to. She argues:

> Himma's bar for what constitutes a successful account of legal normativity is higher than what a conceptual theory of law as such needs to offer. Being able to precisely state how law *qua* legal system provides us with objective reasons for complying with its mandatory norms is dependent not only on how we conceive of law as such (in the

28 Woodbury-Smith 2021: 108 (emphasis added).

29 Raz 2009: 31.

30 Raz 2002: 159–160 (emphasis added). This not only begs the empirical question of how people would react, but is also inconsistent with his view that someone counts as having practical authority only if "effective in imposing [her] will on many over whom [she] claims authority." Raz 1994: 211.

Hartian sense), but also on understanding the ways in which humans can be motivated to comply with norms.[31]

On her view, all that is needed to explain the conceptual normativity of law is that it "claims to be a legitimate authority and, as such, claims to provide us with objective reasons for action".[32]

I have two reactions. First, the idea that law claims legitimate authority as a matter of conceptual necessity is contentious and hence does not count as a truism. As I argued in Chapter 5 of *Morality and the Nature of Law*[33] and elsewhere,[34] a legal system is an abstract object *metaphysically incapable* of making claims. It makes no more sense to attribute communicative acts to a legal system than it does, for instance, to attribute such acts to the abstract object to which the numeral "1" refers. And it is implausible to attribute that claim to individual legislators and judges. The only claim of authority that can plausibly be attributed to them on just the basis of their making and adjudicating rules is that they have authority that counts as legal in virtue of being conferred by law. Indeed, it is worth noting in this regard that judges and legislators commonly express their disagreement with a norm or holding by denying its moral legitimacy — and, lately, in an increasingly strident tone that contributes to the increasing polarization in the U.S. between left and right.[35]

Second, just *claiming* to give us reasons to comply is not enough to vindicate the conceptual truism that legal systems are normative. There is nothing in the fact that some system claims to be morally legitimate that it is reasonably likely to motivate someone to comply because it should motivate her to comply; anyone, after all, can claim to have legitimate authority. To claim my account of law's conceptual normativity is too strong is to deny that law is *actually* normative as a matter of conceptual necessity. Claiming to provide reasons might count as *purportedly* normative but it does not count as *actually* normative.

In closing, I want to thank everyone who contributed to the symposium on my book and to the editors of *Revus* for publishing it. While my reviewers and I disagree a great deal, I am grateful that each took the time to share their thoughts on my work. I learned much from their reviews.

31 Woodbury-Smith 2021: 109.

32 Woodbury-Smith 2021: 112.

33 Himma 2019.

34 See Himma 2001.

35 Antonin Scalia was especially aggressive in expressing his views about the legitimacy of decisions he disagreed with. See, e.g., Stern 2015. But he is far from unique in couching his disagreement in such moral terms.

Bibliography

Beardsley, M. (1982). *The Aesthetic Point of View*. Cornell University Press.

Bix, B. H. (2021). Coercion, function, and the "why" of law. Comments on Kenneth Einar Himma's *Coercion and the Nature of Law*. *Revus. Journal for constitutional theory and philosophy of law*, 45, 31–38. https://doi.org/10.4000/revus.7532

Burazin, L. (2023). Law as an Artifact. In Mortimer Sellers & Stephan Kirste (eds.), *Encyclopedia of the Philosophy of Law and Social Philosophy* (pp. 1845–1850). Springer. https://doi.org/10.1007/978-94-007-6519-1

Bustamante, T. (2021). Should the Coercion Thesis really be defended as a *conceptual* claim? A Dworkinian rumination on Himma. *Revus. Journal for constitutional theory and philosophy of law*, 45, 39–56. https://doi.org/10.4000/revus.7565

Di Lucia, P. & Passerini Glazel, L. (2021). The first and the last word. Critical remarks on Himma's philosophical enterprise. *Revus. Journal for constitutional theory and philosophy of law*, 45, 57–69. https://doi.org/10.4000/revus.7612

Dworkin, R. (1986). *Law's Empire*. Harvard University Press.

Finnis, J. (1996). The Truth in Legal Positivism. In Robert P. George (ed.), *The Autonomy of Law* (pp. 195–214). Clarendon Press.

Hart, H.L.A. (2012). *The Concept of Law* (3rd ed.). Oxford University Press.

Himma, K. E. (2001). Law's Claim of Legitimate Authority. In Jules L. Coleman (ed.), *Hart's Postscript: Essays on the Postscript to the Concept of Law*. Oxford University Press.

Himma, K. E. (2019). *Morality and the Nature of Law*. Oxford University Press.

Himma, K. E. (2020). *Coercion and the Nature of Law*. Oxford University Press.

Jackson, F. (2021). Conceptual analysis and the Coercion Thesis. *Revus. Journal for constitutional theory and philosophy of law*, 45, 71–77. https://doi.org/10.4000/revus.7594

Nozick, R. (1974). *Anarchy, State, and Utopia*. Basic Books.

Pintore, A. (2021). Which coercion, which method, which normativity? Observations on Kenneth E. Himma's *Coercion and the Nature of Law*. *Revus. Journal for constitutional theory and philosophy of law*, 45, 79–92. https://doi.org/10.4000/revus.7647

Posner, R. (1996). *Law and Legal Theory*. Clarendon Press.

Preston, B. (2022). Artifact. In Edward N. Zalta & Uri Nodelman (eds.), *The Stanford Encyclopedia of Philosophy*. <https://plato.stanford.edu/archives/win2022/entries/artifact/>.

Rapetti, P. A. (2021). Law's function, descriptive conceptual analysis, and legal positivism. Some methodological qualms. *Revus. Journal for constitutional theory and philosophy of law*, 45, 93–105. https://doi.org/10.4000/revus.7665

Raz, J. (1994). *Ethics in the Public Domain*. Clarendon Press.

Raz, J. (2002). *Practical Reason and Norms*. Oxford University Press.

Raz, J. (2009). Can There Be a Theory of Law? In Joseph Raz, *Between Authority and Interpretation* (pp. 17–46). Oxford University Press.

Stern, M. (Feb. 24, 2015). Scalia on Supreme Court gay marriage ruling: invalid, illegitimate. Slate. https://slate.com/human-interest/2015/09/scalia-on-supreme-court-gay-marriage-ruling-invalid-illegitimate.html

Woodbury-Smith, K. (2021). Legal normativity in Kenneth Einar Himma's *Coercion and the Nature of Law*. *Revus. Journal for constitutional theory and philosophy of law*, 45, 107–119. https://doi.org/10.4000/revus.7699

Synopsis

David Duarte

Rights as formal combinations of normative variables

SLOV. | *Pravice kot formalne kombinacije normativnih spremenljivk*. Čeprav je v luči Hohfeldovih predpostavk njegova razpredelnica pravnih položajev povsem utemeljena, se zdi, da jo pestijo prav tiste hibe, ki jih je mogoče pripisati omenjenim predpostavkam. Natančneje gre za predpostavki, da norma ni nujni pogoj za pravni položaj in da je eno samo dejanje v korelativni vrsti zadosten pogoj za to, da se povzroči rezultat. S preprostim predlogom poposameznjenja ali individuacije norme avtor v tem članku ponudi povsem na normah osnovano razpredelnico pravnih položajev, v kateri je upoštevano tudi hkratno delovanje korelativnih igralcev (ne da bi bila ogrožena atomičnosti). Ker je pravni položaj zgolj rezultat neke kombinacije normativnih spremenljivk, ta pristop prinaša strogo formalno sestavo pravnih položajev na način, ki izpodbija vlogo, ki so jo doslej imele tradicionalne teorije pravic.

Ključne besede: Hohfeld (Wesley Newcomb), pravne norme, pravni položaji, korelacijske vrste, korelacijski igralci

ENG. | Hohfeld's table of legal positions, though highly consistent under his own assumptions, seems to be vulnerable to the exact flaws assignable to those assumptions. Specifically, the assumptions that a norm is not a necessary condition of a legal position and that one single action in a correlativity line is sufficient to bring about the action's result. With a simple proposal of norm individuation, this paper develops a totally norm-based table of legal positions in which co-action from correlated agents is also considered (without threatening atomicity). Since a legal position is just the result of a combination of normative variables, the present approach leads to a strictly formal composition of legal positions in a way that challenges the role played so far by the traditional theories of rights.

Keywords: Hohfeld (Wesley Newcomb), legal norms, legal positions, correlativity lines, correlated agents

4.1 Duty not to defeat and duty not to: Adaptative content – 4.2 Liberties are protected: Weak and strong protections – 5 First order positions: Duty and claim-right – 5.1 Waiving: Weak and strong waiving and non-waivability – 6 Second order positions: Power and duty not to defeat – 6.1 Without power: Disability and immunity are not legal positions – 7 A table of legal positions: Five atomic positions – 8 Sets of addressees: Who, how many and how – 9 Correlativity: Assuming asymmetry and differentiating directedness – 10 The formality of rights: Combining normative variables – 10.1 Why theories of rights are almost useless: Facing epistemic insufficiency

David Duarte is an Associate Professor at Lisbon Legal Theory. University of Lisbon (Portugal) | E-mail: davidduarte@fd.ulisboa.pt

Synopsis

Miklós Könczöl

Parental proxy voting and political representation

SLOV. | *Zastopniško glasovanje staršev in politično predstavništvo.* V prispevku je predstavljen predlog, da se staršem podelijo dodatni glasovi, ki jih lahko oddajo kot zastopniki v imenu svojih otrok. Proučene so utemeljitve glasovanja na voltivah po starševskem zastopanju s poudarkom na različnih razlagah pojma "zastopnik". V prvem delu razprave je ocenjena trditev, da zastopniško glasovanje staršev ne krši načel enake in neposredne volilne pravice. V nasprotju z zagovorniki zastopniškega glasovanja staršev avtor trdi, da starševskega glasovanja v imenu otrok ni mogoče šteti zgolj kot izraz političnih preferenc otrok in da osebe, za katere velja, da same ne morejo sprejemati odločitev, ne morejo biti zastopane na takšen način. Zastopniško glasovanje staršev tem dejansko podeljuje dodatne glasovalne pravice, njihovim preferencam pa v postopkih odločanja daje dodatno težo. V drugem delu razprave so starši obravnavani kot mogoči zastopniki interesov otrok, pri čemer naj bi bili dodatni glasovi staršev namenjeni njihovi prevladi nad interesi starejših ali tistih, ki niso starši. Tako razumljeno zastopniško glasovanje staršev bi lahko podprli s trditvijo, da starši bolje zastopajo interese svojih otrok kot povprečni volivci. Predlogi zastopniškega glasovanja staršev se običajno sklicujejo na to, da imajo starši boljši dostop do informacij, da imajo z otroki skupne interese in/ali da so nesebični. Avtor pokaže, da so ti argumenti bodisi nepomembni bodisi vprašljivi in zato dejansko ne govorijo v prid uvedbi zastopniškega glasovanja staršev. Čeprav se to običajno prikazuje kot sredstvo, ki hkrati omogoča večjo demokratičnost in previdnost političnih odločitev, avtor opozarja, da to ne drži. In ker omenjenih ciljev ni mogoče doseči z eno samo institucijo, bo za njuno uresničitev treba poiskati več različnih metode.

Ključne besede: politično predstavništvo, glasovanje, volilna pravica, starostna diskriminacija, zastopniško glasovanje staršev

ENG. | This paper reviews the proposal to give parents extra votes that they can cast as proxies on behalf of their children. Justifications of parental proxy voting (PPV) are examined with a focus on various interpretations of the concept of 'proxy'. The first part of the paper assesses the notion that PPV does not violate the principles of equal and direct suffrage. Contrary to proponents of PPV, I argue that parents voting on behalf of their children cannot be con-

sidered as merely expressing children's political preferences, and that persons who are taken to be unable to make a decision themselves cannot be represented in this way. Thus, PPV actually allocates extra voting rights to parents, giving additional weight to their preferences in decision-making. The second part turns to parents as possible proxies for children's interests, with their extra votes being meant to overweigh those of the elderly or of non-parents. PPV thus understood could be supported by the claim that parents are better situated to represent their children's interests than the average voter. Proposals of PPV usually refer to parents' better access to information, their shared interests with their children, and/or their selflessness. These arguments are, however, either irrelevant or questionable, and do not therefore actually speak in favour of the introduction of PPV. In conclusion, while PPV is usually depicted as making political decisions simultaneously more democratic and more prudent, it does neither. Since these aims cannot be achieved through a single institution, different methods to achieve each aim need to be explored.

Keywords: political representation, voting, suffrage, age discrimination, parental proxy voting

Miklós Könczöl is a research fellow at the Centre for Social Sciences, Institute for Legal Studies, and associate professor at Pázmány Péter Catholic University, Faculty of Law, Budapest (Hungary) | E-mail: konczol.miklos@jak.ppke.hu

Synopsis

Bartosz Brożek

Ciencia cognitiva y la naturaleza del derecho

SLOV. | *Kognitivne znanosti in narava prava.* Cilj članka je preučiti, kako bi odkritja kognitivnih znanosti lahko vplivala na ontologijo prava. Avtor najprej ovržbe argument, da je naša pojmovna shema - in z njo naša osnovna ontologija - apriorna v odnosu do katerega koli znanstvenega nauka. Nato na podlagi sodobnih evolucijskih scenarijev in nevroznanstvenih naukov skicira nastanek kulture. Končno pojasni, da pravilno razumevanje prava ni in ne more biti samo eno, iz česar sledi, da je prav mogoče razviti več konkurenčnih in vendar enako sprejemljivih ontologij prava.

Ključne besede: pravo, kognitivne znanosti, pravna onologija, imitacija, narava prava, ravnanje po pravilih

ENG. | *Cognitive science and the nature of law.* The goal of the paper is to consider the possible impact of the discoveries in cognitive science on legal ontology. I begin by rebutting an argument to the effect that our conceptual scheme – and hence our basic ontology – is a priori in relation to any scientific theory. Then I sketch a picture of the emergence of culture as found in the recent evolutionary scenarios and neuroscientific theories. Against this background I argue that there is no – and there cannot be – one correct understanding of what the law is, which explains why it is possible to develop competing, but equally acceptable legal ontologies.

Keywords: law, cognitive science, legal ontology, imitation, the nature of law, rule-following

Bartosz Brożek is Professor of Law and Philosophy, Jagiellonian University, Krakow (Poland) | Address: Department for the Philosophy of Law and Legal Ethics, Jagiellonian University, Bracka Str. 12, 31-005 Krakow, Poland | E-mail: bbroze@yahoo.com

Synopsis

Johan Hermansson

Structuring concepts of legal personhood
On legal personhood as a cluster property

SLOV. | *Strukturirajoči pojmi pravne osebnosti.* Pravne osebe se je običajno opredeljevalo kot subjekte s pravnimi pravicami in/ali dolžnostmi. To tradicionalno pojmovanje pravne osebnosti je bilo v zadnjih desetletjih postavljeno pod vprašaj. V pravni praksi je prišlo do tega z globalnim razvojem prava, ker so bile prejšnjim pravnim neosebam, kot so različne nečloveške naravne entitete, nečloveške živali, zarodki in umetne inteligence, pripisane oz. Dodeljene pravne pravice in/ali status pravnih oseb (ali pa je bilo vsaj predlagano, da se jim jih dodeli). V pravnem nauku je bilo običajno pojmovanje postavljeno pod vprašaj med drugim s Kurkijevo teorijo pravne osebnosti kot svežnja pravic. Namen tega članka je podati kritično oceno pojma pravne osebnosti, ki izhaja iz omenjene teorije. Po obravnavi opredelitvenih strukturiranih tradicionalnih pojmov pravne osebnosti in Kurkijevega argumenta proti njim se avtor osredotoči na prvo glavno načelo teorije svežnjev, in sicer da je pravna osebnost prototipno strukturirana lastnost, sestavljena iz več ločenih, a med seboj povezanih elementov. Avtor utrjuje, da je takšen pojem nevzdržen, saj pravna osebnost pravnih oseb v pozitivnem pravu ni strukturirana na takšen način. Končno pa avtor predlaga, da uporabljamo dvojno strukturirani pojem pravne osebnosti, ki ohranja prednosti prejšnjih pojmov, obenem pa se izogne njihovim glavnim pomanjkljivostim.

Ključne besede: pravna oseba, pravna osebnost, teorija svežnjev, Kurki (Visa), pojmovna struktura

ENG. | Legal persons have traditionally been understood as entities with legal rights and/or duties. This traditional concept of legal personhood has been challenged during the last decades: In legal practice through the global development in law where previous legal non-persons such as different non-human natural entities, non-human animals, fetuses and artificial intelligences have been ascribed, or been proposed to be ascribed, legal rights and/or status as legal persons; in legal theory through, inter alia, Visa Kurki's Bundle Theory of Legal Personhood. The purpose of this paper is to critically assess the concept of legal personhood proposed in the Bundle Theory. After discussing the definitional structured traditional concepts of legal personhood and Kurki's argument

against them, I will focus on the first main tenet of the Bundle Theory: That legal personhood is a prototype structured cluster property which consists of incidents which are separate but interconnected. I will argue that such a concept is untenable since the legal personhood of legal persons in positive law is not structured in this way. Lastly, I will suggest the use of a dual structured concept of legal personhood that maintains the benefits of previous concepts but avoids their major deficiencies.

Keywords: legal person, legal personhood, the bundle theory of legal personhood, Kurki (Visa), conceptual structure

Johan Hermansson is a Doctoral Candidate in Jurisprudence at the at Department of Law, Lund University (Sweden) | Address: Lunds universitet, Juridiska fakulteten, Lilla Gråbrödersgatan 4–6, 221 00 Lund, Sweden w E-mail: johan.hermansson(at)jur.lu.se

Synopsis

Ana Lúcia Costa

Vulnerability, sexual violence and the law
A conceptual analysis

SLOV. | *Ranljivost, spolno nasilje in pravo: pojmovna analiza.* Ta članek preučuje pojem ranljivosti in je zamišljen kot odgovor na delo Susanne Pozzolo. Čeprav se z avtorico strinjam o uporabnosti pojma ranljivosti kot hevrističnega instrumenta za izpostavljanje pomanjkljivosti v zakonih o spolnem nasilju, se moj pogled od njenega razlikuje v dveh točkah: v zavračanju razumevanja telesa kot vira ranljivosti žensk za spolno nasilje in pri upoštevanju vzajemno neizključujočega razmerja med ranljivostjo in avtonomijo, ki je pomembno v zvezi s spolnim nasiljem. Nadalje razpravljam o polisemični naravi ranljivosti in težavah pri uporabi tega pojma v primerih spolnega nasilja, ki izhajajo iz te narave. Zaključim z upanjem, ki ga navdihuje premišljevanje o feminističnem političnem boju za pomen ranljivosti.

Ključne besede: ranljivost, spolno nasilje, ženske, avtonomija, soglasje, ženski stereotipi

ENG. | This article examines the concept of vulnerability and is envisioned as a reply to the work of Susanna Pozzolo. Although agreeing with the author on the usefulness of vulnerability as a heuristic instrument to make visible the flaws on the laws on sexual violence, I differ from her in rejecting to consider the body as a source of women's vulnerability to sexual violence and in considering the non-mutually exclusive relation between vulnerability and autonomy relevant in what regards sexual violence. I further discuss the polysemic nature of vulnerability and the difficulties with the use of the concept in cases of sexual violence, which arise from that nature. I finish with a note of hope by considering the feminist political struggle over the meaning of vulnerability.

Keywords: vulnerability, sexual violence, women, autonomy, consent, female stereotypes

Ana Lúcia Costa is Margarita Salas Postdoctoral Fellow, Law and Philosophy Research Group, Law Department, Pompeu Fabra University, Barcelona, Spain | E-mail: analucia.correiadacosta@gmail.com

Synopsis

Kenneth Einar Himma

In defence of the Coercion Thesis and modest conceptual methodology

A reply to critics

SLOV. | *V bran tezi o prisili in zmerni pojmovni analizi.* To je avtorjev odgovor na Revusov simpozij o njegovi knjigi *Coercion and the Nature of Law* (OUP 2020). Knjiga je imela dva glavna cilja. Prvi je bil pokazati, da je za obravnavo normativnega sistema kot pravnega sistema nujnen pogoj to, da sistem vključuje prepovedi nasilja in kraje, ki sta podkrepljeni s sankcijo, ki neupoštevanje sistema na razumen način odvrača v tolikšni meri, da temu omogoča minimalno izvrševanje svoje naloge ohranjanja miru (to je t. i. Teza o prisili). Drugi cilj knjige sta bili obramba in ponazoritev metodologije zmerne pojmovne analize po opredelitvi Franka Jacksona. V simpoziju o knjigi, ki je bil objavljen v *Revusu* (2021) 45, so sodelovali Brian Bix, Thomas Bustamante, Frank Jackson, Paolo Di Lucia in Lorenzo Passerini Glazel, Anna Pintore, Pablo Rapetti in Kara Woodbury-Smith.

Ključne besede: pravo, prisila, sankcija, zmerna pojmovna analiza, normativnost, funkcija prava

ENG. | This is the author's reply to a book symposium on law and coercion. Himma's book – Coercion and the Nature of Law (OUP 2020) – had two principal objectives. The first was to show it is a necessary condition for a normative system to count as one of law that it includes prohibitions on violence and theft that are backed by detriment that counts as a sanction in virtue of being reasonably contrived to deter enough noncompliance to enable the system to minimally achieve its function of keeping the peace (the Coercion Thesis). The second was to defend and illustrate the methodology of modest conceptual analysis as defined by Frank Jackson. The book was critically discussed by Brian Bix, Thomas Bustamante, Frank Jackson, Paolo Di Lucia and Lorenzo Passerini Glazel, Anna Pintore, Pablo Rapetti and Kara Woodbury-Smith in the 45th issue of Revus.

Keywords: law, coercion, sanction, modest conceptual analysis, normativity, law's function

Kenneth Einar Himma is a Continuing Guest Professor at the at Faculty of Law, University of Zagreb (Croatia) | Address: Trg Republike Hrvatske 14, 10000 Zagreb, Croatia | E-mail: khimma@gmail.com