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Maciej Juzaszek*

Durkheimian utilitarianism and legal moralism

The paper concerns the classical problem of legal moralism, i.e. whether enforcement of morality by the state is justified, even if nobody is harmed. In the article, I analyze Durkheimian utilitarianism, Jonathan Haidt's normative theory of public policies and the law, based on his psychological moral foundations theory. First, I describe Durkheimian utilitarianism and argue how it can be understood as a theory of legal moralism. Then, I subject it to criticism, using five challenges developed by Petersen (2019): the challenge from relativism, the empirical challenge, the no difference challenge, the levelling-down challenge, and the weighing challenge. It leads to the conclusion that Durkheimian utilitarianism, even if it deals with some of the challenges, still suffers from problems that do not allow it to be a fully developed theory of legal moralism.

Keywords: legal moralism, Durkheimian utilitarianism, enforcement of morality, Haidt (Jonathan), Durkheim (Emile), moral foundations

1 INTRODUCTION

In 1959, Lord Patrick Devlin (1965) delivered a Maccabean lecture on jurisprudence at the British Academy under the title *The Enforcement of Morals*. The lecture was a reaction to the publication of the Wolfenden Report, which proposed the decriminalization of male homosexual conduct in Great Britain. This moment is considered the beginning of the modern discussion on whether the state has a right to enforce morality, mainly by criminalizing immoral acts, even if they cause no harm. The doctrine giving a state such a right is called in jurisprudence *legal moralism*. It involved Devlin and Herbert Hart (1967; see Bassham 2012) for the first few years. However, after criticism from authors such as Ronald Dworkin (1965) and Joel Feinberg (1990), legal moralism was treated with at least as much reserve as an illiberal and unpopular position. Although in a liberally oriented philosophy of law it remains a minority view, new moralistic theories and arguments supporting them have been constantly developed by, among others, Robert P. George (1995), John Kekes (2000), Michael Moore (1995) and most recently, Antony Duff (2018).

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To find a common thread among various theories, I adopt a similar understanding of legal moralism as Thaysen (2015: 190), who defines it as a doctrine according to which "[f]or any X, it is always a pro tanto reason for justifiably imposing legal regulation on X that X is morally wrong (where 'morally wrong' is not conceptually equivalent to 'harmful')." As Thaysen (2015: 191–199) shows, such a definition allows interpreting legal moralism broadly to include many different approaches, not only those referring to criminalizing particular types of offences just because they are immoral but also those enforcing morality by the tax law, contract law or family law. In this paper, I discuss the theory of Durkheimian utilitarianism. Although it is not directly a theory of criminalization but a normative theory of law and public policies, I believe it may be a source of possible moralistic justification for the criminalization of wrongdoing because it gives pro tanto reasons for criminalization. The creator of this theory is not a philosopher or legal scholar but a well-known American moral psychologist, Jonathan Haidt. He first presented the Durkheimian version of utilitarianism in his famous book, *The Righteous Mind* (2013).

Unfortunately, Haidt explored his normative ideas in a very rudimentary and sweeping way.[1] Thus, in this paper, I discuss its charitable interpretation (offered and discussed in detail elsewhere (Juzaszek 2022[2])), which I call, using the term proposed by Haidt himself, *Durkheimian utilitarianism*.[3] Furthermore, the paper aims to offer new arguments in discussing the moral justification for the legal enforcement of morality to make it ongoing, which is a positive thing, no matter what position one takes. Supporters of legal moralism can find new arguments backing their position. In contrast, those who deny legal moralism can confront their beliefs with opposing arguments and refine their theory so that it is more resistant to potential criticism.[4]

1 Good example is a reference to Durkheim's theory. Haidt's goal is not to capture the real essence of this French sociologist's thought but rather to select such elements that aged well and fit Haidt's theory. That is why we will not find an in-depth analysis of the concepts of anomie or homo duplex in *The Righteous Mind.* Therefore, the Durkheimian component in Durkheimian utilitarianism is not the French sociologist's idea but rather Haidt's interpretation of it. Just for the record, it seems that Hart in his discussion with Devlin did the same thing with Durkheim's ideas (see Lukes & Prabhat 2012).

2 In this paper, I made a silly slip, labelling Durkheim as German, while, of course, he was French.

3 To be conceptually clear: when I refer in the paper to the Durkheimian version of utilitarianism, I have in mind the idea expressed explicitly by Haidt, mainly in *The Righteous Mind*; and when I refer to Durkheimian utilitarianism, I have in mind a coherent theory resulting from my charitable reconstruction of Haidt's ideas, which may differ (and probably differs) from what he had really in mind. Moreover, I use the term 'moral foundations' as psychological, evolutionary human traits in contrast to 'Moral Foundations' (capitalized) as normative values. According to this terminology, moral foundations theory concerns moral foundations and Durkheimian utilitarianism Moral Foundations.

4 What is important, in the paper I do not present my personal view on whether Durkheimian utilitarianism is a correct theory of morality or criminalization.

2 WHAT IS DURKHEIMIAN UTILITARIANISM?

Haidt (2013: 359) defines the Durkheimian version of utilitarianism as "utilitarianism done by somebody who understands human groupishness." It is a normative ethical theory addressed to law- and policymakers (in contrast to normative ethics for individuals) concerning the creation and implementation of laws and public policies.[5] As Haidt (2013: 441) explains,

> I don't know what the best normative ethical theory is for individuals in their private lives. But when we talk about making laws and implementing public policies in Western democracies that contain some degree of ethnic and moral diversity, then I think there is no compelling alternative to utilitarianism. The important part I think Jeremy Bentham was right that laws and public policies should aim, as a first approximation, to produce the greatest total good.

Contrary to Bentham's theory, the Durkheimian version of utilitarianism is *rule utilitarianism*, whose primary focal points are rules of conduct (not the acts of individuals, as in act utilitarianism). These rules are justified by constituting well-being (Haidt 2013: 441), and they justify the state's and authorities' actions. Moreover, Haidt declares himself as a proponent of *value pluralism*, as he follows Berlin (1969) and Shweder (1991) in "believing that there are multiple and sometimes conflicting goods and values" (Haidt 2013: 441). Thus, Durkheimian utilitarianism treats well-being as constituted by the plurality of values, taking Haidt's Durkheimian version of utilitarianism as a starting point.

We could interpret this value pluralism in two ways. First, we may say that instrumental values are just means to maximize one's well-being, which is the ultimate, non-instrumental value. But that means that well-being is built up by these instrumental values, which can be attained over time, similarly to pleasure in hedonistic theories. The more pleasure, the higher one's well-being is. And if we assume that there are many instrumental values, then one can gain well-being just by attaining one of them in a significant volume while ignoring the others. According to the second interpretation, values are non-instrumental and good in themselves, together constituting one's well-being. That means that well-being is not a different, higher value achieved from calculating instrumental values but is a state in which all non-instrumental values are ensured. One cannot achieve well-being when these non-instrumental values are ignored.

I believe that Durkheimian utilitarianism assumes the latter view. Considering that the ideal of Durkheimian utilitarianism is a society that includes all of the Moral Foundations in its public policies and regulations (contrary to societies based on individualistic or binding ones). Therefore, in this interpretation, Moral Foundations are non-instrumental values which constitute one's well-being (cf. Griffin 1989: 44-55). The mechanism behind it is explained

5 Similar theory is e.g. Krzysztof Saja's (Saja 2019, Saja 2020) Institutional Function Consequentialism.

later in the Durkheimian part. However, the question remains whether there is only one, the best possible equilibrium of non-instrumental goods, which constitutes well-being (monistic view) or whether there are many possible equilibriums that all constitute similar well-being (pluralistic view). Again, considering Haidt's central theme that the moral system of a particular society is grounded in the conditions this society lives in and that different moral systems are based on various equilibriums of moral foundations are equally good, I believe Durkheimian utilitarianism supports the pluralistic view. Therefore, there are many equally good equilibriums of non-instrumental Moral Foundations. But this issue will come back later.

Few theories combine both utilitarianism and pluralism of non-instrumental values, and those that do usually refer to so-called objective lists of goods (e.g. Griffin 1986 or Fletcher 2013). Referring to Crisp's (2006: 102-103) distinction between enumerative and explanatory objective list theories, Durkheimian utilitarianism is the latter. It not only enumerates the goods that should be pursued, as enumerative theories do but also explains the higher purpose of placing goods on the list. The explanatory nature of Durkheimian utilitarianism is a form of moral perfectionism based on realizing a specific vision of human nature. What goods are on the list? To explain it, I consider two other Haidt's ideas: a) *moral foundations theory* to find out which values are on the list and b) *homo duplex view of human nature* to justify why these particular values are on the list.

Moral foundations theory is a psychological theory developed by Haidt to explain the diversity of moralities across societies. It proposes that there are "cognitive modules upon which cultures construct moral matrices" (Haidt 2013: 146). These modules are called moral foundations, and moral systems worldwide are built upon them. They evolved as responses to adaptive challenges (e.g. reaping benefits from relationships) and initially reacted to original triggers (e.g. cheating) by activating characteristic emotions (e.g. anger). Nowadays, they react with the same emotions to current triggers (e.g. broken vending machines). They are also related to moral virtues (e.g. justice or equality). All the examples mentioned above refer to a foundation of fairness/cheating. The other moral foundations distinguished by Haidt are care/harm, loyalty/betrayal, authority/subversion, sanctity/degradation and liberty/oppression (see Haidt 2013: 146). Fairness/cheating and care/harm are called individualist foundations, while loyalty/betrayal, authority/subversion and sanctity/degradation are binding moral foundations.[6] According to Haidt, Western liberal cultures are more focused on the former, while more conservative societies (he mentions, e.g. India) are more focused on the latter.

6 The status of liberty/oppression is, according to Haidt, dualistic, depending on its interpretation.

Significantly, moral foundations theory limits our moral domain to values that are eventually reduced to moral foundations. As a human species, we treat certain things as moral values (e.g. justice) and not others (e.g. having blue eyes) because we evolved in that direction. In his criticism of Sam Harris' theory, Haidt (2014) claims that there is a type of facts significantly different from the facts of science, which he calls "emergent culture-specific anthropocentric truths" and believes that "moral truths are of this sort". Based on this metaphysical claim, let me present two main philosophical assumptions underlying Durkheimian utilitarianism.[7]

First, moral truths are not universal truths that exist independently of human beings (strong-mind independence). However, they also are not subjective; they depend only on an individual's beliefs (strong mind-dependence). They are objective in the sense of objectivity, "on which these theorists insist when they ascribe a dispositive fact-constituting role to collectivities while denying any such role to separate individuals" (Kramer 2009: 4). Second, there is a limited moral domain beyond which humans cannot reach. The only values we know as humans are moral foundations that evolved with us or their derivatives (i.e. values that can be either reduced to moral foundations or instrumental in relation to them).[8] This means that if the environmental conditions were different, completely different moral foundations might have developed, and cultures and societies could have adopted moral foundations that are entirely different from those adopted today. Although moral foundations are deeply embedded in our minds, it is not impossible that, in a few hundred years, evolution will cause moral foundations to change. Maybe there will be more (or fewer) of them; maybe they will be different. But now they are all we have.

From a descriptive point of view, the function of morality is, as Haidt (2013: 314) argues, to suppress or regulate self-interest and make cooperative societies possible. However, from a normative point of view, morality is also defined by its function, which is the realisatization of human nature, which leads to human well-being. The version of human nature that Haidt (2013: 344) adopts is "a view of humankind as being Homo duplex [...], which means that we humans need access to healthy hives to flourish (that's the Durkheimian part)." He claims that lawmakers and policymakers must recognize this because it will help people achieve a positive, utilitarian goal—it will make them flourish and ultimately achieve their well-being. That is why, when Haidt (2013: 316) presents his view of the normative theory of public morality, he immediately adds, "I just want Bentham to read Durkheim and recognize that we are a homo duplex".

7 Importantly, I do not claim that Haidt himself accepts them, they are the assumptions underlying the possible, charitable interpretation of his ideas.

8 I assume that Haidt is right about the catalogue of moral foundations. However, I am taking into account that due to the future research done by moral psychologists, moral sociologists and evolution researchers it may be modified or even completely changed.

Haidt believes that classic utilitarianism does not lead to the best possible results because it treats people as one-dimensional and ignores their social aspects, represented by binding moral foundations. To explain this idea, Haidt refers to the concept of the homo duplex, put forth by Durkheim (2005a: 44) in the following way:

> [W]e are formed by two parts, and are like two beings who, even in their association, are made of very different elements and move us in opposite directions […] the double existence that we lead […] one purely individual, which has roots in our organism, the other social, which is nothing except an extension of society.

Haidt's interpretation is that human nature simultaneously exists on two levels because they are driven by two types of impulses or sentiments: selfish and social. The former are individualist instincts, and the latter are the effects of society's influence on the individual. Therefore, if selfish feelings, such as honour, respect, attachment or fear, can be explained by natural selection at the individual level, social sentiments can be explained by natural selection at the group level. In this context, collective sentiments are critical, activated by binding moral foundations.

A human, as homo duplex, needs the stimulation of their social sentiments from culture, society or state. However, suppose these structures withdraw from the moral sphere, leaving individuals with only their moral compass and relations with their immediate surroundings, family or friends. In that case, this may lead to a disturbance of the fragile balance of human nature. According to Durkheim (2014), the process of changing society from mechanical solidarity (similarities between individuals and standard social norms for everyone) to organic solidarity (differences between individuals, different moral norms and the prioritization of individual reflection) can lead to a. state of anomie (or anomy), i.e. a condition of society in which it is uncertain which social rules should be followed because the old ones do not really fit into the new social reality, and new ones have not yet formed. As Durkheim (2005b: 214) writes:

> [a]t the very moment when traditional rules have lost their authority, the richer prize offered these appetites stimulates them and makes them more exigent and impatient of control. The state of de-regulation or anomy is thus further heightened by passions being less disciplined, precisely when they need more disciplining.

People who experience anomy feel detached from society and may not see norms and values that they think are important. Feeling useless and deprived of an essential role in society can expose them to deviations, mental disorders, or even suicide. Durkheim (2005b: 219) claims that

> [a]nomy, therefore, is a regular and specific factor in suicide in our modern societies; […]. The third sort of suicide, the existence of which has just been shown, results from man's activity's lacking regulation and his consequent sufferings. By virtue of its origin we shall assign this last variety the name of anomic suicide.

Durkheimian utilitarianism proposes that responding to anomy should involve enforcing laws and policies that implement binding foundations to improve social cohesion and, as a result, individuals' identity.

3 DURKHEIMIAN UTILITARIANISM AS LEGAL MORALISM

Considering that Durkheimian utilitarianism postulates the implementation of a specific moral system (based on Moral Foundations and a particular vision of human nature) into public policies and legal regulations, it may be treated as a theory justifying the enforcement of morality by the law. First, however, an important point needs to be made. Durkheimian utilitarianism aims to promote well-being in society as a whole. It means that it does not justify particular norms of policies independently of each other; it validates the whole system aimed to make human beings flourish. Thus, a particular element of the system does not need to be justified by all Moral Foundations altogether (both individualistic and binding); some may be based on Care/Harm, others on Sanctity/Degradation. These various Moral Foundations just need to be reflected and balanced in the system taken as a whole, creating equilibrium. For example, let us imagine a fictional state - the Republic of Polavia, whose criminal law is built according to Durkheimian utilitarianism. Most criminal offences are justified by the harm principle (e.g. murder or theft), understood traditionally in Mill's terms, representing the Care/Harm foundation. However, in Polavian criminal law, there are also offences based on other moral foundations, such as the prohibition of consensual incest between adults (based on Sanctity/Degradation), the prohibition of destroying the national flag (based on Authority/Subversion) or conspiracy with national enemies (on Loyalty/Betrayal) Thanks to that, the Polavian legal system is harmonious because, as a whole, it balances all the moral foundations according to homo duplex human nature and constitutes the well-being of Polavian citizens.

Thus, in the paper, I will focus on the version of legal moralism rising from Durkheimian utilitarianism (hereafter called DU-legal moralism), which claims that, for any X, there is always a pro tanto reason for justifiably imposing legal regulation on X iff X is morally wrong in society A (where "morally wrong" is understood as conflicting with the moral system based on a particular equilibrium of Moral Foundations in society A and is not conceptually equivalent to "harmful") and that criminalizing X will complement the system by helping human nature (i.e. homo duplex) to flourish and as a result contribute to the well-being of the members of society A.

4 CHALLENGES

The question is whether DU-legal moralism is a reasonable idea. To answer it, I will refer to a set of possible challenges to moralistic criminalization theories provided by Petersen (2019: 57-91). These are "the challenge from relativism," "the empirical challenge," "the no difference challenge," "the levelling-down challenge", and "the weighing challenge." I will confront Durkheimian utilitarianism with them not only to identify the possible weaknesses of the theory but also to better understand what DU-legal moralism is.

4.1 Challenge from relativism

The challenge from relativism concerns which kind of morality the law should enforce. According to Thaysen (2015: 191-195), we may distinguish between legal moralisms referring to positive morality and those referring to critical morality. Such a distinction is taken from Hart (1963: 20), who wrote about descriptive, positive morality (i.e. moral principles actually held by a given community) and normative, critical morality (i.e. correct moral principles that serve to criticize positive morality). The following example may illustrate this distinction. Forty years ago, drunk driving could be construed as a part of positive morality in the Polish People's Republic; many people believed there was nothing wrong with such behaviour. However, it is wrong according to critical morality. But Polish positive morality has changed, and today there is no such discrepancy between what is morally wrong (according to critical morality) and what is believed to be morally wrong (according to positive morality).

If we believe that legal moralism refers to positive morality, it may lead to moral relativism. In such a case, the law should enforce whichever morality is shared in a given community, even if it seems wrong according to the positive morality of another community or vision of critical morality. For example, some societies accepted slavery, racial segregation or discrimination against women as part of their moral systems, and one may say they had a right to enforce these convictions legally. This conclusion, however, opposes our basic intuitions that slavery, racial segregation or discrimination against women are morally wrong and should never be executed by the law.

This argument can be used against, e.g. Devlin's theory of legal moralism. Legal moralists can deal with the challenge from relativism by claiming that it is not positive morality but critical morality that the law should enforce. In such a case, legal regulations should reflect what is right and wrong from a critical point of view rather than what people think is right or wrong. For instance, we may claim that homosexual acts should not be criminally prohibited, even in a society of homophobes (who are morally mistaken), or that criminalization of drunk driving was morally justified in the Polish People's Republic, even if people believed (mistakenly) otherwise.

DU-legal moralism claims that the law should advance Durkheimian utilitarianism, a theory of critical (public) morality that considers how legal regulations and public policies should_be shaped to make homo duplex flourish. It does not propose to enforce any particular version of positive morality, so it seems it should be immune to challenge from relativism. However, there is only one set of rules which should be implemented in every society. Even though Durkheimian utilitarianism assumes that all moral systems need to be based on all Moral Foundations (both individualistic and collective), just in different configurations and emphases, every society can have its own best equilibrium of Moral Foundations. Such an equilibrium should best fit a community's characteristics and the environment in which it emerged and developed. Therefore, according to DU-legal moralism, society X's public policies and legal regulations should be based on the equilibrium$_x$ of all Moral Foundations, constituting the well-being of X's members to the greatest extent. But similarly, society Y's public policies and legal regulations should be based on the equilibrium$_y$ of all Moral Foundations, constituting the well-being of Y's members to the greatest extent. But such a formulation of Durkheimian utilitarianism meets Chris Gowans' (2021) definition of (metaethical) moral relativism: "The truth or falsity of moral judgments, or their justification, is not absolute or universal, but is relative to the traditions, convictions, or practices of a group of persons".

Equilibrium$_x$ and equilibrium$_y$ are equally good from the perspective of Durkheimian utilitarianism. This is because they are determined by how well it constitutes well being of people in X or Y.[9] But, on the other hand, there need not be objectively good equilibrium for all societies; each can have its own. There is also no meta-equilibrium or meta-rule which would solve potential conflicts between the different equilibriums of Moral Foundations. For example, we can imagine that the characteristics of society X determine the equlibrium$_x$ dominated by Care/Harm. Thus, according to equlibrium$_{x,}$ consensual homosexual acts should not be criminalized. At the same time, the characteristics of society Y determine the equlibrium$_y$ dominated by Sanctity/Degradation, according to which consensual homosexual acts should be criminalized. And society X should shape their criminal law policy following equlibrium$_x$ and society Y equlibrium$_y$. Thus, X members will inevitably believe that members of Y are wrong (and *vice versa*). Still, it is not even reasonable to ask whether any of them are correct within Durkheimian utilitarianism. That means that DU-legal moralism is exposed to the challenge from relativism.

9 Or equilibriums (equlibrium$_{x1,}$ equlibrium$_{x2}$ etc), if we accept the possibility that there are various possible combinations of Moral Foundations which constitute well-being to the same, greatest extent but in various ways.

4.2 Empirical challenge

The next challenge is an empirical one, derived from Hart's criticism of Devlin. According to Hart's interpretation of Devlin, immoral conduct threatens society's cohesion, and its proliferation may lead to societal collapse (Hart 1967: 1). Society, therefore, has a right to protect itself by enforcing morality. Devlin (1965: 13) argued that "[t]here is disintegration when no common morality is observed, and history shows that the loosening of moral bonds is often the first stage of disintegration" (called "disintegration thesis"). Criticizing this position, Hart (1967: 2–3) identified two possible interpretations. According to the first (called "definitional", the statement that morality is important for society is a necessary truth since society is defined by morality. A society equals its morality. This means that if someone's actions cause the breakup of moral norms in a given community, they also cause the breakup of society itself. Hart argued that this version of the argument would lead to the absurd conclusion that no change in morality can occur, as it would lead to creating an entirely new society. Although Devlin thought of society as static, Hart (1983: 257) believed that morality constantly evolves. According to the second (called "empirical") interpretation of Devlin's disintegration thesis, committing immoral acts leads to the loosening of interpersonal ties in society and, eventually, to the deterioration of the condition of society. Importantly, this is an empirical claim that can be verified. For instance, historians can argue that *mali mores* (i.e. bad customs) impacted the fall of Rome. Therefore, the empirical challenge points out that legal moralists who make such empirical claims need scientific or historical evidence to support them. And usually they do not offer them. According to Hart, Devlin did not prove that the phenomena he criticized would even contribute to, let alone lead to, the disintegration of society.

Interestingly, Hart believes that the empirical interpretation of Devlin's disintegration thesis aligns with the views of Emile Durkheim. Hart (1967: 7) argues that, according to Durkheim, "[p]unishing the offender is required to maintain social cohesion because the common conscience [was] violated by the offence". Although Hart notes some differences between Durkheim and Devlin, he believes they have much in common[10]. Haidt also similarly refers to Durkheim. His Durkheimian version of utilitarianism is embedded in Durkheim's views on law and morality, or at least Haidt's interpretation of them. As mentioned before, Haidt refers to Durkheim's concept of the homo duplex, according to which human nature is dualistic as it has individualistic and collective components.

In light of this, is DU-legal moralism understood in terms of social disintegration justified? There are reasons to think so. Let me call this interpretation of DU-legal moralism an empirical one. As noted above, Haidt (2013: 260-270), referring to Durkheim, adopted the vision of man as homo duplex and

10 See Lukes & Prabhat 2012 for criticism of Hart's interpretations of Durkheim's thought.

its consequences. He (Haidt 2013: 313) claims that anomy occurs in a society that no longer has a shared moral order. The cure for this condition may be the introduction (or even restoration) of laws, regulations and public policies that strengthen the collective identity of individuals by enforcing morality based on binding moral foundations. This is a very clear moralistic claim.

Law has the vital function of maintaining social cohesion and suppressing anomy by guiding the individual. According to Haidt's Durkheimian utilitarianism, fulfilling this function should be done by activating both individualistic and collective emotions, which correspond to the individual and collective aspects of dualistic human nature, from different moral foundations. The law and public policies should enforce not only Fairness/Cheating or Care/Harm foundations (as in liberal legal systems based on the harm principle) but also Loyalty/Betrayal, Authority/Subversion or Sanctity/Degradation, as this increases social cohesion, which will allow people to improve their well-being and flourish. Promoting only one group of moral foundations may lead to negative social phenomena, such as polarization and unconstructive disagreements, as well as an increase in the suicide rate (similar to Durkheim's original predictions).[11]

Haidt's claims are empirically verifiable. One could study how enforcing different moral foundations increases and decreases social cohesion, polarization and social divisions. Haidt (2013: 100, 186) even provides the results of such research, showing that, for example, polarization in the United States has been increasing. One may claim that the last few years have been a period of the gradual disintegration of American society, which would support Durkheimian utilitarianism and protect it from the empirical challenge.

This paper is not a place to decide whether there is enough evidence for such a thesis. However, there are at least two issues worth to be raised in this context. First, even if we prove that one society is collapsing because of a lack of harmony between moral foundations, we still need evidence that this is a universal phenomenon. Otherwise, Durkheimian utilitarianism would be a theory only for a particular society, which clearly is not Haidt's idea. Second, the statement that society is disintegrating is already normative. We need to assume that, at some point, some desired condition of society worsened. However, a positive evaluation of this condition is a matter of the criteria used. For example, suppose we value trust among people. In that case, a society with a high level of interpersonal trust will be positively assessed, and when trust is lost, we may say that the society is disintegrating. At the same time, such a trustful society may be oppressive to its members, and as trust decreases, the liberation of individuals may increase. From another axiological perspective—for example, if autonomy is valued more than trust—such a change may represent not the collapse

11 Haidt (2012: 440) refers there to research on suicide done by Eckersley & Dear 2002.

of the society but success. Therefore, it is difficult to believe that the empirical interpretation of DU-legal moralism is immune to the empirical challenge.

However, as George's (1995) theory of legal moralism shows us, disintegration does not need to entail the actual collapse of society. He claimed that disintegration should be interpreted as "the loss of a distinctive form of interpersonal integration in a community understood as something worthwhile for its own sake […] regardless of whether this loss is accompanied by the breakdown of order" (George 1995: 66). Therefore, we should criminalize immoral acts not because they will lead to "real" destruction of the society, but to the loss of an important component of it, which cannot be grasped empirically. Also, such a deficit is inherent even if no individual is harmed. George uses the example of marriage to illustrate this point. According to him, drifting apart spouses in a marriage does not imply a breakdown. Instead, the spouses simply no longer build their lives around common interests or concerns. This means that this inherent goodness of marriage was lost because the relationship has been instrumentalized. Therefore DU- legal moralism may be interpreted another way: it limits society from losing essential foundations and moral diversity or respect for other moral beliefs. This interpretation (let me call it a non-empirical) would mean that Haidt's claim does not require any empirical evidence and is immune to the empirical challenge.

4.3 No difference challenge

Another challenge against DU-legal moralism is the no difference challenge, which claims that legal moralism is often just a version of harm principle. Feinberg (1990: 8-10) distinguishes between pure legal moralism, which treats enforcing morality as valuable in itself and justifies the criminalization of immoral acts independently from the harmfulness of these acts, and impure legal moralism, according to which criminalization of immoral acts is treated as an instrument to prevent harm. In the latter case, we can question whether there is any difference between legal moralism and the harm principle. If there is not, why not abandon the notion of legal moralism and accept the harm principle as the ultimate source of justification for criminalization? There are two main arguments for why DU-legal moralism differs from harm principle.

Firstly, the notion of harm in DU-legal moralism is understood very narrowly, similarly to the classical discussion on harm principle and legal moralism. Therefore, only individuals, not groups or society, can be harmed (or put at risk of harm). It is because only individuals are the bearers of well-being. If one argued that DU-legal moralism is just a broader version of harm principle theory, then one would require to expand the catalogue of harms, including, e.g. group harms. I am sceptical about such a solution precisely because it blurs the lines between different criminalization principles and makes the discussion about legal paternalism or legal moralism irrelevant, reducing everything to a common denominator, namely, harm. Therefore, I assume a very restricted concept of harm here.

Secondly, according to the definition of DU-legal moralism, the main reason for criminalization is moral wrongness, not harmfulness, which is a result of transgression against Moral Foundations. Lack of such criminalization may cause harms to individuals, but they are merely symptoms of a deeper problem: neglecting human nature and the inability to achieve the complete well-being of the members of society. Let's imagine a society which implements DU-legal moralism and its doctrine of criminalization. Of course, harm principle will be presupposed because many criminal norms will be based on the Harm/Care foundation, which represents the protection of others from physical and psychological suffering. However, other criminal regulations will be grounded in different Moral Foundations and justified without reference to harmfulness or risk of harm, as in the example of Polavia mentioned in chapter 3.

If we accept the above-described non-empirical version of DU-legal moralism, then the difference from the harm principle is even more visible. Under such an interpretation, the harms caused by not adopting Durkheimian utilitarianism may be, e.g. moral harms. Under such an interpretation, DU-legal moralism does not protect the individuals from being harmed in welfarist terms, but their moral integrity and human nature. Well-being in such interpretation includes not only physical or psychological but also moral features of a human being. This is a very different approach from a liberally understood harm principle and its contemporary interpretations. Therefore, it would require reformulating a concept of well-being in non-welfarist terms and, consequently, reframing the whole classical discussion on the principles of criminalization.

4.4 Levelling-down challenge

The levelling-down challenge is a version of the argument raised by philosophers such as Derek Parfit (1997: 210–11) and Joseph Raz (1986: 226–7) against a possible consequence of egalitarianism: that it is good to eliminate inequality by decreasing the well-being of individuals who are better off to the level of those who are worse off. For example, let us imagine a society with many wealthy individuals and a small group of impoverished individuals. This society faces a catastrophe in which the rich lose most of their wealth while the poor stay as poor as they were. Suppose one accepts egalitarianism and the value of equality. In that case, one should believe that society after the catastrophe is better than before, at least in one regard: equality. According to the levelling down objection, this is incompatible with the intuition that there is nothing good in the catastrophe and that the society before it is better.

Petersen (2017: 73-79) notes that we can also challenge some legal moralism theories, such as George's (1995). He presents an example of two societies, A and B. The well-being of every member of society A is much better than the well-being of any member of society B. However, society A does not criminalize non-harmful but immoral types of conduct X (e.g. homosexual sex), while society B does so. Considering that everything else about these two societies is the same, which of them is better? According to George, society A is worse than B in at least one aspect. Even though well-being is higher, society B lacks a crucial moral component, the legal prohibition of harmless immoralities. Similarly to the levelling down objection against egalitarianism, this conclusion is counterintuitive – how can B be better in any sense? Petersen (2017: 76) notices:

> I do not mean to imply that George, all things considered (remember that legal moralists are usually pluralists), would claim that B is better than A, but he must at least claim that B, is in one sense, better than A, because B criminalizes a kind of immorality X that A does not. But how can population B be, in any sense, better than A, if everyone in B is worse off than all the people in A?

It is difficult to accept that the lack of this one feature of society B would make it worse in any aspect than society A. Thus, according to Petersen, legal moralism seems to be vulnerable to the levelling down challenge.

In DU-legal moralism, the realization of the dualistic human nature is not external to the well-being of an individual but an important (although not the only) factor constituting it. And this is crucial for both versions of DU-legal moralism. Contrary to George's theory, non-empirical interpretation assumes that moral integrity and human nature are relevant (or even necessary) for well-being. There is no external (to well-being) value such as equality in Partit's or Raz's arguments. That is why, by modifying Petersen's challenge, one should not compare the well-being of society to the eternal (to well-being) moral component – obtaining the equilibrium of moral foundations. According to Durkheimian utilitarianism, the members of society A, whose criminalization policy is based only on only one type of moral foundations (e.g. binding ones) will (putting other factors influencing well-being aside) have lower well-being than society B, whose criminalization policy is based on the equilibrium of all moral foundations, both individualistic and binding. Therefore, DU-legal moralism seems to pass the levelling-down challenge.[12]

12 Interestingly, an empirical demonstration that the well-being of members of society A is higher than that of members of society B would constitute a much more general objection to Durkheimian utilitarianism (similar to empirical challenge). It would imply that either the implementation of Durkheimian utilitarianism into law and public policies do not increase well-being, or that well being is not founded on the realisation of dualistic human nature. In both cases, Durkheimian utilitarianism would need to explain it.

4.5 Weighting challenge

One can also pose a weighting challenge, which, according to Petersen (2019: 78), considers "how the weighing of values should be executed when determining whether a certain type of conduct C is immoral, and when it is, should be criminalized." I believe it is not a strong argument against not only DU-legal moralism but also many other normative moral theories based on value pluralism. There are two levels to which we can refer. First, there is a question of whether solving all the conflicts between values is really necessary. Second, there is a question about mechanisms of solving, at least the most fundamental, conflicts of values. When it comes to the former, the answer is negative. Durkheimian utilitarianism assumes that there is at least one equilibrium of Moral Foundations for each society, which should make members of this society flourish and obtain well-being to the greatest extent. There is no doubt there will be conflicts concerning either which Moral Foundation should justify a particular element or between various regulations and policies based on different Moral Foundations. As I mentioned earlier, Durkheimian utilitarianism justifies the system as a whole, and Moral Foundations complement but also sometimes contradict each other. Referring to Krzysztof Saja's theory of institutional function consequentialism (coming to similar conclusions to Durkheimian utilitarianism), "we should not search for a perfectly coherent set of institutions that can cover all difficult practical cases, but rather for the harmony of institutions that can optimize the fulfilment of all normative practical functions" (Saja 2019: 19). Therefore, we should not pursue perfect consistency but optimization, which requires some inconsistencies or even contradictions. It is a feature of the complexity of morality that policy and lawmakers sometimes make moral decisions inconsistent with each other, which still fit into the system.

Answering the second question, I believe that in most cases, there are instruments for resolving conflicts between Moral Foundations within Durkheimian utilitarianism. However, the pluralistic character of this theory makes it impossible to suggest one correct way to do that. As there are different equilibriums of Moral Foundations, they also have different ways of resolving conflicts between them. Sometimes impact should be put on practical reason (e.g. Alexy's theory of weighting and balancing), sometimes on using some super scales (see, e.g. Griffin 1986: 90 or Chang 2004)[13] and sometimes on political or pragmatic processes. Taking the two arguments mentioned above, I conclude that DU-legal moralism is immune to the weighting challenge.

13 Which are not super-values, as Moral Foundations are non-instrumental and ultimate.

5 CONCLUSION

As I have shown, Durkheimian utilitarianism is a coherent theory which offers a normative vision of how public policies and laws should be shaped. Moreover, Durkheimian utilitarianism, in the form of DU-legal moralism, introduces a fresh proposal to the discussion between moralists and liberal adherents of the harm principle.

This does not mean, however, that it is a flawless solution. On the contrary, the above considerations show that DU-legal moralism cannot cope with all the challenges to which a good theory of legal moralism should respond. While it is not sensitive to the weighting challenge, the no difference challenge and the levelling down challenge, the challenge from relativism is its major weakness. Also, depending on the interpretation of DU-legal moralism (empirical vs non-empirical), the empirical challenge may be a problem. It would be great if Haidt expanded and refined his theory, answered the problem of moral relativism and provided empirical evidence to support it. Without it, Durkheimian utilitarianism is not still a fully developed theory of legal moralism. However, it would be worthwhile for other researchers to get interested in Durkheimian utilitarianism. But at the same time, it is a fresh and innovative idea in discussing the relations between law and morality.

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Silvina Álvarez Medina*

Beyond discrimination
A reply to Añón

According to my reading of Añón's proposal, a critical shift in our legal perspective is required for improving the performance of legal judgments and decisions vis-à-vis women's concerns. Such a shift would entail overcoming standards of discrimination based on a comparison between unencumbered individuals, without their situated agency being considered—which results in comparing even when such comparison is impracticable—in order to embrace a contextual analysis of individual cases. The move from one pattern to the other implies assimilating the structural bases of discrimination, as well as the relevance of gender analysis for overcoming inequality. In the following I would like to keep arguing in the direction traced by Añón. I will focus on the two main aspects of her analysis: the comparator and stereotypes. In addition, I will consider intersectionality and the contribution of experts, and will analyse in detail the methodology of naming and the contextual interpretation of women's rights.

Keywords: standards of discrimination, comparator methodology, stereotypes intersectionality, the contribution of experts, interdisciplinary and contextual analysis

1 INTRODUCTION

The term "discrimination" has been used in constitutional and human rights law to both describe and support women's demands. Since the 1970s, women have increasingly manifested an array of concerns regarding their private and public life: their sexuality, reproduction, family responsibilities, violence in intimate relations, their struggle to access the labour market, sexual harassment, democratic and political underrepresentation, and their lack of full citizenship. To address all these heterogeneous demands, the legal community's main normative approach has been to suggest anti-discrimination laws. All the different manifestations of women's mistreatment have been read as the differential treatment of women and men, which is precisely what is meant by inequality. Consequently, the law has had to be reformulated to offer identical statements for both men and women. In other words, formal equality needed to be achieved to overcome discrimination.

The meanings of equality, however, have very often been distorted by false universality, devised out of biased historical patterns based on the experiences of historical actors, mainly white men. This view of the universal interests to be protected by human rights has resulted in neutral legal rules and proce-

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dures, which equate being equal with being identical in terms of the normative positions historically recognized by the legal system. This distortion first led to formal equality for women, i.e. women being entitled to the same rights as men, meaning that women were endowed with the rights that men already had. Women were then granted civil, political and social rights. But this first stage of equality soon proved insufficient for answering women's demands, as second-wave feminists offered their own demands, including labour rights, sexual and reproductive rights, and protections against violence in intimate relationships and the family. It then started to become apparent that what was being demanded was not formal equality, but rather substantive equality, and that such demands required new legal forms, tools and procedures.[1]

Although anti-discrimination law has been a crucial legal instrument for achieving some important goals in the path towards the recognition of women's rights, it has revealed itself to be very specific in scope and insufficient for supplying adequate legal answers to a variety of women's concerns. This is the starting point of the analysis conducted by María José Añón in her article on anti-discrimination law and the subjection of women.[2] Añón has produced important academic works on the subject, always stressing the inescapable conceptual framework offered by feminist analysis for understanding women's issues.[3] This framework is the patriarchal social structure, which reflects power relationships corresponding to patterns of female subordination. Along with Añón's work, other important contributions—duly quoted by her—have been made along the same lines in Spanish feminist jurisprudence to show that conducting a strictly individual analysis of unfair treatment, merely on a case-by-case basis, has proved unsuccessful in overcoming gender inequality, which is structural.[4]

According to my reading of Añón's proposal, a critical shift in our legal perspective is required for improving the performance of legal judgments and decisions vis-à-vis women's concerns. Such a shift would entail overcoming standards of discrimination based on a comparison between unencumbered individuals, without their situated agency being considered—which results in comparing even when such comparison is impracticable—in order to embrace a contextual analysis of individual cases. The move from one pattern to the other implies assimilating the structural bases of discrimination, as well as the relevance of gender analysis for overcoming inequality. In the following I would like to keep arguing in the direction traced by Añón. I will focus on the two main aspects of her analysis: the comparator and stereotypes. In addition, I will consider intersectionality and the contribution of experts, and will analyse in detail the methodology of naming and the contextual interpretation of women's rights.

1 On women's specific rights, see Álvarez Medina 2020.

2 See Añón 2020.

3 See, for example, Añón 2019: 47-49.

4 See Barrère 2003 and Bodelón 2010.

2 THE COMPARATOR AND THE TRAP OF INDIVIDUAL FACTS

Comparing equivalent situations is a complex task. Such complexity not only arises from the facts being different in every situation, even though the compared situations may be similar, but rather because everyone's social background and perspectives on facts are also very different. Suzanne Goldberg (2011: 740) describes the success of the comparator methodology in legal analysis and the judiciary in terms of the good reputation of individual facts—better than that of social data and analysis—for ensuring truth, or as the acceptance of equating empirical proof with objective standards. However, comparing requires the presence of equivalent actors and situations to be compared, and these factors are hardly present in circumstances of structural subordination, which entail discrimination against entire groups of people. In such cases, mistreatment is based on multiple meanings and power relations that converge in every single situation. Añón (2020: §§ 22-26) exposes the inadequacies of the comparator methodology and proposes to move towards a broader analysis. I want to focus here on the misleading approach of discrimination law whenever it isolates individual cases merely as individual facts.

My concern is about the fallacy of treating individual cases as isolated facts, ignoring the fact that they are embedded in broader social and cultural conditions which replicate patterns of subordination in countless equivalent cases. The legal paradigm of neutrality, together with the principle of individual autonomy as a capacity which is independent of context,[5] is in the background of this enduring methodological approach, persisting through the neglect of the social and cultural matrix of individual cases. According to the neutral adjudication of cases, the right—fair or just—solution comes from considering all those cases according to constant, so-called "neutral" categories, i.e. those that are presumed to be free from any subjective or group-laden considerations. Consequently, in order to negotiate equality, adjudication should be able to abstract individuals from their differences. In other words, judicial analysis ought to be capable of recognizing differential treatment wherever it exists—including when it is based on sexual differences—casting a neutral eye when comparing similar situations, and adjudicating cases without taking particulars into consideration. But this approach misses the point of inequality entirely: all too often, far from being caused by drawing distinctions, inequality is indeed produced by ignoring such differences at the outset. While differences may sometimes in fact be irrelevant—in which case they may be cast aside in order to focus adjudication on the consideration of pertinent issues—at other times differential or asymmetric positions may call for differential evaluations, treatment or adjudication. Ann Scales refers to the balance between differences and distribution in

5 On personal autonomy as a relational capacity, see Álvarez Medina 2018.

terms of equality, and expresses it in the following terms: "Injustices do not flow directly from recognising differences; injustice results when those differences are transformed into social and economic deprivation" (Scales 1986: 1396). But deprivation and mistreatment may have multiple sources, some of them rooted in history, culture and diverse social aspects. Therefore, avoiding deprivation and mistreatment requires identifying power relations: racial, ethnic, class and gender-based motives that lead to the subordination of large groups of people. Only then can the genuine and important interests of people be identified and protected by law. Gender differences are not to be eradicated or overcome, but rather identified and recognized with a view to transforming the unjust distribution of positions, opportunities and resources. As Scales (1986: 1395) puts it: "The issue is not freedom to be treated without regard to sex; the issue is freedom from systematic subordination because of sex".

Dolores Morondo (2016: 490-493) points to intersectionality's capacity to unveil the inadequacies of discrimination law and the comparator methodology. Intersectionality—as will become clear in the next section—allows for a better refinement of the causes of discriminatory acts and conducts via the incorporation of new categories. According to Morondo, the intersectional approach reveals all the components of the power relationships that create disadvantages and ill treatment. Morondo endeavours to explain the failure of the comparator standard to capture the disregard of black women who suffered discrimination in their workplace. To do so, she analyses two illustrative cases in United States case law which have been reviewed in the literature on intersectionality, namely *De Graffenreid v. General Motors Assembly Division* (1976) and *Jefferies v. Harris Country Community Action Association* (1980). In those cases, it became apparent that, since neither black men nor white women had suffered the consequences of the contract policy as applied to black women, the latter could not be suitably considered to have been discriminated against, compared with either of the former two groups.

In such cases, the comparator becomes an obstacle to identifying discrimination in relation to one-criteria categories, such as "women" or "black". A better characterization of groups by more than one criterion proves to be a compelling requirement for properly identifying discrimination—in the aforementioned cases, discrimination against black women, as a separate group distinct from both black men and white women. Morondo poses the interesting question of what the limit to this multiplication of group categorizations may be, which might eventually lead to one-case categories. Perhaps the answer ought to come from the contextual analysis of individual cases and the structural configuration of groups in each society, based on power relations. Consequently, the categories should be as many as indicated by the structural configuration of each social context, so as to allow for the identification of the nuances of personal acts and behaviours.

3 REASONING ABOUT GENDER STEREOTYPES, INTERSECTIONALITY, AND COMPLEMENTARY METHODOLOGICAL APPROACHES

For better reasoning about the multiple aspects which contribute to substantive inequality, and in order to move towards transformative equality, our legal approach should go beyond discrimination law as developed thus far and improve its methodologies, standards and procedural devices. To begin with, I would like to mention some different, well-known conceptions of equality. Alexandra Timmer (2011: 712) draws a distinction between formal and substantive equality, as well as between substantive and transformative equality. According to her, equality should aim at the transformation of the gender roles and patterns which imprint a hierarchical and patriarchal structure on society. Such transformation should obtain input from institutions,[6] and discrimination law should evolve towards a renewed analysis if it hopes to contribute to this transformation. As indicated by Añón, incorporating the analysis of gender stereotypes is one such imperative change to legal reasoning. Regarding gender stereotypes, these reveal ongoing beliefs about certain characteristics which are presumed to define women, both negative and positive, such as their weakness, fragility, emotionality, caring attitudes, maternal feelings, etc. Peroni and Timmer describe the relation between gender, stereotypes and discrimination as a circular one, and advise the courts on the contextual interpretation of violence in the realms of the household, the family, and intimate relationships:

> Gender stereotyping is both the cause and the manifestation of gender discrimination. Gender stereotypes are also used to rationalise/justify discrimination, which in turn further reinforces discrimination. The circle thus looks like this:
>
> In the context of domestic violence, this circle goes as follows: most domestic violence victims are women. This situation is rationalised or justified by the authorities by gender stereotypes such as 'women ought to be submissive' and 'women (ought to) endure men's aggressiveness'. These ideals make that the authorities do not act at all on the violence, or act weakly (e.g. with lots of delays). This in turn causes domestic violence to continue with impunity, both at an individual level and in society.
>
> […] What the Court urgently needs to develop in terms of new legal reasoning is the idea that gender stereotyping causes discrimination (is the third part of the circle). (Peroni & Timmer 2016: 64-65)

As a legal instrument, this analysis makes it possible to grasp the meaning of rules and rulings, as well as individual attitudes in specific cases. Disclosing the meanings and constraints contained in stereotypes entails unveiling what is hidden within a variety of historical, social and cultural customs, norms and conducts which are largely and very often unconsciously accepted. Therefore,

6 In this regard, Timmer (2011: 713) focuses on the decisions of the European Court of Human Rights (ECHR) and its doctrine of States' positive obligations.

grasping the hidden discriminatory meaning of many of these stereotypes requires *naming the hidden*. Rebecca Cook (2010: 565) suggests applying "the feminist methodology of naming to raise consciousness about gender stereotyping and to expose its harms". According to Cook, naming is the way to diagnose how much and what harm is caused by stereotypes in different societies.

Similarly, Timmer (2011: 710) points to the two stages of judicial analysis that courts like the ECHR should follow: "naming and contesting". In order to unveil the hidden sources of discriminatory treatment, Timmer suggests that courts should delve further into the social and cultural context in which stereotypes have been conceived and used. History, traditions, and ongoing conducts and relationships within families, work, public institutions, and other settings should be unveiled and *named.* Naming entails a process of recognizing social phenomena—expressed through religion, the economy, and culture in general, and transferred to individual acts and behaviours—which have been normalized as universally accepted for too long. These phenomena, however, as in the case of gendered patterns of behaviour, have been consolidated as part of very asymmetric relations of subordination, i.e. power relations. Far from emerging from a collective process of fair communication and consensus, these phenomena have been established and perpetuated by the inertia of repeated individual and collective sequences of domination-guided conducts, crystalized into social structure. Therefore, the judicial process for unveiling the deeply rooted social structures which are reflected in stereotypes requires a thorough inquiry. During such an inquiry, courts should advance towards the uncovering of social phenomena by posing questions and asking experts to provide data, documents, and all sorts of materials that are likely to expose stereotypes (Timmer 2011: 721).

To better understand the sort of discrimination that arises from social structures—long-consolidated by historical and cultural processes—intersectionality has proved to be a useful interpretative tool for overcoming the shortcomings of the comparator, as explained in the previous section. Although it is not directly included in Añón's analysis, intersectionality is, together with stereotypes, another important conceptual device for contextual interpretation in cases of gender discrimination. Frequently, a variety of legal and interpretative tools are required in order to cast light on complex social situations which cause specific acts of discrimination. María Ángeles Barrère (2016: 462) maintains that gender as a category is very often insufficient for achieving a deeper understanding of the real dimension of specific acts or behaviours concerning women's struggles. For such cases, intersectionality introduces a methodology that is capable of cross-referencing valuable information about the causes of discrimination.

The European Court of Human Rights has made an indirect reference to intersectionality in the case *B.S. v. Spain* (2012), stating that a black immigrant woman working as a prostitute was in a situation of "particular vulnerability", a circumstance which should have been recognized by the domestic administration in order to remedy discrimination. The ECHR ruling states the following:

> 62. In the light of the evidence submitted in the present case, the Court considers that the decisions made by the domestic courts failed to take account of the applicant's particular vulnerability inherent in her position as an African woman working as a prostitute. The authorities thus failed to comply with their duty under Article 14 of the Convention taken in conjunction with Article 3 to take all possible steps to ascertain whether or not a discriminatory attitude might have played a role in the events.

According to Cruells López and La Barbera (2016: 543-544), the concept of vulnerability instead of intersectionality—despite a number of reports made by experts asserting the presence of intersectional discrimination—is used with the intention of avoiding more sociological and technical terms, and to favour the use of an easy or comprehensive language. In addition, in recent years, the ECHR has developed an important doctrine on vulnerable groups, to which *B.S. v. Spain* can be added.

Besides the analysis of stereotypes and intersectionality, Goldberg suggests other procedural resources, such as calls for experts or hypothetical comparators. In the case of experts, Goldberg (2011: 797-798) claims that they can provide relevant data, and so constitute a valuable source for supporting sociological evidence underpinning discrimination based on stereotypes. The *Gonzalez y otras v. México*, or "Cotton Fields", case at the Interamerican Court of Human Rights, is a well-known example of the analysis of stereotypes by the judiciary. Distinguished experts, academics and lawyers presented an *amicus curiae* in the case. In their written presentation, these experts explain in detail the role of gender stereotypes regarding inequality, violence and discrimination.[7] In recent years, academic research on stereotypes has produced numerous and valuable results, stressing the importance of judicial reasoning on the issue. Rulings by the Interamerican Commission of Human Rights, the Interamerican Court of Human Rights, the CEDAW Committee, and the European Court of Human Rights have progressively moved in the direction of identifying stereotypes and reasoning about them.[8]

According to Goldberg (2011: 797), "experts can document the presence of implicit identity-related biases and the effects of those biases on workplace decisions". As for hypothetical comparators, and despite the fact that the lack of empirical data may still be a handicap, they are currently being used, together with experts' analysis and information, to explain discrimination.[9] An interest-

7 See the *amicus curiae* prepared by Simone Cusack and Rebecca J. Cook for the International Reproductive and Sexual Health Law Programme, with Viviana Krsticevic and Vanessa Coria for the Center for Justice and International Law (CEJIL), 3 December 2008.

8 See Cook 2010, Cardoso 2015: 36-46, and Undurraga 2016: 70-74.

9 On the implementation of hypothetical comparators in England and the European Union, see Goldberg 2011: 805-806.

ing example can be seen in the European Court of Human Rights' decision in *Opuz v. Turkey,* and its citation of the "improbability" of men being discriminated against on the same basis as women:

> 179. Despite the reforms carried out by the Government in the areas of the Civil Code and Criminal Code in 2002 and 2004 respectively, domestic violence inflicted by men is still tolerated and impunity is granted to the aggressors by judicial and administrative bodies. The applicant and her mother had been victims of violations of Articles 2, 3, 6, and 13 of the Convention merely because of the fact that they were women. In this connection, *the applicant drew the Court's attention to the improbability of any man being a victim of similar violations*. (italics have been added)

Also in *Opuz v. Turkey*, the Court made important statements regarding the burden of proof, evidence formation, and the use of statistics for demonstrating group discrimination:

> 177. As to the burden of proof in this sphere, the Court has established that once the applicant has shown a difference in treatment, it is for the Government to show that it was justified (see, among other authorities, Chassagnou and Others v. France [GC], nos. 25088/94, 28331/95 and 28443/95, §§ 91-92, ECHR 1999-III, and Timishev [v. Russia, nos. 55762/00 and 55974/00], § 57[, ECHR 2005-XII]).
>
> 178. As regards the question of what constitutes prima facie evidence capable of shifting the burden of proof on to the respondent State, the Court stated in Nachova and Others ([v. Bulgaria [GC], nos. 43577/98 and 43579/98], § 147[, ECHR 2005-VII]) that in prior proceedings there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. The Court adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may emerge from the facts and the parties' submissions. According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear, and concordant inferences or of similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this respect, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made, and the Convention right at stake.
>
> 180. As to whether statistics can constitute evidence, the Court has in the past stated that statistics could not in themselves disclose a practice which could be classified as discriminatory (see Hugh Jordan, cited above, § 154). However, in more recent cases on the question of discrimination in which the applicants alleged a difference in the effect of a general measure or de facto situation (see Hoogendijk, cited above, and Zarb Adami, cited above, §§ 77-78), the Court relied extensively on statistics produced by the parties to establish a difference in treatment between two groups (men and women) in similar situations. Thus, in Hoogendijk, the Court stated: "[W]here an applicant is able to show, on the basis of undisputed official statistics, the existence of a prima facie indication that a specific rule—although formulated in a neutral manner—in fact affects a clearly higher percentage of women than men, it is for the respondent Government to show that this is the result of objective factors unrelated to any discrimination on grounds of sex. If the onus of demonstrating that a difference in impact for men and women is not in practice discriminatory does not shift to the re-

spondent Government, it will be in practice extremely difficult for applicants to prove indirect discrimination."

4 THE RELEVANCE OF INTERDISCIPLINARY AND CONTEXTUAL ANALYSIS

In the previous sections, a variety of methodological devices have been expounded, which will contribute to overcoming the failures and problems posed by the comparator methodology. Such legal devices are yet to be firmly incorporated into legal reasoning, but they allow for a better, more accurate understanding of the requirements of equality, based on the recognition of difference. Moreover, undertaking a more ambitious analysis of equality requires embracing other perspectives and disciplines, beyond a strictly legal or constitutional analysis. Such perspectives should include sociology, anthropology and psychology, as well as gender, racial and ethnic studies, leading to a better grasp of the composition of circumstances, actions and activities, their causes, and the genuine components in the fabric of relationships, intentions and expectations, as well as inherited meanings. All these aspects constitute the context of discrimination, and it is that very context which in turn reveals the extent of discrimination itself (Goldberg 2011: 783). In order to fully understand context, courts should therefore go beyond comparing cases alone and broaden their view to include more subtle, yet more revealing aspects surrounding the specific cases. Thus, in this comprehensive enterprise, interdisciplinary analysis may prove to provide important benefits.

In supporting interdisciplinary analysis, feminist theory has developed a solid number of conceptual instruments for explaining the position of women in society, including complex categories of analysis which reveal patriarchy, gender subordination, difference, private issues as public matters, intimate and family violence, and many other features. Añón (2020: § 7) correctly states that feminist theory has abundantly explained this complex social situation of women, which has very frequently been reduced to a short-sighted concept of unequal treatment, understood in a way that seems rather simplistic when compared to existing patterns of behaviour and their correspondent legal standards. As she explains, such standards are inadequate and distort demands for the protection of women's important interests. This amounts to saying that a rich structure of entrenched gender relations has been translated into a single category, thus seeking to conform women's demands to already existing standards of equality, and disregarding women's specific context and positions. Discrimination so understood misses the point entirely. Whenever discrimination focuses on comparative analysis alone, disregarding the surrounding complex context, legal reasoning becomes inefficient in its protection of human rights.

To sum up, and as stated by Añón in her paper, the comparator methodology must be put under examination, and new methodological approaches, such as stereotype analysis, have to be incorporated in order to fully understand structural inequalities. In addition to these, as I have expounded in this reply, other legal tools and procedures can be developed, such as intersectional analysis or consultation with experts, to provide information and advice on specific issues. Notwithstanding the advantages a clean or more aseptic legal analysis comparator methodology may offer, this methodology has been revealed to suffer important deficits, as it ignores the complexity of the cases under study, as well as their origin in structural social unbalances, consequently missing the exact dimensions of the facts and the relevant interests to be protected by law.

The contextual interpretation of discrimination requires a thorough analysis of both individual cases and the background historical, social and cultural circumstances in which such cases are to be found. Legal reasoning by courts should be scrupulous in identifying human rights violations through interpretative tools such as stereotypes, intersectionality and expert information, among others, assembling the pieces of discrimination in specific cases out of structural inequality. Thus, courts will be able to establish the link between individual harms and wider social conditions, and send the message that discriminatory social patterns seriously violate human rights.[10] This shift in our legal approach to women's positions and interests requires an original reflection, i.e. a fresh start that is sensitive to differences and specificities.[11]

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10 See Undurraga (2016: 85-88) on courts' reasoning and stereotypes.

11 See Álvarez Medina 2018 on emerging women's human rights.

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Diego Dei Vecchi*

Sentencias judiciales con premisas fácticas falsas

Entre fallas, errores y exageraciones

Entre juristas es muy usual aseverar que «las decisiones judiciales con enunciados fácticos falsos constituyen *errores*». En este texto se escudriñan los fundamentos de aseveraciones semejantes. El análisis parte de la asunción (justificada en otro trabajo) de que la verdad de las premisas fácticas no es condición necesaria, ni de la aplicación correcta de las normas jurídicas, ni de la justificación de las decisiones judiciales. Sin embargo, la afirmación según la cual las sentencias con enunciados fácticos falsos *son erróneas* podría tener sentido incluso aceptando la asunción antedicha. Este texto se dirige, por ello, a elucidar y analizar diferentes sentidos en que aseveraciones como las señaladas podrían tener asidero. Se mostrará que, por intuitiva que la aserción parezca, ella tiene que ser muy matizada, si no rechazada sin más.

Parablas clave: justificación, decisión judicial, error, verdad, prueba

1 INTRODUCCIÓN

En las páginas que siguen me propongo explorar el sentido de las afirmaciones según las cuales «las decisiones judiciales con enunciados fácticos falsos constituyen *errores*». Esta exploración parte de conclusiones alcanzadas en otro trabajo.[1] En ese trabajo se analizó la tesis según la cual «la verdad de los enunciados fácticos es condición necesaria de la aplicación correcta de normas jurídicas y, por ello, de la justificación de las decisiones judiciales». La denomino *tesis de la verdad como condición de justificación* (TVC):

Tesis de la verdad como condición de justificación	
(TVC)	La verdad de la premisa fáctica es condición necesaria de la aplicación correcta de normas y, por lo tanto, de la justificación de la decisión judicial.

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1 Dei Vecchi 2023.

En dicho artículo se desambigua la *tesis de la verdad como condición de justificación* (TVC), mostrando diferentes versiones que dicha tesis puede adoptar, y rechazándolas una a una. Estos sucesivos rechazos terminan sugiriendo la tesis contraria. Según ella, la verdad de los enunciados fácticos no es condición necesaria ni de la aplicación correcta de normas jurídicas generales ni de la justificación de las decisiones judiciales.

Sin embargo, descartar la TVC en sus versiones más obvias no es suficiente. Pues persiste la intuición, indudablemente fuerte y arraigada, según la cual las sentencias con enunciados fácticos falsos *son erróneas*. Son muchas las personas que se manifiestan en esta orientación. Algunas de ellas parecen incluso dispuestas a aceptar que la TVC carece de sustento en esas lecturas más superficiales. De tal modo, este texto se encargará de analizar algunas versiones adicionales de la TVC, parasitarias de la noción de *error en el derecho*. Todas estas variantes parten de la misma idea, a saber: aun cuando tuviera sentido decir que la verdad de los enunciados fácticos no es condición necesaria ni de la aplicación correcta de normas jurídicas generales ni de la justificación de las decisiones judiciales, dichas decisiones han de considerarse, de todos modos, *errores del derecho*.

Intentaré mostrar que, por intuitiva que parezca esta tesis general, ella tiene que ser muy matizada, si no rechazada sin más. Para ello, en el § 2 reconstruiré de manera sintética los argumentos que anteceden a este trabajo, sobre todo a efectos de dotarlo de autonomía. Luego pasaré a abordar las versiones de la TVC que la ligan a la noción de *error.* En el § 3 analizaré a la TVC como una manera de expresar la idea según la cual las decisiones judiciales con premisas fácticas falsas son, o bien *errores judiciales,* o bien *errores del sistema de justicia*. Luego de mostrar que esa versión de la TVC constituye una exageración, en el § 4 evaluaré la posibilidad de entender dicha tesis como una explicitación de la intuición político-moral según la cual toda decisión judicial cuya premisa fáctica sea falsa es *moralmente errónea* en el sentido de que constituye una *injusticia*. Delinearé algunos argumentos para matizar esta intuición. En el § 5, haré algunos comentarios sobre ciertas tesis que sostienen que lo que hace que los sistemas de justicia se tornen viciosos es superar una cierta cantidad de decisiones judiciales con premisas fácticas falsas.

2 LA VERDAD DE LOS ENUNCIADOS FÁCTICOS, LA APLICACIÓN CORRECTA DE NORMAS Y LA JUSTIFICACIÓN DE LAS DECISIONES JUDICIALES

Una sentencia o decisión judicial puede ser entendida como un argumento cuya conclusión es una norma individual resultante de aplicar una norma jurídica general a un «caso individual».[2] A esa norma individual, resultante de aplicar una norma general, se la llama en ocasiones *decisión-norma* o *decisión-contenido* o simplemente *resultado* de la decisión. En contraste, la expresión «decisión judicial» se emplea a veces también para aludir a la *decisión-acto* que no es otra cosa que la conducta de la persona que aplica la norma general al «caso». Aquí se usa la etiqueta en el primer sentido.

En la filosofía jurídica es muy usual sostener que una sentencia judicial está justificada, como cualquier otro argumento, en la medida en que se satisfagan las exigencias de dos dimensiones justificativas. De acuerdo con la primera de esas dimensiones, la propia de la *justificación interna*, una sentencia judicial está justificada si la conclusión, *i.e.* la norma individual, se sigue lógicamente de las premisas normativa y fáctica. De acuerdo con la segunda dimensión, la relativa a la *justificación externa*, una sentencia judicial está justificada si también lo están sus premisas individualmente consideradas.

Determinar las condiciones bajo las cuales pueden considerarse individualmente justificadas las premisas de los argumentos no es asunto sencillo. No lo es, en especial, establecer las condiciones de justificación de los argumentos que denominamos «sentencias judiciales». Dejaré de lado aquí la cuestión de la justificación externa de las premisas normativas, asunto usualmente vinculado con cuestiones de interpretación jurídica. Me centraré, en cambio, en la justificación externa de las premisas fácticas: el ámbito propio del razonamiento probatorio. En esta perspectiva, todo indica que una premisa fáctica está externamente justificada si queda suficientemente probada.

Si alguien considera que la justificación interna y la justificación externa de las sentencias judiciales son condiciones individualmente necesarias y conjuntamente suficientes de justificación de una decisión judicial, entonces deberá asumir que las dimensiones interna y externa agotan las exigencias justificativas de las decisiones judiciales. Es decir, adopta lo que en el trabajo antes aludido denominé *tesis de la justificación exhaustiva*. De conformidad con esta asunción, satisfechos los criterios de justificación interna y justificación externa, nada más podemos exigir a las personas llamadas a aplicar las normas jurídicas a través de sentencias en nuestros ordenamientos.

2 Sobre la ambigüedad del término «caso» y las dificultades que genera, véase Dei Vecchi 2023.

Esto nos compromete entonces con tres tesis centrales:

Tesis de la justificación exhaustiva	
(TJ_{Exh})	La justificación interna y la justificación externa son condiciones individualmente necesarias y conjuntamente suficientes de justificación de la decisión judicial.

Tesis de la justificación interna	
(TJI)	La decisión judicial está internamente justificada si la decisión-norma se sigue de una norma general y una premisa fáctica.

Tesis de la justificación externa - Tesis de la prueba como condición de justificación	
(TJE-TCP)	La premisa fáctica está externamente justificada si hay prueba suficiente en su favor.

Sin embargo, esto se torna problemático. Pues parece perfectamente factible que, a la luz de estas tres tesis, una sentencia esté exhaustivamente justificada y que, al mismo tiempo, la premisa fáctica sea falsa. La consecuencia contraintuitiva a que las tres tesis pueden conducir suele ilustrarse en el ámbito iusfilosófico recurriendo a un ejemplo literario. En *Los hermanos Karamazov,* de Fiódor Dostoyevski, Dimitri Karamazov es acusado, juzgado y condenado por haber matado a su padre. Aunque las cosas son algo más intrincadas en la narrativa, asumamos que la acusación y juzgamiento fueron intachables a la luz de las garantías actuales. Asumamos, ante todo, que el (enunciado sobre el) hecho de que Dimitri mató a su padre quedó suficientemente probado en juicio. La sentencia de condena resultante podría presentarse del siguiente modo:

[Norma general] N_i: Homicidio.
Toda persona que mate a otra debe ser condenada a la pena X.

[Premisa fáctica]
Dimitri Karamazov mató a su padre.

[Conclusión = Decisión norma]
Dimitri Karamazov debe ser condenado a la pena X.

Pues bien, sucede que, tal como el autor de la novela nos permite saber, a pesar de que la ocurrencia del evento se pudo probar, Dimitri no había cometido el delito que se le achacó.[3] En adelante referiré a los veredictos de este tipo como *sentencias K*. Se trata de sentencias que satisfacen las exigencias de la tesis de la justificación exhaustiva (es decir, están interna y externamente justificadas) y que, sin embargo, contienen una premisa fáctica falsa.

La estridencia que se produce en estas situaciones (por reales o imaginarias que fueren) ha llevado a mucha gente a sostener que las *sentencias K* carecen de justificación. Se trata de una postura que suscribe la *tesis de la verdad como condición de justificación* (TVC) sobre la base de asumir que la verdad de la premisa fáctica es condición necesaria de la aplicación correcta de normas y, por tanto, de la justificación de la decisión judicial.[4] Paolo Comanducci, citando precisamente el caso de Dimitri Karamazov, ha sostenido a este respecto lo siguiente:

> La decisión de la condena no está justificada, como resultado, ya que la norma individual expresada por la sentencia no está justificada por la norma sustantiva del homicidio, porque tal norma no resulta internamente aplicable, en tanto que Dimitri no ha asesinado a su padre.[5]

En la misma orientación, Eugenio Bulygin había sostenido años antes que:

> ... el hecho de que la sentencia del juez, aunque legal [dado que la culpabilidad se ha probado en juicio], no está justificada por el derecho penal [dado que la premisa probada es falsa] hace posible decir que se basa en una decisión equivocada y que (...) se cometió un *error judicial*.[6]

Este modo de ver está bastante difundido entre especialistas, pero no es claro cuáles son las razones que sustentan la suscripción de esa tesis. Pues esta postura parece obligada a aceptar al menos una de las tres tesis siguientes:

3 Es muy importante ser conscientes de que si sabemos, sin posibilidad de error, que Dimitri Karamazov es inocente, ello es así porque el autor de la novela nos pone en una posición epistémica privilegiada, infalible, de acceso directo a los hechos. Esta posición no existe en la vida real, donde el acceso a los hechos solo es posible a partir de pruebas, *i.e.* razones epistémicas.

4 Es usual asumir que las premisas normativas no *pueden* ser verdaderas (ni falsas), puesto que las normas carecen de valor de verdad. De modo que no tendría sentido decir que la respuesta a la *quaestio iuris*, como la relativa a la *quaestio facti*, procura alcanzar la verdad. Esta tesis ha sido criticada por Redondo 2009. En contra Ferrer Beltrán 2011.

5 Comanducci 2010: 163.

6 Bulygin 2021 [1985]: 298.

Tesis de la verdad como condición de justificación interna	
(TVC_{INT})	La verdad de la premisa fáctica es condición necesaria de la justificación interna de la decisión judicial.

Tesis de la verdad como condición de justificación externa	
(TVC_{EXT})	La verdad del enunciado fáctico es condición necesaria o bien de la justificación externa de la premisa fáctica de la decisión judicial o bien de la justificación externa de la premisa normativa de la decisión judicial.

Tesis de la justificación no exhaustiva	
(TJ_{NoEXH})	La justificación interna y la justificación externa, aun si son condiciones necesarias de justificación de la decisión judicial, *no constituyen* condiciones conjuntamente suficientes.

La primera (TVC_{INT}) y la segunda tesis (TVC_{EXT}) son dos diferentes versiones de la *tesis de la verdad como condición de justificación* (TVC). La tercera tesis (TJ_{NoEXH}) presupone alguna dimensión justificativa diferente respecto de las dimensiones interna y externa. En el marco de esa dimensión justificativa adicional –y a diferencia de lo que por hipótesis sucede con las justificaciones interna y externa– la verdad de la premisa fáctica de la decisión judicial es condición necesaria de justificación. En otro sitio he intentado mostrar que las tres tesis son inadecuadas, de allí que la postura criticada conduzca a un trilema. De modo muy sintético, los argumentos son los siguientes.

La TVC_{INT} es inaceptable puesto que presupone que la verdad de la premisa fáctica condiciona la relación lógica entre la premisa normativa y la fáctica, lo cual constituye un error bastante evidente. Este error, si es que alguien lo comete, podría ser producto de un tratamiento poco precavido de la noción de *aplicabilidad interna* de normas jurídicas. Pero esto puede ser dejado de lado aquí. La cuestión central es que, afirmar que la verdad de la premisa fáctica de la decisión judicial es condición necesaria de la validez lógica de la inferencia, es absurdo.

La TVC_{EXT} es inaceptable en sus dos variantes. Por un lado, la verdad de la premisa fáctica no es condición necesaria de la justificación externa de dicha premisa, aun cuando esa justificación apunta a alcanzar dicha verdad. Los criterios de justificación de las premisas fácticas de las decisiones judiciales se identifican con aquellos que gobiernan la justificación de todo otro enunciado fáctico, en cualquier ámbito de la investigación empírica. Es decir, la justificación de las premisas fácticas de las decisiones judiciales no es otra cosa que *justificación* *epistémica*. Y, al igual que sucede en cualquier otro ámbito de la investigación empírica, un enunciado acerca de ciertos hechos puede estar justificado siendo, a pesar de ello, falso.[7] La segunda variante de la TVC_{Ext} sostiene que la verdad de la premisa fáctica condiciona la justificación externa de la premisa normativa. La idea es, muy rápidamente reconstruida, que una norma jurídica general no constituye una razón justificativa de la acción a menos que los hechos que condicionan su aplicación hayan ocurrido, es decir, a menos que la premisa fáctica sea verdadera. He argumentado que esta versión de la tesis se basa en una concepción demasiado exigente –y, por ello, poco realista– de la justificación práctica. Sostuve que, a mi modo de ver, una norma N_i –jurídica o de otro tipo– constituye una razón justificativa para una persona P para la acción Φ, en tanto y en cuanto P tenga una justificación epistémica adecuada respecto de que el hecho que condiciona la aplicación de N_i ha ocurrido.

La única opción restante para la postura clásica sería la de rechazar la tesis de la justificación exhaustiva. Ello exige, como se vio, apelar a un sentido de «justificación de decisiones judiciales» no reconducible ni a la justificación interna ni a la justificación externa. He argumentado que, al tiempo que no parecen haberse alegado razones atendibles en favor de un sentido tal de «justificación de decisiones judiciales», esta estrategia debería sortear un escollo que parece infranqueable, a saber: debería ser capaz de mostrar que hay relaciones justificativas entre *hechos*, por un lado, y proposiciones o normas, por el otro. Esto es algo que Donald Davidson ha rechazado hace ya un buen tiempo.[8]

A mi modo de ver, la postura clásica no puede salir airosa de este trilema. Sin embargo, la idea de que «una decisión judicial con una premisa fáctica falsa es *errónea*» subsiste entre especialistas. Como se adelantó, esto transforma a la *tesis de la verdad como condición de justificación* (TVC) en una tesis relativa al error en el derecho: la verdad de la premisa fáctica es condición necesaria de la exclusión del *error* (TVC_E).

7 Aunque esta es la posición dominante en el marco de la epistemología jurídica (y quizás también en la epistemología general), lo cierto es que hay voces que, con potentes argumentos, sostienen que la verdad es condición necesaria de la justificación epistémica (por ejemplo, véanse Littlejohn 2012; Williamson 2023, pero cfr. Madison 2018). Muchos de esos argumentos parten de distinguir entre «justificación personal» y «justificación doxástica». La segunda, pero no la primera, está condicionada a que las creencias a que refieren *sean verdaderas*. No puedo ocuparme de esta cuestión en este marco, pero cabe decir que, a mi modo de ver, algunas de las intuiciones que llevan a considerar que la justificación doxástica supone *verdad* (como condición externa de la justificación) coinciden con las que sustentan la distinción que propondré trazar entre fallas y yerros.

8 Davidson 2001 [1983]. El argumento va dirigido, de todas maneras, específicamente en contra del fundacionismo epistemológico. Véase también Quine 1951.

Tesis de la verdad como condición de exclusión del error en el derecho	
(TVC$_E$)	La verdad de la premisa fáctica es condición necesaria de la exclusión del *error en el derecho.*

Pues bien, en los apartados que siguen introduciré una buena cantidad de matices en la noción de *error*. Sostendré que, bajo circunstancias muy específicas –quizás solamente ideales– es perfectamente posible decir que decisiones judiciales con premisas fácticas falsas no constituyen errores judiciales, ni errores del sistema de justicia y, bajo ciertas precauciones, ni siquiera son injusticias en términos político-morales (al contrario).

3 LOS «VEREDICTOS FALSOS», ERRORES JUDICIALES Y ERRORES DEL SISTEMA DE JUSTICIA

Si lo hasta aquí dicho es correcto, una decisión judicial puede estar *plenamente* justificada –y una norma puede ser correctamente aplicada– a pesar de que la premisa fáctica sea falsa. La verdad de dicha premisa no es condición necesaria ni de la justificación interna ni de la justificación externa de una sentencia judicial. A la luz de esta segunda dimensión, al menos en principio, la falsedad de los enunciados sobre hechos no bloquea la justificación ni de la premisa fáctica ni la de la premisa normativa. Apelar a un tercer sentido de «justificación», dada la falta de plausibilidad de una alegación tal, termina pareciendo no más que un alegato *ad hoc* para no abandonar la TVC.

No obstante, aun concediendo todo esto, alguien podría insistir diciendo que casos como el de Dimitri Karamazov constituyen siempre un *error judicial* dado que la premisa fáctica es falsa. La nueva versión de la tesis en cuestión (TVC$_E$) sería la siguiente:

Tesis de la verdad como condición de exclusión del error judicial	
(TVC$_{EJ}$)	Aunque la verdad de la premisa fáctica no es condición necesaria de la justificación de la decisión judicial, una decisión judicial cuya premisa fáctica es falsa entraña necesariamente un *error judicial.*

Creo que aquí hay que proceder con cuidado. Pues estas afirmaciones podrían llevar a pensar que de la afirmación según la cual (a) «las decisiones con premisas fácticas falsas son erróneas» se sigue que (b) «las decisiones con premisas fácticas falsas están injustificadas». O podría incluso asumirse que una cosa equivale a la otra. Ambas asunciones serían, sin embargo, equivocadas.

La distinción trazada por Larry Laudan respecto de los «errores» que es posible identificar en la fijación de las premisas fácticas puede ser de utilidad en este punto. De entre los errores en que es posible incurrir respecto de las cuestiones fácticas en el derecho, los que más preocupaban a Laudan son los que él llamó «veredictos falsos». Estos errores se dan en dos variantes. Por un lado, están los veredictos falsos consistentes en dar por no probadas premisas fácticas verdaderas (falsos negativos). En el ámbito penal esto se traduce en absolver a personas que en realidad habían cometido el delito por el que se las juzgó. Con una etiqueta que me parece por demás inoportuna, Laudan etiquetó a estas sentencias como «absoluciones falsas». Por el otro lado, están los veredictos falsos consistentes en tener por probadas premisas fácticas falsas (falsos positivos). En el derecho penal esto se traduce en condenas en contra de personas que en realidad no habían cometido el delito por el que se las juzgó, como le sucedió a Dimitri Karamazov. Laudan las llama «condenas falsas».

Frente a estas dos variantes de «veredictos falsos», Laudan destaca la posibilidad de un diferente tipo de «error» que él llama «veredictos inválidos». Estos últimos se dan, para el autor texano, toda vez que (i) el juzgador otorgue a alguno de los elementos de prueba mayor o menor peso del que «genuinamente le correspondería» o (ii) malinterprete el grado de severidad del estándar de prueba que deba aplicar.[9] En términos más amplios, podemos decir que un veredicto es inválido cuando quien juzga comete un error en el razonamiento probatorio.

Las dos clases de «error» son lógicamente independientes. De modo que puede haber veredictos verdaderos válidos, veredictos verdaderos inválidos, veredictos falsos inválidos y veredictos falsos válidos.[10] Como puede verse sin dificultad, el caso de Dimitri Karamazov es instancia de esta última clase, es decir, se trata de un veredicto falso pero –según hemos asumido en el § 2– válido. La validez del veredicto es producto de que, según esa asunción, el razonamiento probatorio de quien juzgó el caso fue intachable. Como hemos visto, en situaciones semejantes, la decisión judicial puede considerarse plenamente justificada desde el punto de vista jurídico, al menos en tanto se acepte que una decisión judicial está justificada si lo está interna y externamente. En las palabras de Bulygin citadas al inicio, es esto lo que parece indicarse cuando se afirma que el veredicto es «legal». En lo que sigue de este trabajo asumiré sin

9 Laudan 2013b: 38.

10 Vale la pena destacar desde ya otra terminología común del autor: Laudan llama «*culpables materiales*» a quienes efectivamente han cometido el delito e «*inocentes materiales*» a quienes no lo han hecho. Paralelamente, a quienes se les prueba jurídicamente haber cometido el delito se los denomina «*culpables probatorios*» y a quienes no se les prueba haberlo hecho «*inocentes probatorios*». Tal como sucede con los «veredictos falsos» y los «veredictos válidos», las categorías relativas a culpables e inocentes son independientes, de modo que un inocente material puede ser culpable probatorio (como ocurre al pobre Dimiri) y, viceversa, el culpable material puede ser inocente probatorio. Véanse Laudan 2013b: 37 y también Laudan 2005b.

más que estamos hablando siempre de veredictos *válidos*, *legales* o, en definitiva, *jurídicamente justificados*.

Pues bien, aun cuando se trate de sentencias justificadas en este específico sentido, la versión que ahora contemplamos de la TVC sostiene que ellas constituyen un *error*, toda vez que sus premisas fácticas son falsas. Como vimos, Bulygin decía específicamente que estos veredictos son errores *judiciales*. Por mi parte, creo que esto es engañoso.

Ante todo, si una decisión judicial está justificada, en especial si lo está su premisa fáctica, entonces no tiene sentido decir que hay un error *judicial*. Decir que la premisa fáctica está justificada (*i.e.* que la sentencia es «válida» en esta dimensión específica) equivale a decir que quien juzga *no ha cometido ningún error* en lo que al razonamiento concierne. De modo que, en contra de lo que parece pensar Bulygin, no hay error *judicial*. Un «veredicto falso» puede ser producto de una actividad epistémicamente inmejorable, irreprochable, de quienes hayan investigado y juzgado.[11] Esto fue sugerido hace tiempo por Ferrer Beltrán al decir:

> En algún sentido, puede decirse que en esos supuestos no se da error judicial. Dado que se trata de supuestos en los que el juez está jurídicamente (y, en algunas ocasiones, racionalmente) obligado a declarar probados los hechos, a lo sumo podrá decirse que ha fracasado el sistema jurídico en la búsqueda de la verdad, pero no que el juez haya cometido error alguno en la valoración de los medios de prueba disponibles.[12]

Pero esto sugiere una nueva manera de entender la TVC_{E}. Aunque pueda ser cierto que no todo «veredicto falso» constituye un error epistémico *judicial*, podría insistirse en que veredictos tales entrañan siempre errores epistémicos *del sistema*.[13] TVC_{E} sería ahora:

Tesis de la verdad como condición de exclusión del error epistémico del sistema de justicia

(TVC_{EES})	Aunque la verdad de la premisa fáctica no es condición necesaria de la justificación de la decisión judicial ni de la exclusión de error judicial, una decisión judicial cuya premisa fáctica sea falsa entraña necesariamente un *error epistémico del sistema de justicia*, que fracasa en hallar la verdad.

¿Es correcta esta versión de la tesis? Ciertamente, toda vez que se produce un «veredicto falso» (aun si válido) es perfectamente *posible* que haya un genuino

11 Laudan 2013b, § 3. Él distingue también, a efectos de su análisis, entre veredictos falsos que sobrevienen a un juicio, i.e. los que secundan a la etapa final del proceso penal, veredictos falsos donde el culpable no es sometido a juicio y veredictos falsos donde se llega a un acuerdo (*plea bargain*) que no se corresponde con los hechos acaecidos.

12 Ferrer Beltrán 2005: 97, nota 27.

13 Véanse Laudan 2013b, Laudan 2016.

error del sistema. Un procedimiento organizado para decidir sobre la verdad o falsedad de las premisas fácticas arrojando monedas al aire, por ejemplo, producirá en una enorme cantidad de situaciones «veredictos falsos» que son *errores*, achacables a quien haya tenido la idea de diseñar un sistema semejante y a quienes la hayan implementado. Pero esto no es *necesariamente* así. También pueden darse, sin dudas, casos de falsos positivos o falsos negativos causados por errores que cometen operadores del sistema diferentes de quienes juzgan.[14] Estos últimos pueden ser de muy diversa índole: malos diseños legislativos; investigaciones deficientes; corrupción de ciertas personas que intervienen en la investigación, en el juzgamiento o como partes procesales; malos razonamientos, y una larga lista de etcéteras. El punto es, de nuevo, que no *necesariamente* es así.

Para hacer más claro el punto que deseo señalar, y a falta de mejores etiquetas, propongo distinguir entre *fallas* y *yerros* a efectos de explicitar una diferencia intuitiva entre diversas maneras de producir errores. Limitaré el uso del primer término, «fallas», para referir a determinaciones falsas (falsos positivos o falsos negativos) no reprochables a agente o método alguno.[15] Llamaré «yerros» tan solo a los errores reprochables, a los que son producto de acciones o actividades que, o bien no debieron ejecutarse, o bien debieron ejecutarse de una manera diferente a como fueron llevadas a cabo.[16] En este sentido, las decisiones injustificadas, los «veredictos inválidos», son indudablemente yerros. Pero, a mi modo de ver, no todos los «veredictos falsos» son yerros, y algunos no son ni siquiera fallas del sistema.[17] En consecuencia, la tesis según la cual la verdad de la premisa fáctica es condición necesaria de la exclusión del error del sistema de justicia, tiene que ser falsa.

Creo que el problema aquí tiene más que ver con la categorización laudaniana de los «errores» que con asumir que la verdad es condición necesaria de exclusión del error epistémico del sistema de justicia, es decir, con la $\mathrm{TVC}_{\mathrm{EES}}$ en sí. Obsérvese que de esta versión de la tesis junto con las categorías de error que ofrece Laudan se sigue que todo «veredicto falso» –es decir, toda «condena fal-

14 Obsérvese que si el error fuera genuinamente *judicial*, entonces sería difícil seguir diciendo que el veredicto es «válido» o «legal» o, en otras palabras, que está justificado.

15 Esta noción está muy presente en trabajos que tratan sobre «riesgos epistémicos». Véanse, por ejemplo, Biddle & Kukla 2017 y Douglas 2000.

16 Naturalmente, en el lenguaje ordinario ambos términos son sinónimos y, como tales, ambos sirven para expresar en general el mismo contenido semántico, con más o menos los mismos matices. Pero esto no debe llevar a pensar que los dos *conceptos* que aquí intento distinguir no existan en nuestro modo ordinario de hablar. El problema está en que tanto «error» como «falla» sirven para expresar *ambos* conceptos. Si decimos que «el termómetro genera un error –o falla– cada mes» entendemos por el contexto lingüístico que «error» o «falla» no significa exactamente lo mismo que si decimos «Lucila cometió un gran error al dedicarse a la música», ni significa exactamente lo mismo que decir «fue un error ingresar a la vivienda sin orden judicial».

17 Aquí también hay que evitar caer víctimas del engaño de pensar que todo «veredicto falso» es una *falla*. En particular, no toda «absolución falsa» lo es. Pero este punto conviene tratarlo en el apartado siguiente.

sa» y toda «absolución falsa»– constituye un error epistémico del sistema. Pero esto puede llevar a confusión. Para ver dónde reside el problema es necesario indagar más profundamente en la categoría de «veredictos falsos».

Para Laudan hay una perfecta simetría «alética» –por decirlo de algún modo– entre los falsos positivos y los falsos negativos que él engloba dentro de la categoría de «veredictos falsos». Con término «alético» quiero subrayar que la simetría aludida tiene que ver con la relación que una «condena falsa» y una «absolución falsa» mantienen con la verdad y la falsedad. Hay otros sentidos en que se puede evaluar la simetría o asimetría entre estos dos tipos de error. Uno de ellos es el relativo a su gravedad o indeseabilidad en términos morales. En esta variante, Laudan no considera que los errores sean simétricos. Él evalúa, como la mayor parte de la gente, que las «condenas falsas» son moralmente más graves o indeseables que las «absoluciones falsas», aunque, desde *su* punto de vista moral, la asimetría es menor de lo que –él asume– la gente suele pensar.[18]

Lo importante ahora es, de cualquier modo, lo que he denominado «simetría alética». Para Laudan, en este sentido, las «condenas falsas» y las «absoluciones falsas» comparten y agotan la clase de los veredictos *falsos*. Es decir, tanto las condenas cuanto las absoluciones falsas constituyen, para él, fracasos en el hallazgo de la verdad. Los «fracasos potenciales» en el hallazgo de la verdad (i.e. las absoluciones y condenas falsas a que un sistema podría conducir y la *ratio* en que se den) son herramientas que Laudan emplea a efectos de reflexionar sobre cuáles habrían de ser las exigencias epistémicas que los estándares de prueba tendrían que imponer. En este sentido, los veredictos falsos potenciales sirven como una herramienta heurística para diseñar, de antemano, un sistema que se adecúe a ciertas pretensiones axiológicas. No hay nada de malo en esto, al menos en principio.[19] Pero es una grave equivocación pensar que las «condenas falsas» y las «absoluciones falsas» *efectivamente dictadas* en el marco de un ordenamiento constituyen necesariamente *errores* epistémicos del sistema de justicia.

Sin dudas, cuando se condena a una persona inocente, como sucedió a Dimitri Karamazov, *se afirma como verdadero lo que es falso*. En estos casos es correcto decir que quien decide suscribe una premisa falsa, al menos en el sentido de que incluye esa premisa en su razonamiento. De modo que toda «con-

18 Véase especialmente Laudan 2016.

19 De hecho, no estoy negando que reflexionar sobre el carácter moralmente indeseable de absolver a quienes cometieron delitos y condenar a quienes no lo hicieron sea crucial a efectos de determinar ciertas exigencias respecto de la suficiencia probatoria y, eventualmente, a efectos de fijar un estándar de prueba. No estoy negando tampoco que, a estos efectos, sea relevante y hasta incluso quizás conveniente reflexionar sobre *cuántas* absoluciones y condenas de ese tipo deberíamos tolerar, y cuántas de ellas cierto sistema, cierto estándar, cierta regla, podría conducir a provocar. Lo que estoy sosteniendo es, muy por el contrario, que es incorrecto tratar a las "absoluciones falsas" y a las "condenas falsas" como errores simétricos respecto de su relación con la verdad *una vez que el umbral de suficiencia apropiado ya se ha determinado y se ha aplicado*.

dena falsa» es, como mínimo, una *falla* del sistema. Por cierto, esa sentencia podría entrañar, además, un *yerro*.

Pero sería un grave error pensar que lo mismo ocurre en todos los casos en que se absuelve a una persona culpable. Pues este tipo de absoluciones no implican *afirmar una falsedad*. Sencillamente no es verdad que quien decide en estos casos suscriba una premisa falsa, ni siquiera en el sentido de emplear una premisa semejante en su razonamiento. Y es por ello que no tiene sentido hablar de «absoluciones *falsas*», al menos no de manera indiscriminada, ni tratarlas como situaciones epistémicamente simétricas a las «condenas falsas».[20] Afirmar una falsedad no es lo mismo que no tener por acreditada una verdad. Y, como es de sobra sabido, esto último es lo que ocurre en muchas de las que Laudan califica como «absoluciones falsas».

Una absolución válida, aun siendo «falsa», exime de responsabilidad en virtud de que no se dan los presupuestos para responsabilizar. La ejecución de una acción típica antijurídica y culpable no es el único presupuesto que condiciona la responsabilidad penal (ni la jurídica en general y ni siquiera la moral). De entre esas condiciones hay, además, varias vinculadas con cuestiones procesales y probatorias. Si alguna de esas condiciones no se da, lisa y llanamente *no hay responsabilidad penal*, en el sentido de que no hay justificación admisible para achacar la acción dañosa a la persona juzgada. Y esto es así haya o no esa persona ejecutado la acción en cuestión. Cuando esa ejecución no se ha probado, aun si ha ocurrido, no hay falsedad alguna. De hecho, bajo concepciones «descriptivistas» de la suficiencia probatoria como la que defiende Ferrer Beltrán, las «absoluciones falsas» producto de que no se alcanzó el umbral de suficiencia probatoria, no solo no implican afirmar una falsedad, sino que constituyen una oportuna y cabal afirmación de lo que es *verdad*: que *no hay* pruebas suficientes.[21] En este orden de ideas, las «absoluciones falsas», aunque puedan a veces constituir fallas o yerros epistémicos, no necesariamente lo son.

Esto se puede ver muy fácilmente si se piensa, por analogía, apelando a hipótesis fácticas más generales: supongamos que la proposición *hay seres extraterrestres* es verdadera. Permítaseme asumir que, de acuerdo con las pruebas (*i.e.* las razones epistémicas) con que contamos hoy en día, no podemos tener

20 Hay casos donde la simetría sí parece funcionar. Por ejemplo, los casos donde se tiene por probado que una persona acusada por un delito no lo cometió, cuando en verdad sí lo hizo; o los casos en que se tiene por probada una causa de justificación que en verdad no existió. Agradezco a Marianela Delgado Nieves por indicarme este punto.

21 Para él, afirmar que *hay pruebas suficientes* en favor de una hipótesis fáctica es una aserción con fuerza descriptiva. La suficiencia probatoria es, por tanto, una cuestión objetiva de la que puede predicarse verdad o falsedad (en la medida en que se haya satisfecho, o no, un determinado estándar de prueba). De modo que, en contraste, afirmar que *no hay pruebas suficientes* en favor de una hipótesis es, también, algo susceptible de verdad o falsedad. Véanse Ferrer Beltrán 2001 y Ferrer Beltrán 2002. Creo, de todas maneras, que esta es una concepción errada de la suficiencia probatoria. Remito a Dei Vecchi 2014, Dei Vecchi 2020b y Dei Vecchi 2022.

por probada esa proposición. Es decir, no tenemos razones epistémicas suficientes para aceptar como verdadero que hay seres extraterrestres. Decir que *no hay pruebas suficientes en favor de la existencia de extraterrestres*, no solo no implica afirmar algo falso (no se está afirmando que *no existen seres extraterrestres*), sino que no constituye necesariamente ni un yerro ni una falla epistémica. Lo mismo pasa en todos los casos en que se absuelve a una persona cuya culpabilidad no está suficientemente probada, aun si esa persona, en efecto, había cometido el delito por el que se la juzga. Aquí no estamos ante un error de ningún tipo: no hay ni falla ni yerro; al menos no de manera necesaria. Incluso más: tal como veremos más adelante, ni siquiera está dicho que se trate de una *injusticia*.

Dejando de lado el caso de las mal llamadas «absoluciones falsas», aunque un sistema de justicia diseñado de manera epistémicamente adecuada sin dudas producirá *fallas* –como sucede en todo campo de la investigación empírica–, esas fallas no necesariamente serán yerros. De modo que dichas *fallas* tampoco constituirán razones para revisar el diseño del sistema ni la forma de decidir. En este sentido, no toda falla implica que un sistema sea malo o esté mal diseñado.

Imagínese un sistema de justicia epistémicamente ideal, por utópico que parezca. Un sistema donde el diseño procesal es tan bueno como podría ser respecto de la metodología de investigación y decisión dirigidas al hallazgo de la verdad. Imagínese que en ese sistema las personas que investigan, instruyen y juzgan delitos están tan preparadas como podrían estar en materia de razonamiento probatorio y donde tanto la valoración de la prueba cuanto las decisiones sobre la suficiencia probatoria se desarrollan, de manera consistente, apelando al tipo adecuado de razones (i.e. las de carácter epistémico). Piénsese, además, en un caso concreto investigado, instruido y juzgado de manera epistémicamente impecable en el marco de un sistema tal. Un caso donde se ha recolectado tanta prueba como podía recabarse, donde las condiciones de recolección, ofrecimiento, admisión y producción de prueba fueron epistémicamente ideales y donde la actividad inferencial es irreprochable. A mi modo de ver, en situaciones tales, las «condenas falsas» (pero no necesariamente las «absoluciones falsas») seguirían siendo *fallas* en el más básico sentido.[22] Pero no serán *yerros*, ni judiciales, ni del sistema. De modo que, si esto es así, como se ha dicho, la tesis según la cual la verdad es condición necesaria de exclusión del error epistémico del sistema de justicia (TVC_{EES}) tiene que ser rechazada. La falsedad de las premisas fácticas de condenas a inocentes, aunque pueda considerarse siempre una falla, no necesariamente entraña un yerro del sistema de justicia. Las absoluciones de culpables, por su parte, en ocasiones no son siquiera fallas.

22 Esto se debe a que los procedimientos de investigación y los criterios de justificación epistémica son *falibles* (i.e. pueden conducir a la aceptación de hipótesis falsas) incluso si respetados a rajatabla.

4 REGLAS CONTRA-EPISTÉMICAS, DETERMINACIONES DE SUFICIENCIA PROBATORIA E INJUSTICIAS

Uno de los últimos recovecos que encuentro para salvar la TVC exige convertirla en una tesis de carácter político-moral según la cual los «veredictos falsos» constituyen necesariamente errores político-morales, llamémoslos *injusticias*:

Tesis de la verdad como condición de exclusión de injusticias	
(TVC_{EI})	Aunque la verdad de la premisa fáctica no sea condición necesaria de la justificación de la decisión judicial, ni de la exclusión del error judicial, ni de la corrección del funcionamiento del sistema de justicia, una decisión judicial cuya premisa fáctica es falsa es necesariamente una *injusticia*.

Esta pareció ser en ocasiones la posición de Michele Taruffo quien, por lo demás, llegó a plantear la cuestión apelando a la noción de aplicación de normas:

> [E]s evidente que si la norma N identifica el supuesto de hecho H como premisa necesaria para determinados efectos jurídicos, pero el hecho individual h que corresponde a H no existe (en la medida en que es falso el enunciado que lo describe), entonces la norma N no puede ser aplicada en este caso. Si, de todas manera, el juez la aplica, *ello basta para decir que la decisión no es justa.*[23]

Esta versión de la tesis según la cual la verdad de la premisa fáctica es condición necesaria de la exclusión del *error* (TVC_E) implica que todo «veredicto falso» es indeseable, un error, desde el punto de vista político-moral. En consecuencia, todas las «condenas falsas» y todas las «absoluciones falsa» constituyen injusticias. Pero, como ocurría con varias de las tesis precedentes, esta postura también resulta, como mínimo, engañosa.

Como se adelantó, las «condenas falsas» constituyen siempre *fallas* del sistema de justicia y pueden entrañar, además, *yerros* judiciales o del sistema. Quizás esto sea suficiente para cimentar la intuición de que las condenas en contra de personas inocentes son siempre injustas o indeseables.

No obstante, esto no es lo que ocurre con las que Laudan llama «absoluciones falsas». Ya hemos visto que absoluciones tales pueden no ser erróneas en absoluto desde el punto de vista epistémico. Ahora es importante agregar a ello

23 Taruffo 2003: 29-30. El énfasis me pertenece. Sobre la ambigüedad de «caso» y de «aplicación», que afectan el argumento de Taruffo, véase el trabajo citado en la nota 1. En el mismo sentido: «... hay un sentido obvio en que nos preocupamos por la verdad o falsedad de los veredictos. La justicia exige verdad, y los veredictos falsos son una forma de injusticia; esta es, después de todo, la razón por la que nos preocupan la prueba y la evidencia en primer término. De modo que parece absurdo, en este sentido, rechazar a la verdad como el objetivo o finalidad de la prueba» (Pardo 2010: 43).

que las «absoluciones falsas» tampoco son necesariamente erróneas en términos político-morales, es decir, pueden no ser injustas. Más aún, para decirlo de manera un tanto provocativa, ellas podrían constituir verdaderos *éxitos* –jurídicos y político morales– del sistema de justicia. Para ver este punto con claridad alcanza con meditar mínimamente sobre algunas de las *razones* por las que se suele absolver a las personas acusadas en procesos penales.

En primer lugar, en el derecho procesal hay reglas o institutos contra-epistémicos que se cimientan en *razones de justicia*.[24] Estos institutos pueden llevar a que las decisiones judiciales se adopten en condiciones probatorias (i.e. de información disponible) subóptimas respecto de las que podrían alcanzarse en un contexto extrajurídico. En el contexto jurídico hay, como es de sobra sabido, prohibiciones relativas al empleo de medios probatorios específicos, prohibiciones relativas a «objetos de prueba» que no es admisible discutir, y hay regulaciones estrictas respecto de cómo acceder a cierta información. En ocasiones, si estas regulaciones no se respetan, la información adquirida es excluida del proceso. Ellos son solo algunos ejemplos de los institutos ahora invocados. Estos ejemplos alcanzan para demostrar por qué el conjunto de elementos probatorios sobre la base del cual se adoptan las decisiones judiciales podría no coincidir con el conjunto de elementos probatorios con el que podría esperarse contar en otro contexto.[25]

Además, las personas llamadas a determinar si la premisa fáctica de una decisión judicial está o no probada deben adoptar una decisión al respecto en tiempos acotados. De modo que, por lo general, las investigaciones judiciales no pueden profundizarse como las investigaciones desarrolladas en otros campos, ni quedan abiertas a correcciones ulteriores. Estas no son las únicas razones que pueden provocar «absoluciones falsas», pero alcanza con mencionarlas para mostrar que quienes deciden judicialmente en ocasiones se encuentran en una situación epistémica peor de la que ocupan quienes no se ven afectados por restricciones de ese tipo.

Lo importante es enfatizar que la presencia de factores contra-epistémicos como los mencionados *puede estar* política o moralmente justificada, y a menudo asumimos que lo está. Esto es así, por ejemplo, dada la necesidad de tutelar ciertos valores como la intimidad de las personas, la privacidad, la integridad física o psíquica, etc.[26] Ante esto, piénsese en casos donde las «absoluciones falsas» son el resultado de la aplicación de garantías contra-epistémicas cuya

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24 Véase Gascón Abellán 2004: 122.

25 De todas maneras, obsérvese que las reglas contra-epistémicas no son exclusivas del derecho. En el campo de las ciencias tampoco pueden emplearse todos los medios probatorios imaginables o llevarse a cabo cualquier experimento posible. En todo ámbito de la investigación empírica hay límites a la indagación que se basan, en última instancia, en postulados políticos y morales.

26 A veces se justifican incluso por razones epistémicas, pero esto puede ahora dejarse de lado.

justificación político-moral no esté en entredicho. En estos casos, aun cuando la persona absuelta sea culpable –y queda por ver cómo podemos llegar a *saber* que lo es–,[27] la decisión absolutoria habrá de considerarse plenamente justificada, no solo desde el punto de vista jurídico, sino incluso en términos político-morales.[28]

En segundo lugar, la determinación judicial de las premisas fácticas está condicionada también por consideraciones *de justicia* relativas a la suficiencia probatoria. En este sentido, las personas que tienen que adoptar una decisión judicial cuentan con un conjunto de elementos probatorios que deben valorar. Luego de esa valoración, esas personas tienen que determinar si las pruebas habidas brindan a la hipótesis fáctica un apoyo epistémico *suficiente* o, como se dice en ocasiones, si la probabilidad epistémica (o inductiva) alcanzada a través de esas pruebas es *suficiente* a efectos de adoptar la decisión en cuestión.[29] Establecer cuándo un cierto grado de probabilidad epistémica es suficiente a efectos de adoptar un cierto curso de acción, o una decisión, depende de factores *evaluativos*. Estos factores, al igual que los que informan las reglas contra-epistémicas, se identifican en general con valoraciones vinculadas con los costos que pueden tener los falsos positivos y falsos negativos respecto del curso de acción a adoptar (*e.g.* enviar a una persona a la cárcel, ejecutarle su vivienda, privarla de la patria potestad, etc.). Esto es lo que ocurre frente a la pretensión de evitar, en la mayor medida de lo posible, condenas penales en contra de personas inocentes: la valoración subyacente es que, si se tratase de un falso positivo (*i.e.* una condena a quien no cometió el delito) el daño causado a esa persona sería muy grave, muy indeseable en términos morales. Estas valoraciones se traducen (o se pretenden traducir) en exigencias relativas a la suficiencia probatoria. Por hipótesis, a mayor exigencia de justificación epistémica, menor es el riesgo de condenar a personas inocentes, aunque aumenta el riesgo de absolver a personas culpables.[30] En contraste, a menor exigencia probatoria, ma-

27 Volveré sobre este punto más adelante.

28 Supongamos que hay que decidir si Vladimir es culpable o inocente, y que se llega al momento de esa decisión con un conjunto de elementos CE que es insuficiente para condenar. Imaginemos que la persona llamada a decidir el caso, por la razón que fuera, sabe (indudablemente) que (a) el acusado sí cometió el delito por el que se lo debe juzgar y (b) si se lo sometiese a tortura por unos pocos minutos confesaría el delito, aportando la prueba necesaria para confirmar su confesión, prueba que indudablemente sería suficiente para condenar pero que es imposible obtener de otro modo. Pues bien, aunque creo que las posturas político-morales son subjetivas, he de declarar que incluso en una situación como la imaginada, condenar a Vladimir sobre la base de torturarlo me parecería más indeseable que absolverlo por no contar con las pruebas que la tortura habilitaría. Quien comparta esta opinión considerará, como yo considero, que la manera *justa* de resolver es absolviendo, aun cuando en muchos casos quedará, indudablemente, un «residuo moral».

29 Véase Ferrer Beltrán 2007: 120 ss.

30 Obsérvese que esto es verdad con independencia de la discusión de si es o no posible fijar estándares de prueba legislados que (de por sí) determinen el umbral de suficiencia y distri-

yor es la probabilidad de condenar a personas culpables, pero también mayor es el riego de condenar a personas inocentes.

Como puede verse, el incremento o relajamiento de dichas exigencias responde, después de todo, a la adopción de una postura político-moral, a ciertas pretensiones de carácter axiológico. Dicho de manera muy simplificada, esa postura y estas pretensiones conciernen a una valoración relativa a, por un lado, si condenar a personas inocentes es o no más moralmente indeseable que absolver a personas culpables y, en su caso, cuánto más indeseable resulta este tipo de decisión. Estas consideraciones sobre la suficiencia probatoria podrían llevar a considerar que cierto caudal probatorio que sería suficiente para creer en la verdad de una hipótesis o para afirmarla en un contexto diferente resulte insuficiente a efectos de adoptar una determinada decisión judicial, por ejemplo, la de condenar penalmente a una persona imputada.[31]

La determinación de cuándo ciertas pruebas han de considerarse suficientes para condenar, incluida la faceta político-moral de esa determinación, o bien quedan en manos de la judicatura o bien, como muchas pregonan, han de confiarse al poder legislativo. La discusión en torno a la fijación de «estándares de prueba» legislados apunta a intentar fijar, por medio de reglas jurídicas generales, umbrales de suficiencia que indiquen a las personas que juzgan cuándo cuentan con prueba suficiente para condenar, eliminando sus juicios valorativos al respecto. Si esto fuera posible, sería la legislatura la que, luego de adoptar una posición político-moral como la señalada, fijaría el margen de «distribución del riesgo de error» entre «condenas falsas» y «absoluciones falsas».[32]

Por muchas razones, creo que confiar en la posibilidad de fijar legislativamente umbrales de suficiencia probatoria que tengan la capacidad de eliminar el juicio valorativo judicial respecto de la suficiencia probatoria es ni más ni menos que *wishful thinking*. Pero a efectos de analizar la plausibilidad de nuestra versión final de la TVC_E es útil adoptar la hipótesis ficticia que subyace a esa ilusión. Asumamos entonces que, no solo es posible fijar estándares de prueba objetivos por medio de reglas legisladas, sino que, además, ello puede hacerse

buyan el riesgo de error. Lo aquí dicho es neutral a este respecto.

31 El problema del estatus justificativo de las premisas fácticas de razonamientos prácticos trasciende al campo jurídico. Se trata de un problema ampliamente debatido en el ámbito de la epistemología general actual, donde el análisis del entrelazamiento entre razones epistémicas y consideraciones prácticas tiene todavía mucho que ofrecer. Véanse, por ejemplo, Fantl & McGrath 2007, Fantl & McGrath 2009 y Fantl & McGrath 2012; Fritz & Jackson 2021; Gardiner 2018; Kvanvig 2011; McGrath 2018; Ross & Schroeder 2012 y Ross & Schroeder 2014; Schroeder 2012 y Schroeder 2018.

32 El debate sobre este punto está abierto. Pueden verse, por ejemplo, Accatino 2011, Accatino 2019 y 2020; Aguilera García 2021; Allen 2013; Clermont 2009; Ferrer Beltrán 2021; Gama 2021a y Gama 2021b; Gardiner 2017; Gascón Abellán 2005; González Lagier 2020; Laudan 2005a, Laudan 2013a y Laudan 2013b; Laudan & Saunders 2009; Nance 2016 y Nance 2018; Picinali 2015 y Picinali 2018.

cuantificando los grados de justificación epistémica, cuya gradación va de 0 a 0,99. Supongamos que la legislatura de este mundo ilusorio determina que el umbral de suficiencia probatoria *justo* a efectos de las condenas penales ha de fijarse en 0,8 grados de justificación epistémica. Y asumamos adicionalmente, aprovechando de este mundo de fantasía, que los juicios político-morales son también objetivos y que nuestras legislaturas son verdaderas «autoridades epistémico-morales». De modo que el umbral de suficiencia de 0,8 grados de justificación no solo es epistémicamente objetivo, sino que constituye, además, la exigencia probatoria objetivamente *justa* a efectos de condenar penalmente.

De todo esto resulta que toda absolución que sea resultado de no haberse alcanzado el grado de justificación epistémica indicado por el estándar estará justificada, no solo jurídicamente, sino también en términos epistémicos y político-morales. Y esto es así tanto en los casos en que las personas absueltas no hayan cometido los delitos que se les atribuían, como en los casos en que sí lo hayan hecho.

En pocas palabras: quizás para responsabilizar penalmente a una persona por la acción Φ, y para hacerlo justamente, sea necesario que esa persona haya ejecutado Φ y que haya pruebas suficientes acerca de ello. Pero para absolver de responsabilidad penal por Φ, y para hacerlo justamente, alcanza con que no haya pruebas suficientes para acreditar que la persona absuelta ejecutó esa acción, aun si lo hizo.

Por cierto, al analizar la cuestión relativa a las reglas contra-epistémicas y la concerniente de los estándares de suficiencia probatoria hemos estado imaginando un sistema de justicia ya no solo epistémicamente ideal (como sucedía en el apartado anterior), sino también moralmente indisputable. Lo importante es evidenciar que, en marcos como este, por ficticios o utópicos que suenen, absolver «culpables materiales» en virtud de la aplicación de cualquiera de estos institutos, no solo no vulnera ningún requisito de justificación *jurídica* de las decisiones judiciales ni constituye un error del sistema de justicia. Es más que eso: este tipo de «absoluciones falsas» no constituyen tampoco injusticias. De hecho, son absoluciones dictadas por exigencias político-morales, es decir, son manifestaciones cabales de lo que es *justo* hacer, sin que ello implique, por cierto, que todo «residuo moral» desaparezca.

Por consiguiente, si aplicada simétricamente a *todo* «veredicto falso», la tesis de la verdad como condición necesaria de exclusión del error político-moral, i.e. como evitación de la injusticia (TVC_{EI}), debe ser también rechazada.

5 ERRORES EXCESIVOS Y EXCESOS ARGUMENTALES

Frente a la última versión analizada de la tesis según la cual la verdad de la premisa fáctica es condición necesaria de la exclusión del *error* (TVC_E), que los «veredictos falsos» constituyan o no injusticias depende de la adopción de una postura político-moral, sobre todo respecto de las garantías en juego. Esta es, a mi modo de ver, parte de la importancia de la distinción que aquí he propuesto trazar entre fallas y yerros. Respecto de las llamadas «absoluciones falsas» la cuestión es todavía más relevante, pues la distinción se extiende en dos perspectivas conectadas que me parecen cruciales.

En primer lugar, la distinción permite abordar desde una nueva óptica la TVC_E.

Tesis de la verdad como condición de satisfacción de la *ratio* de error admisible	
(TVC_{RE})	Aunque la verdad de la premisa fáctica no sea condición necesaria de la justificación de la decisión judicial, ni de la exclusión del error judicial, ni de la corrección del funcionamiento del sistema, una cierta *ratio* de fallas entraña un mal funcionamiento del sistema.

Ahora bien, en ocasiones el juicio político-moral que subyace a la fijación de un cierto umbral de suficiencia probatoria se critica arguyendo que la *ratio* de falsos positivos y falsos negativos que el sistema produce es *moralmente inadmisible*. Larry Laudan ha sostenido esto en reiteradas oportunidades respecto del sistema estadounidense. En concreto, para este autor, dicho sistema produce una cantidad moralmente inadmisible de «absoluciones falsas». El carácter inadmisible de la *ratio* entre absoluciones y condenas falsas depende, en la obra del autor citado, de una serie de dudosos cálculos consecuencialistas que aquí no puedo analizar.[33] Pero lo que es indispensable destacar ahora es *cómo* Laudan calcula la *ratio* que, alega, el sistema criticado produce.

Ante todo, recordemos que, desde hace unas cuantas páginas, venimos analizando veredictos que se presuponen válidos. Una absolución válida por falta de prueba declara correctamente que las razones epistémicas recabadas y valoradas no son suficientes para condenar. Afirmar que una absolución semejante es falsa implica haber establecido que ella se dicta en beneficio de una persona que *sí* había cometido el delito por el que se la absolvió. Es precisamente esto lo que hace Laudan cuando predica la «falsedad» de esa absolución. Dado que, como se dijo al inicio, en la vida real no gozamos de los privilegios epistémicos de la omnisciencia o los que tenemos cuando operamos, por ejemplo, como lectores

33 Véase Dei Vecchi 2020a.

de novelas literarias, esa determinación no puede llevarse a cabo más que a través de *pruebas*, es decir, apelando a razones epistémicas. Aquí hay dos opciones.

La primera es que, quien afirma que la absolución es «falsa», (a) se apoye en *pruebas* diferentes y adicionales respecto de las contempladas en el proceso judicial y (b) argumente en favor de que con esas pruebas adicionales habría sido suficiente para condenar penalmente de acuerdo con el estándar adecuado para atribuir responsabilidad penal (en nuestro mundo imaginario, un 0,8 de probabilidad epistémica). Si fuera el caso, quizás aquí habrá que ponderar (en sentido evaluativo, político-moral) si las razones por las cuales esas pruebas adicionales no ingresaron al proceso o no fueron tenidas en cuenta prevalecen por sobre los valores involucrados en la condena de personas culpables. Si la respuesta es afirmativa, la absolución en cuestión no constituye ni un error judicial, ni un error del sistema de justicia, ni una injusticia, al menos no necesariamente.

La segunda opción es más delicada, y es aquella frente a la cual hay que tener especial precaución. Se trata de la estrategia consistente en contabilizar «absoluciones falsas» sobre la base del mismo conjunto de pruebas que en el proceso resultó insuficiente para condenar. Para ver con claridad cómo funciona este argumento –que a mi modo de ver constituye una peligrosa falacia– puede ser útil volver a nuestro experimento mental, que ideaba un mundo imaginario donde los grados de justificación epistémica son cuantificables y los juicios político-morales objetivos. Recordemos que allí la legislatura había logrado «descubrir» (o, en una lectura más realista, simplemente acordó) que el umbral de suficiencia epistémica *justo* a efectos de condenar penalmente es del 0,8 grados de justificación epistémica. Recordemos también que estamos presuponiendo que la absolución es válida, lo que significa que, si una persona P fue absuelta por falta de prueba ello implica que el grado de probabilidad o justificación epistémica alcanzado es inferior a 0,8. Pero supongamos que la prueba de la culpabilidad de P había alcanzado una probabilidad, digamos, de 0,7 grados. Obviamente, si alguien afirma, sobre la base de ese mismo conjunto de elementos probatorios y esa misma valoración, que la absolución de P es «falsa», lo que estará haciendo es (a) aplicar un estándar de prueba más bajo que el que la legislatura juzgó como *justo* a efectos de atribuir responsabilidad penal y, precisamente por ello, (b) cuestionar de algún modo, quizás implícitamente, ese juicio político-moral según el cual las condenas penales solo son admisibles si se alcanza al menos grado de probabilidad epistémica de 0,8. Suscribir el juicio político-moral de la legislatura según el cual la culpabilidad solo puede acreditarse con 0,8 de probabilidad epistémica y sostener al mismo tiempo que la absolución de P es «falsa» dado que hay prueba de culpabilidad de 0,7 sería incurrir en una grave inconsistencia o, lisa y llanamente, hacer trampa.

Ahora bien, manteniendo los presupuestos del experimento mental propuesto, supongamos que en un determinado periodo de tiempo de 10 años en un sistema jurídico SJ se absuelve a 1.000 personas dado que la prueba no alcanza el 0,8 que el estándar exige. Supongamos que logramos «corroborar» que la prueba de culpabilidad del 80% de la totalidad de las personas absueltas alcanzaba un grado de probabilidad epistémica del 0,7. La estrategia argumental de Laudan, aplicada a nuestro ejemplo, lleva a afirmar que el 80% de las absoluciones dictadas a lo largo de esos 10 años en SJ son «falsas» y que, por lo tanto, 800 personas criminarles fueron liberadas en virtud de las exageradas exigencias probatorias del ordenamiento. Laudan concluye, a partir de un argumento de este tipo, que la *ratio* entre falsos positivos y falsos negativos se muestra, por tanto, demasiado desproporcionada. Y de todo ello colige que *es necesario bajar los estándares de prueba* en vigor. En nuestro ejemplo ello significaría abandonar el umbral de 0,8 grados de probabilidad epistémica.

Como resultará claro, esta conclusión solo puede extraerse si se aplica recurrentemente a casos ya juzgados (y absueltos) un umbral de suficiencia inferior al que la legislatura juzgó *apropiado* a efectos de considerar penalmente culpable a la gente en SJ. De modo que el argumento es una evidente petición de principio: concluye que el estándar legislativo del 0,8 es demasiado exigente y produce resultados moralmente inadmisibles puesto que lleva a absolver a un 80% de culpables. Pero esta conclusión solo se obtiene si se presupone que el estándar adecuado para asumir que una persona es culpable es del 0,7 (o, en todo caso, uno más bajo que el vigente).

Esta «argumentación» podría ir acompañada de otra que incrementa el riesgo de caer en la falacia. Ella reside en el modo de corroborar el grado de probabilidad epistémica de culpabilidad de las personas absueltas en un tal o cual periodo de tiempo. En el caso de Laudan, sus *pruebas* del grado en que estaba probada la culpabilidad de las personas absueltas (en los términos de nuestro experimento mental, un 0,7 de probabilidad epistémica) se reducen a *las opiniones de quienes juzgaron esos casos respecto de cuál era el grado de probabilidad subjetiva de culpabilidad*. En otras palabras, Laudan hace coincidir el grado en que las personas juzgadoras *se sentían convencidas* de que las personas que terminaron absolviendo eran culpables con el grado de justificación epistémica de culpabilidad.

No es este el lugar para profundizar sobre este punto. Pero es útil señalarlo, pues sirve para mostrar por qué es importante distinguir entre yerros y fallas como tipos de error. Y permite mostrar también por qué hay que tener cautela con las tesis que afirman que ciertos sistemas *producen demasiados errores de un cierto tipo*. Aseverar que un sistema produce una *cantidad excesiva* de falsos negativos, es decir, que absuelve a demasiados culpables, presupone necesariamente un juicio de carácter moral, al menos si los argumentos se articulan en el modo arriba ejemplificado. Ese juicio subyace a la contabilización de la *ratio de error*. Pues para establecer que una absolución (válida) es «falsa», si no hay pruebas adicionales, o bien se cuestiona un instituto contra-epistémico, o bien se aplica un estándar probatorio inferior al empleado en el contexto jurídico-penal. Y tanto los institutos contra-epistémicos como las exigencias de suficiencia epistémica están basadas en juicios de carácter político-moral. De allí que los alegatos relativos a «los errores del sistema» deban ser escudriñados con suma cautela, distinguiendo los distintos tipos de razones involucradas, sobre todo para evitar el contrabando de ideología política bajo el ropaje de argumentos pseudo-epistemológicos.

6 CONCLUSIONES

Lo dicho permite concluir lo siguiente:

(1) La verdad del enunciado sobre hechos no es condición necesaria de la *justificación jurídica* de la decisión judicial. No es condición necesaria de la justificación interna, ni lo es de la justificación externa de la premisa fáctica, ni de la premisa normativa, ni es condición necesaria de «justificación» en un sentido adicional del término.

(2) La verdad de la premisa fáctica no es condición necesaria del funcionamiento correcto (i.e. no *erróneo*) del sistema jurídico.

(3) La verdad de la premisa fáctica, al menos si se admite la engañosa idea de «absolución falsa», no es condición necesaria de la *justicia* de la decisión, ni del funcionamiento justo del sistema.

Por cierto, hay que resistir la tentación de caer en la falacia de derivar de lo aquí dicho cosas tales como que *la verdad es irrelevante para el proceso judicial*, o que *la verdad es irrelevante a efectos de la justificación de la decisión judicial*. Tesis semejantes, ni se siguen de lo anterior, ni tienen realmente mucho asidero.

Lo dicho descarta la tesis según la cual la verdad de las premisas fácticas es condición necesaria de la justificación de la decisión judicial o de la ausencia de error (TVC), en todas sus posibles variantes. Pero también muestra lo inaceptable de la posición extrema contraria: la que afirma que la verdad es irrelevante para el proceso judicial. Pues, aunque la verdad no sea condición necesaria de justificación de las decisiones judiciales, de su justicia, o del correcto funcionamiento de un sistema jurídico; la adecuación de las justificaciones epistémicas de dichas decisiones y el diseño epistémicamente adecuado del sistema sí lo son. Y esto último significa, ni más ni menos, que *adecuación respecto de la búsqueda de la verdad*.

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Diego Dei Vecchi*

Judicial rulings with false factual premises

Between *flaws*, *errors* and exaggerations

It is a common assertion among lawyers that "judicial rulings containing false statements about facts constitute *errors*". This paper examines the basis for such claims. The analysis starts from the assumption (substantiated in another paper) that the truth of factual premises is not a necessary condition for either the correct application of legal norms or the justification of judicial decisions. However, the claim that rulings with false factual statements *are erroneous* could make sense even if one accepts the above assumption. This paper therefore aims to elucidate and analyse the various senses in which claims such as the above might be plausible. It will be shown that the claim, however intuitive it may seem, must be highly nuanced if it is not to be rejected out of hand.

Keywords: justification, judicial ruling, error, truth, proof

1 INTRODUCTION

In the following pages, I will set out to explore the meaning of the assertions according to which "judicial findings with false factual statements are *errors*". This examination stems from conclusions drawn in another work.[1] The work in question analysed the thesis according to which "the truth of factual statements is a necessary condition for the proper application of judicial rules and therefore for the justification of court findings". I call it *the thesis of the truth as a condition of justification* (TTC).

The thesis of the truth as a condition of justification	
(TTC)	The truth of the factual premise is a necessary condition for the proper application of legal rules and therefore for the justification of a court finding.

The aforementioned work disambiguates the TTC, showing the different versions that such a thesis can take on, rejecting them one by one. These suc-

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cessive rejections eventually suggest the opposite thesis, according to which the truth of factual statements is not a necessary condition for the proper application of rules or for the justification of court findings.

However, it does not suffice to rule out the most obvious versions of the TTC. Because the intuition, undoubtedly strongly rooted, and according to which rulings with false factual statements *are wrong*, persists. Many people seem to subscribe to this approach. Some of them may even be willing to accept that the TTC lacks foundation in these more superficial readings. Therefore, this paper will analyse some additional versions of the TTC, which depend upon the notion of *error in law*. According to these additional versions of the thesis, even when it would make sense to say that the truth of factual statements is not a necessary condition for the proper application of general legal rules or for the justification of court findings, these findings must in any event be regarded as *errors of the justice system*.

I will attempt to demonstrate that however intuitive this thesis may seem, it needs to be highly nuanced, if not rejected out of hand. To this end, in § 2 I will synthetically reconstruct the arguments that precede this work, above all for the purpose of making it independent. I shall then go on to address the versions of the TTC that link it to the notion of *error*. In § 3 I will analyse the TTC as a way of expressing the idea according to which court findings with false factual premises are either errors attributable to the judge or to the justice system. After showing that such a version of the TTC is an exaggeration, in § 4 I will assess the possibility of understanding the thesis as a corollary of the political and moral intuition according to which any court finding whose factual premise is false is *morally wrong* in the sense that it constitutes an *injustice*. I shall set out some arguments to nuance this intuition. In § 5, I will comment upon certain theses that maintain that what causes justice systems to become flawed is when they exceed a certain number of court findings with false factual premises.

2 THE TRUTH OF FACTUAL STATEMENTS, THE PROPER APPLICATION OF RULES AND THE JUSTIFICATION OF COURT FINDINGS: SOME ASSUMPTIONS

A court ruling or finding may be regarded as an argument whose conclusion is an individual rule resulting from applying a general legal rule to an "individual case".[2] This individual rule, the product of the application of a general rule, is the content of the finding or simply its *result*. In contrast, the expression

2 With regard to the ambiguity of the term "case" and the difficulties that it generates, please refer to the work cited in the preceding note.

"court finding" is sometimes used to allude to the *finding-act* which is nothing other than the conduct of the person applying the general rule to the "case". Here, this label is used with the first meaning in mind.

In legal philosophy, it is very common to assert that a court ruling is justified, just like any other argument, to the extent that the requirements of two dimensions of justification are fulfilled. According to the first dimension, which pertains to *internal justification*, a court ruling is justified if the conclusion, *i.e.* the individual rule, is a logical conclusion of the normative and factual premises. According to the second dimension, which pertains to *external justification*, a court ruling is justified if its premises taken individually are also justified.

Determining the conditions under which the premises of arguments may be regarded as being individually justified is no easy task. And neither is, and more particularly so, establishing the conditions of justification of the argument that we call "court rulings". I will not dwell upon the question of the external justification of the normative premises, usually linked to matters of judicial interpretation. I shall focus, on the other hand, on the external justification of factual premises: the area specific to evidence and proof. In this perspective, everything indicates that a factual premise is externally justified if it is sufficiently supported by the evidence.

If someone considers that the internal justification and the external justification of court rulings are individually necessary and jointly sufficient conditions of justification of a court finding, then they must also assume that the internal and external dimensions exhaust the demands of justification of court findings. In other words, they adopt what in the aforementioned work I called the *thesis of exhaustive justification*. According to this assumption, and once the internal and external justification criteria have been met, we cannot make any further demands upon people who are called upon to apply the legal rules through rulings in our legal systems.

This leads us to three main theses:

The thesis of exhaustive justification	
(TJ_{EXH})	The internal and external justification are individually necessary and jointly sufficient conditions of justification of the court finding.

The thesis of internal justification	
(TIJ)	The court finding is internally justified if the finding-qua-individual rule follows from a general rule and a factual premise.

The thesis of external justification – Proof condition thesis	
(TEJPCT)	The factual premise is externally justified if there is sufficient evidence in its favour.

Nevertheless, this becomes problematic, since, in the light of these three theses, it would appear to be perfectly feasible for a ruling to be exhaustively justified and at the same time for the factual premise to be false. The counter-intuitive consequence to which the three theses may lead is normally illustrated in the domain of legal philosophy by means of a literary example. In *The Brothers Karamazov,* by Fyodor Dostoevsky, Dmitri Karamazov is accused, tried and convicted of killing his father. Although things are somewhat more intricate in the novel, let us assume that the case was tried and judged flawlessly in terms of modern legal guarantees. Let us assume, first and foremost, that the (statement about the) fact that Dmitri killed his father was duly proven in court. The ensuing guilty verdict could be presented in the following way:

[General rule] N_i: Manslaughter.
Any person that kills another must be sentenced to punishment X.

[Factual premise]
Dmitri Karamazov killed his father.

[Conclusion = Finding rule]
Dmitri Karamazov must be sentenced to punishment X.

However, it transpires, as the author of the novel tells us, that although the actual occurrence of the event was proven, Dmitri had not committed the crime he was accused of.[3] Hereinafter, I will refer to this type of verdicts as *K verdicts*.

3 It is very important to realise that if we know, without a shadow of a doubt, that Dmitri Karamazov is innocent, it is because the author of the novel places us in a privileged and infallible epistemic position by giving us direct access to the facts. This position does not exist in real life, where access to the facts is only possible through evidence, *i.e.* epistemic reasons.

These are rulings that satisfy the requirements of the exhaustive justification thesis (i.e. they are internally and externally justified) but which nevertheless contain a false factual premise.

The stridency that is caused in these situations (however real or imaginary they may be) has led many people to hold that *K verdicts* lack justification. This view is based on the assumption that the truth of the factual premise is a necessary condition for the proper application of rules and therefore for the justification of the court finding.[4] Paolo Comanducci, citing the case of Dmitri Karamazov, has argued as follows in this regard:

> The guilty finding is not justified, as a result, since the individual rule expressed by the ruling is not justified by the substantive rule of manslaughter, because such a rule is not internally applicable in that Dmitri did not murder his father.[5]

In the same line, Eugenio Bulygin had maintained, some years previously, that:

> ... the fact that the judge's ruling, albeit lawful [since guilt was proven in the trial], is not justified by criminal law [given that the proven premise is false] renders it possible to say that it is based on a wrong decision and that (...) a *judicial error* was made.[6]

This way of seeing things is fairly widespread among specialists, although it is not clear what the reasons that support adherence to this thesis are. Because this posture seems obligated to accept at least one of the following three theses:

4 It is normally assumed that normative premises *cannot* be true (or false), since the rules lack true value. Meaning that it would make no sense to say that the response to the *quaestio iuris*, like the response to *quaestio facti*, seeks to find the truth. This thesis has been criticised by Redondo 2009. Cf. Ferrer Beltrán 2011.

5 Comanducci 2010: 163.

6 Bulygin 2021 [1985]: 298.

The thesis of the truth as a condition of the internal justification	
(TTC_{INT})	The truth of the factual premise is a necessary condition for the internal justification of the court finding.

The thesis of the truth as a condition of the external justification	
(TTC_{EXT})	The truth of the factual statement is a necessary condition for the external justification of the factual premise of the court finding or for the external justification of the normative premise of the court finding.

The thesis of non-exhaustive justification	
(TJ_{NoEXH})	The internal and external justification, even if they are necessary conditions for the justification of the court finding, *do not constitute* jointly sufficient conditions.

The first and second theses are two different versions of the *thesis of the truth as a condition of justification* (TTC). The third thesis assumes that there is a different dimension of justification additional to the internal and external dimensions. Within the framework of this additional dimension of justification – and unlike that which hypothetically occurs with the internal and external justifications – the truth of the factual premise of the court finding is a necessary condition for justification. Elsewhere, I attempted to show that the three theses are inadequate, meaning that the posture criticised leads to a trilemma. The arguments are succinctly summarised below.

The TTC_{INT} is unacceptable because it assumes that the truth of the factual premise conditions the logical relationship between the normative and the factual premises, which is an evident mistake. This mistake, if someone actually makes it, could be the result of a rather incautious treatment of the notion of the *internal applicability* of legal rules. However, this does not need to be addressed here. The important point is that it is absurd to assert that the truth of the factual premise of the court finding is a necessary condition for the logical validity of the inference.

Both variants of the TTC_{EXT} are unacceptable. On the one hand, the truth of the factual premise is not a necessary condition for the external justification of this premise, even if the ideal aim of this justification is to reach true conclusions. The justification criteria of the factual premises of court findings may be identified with those that govern the justification of any other factual statement in any domain of empirical research. In other words, the justification of the factual premises of court findings is nothing more than *epistemic justification*. And as also occurs in any other domain of empirical research, a statement about certain facts may be justified but nevertheless still be false.[7] The second variant of the TTC_{Ext} holds that the truth of the factual premise conditions the external justification of the normative premise. Reconstructing this idea rapidly, it means that a general legal rule does not constitute a reason justifying the action unless the facts that condition its application have actually occurred, in other words unless the factual premise is true. I have argued that this version of the thesis is based on an over-demanding– and therefore somewhat unrealistic – concept of practical justification. I argued that, in my opinion, a rule N_i – be it legal or of any other kind – is a justificatory reason for a person P for an action Φ, to the extent that P is epistemically justified in accepting the factual condition of N_i as true.

The only remaining option would be to reject the thesis of exhaustive justification. This requires, as was already seen, having recourse to a sense of "justification of court findings" that does not lead to internal or external justification. I have argued that while reasons worthy of consideration in favour of such a sense or meaning of "justification of court findings" do not seem to have been mooted, this strategy would have to negotiate a seemingly impossible pitfall, to wit: it would have to be capable of demonstrating that there are relationships of justification between *facts*, on the one hand, and propositions or rules on the other. This is something that Donald Davidson rejected quite some time ago.[8]

To my mind, the posture under discussion cannot emerge unscathed from this trilemma. However, the idea that a "court finding with a false factual premise is *wrong*" subsists among specialists. This transforms *the thesis of the truth of as a condition of justification* (TTC) into a thesis related to legal error: the truth of the factual premise is a necessary condition for the absence of *legal error* (TTC_E).

The thesis of the truth as a condition for the absence of legal error

(TTC_E)	The truth of the factual premise is a necessary condition for the absence of *legal error*.

In the following paragraphs I will introduce a significant number of nuances into the notion of *error*. I will argue that, in very specific circumstances – per-

7 Although this is the dominant position within the framework of legal epistemology (and perhaps also in general epistemology), the truth is that there are voices that, with powerful arguments, maintain that truth is a necessary condition for epistemic justification (for example, see Littlejohn 2012; Williamson 2023, but compare Madison 2018). Many of these arguments start by distinguishing between "personal justification" and "doxastic justification." The second, but not the first, is conditioned on the beliefs they refer to being true. I cannot address this issue within this framework. Still, it is worth saying that, in my view, some of the intuitions that lead to considering doxastic justification as requiring truth (as an external condition for justification) coincide with those that support the distinction I will propose between flaws and mistakes.

8 Davidson 2001 [1983]. In any event, the argument is directed specifically against epistemological foundationism. See also Quine 1951.

haps only ideal ones – it is perfectly possible to say that court findings with false factual premises are not judicial errors and nor are they errors of the justice system and that, with certain precautions, neither are they injustices in political and moral terms (quite the opposite).

3 "FALSE VERDICTS", JUDICIAL ERRORS AND ERRORS OF THE JUSTICE SYSTEM

If what has been said hitherto is right, a court finding may be *fully* justified – and a rule may be properly applied – even if the factual premise is false. The truth of this premise is not a necessary condition for the internal justification or the external justification of a court ruling. In the light of this second dimension, at least in principle, the falsity of statements about facts does not block the justification of the factual premise nor of the normative premise. Having recourse to a third meaning of "justification", in view of the lack of plausibility of such a claim, ultimately appears to be nothing more than an *ad hoc* plea so as not to abandon the TTC.

Nevertheless, and even conceding the foregoing, someone might continue to argue that cases such as Dmitri Karamazov's are an *epistemic judicial error*, given that the factual premise is false. The new version of the TTC_E would be TTC_{JE}:

The thesis of the truth as a condition for the absence of judicial error

(TTC_{JE})	Although the truth of the factual premise is not a necessary condition for the justification of the court finding, a court finding whose factual premise is false must constitute a *judicial error*.

Here I think that we should proceed with caution. This is because these statements could lead one to think that on the basis of the statement according to which (a) "findings with false factual premises are wrong" it follows that (b) "findings with false factual premises are unjustified". Or one thing could even be assumed to be the same as the other. However, both assumptions would be wrong.

The distinction made by Larry Laudan with regard to the "errors" that can be identified when factual premises are established may be of help in this point. Among the errors that may be made with regard to factual questions in law, the ones that gave Laudan greatest cause for concern are the ones he called "false verdicts". There are two variants of these errors. One class of false verdict obtains when true factual premises are nonetheless regarded as not-proven by the trier of fact (false negatives). In the criminal domain, this translates into acquitting people who had actually committed the offence with which they were charged and tried. Using a label which I find misleading and inopportune, Laudan called such findings “false acquittals”. The other class of false verdicts obtains when false factual premises are eventually regarded as proven by the trier of fact (false positives). In criminal law, this translates into convicting people who had not actually committed the offence with which they were charged and tried, as happened with Dmitri Karamazov. Laudan calls them “false convictions”.

With regard to these two variants of “false verdicts”, Laudan highlights the possibility of a different type of “error” that he calls “invalid verdicts”. The latter occur, in the Texan author’s opinion, since the (i) fact-finder gives more or less weight to certain item of evidence than what “it genuinely merits” or (ii) misconceives the height of the standard of proof that they should apply.[9] In broader terms, we may say that a verdict is invalid when the fact-finder errs in their evidentiary reasoning.

The two types of “error” are logically independent, meaning that there may be valid true verdicts, invalid true verdicts, invalid false verdicts and valid false verdicts.[10] It is clear that the case of Dmitri Karamazov falls within the final class, i.e. it is a false verdict, albeit – as we assumed in § 2 – valid. According to this assumption, the validity of the verdict is the result of the evidential reasoning employed by the fact-finder being faultless. As we have seen, in similar situations, the court finding may be regarded as fully justified from the judicial standpoint, at least in the sense that a court finding is accepted as justified if it is internally and externally justified. In the words of Bulygin cited at the outset, this is what seems to be indicated when a verdict is said to be “lawful”. In the remaining part of this work, I shall assume that we are always dealing with *legally valid*, *lawful* verdicts or, in short, *legally justified* ones.

Therefore, and even in the case of justified rulings in this specific sense, the version of the TTC that we now address maintains that these rulings constitute an *error*, since their factual premises are false. As we have already seen, Bulygin specifically said that these verdicts are *judicial* errors. I think that this is misleading.

First and foremost, if a court finding is justified, particularly if its factual premise is, then it makes no sense to say that there is a *judicial* error. Saying that the factual premise is justified (*i.e.* that the ruling is “valid” in this specific dimension) is equivalent to saying that the fact-finder *has not made any mistake* in terms of reasoning. Meaning that, contrary to what Bulygin appears to think,

9 Laudan 2006: 13.

10 As of now I would draw attention to another terminological item commonly used by the author: Laudan calls people who actually committed the offence “*materially guilty*” and those who did not “*materially innocent*”. In parallel, he calls people who are legally proven to have committed the offence “*probatorily guilty*” and those who are not proven to have done so “*probatorily innocent*”. As occurs with the “false verdicts” and the “valid verdicts”, the categories pertaining to guilty and innocent are independent, meaning that a materially innocent may be a probatorily guilty (like the unfortunate Dmitri) and, vice versa, the materially guilty may be probatorily innocent. See Laudan 2006: 12 and also Laudan 2005b.

there is no *judicial* error. A “false verdict” may be the result of the epistemically faultless and irreproachable activity of the people who investigated and tried the case.[11] This was suggested some time ago by Ferrer Beltrán, who held:

> In some regards, it may be said that in these cases a judicial error does not take place. Since these are cases in which the judge is legally (and sometimes rationally) obliged to find that the facts are proven, at best it may be said that the judicial system has failed in the search for the truth but not that the judge has committed any error whatsoever in their appraisal of the available evidence.[12]

But this suggests a new way of understanding the TTC. While it may be true that not all “false verdicts” are *judicial* epistemic errors, one might insist that such verdicts always involve epistemic errors *of the system*.[13] The TTC_E would now be:

The thesis of the truth as a condition for the absence of the justice system’s epistemic error	
(TTC_EES)	Although the truth of the factual premise is not a necessary condition for the justification of the court finding or for the exclusion of judicial error, a court finding whose factual premise is false by necessity constitutes an *epistemic error of the justice system*, which fails to find the truth.

Is this version of the thesis correct? It is true that since a “false verdict” (even if it is valid) is reached, it is perfectly *possible* that there is a genuine error of the system. A procedure organised to decide upon the truth or falsity of factual premises by tossing coins into the air, for example, will yield an enormous number of “false verdicts” that are *errors* that may be attributed to the person who had the idea of designing such a system and of those who put it into practice. However, this is not *necessarily* so. Cases of false positives or false negatives caused by mistakes made by operators of the system other than those who reach the findings may also undoubtedly occur.[14] These operators may be of several kinds: poor legislative designs; deficient investigations; corruption of certain individuals involved in the investigation, in the court proceedings or as parties thereto; bad reasoning and so on. Once again, the point here is that it is not *necessarily* so.

To make my point clearer, and for want of better labels, I would propose a distinction between *flaws* and *mistakes* for the purpose of explaining an intui-

11 Laudan 2006 and Laudan 2013: § 3. He also distinguishes, for the purpose of his analysis, between false verdicts that occur in a proceedings, i.e. those which follow the final stage of the criminal proceedings, false verdicts in which the culprit is not brought to trial and false verdicts in which a plea bargain that does not correspond to the actual facts is reached.

12 Ferrer Beltrán 2005: 97, note 27.

13 See Laudan 2006 and Laudan 2016.

14 If the error were truly *judicial*, then it would be difficult to continue to assert that the verdict is “valid” or “legal”, or in other words that it is justified.

tive difference between different ways of producing errors. I will use the first term, “flaws”, to refer solely to false determinations (false positives or false negatives) for which no agent or method can be blamed[15]. I will use the word “mistakes” to refer only to blameworthy errors, those which are the outcome of actions or activities which either should not have been executed or should have been executed differently to the way in which they actually were.[16] In this regard, unjustified findings, “invalid verdicts”, are undoubtedly mistakes. But not all “false verdicts” are mistakes, and some of them are not even system flaws.[17]

I think that the problem here is more related to Laudan’s categorisation of “errors” than to the TTC_{EES} in itself. It should be noted that on the basis of this version of the thesis, together with the error categories offered by Laudan, it follows that any “false verdict” – in other words any “false conviction” and any “false acquittal” – are an epistemic error of the system. But this may lead to confusion. In order to see where the problem lies we need to delve further into the category of “false verdicts”.

As far as Laudan is concerned, there is a perfect “alethic” symmetry – so to speak – between the false positives and false negatives that he includes in the category of “false verdicts”. By using the term “alethic”, I seek to emphasise that the symmetry referred to is related to the relationship that a “false conviction” and a “false acquittal” have with truth and falsehood. The symmetry or asymmetry between these two kinds of error can be evaluated in other senses. One of them pertains to their severity or undesirability in moral terms. In this variant, Laudan does not regard errors as symmetric. His appraisal, like most people’s, is that “false convictions” are morally more serious or undesirable than “false acquittals”, although from *his* moral point of view the asymmetry is less – he assumes – than what people tend to think.[18]

In any event, what is now important is what I have termed “alethic symmetry”. For Laudan, in this sense, “false convictions” and “false acquittals” share

15 This notion is highly present in works dealing with “epistemic risks”. See, for example, Biddle & Kukla 2017; Douglas 2000.

16 Of course, in ordinary language both terms are synonymous and as such both of them are generally used to express the same semantic content, with more or less the same nuances. However, this should not lead anyone to think that the two *concepts* between which I am attempting to make a distinction here do not exist in our ordinary speech. The problem lies in that both “error” and “flaw” can be used to express *both* concepts. If we say that “the thermometer yields an error – or flaw – every month” we understand, thanks to the linguistic context, that “error” or “flaw” does not mean exactly the same as if we say “Lucille committed a major error in dedicating her life to music”, and nor does it mean exactly the same as saying “entering the house without a court order was an error”.

17 Here, we must also avoid falling foul of the mistake of thinking that all “false verdicts” are *flaws*. More particularly, not every “false acquittal” is. Nevertheless, this point should be addressed in the next section.

18 See, particularly Laudan 2016.

and exhaust the type of *false* verdicts. In other words, in his opinion, both false convictions and false acquittals represent the failure to find the truth. "Potential failures" in finding the truth (i.e. the false acquittals and false convictions that a system may generate and their ratio of occurrence) are tools that Laudan (and many others) uses to reflect upon what the epistemic demands that standards of proof should impose ought to be. In this regard, potential false verdicts serve as a heuristic tool to design, in advance, a system that is adapted to certain axiological aims. There is nothing bad in this, at least in principle.[19] But it is a serious mistake to think that "false convictions" and "false acquittals" *effectively dictated* within the framework of a legal system are necessarily epistemic *errors* of the justice system.

There is no doubt that when an innocent person is convicted, as was the case of Dmitri Karamazov, *something false is asserted as being true*. In such cases, it is right to say that the person making the ruling employs a false premise, at least in the sense that they include this premise in their reasoning. Meaning that any "false conviction" is at least a *flaw* of the system. And in fact, this ruling could also be a *mistake*.

But it would be a serious error to think that the same occurs in cases in which a guilty person is acquitted. Because these types of acquittals do not involve *asserting a falsity*. It is simply not true that the person ruling in these cases endorses a false premise, not even in the sense of using such a premise in their reasoning. And this is why it makes no sense to talk about "*false* acquittals", at least not indiscriminately, or to treat them as epistemically symmetrical situations to "false convictions".[20] Asserting a falsity is not the same as not having substantiated the truth. And as is well known, the latter is what occurs in many of the acquittals which Laudan labels as "false".

A valid acquittal, even if it is "false", releases a person from responsibility because the requirements to deem responsibility are not met. Committing a typically unlawful and culpable action is not the only requirement that conditions criminal liability (or legal, or even moral). Moreover, these conditions include several others related to procedural and probatory matters. If any of these conditions are not met, then, to put it simply and clearly, *there is no criminal liabil-*

19 Actually, I do not deny that reflecting on the (moral) undesirability of acquitting those who commit the crime and convicting those who don't is crucial to determine the appropriate threshold of evidence and, eventually, the proper standard of proof. I do not deny either the importance of reflecting on the quantum of that potential kind of acquittals and convictions. What I am claiming is, on the contrary, that it is a big mistake to treat "false acquittals" and "false convictions" as symmetrical errors regarding their relationship with the truth *once the appropriate threshold has been determined and applied*.

20 There are cases in which symmetry does appear to work. For example, in cases in which it is regarded as proven that a person charged with an offence did not commit it when in actual fact they did; or in cases in which a cause of justification which did not actually exist is deemed to be proven. I would like to thank Marianela Delgado Nieves for pointing this out to me.

ity, in the sense that there is no admissible justification to attribute the unlawful action to the person being tried. And this is so whether or not the person did or did not perpetrate the deed in question. When such perpetration *is not proven*, even if it did happen, there is no falsity whatsoever. In fact, according to the "descriptivist" conceptions of sufficiency of evidence of the type defended by Ferrer Beltrán, "false acquittals" resulting from the failure to reach the threshold of evidence not only are not "falsehoods", they are rather *the total assertion of a truth*, to wit: that *there is not* enough evidence to convict.[21] In this order of ideas, although "false acquittals" may sometimes constitute epistemic flaws or mistakes, they are not necessarily so.

This can be clearly seen if, by analogy, one thinks of more general factual hypotheses: let us assume that the proposition *extraterrestrial beings exist* is true. Allow me to assume that, in accordance with the evidence available nowadays, we cannot deem this proposition proven. Or in other words, we lack sufficient epistemic reasons to accept the existence of extraterrestrial beings as true. Saying that *there is insufficient evidence in favour of the existence of extraterrestrial beings* not only does not involve asserting something that is false (we are not claiming that *extraterrestrial beings do not exist*), but neither does it necessarily constitute an epistemic mistake or flaw. The same occurs in all the cases in which a person whose guilt is not sufficiently proven is acquitted, even if this person had indeed committed the offence for which they are being tried. Here, we are not dealing with an error of any kind or with a flaw or mistake; at least not necessarily. What is more, and as we shall see later, it has not even been said to be an *injustice*.

Setting the case of the wrongly-named "false acquittals" to one side, even if a justice system with an adequate epistemic design would undoubtedly yield *flaws* – as occurs in any field of empirical research –, these flaws will not necessarily be mistakes. Meaning that neither would such *flaws* be reasons to review the design of the system nor the way that decisions are taken. In this regard, not every flaw implies that a system is bad or is badly designed.

Imagine an epistemically ideal justice system, however much of a utopia this may seem. A system in which procedural design is as good as it could be in terms of investigation and decision-making methodology geared towards finding out the truth. Imagine that in this system the people who investigate, try and

21 For Ferrer Beltrán, asserting that *there is sufficient evidence* in favour of a factual hypothesis is an assertion with descriptive force. Sufficiency of evidence is therefore an objective occurrence upon which truth or falsity may be predicated (to the extent that a given standard of proof has or has not been satisfied). This means that, in contrast, asserting that *there is not sufficient evidence* in favour of a hypothesis is also something that is susceptible to truth or falsity. See Ferrer Beltrán 2001 and Ferrer Beltrán 2002. I believe, in any event, that this is a mistaken conception of sufficiency of evidence. I would refer to Dei Vecchi 2014, Dei Vecchi 2020b and Dei Vecchi 2022.

reach findings on offences are as well trained or prepared as possible in matters of evidential reasoning and in which both the appraisal of the evidence and the sufficiency of evidence are developed consistently appealing to the right kind of reasons (i.e., epistemic reasons). Moreover, let us imagine a specific case with an epistemically impeccable investigation, trial and ruling conducted in such a framework. A case in which all the possible relevant evidence has been gathered, the conditions pertaining to the gathering, presentation, admission and presentation of evidence were epistemically ideal, and in which the inferential activity is faultless. In my opinion, in such situations, "false convictions" (but not necessarily "false acquittals") would continue to be *flaws* in the most basic sense.[22] But they will be neither judicial nor system *mistakes*. Meaning that, if all this is so, the TTC_{EES} must be rejected. The falsity of the factual premises of convictions of innocent people, while it may always be regarded as a flaw, does not necessarily involve an epistemic mistake by the justice system. Acquittals of the guilty are sometimes not even flaws.

4 EXCLUSIONARY RULES, SUFFICIENCY OF EVIDENCE AND INJUSTICES

One of the last redoubts that I find for saving the TTC_E requires that it be converted into a political and moral thesis according to which "false verdicts" are by necessity *injustices*:

The thesis of the truth as a condition for the absence of injustices

(TTC_{EI})	Although the truth of the factual premise is not a mandatory condition for the justification of the court finding, for the exclusion of the court error or for the proper operation of the justice system, a court finding based on a false factual premise is necessarily an *injustice*.

On occasions, this seemed to be the position taken by Michele Taruffo, who moreover actually addressed the question through recourse to the notion of the application of rules:

> ... it is evident that if the rule N identifies the factual condition H as a necessary premise for certain legal purposes, but the individual fact h that corresponds to H does not exist (to the extent that the statement that describes it is false), then the rule N cannot be applied in this case. If, in any case, the judge applies it, *this will suffice to be able to say that the finding is unjust.*[23]

22 This is because investigation procedures and epistemic justification criteria are *fallible* (i.e. they may lead to the acceptance of false hypotheses) even when they are strictly observed.

23 Taruffo 2003: 29-30. The italics are my own. With regard to the ambiguity of "case" and "application" which affect Taruffo's argument, see the work cited in note 1. In the same regard: "...

This version of the thesis according to which the truth of the factual premise is a necessary condition for the exclusion of error (TTC_E) implies that any "false verdict" is undesirable from the political and moral standpoint. Consequently, all "false convictions" and all "false acquittals" are injustices. However, this is at least misleading.

As has already been said, "false convictions" are always *flaws* of the justice system and may also be legal *mistakes*. Perhaps this is sufficient to consolidate the intuition that convictions of innocent people are always unjust.

Nevertheless, this is not what happens with what Laudan calls "false acquittals". We have already seen that such acquittals may not at all be wrong from the epistemic standpoint. Now, here it is important to add that neither are "false acquittals" always necessarily injustices. What is more, they could be true legal, political and moral *successes* of the justice system. To understand this point clearly, it would suffice to give some thought to some of the *reasons* why people that are tried in criminal proceedings tend to be acquitted.

First of all, procedural law has "counter-epistemic rules" or institutions that are based on *reasons of justice.*[24] These institutions may lead court findings to be taken in suboptimal conditions of evidence (i.e. of available information) as opposed to those that could be taken in an extrajudicial setting. In the judicial setting, there are, as is well known, prohibitions pertaining to the use of specific means of evidence, provisions pertaining to certain facts that are beyond discussion, and there are strict regulations on how certain information may be accessed. Sometimes, if these regulations are not observed, the information acquired is excluded from the proceedings. These are but some examples of the aforementioned institutions. These examples are sufficient to demonstrate why the items of evidence used to take court rulings might not be the same as the items of evidence that one might expect to have in another setting.[25]

Moreover, fact-finders must take a decision within specific time constraints. This means that as a rule, court investigations cannot be as profound as those conducted in other areas and nor can they be subsequently corrected. These are not the only reasons that may give rise to "false acquittals", although they will serve to show that those entrusted with taking legal decisions sometimes find

there is an obvious sense in which we care about the truth or falsity of legal verdicts. Justice requires truth, and false verdicts are a form of injustice; this, after all, is why we care about proof and evidence in the first place. So it seems, in this sense, absurd to reject truth as the goal or the aim of proof" (Pardo 2010: 43).

24 See Gascón Abellán 2004: 122.

25 In any event, it should be said that "counter-epistemic rules" are not exclusive to the legal system. For example, in the domain of science, neither can all means of evidence available be used and nor can any experiment that is possible be carried out. All areas of empirical research or investigation have constraints that are ultimately based on political and moral postulates.

themselves in a poorer epistemic situation than those who are not affected by this type of constraints.

The important thing is to emphasise that the presence of "counter-epistemic" factors like the ones mentioned above *may be* politically or morally justified, and we often assume that they are. This is so, for example, given the need to safeguard certain values such as people's privacy, physical or mental integrity, etc.[26] Therefore, let us think about cases in which "false acquittals" are the outcome of the application of counter-epistemic guarantees whose political and moral justification is not questioned. In these cases, even when the person acquitted is guilty – and it remains to be seen how we can actually *know* that they are[27] –, the decision to acquit must be regarded as totally justified, not only from the legal standpoint, but also in political and moral terms.[28]

Secondly, the legal determination of factual premises is also conditioned by considerations *of justice* pertaining the sufficiency of evidence. In this sense, fact-finders have a limited set of items of evidence that they must consider. Following this appraisal, these people must decide whether the evidence available provides *sufficient* epistemic support to the factual hypothesis or, as is sometimes said, whether the *epistemic (or inductive) probability* reached with this evidence is *sufficient* to take the decision in question.[29] Broadly speaking, establishing whether a certain *degree* of epistemic probability is sufficient for the purpose of taking a certain course of action or decision depends on *evaluative* factors. These factors, just like those that underpin "counter-epistemic rules", are generally related to evaluations linked to the possible costs of false positives and false negatives in terms of the course of action to be taken (*e.g.* sending a person to prison, evicting them, removal of custody, etc.). This is what occurs when we are faced with the aim of avoiding, to the greatest extent possible, criminal convictions of innocent people: the underlying evaluation is that in the event of a false positive (*i.e.* the person did not commit the offence and is convicted), the damage caused to this person will be very serious and highly undesirable in moral terms than a false negative. These kinds of evaluations translate (or are intended to translate) into requirements pertaining to sufficiency of evidence.

26 Sometimes it is even justified by epistemic reasons, although I shall not dwell upon that here.

27 I shall return to this point presently.

28 Let us assume that we must decide whether Vladimir is guilty or innocent and that the time has come to take a decision with a set of evidentiary items that is insufficient for a conviction. Let us assume that the fact-finder, for whatever reason, knows (without any shadow of a doubt) that (a) the defendant did commit the offence for which they are being tried and (b) that if tortured for a few minutes they would confess, providing the necessary evidence to confirm the confession, evidence that would be more than sufficient to convict him. Well, convicting Vladimir through having tortured him strikes me as more undesirable than acquitting him for lack of evidence that torturing him would have provided. Anyone who shares this opinion will think, as I do, that acquittal would be the *just* solution.

29 See Ferrer Beltrán 2007: 120 ff.

The hypothesis is that the greater the requirement of epistemic justification, the lower the risk of convicting innocent people will be, although the risk of acquitting guilty people increases.[30] In contrast, the lower the evidentiary requirement, the greater the probability of convicting guilty people, although so too is the risk of convicting innocent people greater.

As can be seen, increasing or relaxing these requirements means, after all, taking a political and moral stance, involving certain axiological objectives. Or to put it more simply, this stance and these aims are related to an evaluation or appraisal that pertains, on the one hand, to whether convicting innocent people is or is not more morally undesirable than acquitting guilty persons and, in such an eventuality, how much more undesirable this type of decision is. These considerations on sufficiency of evidence could lead us to consider that a certain volume of evidence that would be sufficient to believe in the truth of a hypothesis or to assert it in a different context is insufficient for the purpose of taking a certain legal decision, for example, to convict a defendant.[31]

Deciding when certain evidence must be regarded as sufficient to convict, including the political and moral facet of this decision, is left in the hands of the judiciary or else, as many advocate, has to be entrusted to the legislative power. The decision around the establishment of legislated "standards of proof" attempts to establish, by means of general legal rules, thresholds of sufficiency that tell fact-finders when they have sufficient evidence to convict, eliminating any value judgements they may make in this regard. If this were possible, it would be the legislature which, after taking a political and moral position like the one mentioned, would establish the margin of "distribution of the risk of error" between "false convictions" and "false acquittals".[32]

For many reasons, I believe that relying on the possibility of legislatively establishing objective thresholds of evidence – thereby eliminating value judgements of fact-finders regarding sufficiency of evidence – is no more than wishful thinking. But for the purpose of analysing the possibility of a final version of

30 It should be observed that this is true irrespective of the debate as to whether or not it is possible to establish legislated standards of proof which (in themselves) determine the threshold of sufficiency and distribute the risk of error. What is being said here is neutral in this regard.

31 The problem of the justification status of factual premises of practical reasoning transcends the domain of the law. It is a problem that is extensively debated in the current domain of general epistemology, in which the analysis of how epistemic reasons and practical considerations are interwoven still has a long way to go. See, for example, Fantl & McGrath 2007, Fantl & McGrath 2009 and Fantl & McGrath 2012; Fritz & Jackson 2021; Gardiner 2018; Kvanvig 2011; McGrath 2018; Ross & Schroeder 2012 and Ross & Schroeder 2014; Schroeder 2012 and Schroeder 2018.

32 The debate on this point continues. See, for example Accatino 2011; Accatino 2019 and Accatino 2020; Aguilera García 2021; Allen 2013; Clermont 2009; Ferrer Beltrán 2021; Gama Leyva 2021a and Gama Leyva 2021b; Gardiner 2017; Gascón Abellán 2005; González Lagier 2020; Laudan 2005a, Laudan 2006, Laudan 2011 and Laudan 2013; Laudan & Saunders 2009; Nance 2016 and Nance 2018; Picinali 2015 and Picinali 2018.

the TTC_E, it would be useful to adopt the factual hypothesis underlying this illusion. Let us therefore assume that not only is it possible to establish objective standards of proof by means of legislated rules, but that moreover this can be done quantifying the degrees of epistemic justification, ranging from 0 to 0.99. Let us imagine that the legislature of this imaginary world determines that the *just* threshold of evidence for criminal convictions must be set at 0.8 degrees of epistemic justification. And let us assume, in addition, making the most of this fantasy world, that political and moral judgements are all objective and that our legislatures are true "epistemic and moral authorities". Thus, the threshold of sufficiency of 0.8 degrees is not only epistemically objective, it also represents the objectively *just* evidentiary requirement for the purpose of a criminal conviction.

As a result of all this, it transpires that any acquittal that is the outcome of failing to reach the degree of epistemic justification established by the standard will be justified, not only legally, but also epistemically, politically and morally. And this is so both in cases in which the individuals acquitted have not committed the offences with which they were charged and in the cases in which they have.

In a nutshell: perhaps, to convict a person for the action Φ, and for this to be just, this person must have done Φ and there must be sufficient evidence to prove this. However, in order to acquit the person for Φ, and for this to be just, it will suffice that there is insufficient evidence to prove that the person absolved perpetrated action, even if they did.

It should be noted that in analysing the question pertaining to "counter-epistemic rules" and that which pertains to standards of sufficiency of evidence, we have been imagining a justice system that is not only epistemically ideal (as was the case in the previous section), but also morally faultless. What matters is showing that, in frameworks like this, however fictitious or utopian they may be, acquitting the "materially guilty" through the application of any of these institutions not only does not infringe any *legal* requirement of justification of court findings, nor is it an error of the justice system. It is more than this: neither does this type of "false acquittals" herald an injustice. In fact, they are acquittals dictated by political and moral demands, in other words they are full embodiments of what is *just*.

Therefore, if it is applied symmetrically to *every* "false verdict", the thesis of the truth as a necessary condition for the absence of injustices (TTC_{EI}) must also be rejected.

5 EXCESSIVE ERRORS AND ARGUMENTATIVE EXCESSES

With regard to the latest version of the thesis of truth as a necessary condition for the absence of error (TTC_E), whether "false verdicts" are or are not injustices depends on taking a political and moral stance, above all with regard to the fundamental rights at stake. To my mind, this is part of the importance of the distinction that I have proposed here between flaws and mistakes. In the so-called "false acquittals", the question is even more relevant, because the distinction extends to two interconnected perspectives that I find crucial.

First of all, the distinction makes it possible to address the TTC_E from a new perspective.

The thesis of the truth as a condition for the satisfaction of the moral admissible *ratio* of error

(TTC_{RE})	Although the truth of the factual premise is not a mandatory condition for the justification of the court finding, nor for the exclusion of the court error, nor for the proper operation of the system, a certain *ratio* of flaws means that the system is malfunctioning.

Sometimes, the political and moral judgement that underlies the establishing of a certain threshold of evidence is criticised with the argument that the *ratio* of false positives and false negatives generated by the system under that threshold is *morally inadmissible*. Larry Laudan has taken this line on numerous occasions with regard to the United States system. More specifically, Laudan is of the opinion that this system produces a morally inadmissible amount of "false acquittals" because of the threshold *beyond a reasonable doubt*. The inadmissible nature of the *ratio* between false acquittals and convictions depends on a series of dubious consequentialist calculations that I cannot go into here.[33] However, what must be emphasised now is *how* Laudan calculates the *ratio* which, he alleges, the system he criticises yields.

First and foremost, let us remember that over the last few pages we have been analysing verdicts that are assumed to be valid. A valid acquittal due to lack of evidence or proof correctly states that the epistemic reasons gathered and appraised are insufficient to convict. Asserting that such an acquittal is false implies that it has been established that the finding is reached to the benefit of a person who *did* commit the offence of which they were acquitted. This is precisely what Laudan does when he refers to the "falsity" of this acquittal. Since, as was said at the outset, in real life we do not enjoy the epistemic privileges of

33 See Dei Vecchi 2020a.

omniscience or those available to us when we operate, for example, as readers of literary novels, this determination can only be reached through *evidence*, i.e., having recourse to epistemic reasons. Here there are two options.

The first one is for anyone who asserts that the acquittal is "false" (a) to avail themselves of and invoke different and additional *evidence* beyond that which was heard in the proceedings and (b) to argue that on the basis of this additional evidence it would have been sufficient to convict the defendant according to the adequate threshold required to attribute criminal responsibility (in our imaginary world, a 0.8 epistemic probability). Here, one would need to reflect upon (in the evaluative, political and moral sense) whether the reasons why this additional evidence was not admitted to the proceedings prevail over the values involved in the conviction of the guilty. If the answer is affirmative, the acquittal in question is not a court error, an error of the justice system or an injustice, at least not necessarily so.

The second option is more delicate, and with regard to which particular caution must be exercised. It is about the strategy consisting of counting "false acquittals" on the basis of the same set of evidence which proved happened to be insufficient for a conviction in the proceedings. To see how this argument works – and which to my mind is dangerously deceptive – it may be useful to return to our mental experiment, the imaginary world in which degrees of epistemic justification are quantifiable and political and moral judgements are objective. Let us recall here that the legislature had managed to "discover" that the *just* threshold of epistemic sufficiency for the purpose of a criminal conviction is 0.8 degrees of epistemic justification. Let us also recall that we are assuming that the acquittal is valid, meaning that if a person P was acquitted for lack of evidence this implies that the degree of probability or epistemic justification reached is below 0.8. However, let us assume that proof of P's culpability had reached a probability, for example, of 0.7 degrees. Obviously, if someone asserts, on the basis of this same set of evidentiary items and this same appraisal, that the acquittal of P is "false", they would be (a) applying a lower standard of proof than that which the legislature regarded as *just* and, precisely for this reason, (b) they would somehow be questioning this political and moral judgement according to which criminal convictions are only admissible if the degree of at least 0.8 of epistemic probability is reached. Subscribing to the political and moral judgement of the legislature according to which guilt can only be substantiated with 0.8 degrees of epistemic probability, while also maintaining that acquittal of P is "false" because there is 0.7 degrees of proof of culpability would be a serious inconsistency or, put simply and plainly, cheating.

Let us assume that in a given time span of 10 years in a legal system (LS) 1,000 people are acquitted because the evidence does not reach the 0.8 required by the standard. Let us also assume that we manage "to corroborate" that the proof of culpability of 80% of the persons acquitted reached a degree of epistemic probability of 0.7. Laudan's argumentation strategy applied to our example leads us to assert that 80% of the acquittals made over this 10-year period in the LS are "false" and that that therefore 800 criminals were released due to this system's disproportionate evidentiary requirements. Laudan concludes, on the basis of pseudo-confirmations like this one, that the *ratio* between false positives and false negatives is therefore too disproportionate. And on the basis of the above, he deduces that the standard of proof must be lowered. In our example, this would mean abandoning the threshold of 0.8 degrees of epistemic probability.

It is clear that this conclusion can only be drawn if a threshold of sufficiency lower than that which the legislature regarded as *appropriate* for the purpose of convicting a person in the LS is applied. This means that the argument is a clear *petitio principii*: it concludes that the legislative standard of 0.8 is too demanding and that it yields morally inadmissible outcomes because it leads to the acquittal of 80% of guilty defendants. However, this conclusion is only reached if we assume that the appropriate standard for regarding a person as guilty is 0.7 (or, in any event, lower than the present one).

This trap could be accompanied by another hazard-increasing fallacy. This lies in the way that the degree of epistemic probability of the culpability of the individuals acquitted in a given time period is corroborated. In Laudan's case, his *evidence* of the degree at which the culpability of the acquitted individuals is proven (0.7 epistemic probability in our mental experiment) is reduced to *the opinions of the fact-finders with regard to what the degree of subjective probability of culpability was*. In other words, the degree at which these people *felt convinced* that the people they eventually acquitted were guilty.

This all serves to show why it is important to make the distinction between mistakes and flaws as types of error. And it makes it possible to show why caution must be exercised with theses that assert that certain systems *produce too many errors of a certain kind*. Claiming that a system produces an *excessive amount* of false negatives, or in other words that it acquits too many guilty individuals, involves by necessity a moral judgement. This judgement underlies the counting of the *error ratio*, because in establishing that a (valid) acquittal is "false", if there is no additional evidence, either a "counter-epistemic" institute is questioned or a standard of proof lower than that which is used in the legal and criminal domain is applied. Hence, this type of statements must be examined with the utmost caution, distinguishing between the different types of reasons involved, above all in order to avoid a contraband of political ideology under the guise of pseudo-epistemological arguments.

6 CONCLUSIONS

The following conclusions may be drawn:

(1) The truth of the statement about facts is not a necessary condition for the *legal justification* of the court finding. It is not a necessary condition for the internal justification, for the external justification of the factual premise or for the external justification of the normative one and is not a necessary condition for "justification" in an additional sense of the term.

(2) The truth of the factual premise is not a necessary condition for the legal system to operate correctly (i.e. not *wrongly*).

(3) The truth of the factual premise, at least if the misleading idea of "false acquittal" is accepted, is not a necessary condition for the *justice* of the decision or for the system to operate justly.

Of course, the temptation to lapse into the fallacy of deriving, from what has been said here, things such as *the truth is irrelevant to court proceedings* or that *the truth is irrelevant for the purpose of justifying a court finding*, must be avoided. Such theses do not follow from the above and nor do they really enjoy a great deal of traction.

All the foregoing rules out the TTC and all its possible variants. However, it also shows how unacceptable the opposing extreme position is: i.e., that which claims that the truth is irrelevant to legal proceedings. Thus, while the truth is not a necessary condition for the justification of court findings, of their justice, or for a legal system to operate properly, the suitability of the epistemic justifications of such findings and an epistemically suitable design of the system are. And this means, nothing more or nothing less, *that they must be suitable for finding the truth*.

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Are there any elements of juridicity beyond positive law in Robert Alexy's non-positivism?

The aim of this article is to assess Alexy's non-positivist account of the law's dual nature from the viewpoint of the question of whether he permits the existence of the elements of juridicity that do not meet the criteria for identifying valid positive law. An affirmative answer to that question would fit within the ordinary non-positivist stance that denies the positivists' thesis that "all law is positive law". In the article, I argue that Alexy, however, systematically denies the existence of non-posited elements of juridicity. I first explore Alexy's foundational commitment to the social thesis in describing law's nature. Next, I present his claim that the principles of justice cannot themselves constitute law without meeting the requirements of source-based positivity of legal norms. Finally, I clarify that, regardless of the non-positivist structure of his crucial arguments, Alexy does not ultimately hold that law may be "in" non-posited realities.

Keywords: nature of law, Alexy (Robert), justice, non-positivism, human rights

1 INTRODUCTION

Robert Alexy, surely one of the most prominent legal philosophers of the last half century, frequently highlights that his research aims to explain nothing less than the very nature or concept of law,[1] that is, the essential features of the legal phenomenon at the highest level of analysis. The line of argument at this level of analysis always denotes an answer to the fundamental legal-philosophical question concerning the nature of law, variously worded as, "what is law?",[2] "what is the essence of law?",[3] or "what it is that is necessarily included in the concept of

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1 See, for example, Alexy 2021a: 9-10. For the claim that Alexy's legal-philosophical account does "not primarily concern" more specific questions, such as the issue of "the criteria of legal validity", but rather "a more general analysis of the nature of law", see Sieckmann 2021: 726. Klatt (2012: 2-14) correctly notes that Alexy's books prior to the 1992 first German edition of *The Argument from Injustice* presuppose a non-positivistic concept of law, but do not develop it. It is only with *The Argument from Injustice* and subsequent works that Alexy systematically presents the debate between positivism and non-positivism and develops his non-positivist concept of law. Accordingly, in this paper I will predominantly rely on his post-1992 writings, although I will, of course, take into consideration his earlier legal-philosophical arguments, especially as these were further developed in his later works.

2 Alexy 2002: 5.

3 Alexy 2021b: 64.

law?"[4] This last version of the question comes closest to capturing Alexy's approach to understanding law's nature, especially if we know that, as he says, "the central problem in the debate surrounding the concept of law is the relationship of law and morality".[5] Since his solution to this problem is that "the concept of law is to be defined such that moral elements are included",[6] the main direction of Alexy's legal-philosophical analysis is determined by the question of the ways in which morality may be said to be necessarily included in the concept of law. Thus, in his view, as is well known, law has a dual nature: "both a real or factual dimension and an ideal or critical one" are "necessarily" included in the ontology of law.[7] The "real" or "factual" dimension corresponds to law's source-based social facticity or positivity, while the "ideal" or "critical" dimension denotes the inclusion and continuous presence of moral elements, even of substantive morality, in law's nature.[8]

Alexy claims that his proposal results in a "non-positivistic concept of law"[9] and that its fundamental aspects represent versions of a "classic non-positivistic argument"[10] ("non positivism" is, as he clarifies, synonymous with "anti-positivism"[11]). In a sense, his assessment is correct, since the argument in favour of a necessary inclusion of certain evaluative features that also comprise the values of substantive morality in the very nature of law is indeed in contrast with a central tenet of legal positivism, namely, the thesis on the separation or at least the separability (i.e., no necessary connection) between law and substantive morality. In a framework where the legal-philosophical analysis amounts to the inquiry of whether and how morality may (or may not) be said to be included in the nature of law, Alexy should certainly be enlisted among non-positivists.

However, I would like to advance and explore certain arguments according to which Alexy's non-positivism or anti-positivism is more limited than he seems to acknowledge. To ground these arguments, I will have to assess Alexy's theory from a viewpoint that is different from the question of whether and how morality may be included in law. In the past few decades, the elucidation of law's nature from the viewpoint of the question "is morality somehow in law?", has indeed become more complex and less conducive to clear and definitive conclusions. Alexy himself noticed that "positivism nowadays says a lot about

4 Alexy & Marmor 2005: 770.

5 Alexy 2002: 3.

6 Alexy 2002: 4.

7 Alexy 2021c: 36.

8 "In the definition of law, the factual dimension is represented by the elements of authoritative issuance and social efficacy, whereas the ideal dimension finds its expression in the element of moral correctness". Alexy 2021c: 36.

9 Alexy 2021c: 36.

10 Alexy 2002: 7.

11 Alexy & Marmor 2005: 769.

the close relation between law and morality",[12] and, indeed, some contemporary legal positivists argue that there are certain – purely systemic, procedural, formal, or extra-conceptual (i.e., essentially external to what law is) – important connections between law and morality.[13] Perhaps the fundamental aspects of the question of the (no) necessary connection between the content of law and substantive morality, and the corresponding dependence of the former on the latter for the constitution of the juridical status of legal norms, are still sufficiently intelligible for a clear demarcation between positivism and non-positivism.[14] Regardless, I propose that there exists a parallel strategy of assessing an account of the nature of law for categorizing that account as pertaining to the family of positivistic or anti-positivistic legal theories, that is, a way that is irreducible to both the separability and the necessary connection thesis.

For the purposes of this paper, it is best to start the presentation of this parallel way by identifying another central tenet of legal positivism, ideally with the help of a prominent positivist. Thus, Leslie Green holds that "it is hard to find contemporary positivists who still hold […] that there are no necessary connections between law and morality".[15] Nonetheless, as Green adds, it is possible to identify another central claim that assists us in infallibly identifying a legal positivist: "But one doctrine remains essential: any theory of law that *a positivist* would be willing to call 'positivist' endorses a version of the following claim: *All law is positive law*".[16] John L. Mackie highlights this formulation of a central tenet of legal positivism with even more precision: "Law is, as I have maintained that morality also is, a human product. […] This amounts to saying that all law is positive law: it is law *wholly in* and *by* being 'posited' by some society or institution".[17]

This central tenet of legal positivism answers a legal-philosophical question different from the query of whether and how morality (or anything else, really) is, so to speak, "in" law. Here is a simple formulation of this parallel question: What is law "in"? The answers to this latter question seek to explain whether and how exactly it is possible to claim that law is identifiable in certain realities

12 Alexy & Marmor 2005: 769. See also Alexy 2021b: 64.

13 For examples of this line of argument, see Spaak & Mindus 2021: 9-11. Some authors, perhaps most notably Julie Dickson, added an additional level of complexity to the same line of argument: "We should preserve the relative autonomy of [making moral value judgments about the moral value and justifiability of aspects of law] from the non-morally evaluative task of identifying and explaining law's essential properties". Dickson 2007: 399.

14 Alexy (2021b: 64) certainly thinks that they are: "In order to answer the question of what the essence of law is, the positivists refer only to facts, while the non-positivist, in contrast, refers to both facts and ideals. I think that this difference is significant enough to warrant the labels 'positivism' and 'non-positivism'".

15 Green 2021: 39.

16 Green 2021: 39-40 (emphasis original). For Green's earlier claim that "someone who thinks all law is posited is a *legal positivist*", see Green 2012: xix (emphasis original).

17 Mackie 1977: 232-33 (emphasis added).

or entities and only in those (thus, not in other) realities and entities. Alexy is familiar with this basic legal-philosophical question, since he notes that one of the problems around which the arguments about the nature of law revolve is denoted by the following query: "In what kind of entities does the law consist, and how are these entities connected such that they form an overarching entity we call 'law'"?[18] An important aspect of same question is echoed in another question that Alexy seeks to answer: "Is there an outermost border of law?"[19] In other words, is it possible – and according to what criteria – to definitively identify the existence of law in certain realities or entities and to assert that there is a limit (an "outermost border") beyond which law can no longer be found in these or other realities and entities, thereby categorizing these latter as "non-law"?

As we have seen, the positivist answer to the question of what law is "in" is that all law is necessarily posited law, that is, law's nature is, as Mackie claims, wholly "in" posited law. Said differently, what is not posited is not law, not part of the legal world, it is "non-law". Now, what would constitute an anti-positivist position with regard to this positivist tenet? I propose that an anti-positivist position amounts to the claim (1) that there are, indeed, certain elements of genuine juridicity[20] (and not merely morality) beyond, parallel to, or not nec-

18 Alexy 2021a: 10.

19 Alexy 2021d: 97.

20 Throughout the paper I will use the term "juridicity" (or the adjective "juridical") to denote the specific field that pertains to law and thus not to other, possibly overlapping fields, such as the field of morality. I take juridicity to mean, at the highest level of analysis, a specific quality of a given reality – whether a norm, a "thing" (broadly speaking), aspects of human agency, a state of affairs, etc. – that arises from a fixed set of constitutive properties, which render that determinate reality somehow suitable for being considered to pertain to the domain of law, while other realities that do not possess the aforementioned quality are deemed non-law. At this general level of analysis, the term "juridicity" does not of itself rely on a certain concrete set of such properties, but it is rather presented as a structural vehicle for the subsequent implementations of such properties in a particular theory of what is to count as law, presented at the level of general jurisprudence. Thus, for example, H. L. A. Hart's idea of a rule of recognition represents a particular theory of the constitutive properties of juridicity. As will be shown in this paper, Alexy also presents his own theory of what is to count as law, that is, his own set of constitutive properties that render certain norms or, broadly speaking, realities unmistakably juridical or enables the identification of these realities or phenomena as juridical. Alexy himself sometimes uses the term "juridical" (in German: *juristische*) with this meaning in mind, for example when he distinguishes the "juridical [*juristische*] concept of legal validity" from the "sociological" and the "ethical" concepts of validity, or when he speaks about the "juridical definition of the law". See Alexy 2002: 87, 127. For the corresponding original German occurrences of the term *juristische* in Alexy's text, see Alexy 2011: 142, 199. André-Jean Arnaud (1993: 322-323) emphasizes that the concept of juridicity, predominantly developed in French legal philosophy, aims to "specify the domain of law" by distinguishing it from the field of non-juridical social reality. In Arnaud's view (1985: 138), the concept of juridicity finds its *raison d'être* in relation to the "problem of knowing where law, the juridical sphere, starts"; the viewpoint of this problem, indeed, "justifies the emergence of an independent concept of juridicity". In his brief overview of the concept of juridicity in French legal philosophy, Neil Duxbury (1989: 89) argues that this concept is predominantly used as "a convenient ru-

essarily "in" posited law, that is, beyond the scope of the criteria for recognizing or identifying valid positive law, and (2) that these non-posited elements of juridicity significantly modify the ontological fabric of law. This anti-positivist position would then have to explain what these elements of juridicity are "in", according to what criteria we may identify them and delimit them from "non-law", and how exactly they alter law's ontological features.

Ronald Dworkin's theory of law is one example of such an anti-positivist position. In Dworkin's view, law is not only "in" posited legal rules, but also "in" those non-posited moral-evaluative features – the so-called legal principles that point to certain supra-positive political rights – that may be discovered beyond the boundaries of the settled criteria for identifying valid positive law.[21] The account of law's nature provided by one strand of the Thomistic natural-law theory of law, namely, Thomistic juridical realism, represents another example of this anti-positivist stance. According to that account, law is not only "in" certain "things" or realities that are constituted as the objects of justice by those posited legal rules that are identified according to the criteria of validity of positive law, but also and pre-eminently "in" all those outwardly manifestable and essentially interpersonal "things" or realities that are attributed by supra-positive principles of justice to their titleholders and consequently legally owed by all those persons who are in a position to at least potentially interfere with that attribution.[22]

In this paper, I will explore Alexy's answer to the question of what law is "in" and thereby evaluate whether his view on law's nature is genuinely anti-positivist, that is, whether he significantly differs from legal positivists in their claim that "all law is positive law". This assessment of Alexy's theory must yield a definitive reply to the question of whether he recognizes the existence of any

bric under which purely speculative pronouncements about what are taken to be the essential foundations of law can be made". My present use of the concept of juridicity largely overlaps with this more abstract stage of the analysis of that concept in French legal philosophy.

21 "Hart had said that […] legal systems contain a fundamental, if sometimes complex, social 'rule of recognition', which is accepted by substantially all legal actors and which operates for them as a decisive pedigree test of true propositions of law. I argued that this claim neglected the important role of moral principles in legal reasoning [that] figure in judges' explanations of why the law is as they claim it to be, but they are not themselves identified by any broadly accepted master test of pedigree [because] their identity […] is controversial". Dworkin 2006: 32.

22 See Hervada 2020: 7-30. Interestingly enough, in his natural-law account of law's nature John Finnis does not maintain that there are any elements of true juridicity beyond posited law, that is, beyond the criteria for identifying valid positive law. In Finnis's theory, law in the true sense of the term is always and necessarily connected to positive human law. The moral elements that necessarily constrain the content of positive law, in his view, possess only a moral nature once they are seen as detached from law's social-factual aspect; thus, these moral elements (i.e., the principles of natural law) are only "analogically" law. See, for example, his definition of law in Finnis 2011: 276-77. For his claim that natural law is only "analogically law", see Finnis 2011: 280.

elements of genuine juridicity beyond the criteria for the identification of valid positive law.

In the first section of the paper, I will explore Alexy's foundational commitment to the claim that the dual nature of law, besides its ideal or moral aspects, necessarily comprises its positivity or social facticity, that is, his dependence on the source thesis. This commitment, crucial for the aim of my paper, is sufficiently explicit and clear in Alexy's writings, but the full range of its consequences for his account of law's nature, especially with regard to the main question of this paper, has not as yet been fully explored. Next, I will analyse the extent to which his account of the nature of law depends on his understanding of justice, including substantive justice, the core of which consists in a set of basic human rights, in order to show that this component of his theory does not amount to supra-positive elements of juridicity. Finally, I will address the arguments from Alexy's theory that could perhaps be presented in favour of the claim that he ultimately supports the existence of certain elements of juridicity beyond the reach of the criteria for the identification of valid positive law, namely, (1) his occasional mention of a "supra-positive law" that causes the collapse of valid but radically unjust legal norms into "non-law", (2) his doctrine of legal principles, and (3) his thesis that law is a part or a special case of general practical discourse, which is also related to aspects of practical reasoning and morality (and that, in this sense, law is "in" morality). Taken together, these stages of inquiry will lead to the conclusion that Alexy's system does not permit him to support the claim for the existence of non-posited elements of genuine juridicity and that, regardless of his endorsement of non-positivism, he may be said to subscribe to the central tenet of legal positivism according to which, ultimately, "all law is positive law".

2 THE IMPORTANCE OF LAW'S POSITIVITY IN ALEXY'S THEORY

Regardless of his strong emphasis on the role of law's ideal dimension, which constitutes an essential feature of the nature of law that lays the foundations for the necessary intralegal connection between law and morality, Alexy is equally committed to the thesis that law's nature indispensably also comprises its real dimension, that is, its source-based social facticity or positivity. His somewhat peculiar conceptualization of law within the framework of the duality of law's real-ideal nature may cause his commentators and critics to focus predominantly on the analysis of law's ideal dimension and on the conditions for the inclusion of that moral-evaluative dimension in the concept of law. However, a comprehensive grasp of his theory requires taking into serious consideration his explicit commitment to the full range of law's essentially posited features.

Thus, Alexy highlights that his position belongs to the so-called "source family" since it "includes the thesis that law must be based on sources".[23] He further confirms that "positivism and non-positivism share what [Joseph] Raz calls the 'social thesis', but they do it in different ways" – the main difference being that non-positivism advocates that the "existence and content of law necessarily depends not only on social facts [as positivists maintain] but also on moral ideas".[24] Notwithstanding this evident and significant difference, Alexy's non-positivism subscribes to the thesis that law must necessarily be "embodied", so to speak, in source-based social-factual features, that is, that it must be posited, and he is, as we have already seen, quite explicit about his awareness that he shares this position with legal positivists.

Law's positivity is thus not an optional feature of the existence of the juridical phenomenon but an essential and indispensable aspect of its nature. From this it follows that, for Alexy, law may be found only in those entities and realities that possess the features of law's positivity, namely, the features of source-based social-factual "authoritative issuance" and "social efficacy".[25] When explaining that law's positivity is an indispensable character of its nature, Alexy frequently highlights, (1) that positivity is a "necessary" property of law,[26] (2) that real and ideal dimensions "belong to law from the beginning",[27] (3) that the factual dimension is "internally connected" with the ideal dimension,[28] or (4) that "law would not be law" if it did not comprise both the real and the ideal dimension.[29] The inclusion of moral elements in the definition of the concept of law, he claims, never amounts to the thesis according to which a non-positivist would aim to prescind from law's positivity: "No serious non-positivist is thereby excluding from the concept of law either the element of authoritative issuance or the element of social efficacy".[30]

23 Alexy & Marmor 2005: 769-70. "This version of non-positivism shares with positivism a sources thesis […]. Membership of the 'sources family' is necessary in order to do justice to the factual dimension of law". Alexy 2006: 172-73.

24 Alexy 2005: 738. "To be sure, the version of non-positivism that I defend contains strong positivistic elements. It by no means substitutes correctness of content [i.e., elements of law's ideal dimension] for authoritative issuance and social efficacy [i.e., elements of law's real dimension]. On the contrary, both are necessarily included". Alexy 2012a: 237.

25 "In the definition of law, the factual dimension is represented by the elements of authoritative issuance and social efficacy". Alexy 2021c: 36. See also Alexy 2002: 4.

26 Alexy 2021e: 29; Alexy 2021c: 36.

27 Alexy 2021e: 24. "My thesis is that a […] construction that, from the very beginning, gives more weight to the factual dimension of law vis-à-vis its ideal dimension […] mirrors […] the nature or essence of law". Alexy 2006: 171.

28 Alexy 2021b: 64.

29 Alexy 2021b: 79.

30 Alexy 2002: 4.

While it is true that non-positivists do not necessarily exclude the element of positivity from their explanations of the properties of law, it is also true, as we saw in the previous section, that one would normally expect an anti-positivist stance to advocate (or at least to hypothesize) the existence of the juridical phenomenon outside of the realm of posited law, that is, to refute the positivist claim that "all law is positive law".[31] What are Alexy's reasons for defending the element of positivity as something inherent to law's very nature, and thus for bringing his theory into close proximity with the positivists' claim that the nature of law is always necessarily manifested in posited law? His justification begins with the argument that the sole ideal dimension, namely, the sphere of morality (or, as he says, moral correctness), is "insufficient" for the existence of the juridical phenomenon, which is why it "necessitates as its complement the existence of the real, that is, the positive dimension of law".[32] The "insufficiency" of the sole moral-evaluative features for their constitution as genuine law stems, as Alexy's claims, from the fact that "the idea of pure ideality" (or "a purely ideal system of reasons for action") amounts to nothing more than "moral" knowledge and reasoning.[33] Now, the domain of moral reasoning is, or so Alexy claims, inherently inadequate for constituting law because in that domain, (1) "there are a great many practical questions in which no agreement can be arrived at, not even between reasonable persons", (2) "spontaneous compliance is not enough" for the enforcement of what is only ideal, and thus (3) it is necessary to avoid "anarchy and civil war [by] achieving the advantages of social coordination and cooperation".[34] For these reasons, the institution of the social-factual authoritative issuance of reasons for action, coercive mechanisms for the social efficacy of their enforcement, and the associated forms of legal organization are not only purposeful on the basis of mere utility, but constitute a moral value in itself,[35] namely, the value of legal certainty.[36]

Alexy persistently critiques proposals for the constitution of law's nature according to the sole reference to the elements of the ideal dimension. He writes: "Attaching no significance whatsoever to authoritative issuance and social efficacy, focusing exclusively on correctness of content, one arrives at a concept of

31 As Spaak (2020: 152) also notes, it is precisely "the social thesis which constitutes the backbone of legal positivism, and there are serious nonpositivist legal philosophers who do not accept the social thesis, at least not fully". Spaak (2020: 152) points to Dworkin's thesis that law may include content that "goes beyond the usual sources of law" as an example. In his 2005 debate with Alexy, Marmor (Alexy & Marmor 2005: 774) also highlights that Dworkin represents an example of a non-positivist that "denies the truth of both the social thesis and the separation thesis".

32 Alexy 2021c: 42.

33 Alexy 2021d: 91.

34 Alexy 2021d: 91.

35 Alexy 2021d: 91.

36 Alexy 2002: 51-53; Alexy 2021c: 43.

law purely reflective of natural law or the law of reason",[37] and this concept, in his view, is not permissible for the reasons presented above. He warns that the excessive focus on the moral elements in describing law's nature "runs the risk of uncritically identifying legal with moral requirements".[38] This risk is especially operative in a position that he calls "exclusive non-positivism", which is held by those who "define the law exclusively by its substantial correctness"[39] and thereby "give precedence to justice over legal certainty in all circumstances".[40] The logic of his argument leads Alexy to formulate a rather strong critique of this legal-philosophical position: "Owing to the inherently controversial nature of moral issues, exclusive non-positivism would be tantamount to anarchism".[41] Inversely, in a hypothetical situation wherein "everyone were to recognize in all cases what is correct, and if all citizens were to comply with what they recognize as correct, law would be redundant"; but, as Alexy notes, "these two conditions [...] are utopian".[42]

In sum, without its connectedness to law's real or factual dimension according to the demands of positivity, the ideal or moral dimension remains essentially non-juridical and it does not of itself possess sufficient conditions for the constitution of the juridical phenomenon. Thus, it may be said that, at least at this point of his theoretical account, the absence of positivity generally denotes what he refers to as crossing the "outermost border of law".[43]

3 THE JURIDICAL STATUS OF JUSTICE IN ALEXY'S ACCOUNT OF THE IDEAL DIMENSION OF LAW

What distinguishes Alexy from legal positivists is not, therefore, the degree of importance that he attributes to the real or factual dimension of law, that is, his commitment to the necessity of positivity for the constitution of the juridical phenomenon.[44] Rather, it is his argument that the nature of law also neces-

37 Alexy 2002: 13.

38 Alexy 2002: 46.

39 Alexy 1999a: 23.

40 Alexy 2021d: 99. This position is described by Alexy (1999a: 23) as the "most extreme antipode to legal positivism". Dworkin (1978: 339, 342, 344; 1986: 35-36, 97-98, 102) maintains that this same position is especially present in the arguments of the adherents of the "strong", "orthodox", or "extreme" versions of natural-law theory, which he criticizes for denying any essential difference between principles of law and principles of substantive morality, or, said differently, for erroneously concluding that substantive moral principles have a legal status simply in virtue of their objective moral truth or merit.

41 Alexy 2007: 335.

42 Alexy 2012b: 323.

43 Alexy 2021d: 97.

44 For his claim that "the necessity of positivity" does not "imply positivism", see Alexy 2021c: 43.

sarily includes the ideal dimension.[45] He refers to this position as the "necessarily inclusive social thesis",[46] the object of the "necessary inclusion" being the ideal or moral dimension. Again, the framework that represents the backbone of this position is organized as an answer to the question of what is necessarily included in law's ontological fabric; Alexy's answer is that morality is necessarily included in the very nature of law,[47] which, in turn, to be truly law, must be ontologically structured according to the properties of positivity. Thus, possible tensions that may exist between the real and the ideal dimension of law are, according to Alexy, "no longer tensions between the law and morality *qua* something outside the law, but tensions inside the law"[48] that is essentially posited.

For a better understanding of these tensions between the two dimensions of law's nature, it is important to know what forms part of the content of the ideal dimension of law. There are certainly multiple ways of presenting and assessing Alexy's account of the elements of law's ideal dimension. For the purposes of this paper, the most efficient way is to understand the status of justice in his description of the ideal dimension of law, since justice constitutes a central feature in various prominent anti-positivist claims in favour of the existence of elements of juridicity beyond the limits of posited law.[49]

The idea of justice, in Alexy's estimation, denotes the evaluative point of law: "law necessarily includes an aspiration towards justice".[50] In this sense, justice may be adequately described as the ordering principle for the moral content included in the ideal dimension of law.[51] Thus, for a complete understanding of the nature of law it is imperative to comprehend the precise content and the ordering function of the legally relevant idea of justice in Alexy's system. In a text that contains his most complete account of the idea of justice, Alexy arrives at a working definition of justice by starting from an analysis of the classical Roman jurists' formula according to which "justice consists in giving to each that which is his own (*suum cuique tribuere*)".[52] It is precisely this formula, which he seems to hold in high esteem, that marks out the distinctive features that specify justice within the broader domain of moral affairs: "the object of justice is not the whole field of morality, but only that part of morality which concerns the is-

45 Alexy 2002: 4; Alexy 2005: 738; Alexy 2021c: 83.

46 Alexy 2005: 738. See also Alexy & Marmor 2005: 770.

47 Alexy 2021a: 15.

48 Alexy 2005: 742.

49 Most notably, justice figures as the central evaluative feature in the anti-positivist accounts of law's nature developed within Thomistic juridical realism (as described in the introductory section of this paper), and from a different viewpoint, by Dworkin. For the centrality of justice in Dworkin's account of the nature of law, see Covell 1992: 145-195.

50 Atienza Rodríguez & Alexy 2001: 684.

51 Alexy 2021e: 31-32; Alexy 2021c: 37, 39-40, 43; Alexy 2021d: 91.

52 Alexy 2003: 161.

sues of distribution and compensation".[53] Indeed, Alexy's definition of justice is determined by these same elements: "justice is correctness in distribution and compensation".[54] While justice in distribution concerns a certain quality of the relationships between persons regarding certain "goods or burdens", justice in compensation regards "the relationship between objects or between things, in the broadest sense of the term", namely, "between punishment and guilt or illicit acts, between damage and reparation, and between what is given or rendered and what is received in exchange".[55]

The fundamental question, however, concerns precisely the quality of these relationships that ultimately renders them just. That is, it concerns the criteria for determining the "correctness" as the defining feature of justice in Alexy's theory. He makes it clear that "as a general or abstract claim, a claim to justice does not aim at a specific conception of justice", and that the underlying "criteria for justice and compensation" may be "different".[56] Rather, the criteria that determine what is owed to whom as his own (his *suum*) and what should accordingly be given to that titleholder, are specified in a procedure of public rational discourse in which different conceptions of justice are gradually balanced so that the outcome reflects the standards of a public conception of justice to which all the participants in the procedure, as members of a free and equal society wherein no particular conception of justice as such is preferred over others, may give their consent. The primary scope of this democratic procedure is to arrive at what Alexy calls a "nucleus of normative stability" at the constitutional level of positive law, a nucleus that consists of a "catalogue of fundamental rights" with regard to which there is a "sufficient level of agreement" between citizens.[57]

The details of the stages through which a society arrives at a public agreement regarding fundamental rights in Alexy's discourse theory is not the primary concern of this paper. However, certain claims that are contained in his line of argument regarding the specification of the criteria of legally relevant justice are indeed relevant for an assessment of his account of law's nature.

First, the "core of justice" consists in a cluster of basic human rights that "essentially claim priority with respect to all other norms".[58] Although the idea of justice is broader than the idea of human rights, the two ideas are sufficiently interconnected such that it may be said that every violation of human rights is a violation of the principles of justice.[59] The principles of justice and basic hu-

53 Alexy 2003: 161.

54 Alexy 2003: 163. For echoes of this definition in his other texts, see Alexy 2021c: 39-40; Alexy 2021f: 317.

55 Alexy 2003: 161.

56 Alexy 2021f: 317.

57 Alexy 2003: 167-171.

58 Alexy 2021g: 58–59.

59 Alexy 2021g: 58.

man rights, both denoting the correctness of what should be given to each as his own, have only a moral character.[60] Their essentially moral character fits perfectly with their belonging exclusively to the ideal dimension of law.[61] As such, the principles of justice, together with the basic human rights that denote their core, share the legal status of the dimension that they pertain to, that is, they are not of themselves law and law may not be said to be "in" them unless they meet the demands of the real dimension of law, that is, unless they are positivized. The novelty of Alexy's account of law's ideal nature is not in the claim that law may be said to be somehow "in" the principles of justice or in basic human rights, but in the claim that these elements of the ideal dimension of law, when positivized and constituted as real or source-based law (and as real or source-based rights), continue to operate as moral-evaluative features at the same time both "behind" and "in" law.[62]

Second, the idea of justice is not the only evaluative point of positive law in Alexy's theory. Legal certainty, namely, the value that can be achieved only by means of law's positivity,[63] constitutes a formal and systemic evaluative point of positive law whose *ratio* is precisely in the fact that, in Alexy's estimation, "the idea of justice as such – that is, morality *simpliciter* – does not […] suffice to resolve problems of social co-ordination and co-operation [and] the moral costs of anarchy can be avoided only by law understood as an enterprise that strives to realize the value of legal certainty".[64] Therefore, the dual nature of law demands that the operativity of the principles of justice and basic human rights *qua* moral entities within the ideal dimension of law must be seen "in correct proportion" to the value of legal certainty or positivity.[65] This correct proportion is crucial for a precise understanding of what law is and what it is not, since the "balancing" (or "weighing"[66]) between the two values pertains to the very nature of law.[67]

60 "Questions of justice, however, are moral questions". Alexy 2021c: 40. "Human rights are, first, moral, second, universal, third, fundamental, and fourth, abstract rights, that, fifth, take priority over all other norms". Alexy 2021c: 47.

61 "Human rights as moral rights belong exclusively to the ideal dimension of law". Alexy 2021c: 47.

62 "The claim to justice does not vanish once law is institutionalized. It remains alive, standing behind and found in the law; and it is the main task of the theory of the ideal dimension of law to make this explicit". Alexy 2021d: 91. "Constitutional rights are part of positive law, namely, positive law at the level of the constitution. […] Constitutional rights may be considered as attempts to transform human rights *qua* ideal rights into positive law, that is, into real rights. The ideal dimension remains alive after the transformation into the real dimension". Alexy 2021d: 105. Thus, in Alexy's view (2021h: 237), constitutional rights participate in law's dual nature, since these rights encompass both (1) the exclusively moral value of supra-positive human rights (which are transformed into constitutional rights) and (2) the positivity that is also necessary for their inclusion in law (i.e., for their juridicity).

63 Alexy 2021c: 43.

64 Alexy 2012a: 227.

65 Alexy 2021c: 43.

66 Alexy 2002: 52.

67 Alexy 2021d: 92.

Alexy proposes the following solution for cases in which justice and legal certainty collide with regard to a particular legal norm deemed contrary to the principles of justice: "the principle of legal certainty precedes justice even if the law is unjust, save for one sort of case: that in which the threshold of extreme injustice is crossed".[68] The balancing between the two values also provides us with an answer to the question of what law is "not in". The Radbruch "extreme justice is no law" Formula epitomizes the claim that "an outermost border of law exists",[69] since it allows legal officials to "determine" that a radically unjust law was never law at all but a "non-law" (in German: *Unrecht*) throughout its posited existence,[70] that is, that law was never "in" that radically unjust norm. Alexy holds that one who accepts the Radbruch Formula "has bid farewell to positivism".[71] However, the balancing between the two values – indeed, one of the two values is always legal certainty, achieved only by means of positivity – never leads to a solution where law is "in" the principles of justice or "in" the basic human rights that are not posited, but remain only ideal and exclusively moral. In this sense, although he gives much structural importance to the idea of justice and to basic human rights as the core of that idea, Alexy has never bid farewell to the positivists' claim that all law is, ultimately, positive law and that there are no elements of real juridicity beyond it.

4 CLARIFYING SOME FURTHER DOUBTS

Perhaps as a remainder of anti-positivism's in-built (or at least highly probable) commitment to the rebuttal of positivism's "all law is positive law" thesis, Alexy's writings contain arguments that could perhaps be presented in favour of the claim that he ultimately supports the existence of certain elements of juridicity beyond the reach of the criteria for the identification of valid positive law. The assessment of these arguments will provide a definitive answer to the main question of this paper.

Starting with the argument most closely connected to his endorsement of the Radbruch Formula, Alexy sometimes refers to a "supra-positive law"[72] in

68 Alexy 2021b: 79. Alexy is always careful to acknowledge that he inherited the second part of this argument – in its shortest form, that "extreme justice is no law" – from Gustav Radbruch (the so-called "Radbruch Formula"). See Alexy 2002: 28; Alexy 2021c: 45. For the original formulation of Radbruch's formula, see Radbruch 2006a: 7; Radbruch 2006b:14.

69 Alexy 2021d: 98.

70 Alexy 2002: 28.

71 Alexy 2021b: 77.

72 "This is a classic non-positivistic argument. An authoritatively issued norm, socially efficacious from the time of issuance, is denied validity or […] legal character because it violates supra-statutory law". Alexy 2002: 7. Alexy's reference to "supra-positive law" relies on Radbruch's (2006a: 6-7) more developed (and arguably more juridically fuelled) usage of the same

developing his claim that the radically unjust legal norm is "non-law". This line of argument could imply that the valid legal norm containing extreme substantive injustice is deemed "non-law" on account of the existence of hierarchically superior and fully juridical supra-positive legal norms. Indeed, this thesis would resemble an anti-positivist stance. In a similar fashion, Alexy occasionally refers to "supra-positive rights"[73] when he wants to describe the juridical status of basic human rights. I argue that, regardless of the terminological reference to entities that are at the same time both "supra-positive" and "law" (or "rights"), Alexy's theoretical framework does not allow the expression "supra-positive law" to denote anything more than a strong metaphor or, at best, a virtual (or analogical) "law" that comprises moral elements pertaining only to law's ideal dimension. Of course, he advocates the existence of supra-positive content of the principles of justice and of the values protected by basic human rights, but, as we saw earlier, this ideal content is of itself insufficient to constitute law. Again, until the two dimensions of law, the ideal and real, are properly united, the juridical phenomenon has not as yet appeared; the ideal elements are still "non-law", and their status remains purely moral.

In addition, radically unjust legal norms are deemed "non-law" in Alexy's theory not on account of a "higher" law containing ideal elements that are not posited, but as a result of the tensions between the ideal and the real dimensions – and the prevailing effects of the ideal principles of justice over the real elements of legal certainty in this particular case – that occur at the level of posited law.[74] In this particular case, the purely moral features of law's ideal dimension that are present in law and "remain alive standing behind"[75] the posited features of law's social-factual existence, lead to the declaration that both the content and the formal posited features of a radically unjust legal norm are "non-law". In sum, the supra-positive normative features that are operative in Radbruch's formula do not render an unjust legal norm "non-law" because those features

term: "Where there arises a conflict between legal certainty and justice, between an objectionable but duly enacted statute and a just law that has not been cast in statutory form, there is in truth a conflict of justice with itself, a conflict between apparent and real justice". Radbruch (2006b: 14-15) explicitly identifies supra-positive law with normative content that is usually referred to as "natural law": "There are principles of law, therefore, that are weightier than any legal enactment, so that a law in conflict with them is devoid of validity. These principles are known as natural law or the law of reason".

73 "Thus, constitutional rights have a dual nature. The reason for this is that, with constitutional rights, not just any political decision is transformed into positive law; rather, it is human rights *qua* supra-positive rights that are rendered positive". Alexy 2021h: 237.

74 Sieckmann (2021: 736) argues that, since the values of justice and legal certainty are both ideal values, the true intralegal conflict between these values is played out solely "within the ideal dimension" of law. Be that as it may, my present claim that both these ideal values collide at the level of necessarily posited law – and not at the level that comprises also non-posited or supra-positive law – still stands.

75 Alexy 2021d: 91.

are (1) supra-positive and (2) somehow of themselves truly law. Rather, they render that norm "non-law" because in Alexy's framework they are (1) essentially moral and, precisely as such, (2) intra-positive.

Next, the status of the so-called "principles" in Alexy's theory might, on first sight, lead to a conclusion that these principles denote non-posited elements of juridicity. It is Alexy's thesis that in an "open-texture" situation (or the "open area of positive law"), where legal officials cannot "base a decision on the positive law" (on account of various reasons, such as "the vagaries of legal language, the possibility of norm conflicts, the absence of a norm"), the decision may also be reached by invoking (and by balancing between) non-posited principles.[76] In contrast to legal positivists, who claim that these principles are essentially "non-legal or extra-legal",[77] Alexy maintains that "everything on which an official applying the law in the open area of the law bases and/or must base a decision in order to satisfy the claim to correctness belongs to the law".[78] For the purposes of this paper it is not necessary to enter into the details of what it means to say that principles must "satisfy the claim to correctness". Suffice it to say that, in Alexy's estimation, principles, "even when they cannot be identified as legal principles according to the validity criteria", may be said to "become the components of the law".[79] This part of Alexy's thesis on principles resembles a classical anti-positivist argument for the existence of non-posited elements of juridicity. However, on closer inspection, it is possible to understand that non-posited principles, which Alexy deems law, are in fact within the reach of posited law and of the criteria for its validity. This is so because, first, the invoking of principles is always contextualized in the process of law application and is necessarily included in its result, that is, in a posited decision made by legal officials.[80] Second, and perhaps more importantly, principles may be said to be well within the reach of the criteria of validity for positive law because their non-posited operativity is confined to the "open area" of positive law, that is, to the area where the starting point is always a certain legal situation related to the status of the "texture", in this case the "open texture", of positive law. Alexy's argument from principles thus fits perfectly within the reach of an objection that Hart raised to Dworkin's non-positivism:

> A rule of recognition is necessary if legal principles are to be identified […]. This is because the starting-point for the identification of any legal principle to be brought to light […] is some specific area of the settled law which the principle fits and helps to

76 Alexy 2002: 68-70.

77 Alexy 2002: 69.

78 Alexy 2002: 129.

79 Alexy 2002: 130.

80 "This claim [i.e., the claim to correctness that is operative in cases that fall within the scope of the 'open' quality of positive law] is because of its necessary connection to the judicial judgment a legal, and not merely a moral claim". Alexy 2021f: 321.

justify. The use of [Dworkin's interpretive law-identifying] criterion [which he claims to be non-posited and autonomous from a rule of recognition] therefore presupposes the identification of the settled law, and for that to be possible a rule of recognition specifying the sources of law [...] is necessary. (Hart 2012: 266)

Now, Dworkin may be said to have at least partly avoided Hart's objection. This is because, first, Dworkin maintains that the criteria for law-identification do not necessitate the conventional support of legal officials, and accordingly, principles may, even in the situation of disagreement among legal officials regarding their content and relevance,[81] be identified as law for rather complex reasons described in Dworkin's account of law as a part of political morality. Secondly, it is Dworkin's view that his rights-based non-posited principles are already fully law awaiting discovery by the legal officials – and law is fully "in" them – before, during, and after the moment in which the state of affairs of positive law's "open texture" is rendered manifest.[82] Alexy, however, cannot avoid Hart's objection, since he disagrees with Dworkin's above-mentioned theses. In reference to Dworkin's first thesis, Alexy supports the argument, which he shares with Hart and legal positivists, that the very nature of law necessitates the existence of the shared criteria for law-identification, at least with regard to the validity of law's real, factual, or posited elements. With regard to Dworkin's second thesis, Alexy argues that the ideal dimension of principles, in order to possess legal character, must be necessarily connected to the real dimension of law at least with regard to the above-described two points of contact between these dimensions, that is, (1) principles are law only insofar as their existence and operativity forms part of a posited judicial decision and (2) the starting point for the invoking of principles must be an "open area" of positive law.

Finally, it is at least *prima facie* possible to read Alexy's thesis that law is a part or a special case of general practical discourse, which is also related to issues of practical reasoning and morality (together with ethical-political and

81 See Dworkin 2006: 197.

82 Dworkin's entire legal-philosophical project consists in explaining that the "standing political order is a source of judicial rights" by "showing why people can have genuine political rights just by virtue of the actual political history of their community, and why these rights hold with special force in litigation". See Dworkin 1982: 185. In Dworkin's view (2011: 402), principles are law even before they are – indeed, even if they never are – posited: "[Interpretivism] argues that law includes not only the specific rules enacted in accordance with the community's accepted practices but also principles that provide the best moral justification for those enacted rules. The law then also includes the rules that follow from those justifying principles, even if those rules were never enacted". Regardless of his many objections to Dworkin's project and his attempts to show that this project may be said to ultimately accommodate the central tenets of inclusive positivism, Hart (2016: 470) clearly acknowledges Dworkin's claim that non-posited principles are already law: "[Dworkin] maintains that there are objectively certain moral principles that are also law, [and that] these principles owe their legal status neither to any form of incorporation nor to any normative decision or judicial practice, nor to any consensus. Accordingly, they are law even if they are not so identified with reference to the social sources of law".

pragmatic reasons),[83] as an argument in favour of the claim that, in this sense, at the highest level of analysis, law may ultimately be said to be somehow "in" morality. Indeed, he highlights that "legal argumentation or legal discourse is a special case of general practical argumentation or discourse", which also comprises "moral arguments concerning justice and rights".[84] However, he immediately adds that although "general practical argumentation" pertains to what he refers to as law's ideal dimension, the distinctive feature that makes legal argumentation – and the very nature of law – a "special" case of practical reasoning is precisely the claim that it "concerns justice as well as legal certainty".[85] Again, even if law may be said to constitute a specialized domain within the broader sphere of morality, in Alexy's framework this means that the dual real-ideal nature of law is precisely the distinctive feature of law within practical reasoning. In sum, law as a special case of practical reasoning may be said to be "in" morality, but only in that morality that ultimately and necessarily meets the requirements of the law's real dimension (i.e., the positivity of law) and is thereby "institutionalized".[86]

5 CONCLUSION

It is usually thought that Alexy "loosens the link between law and authoritative issuance" by his non-positivist thesis that "the law consists of much more than the structured set of its constituent norms",[87] namely, that it consists also of the elements of the ideal or moral dimension. As I argued in this paper, this common interpretation of Alexy's legal-philosophical approach needs further elucidation in order to better understand his commitments to both positivism and non-positivism. To assert that "law consists in much more" than merely posited law can mean significantly different things. As I explained in this paper, Alexy understands this claim in the sense that morality may be said to form part of law's nature – that morality is "in" law – and as such the moral domain also determines what is "non-law" in some cases. However, Alexy does not support the anti-positivist claim that law is "in" any other reality or "thing" that is not within the reach of the criteria for the identification of valid positive law.

Again, if we assume that the core criterion for the categorization of a legal-philosophical approach on one side of the divide between positivism and non-positivism is the endorsement (or refutation) of the thesis in favour of the

83 See Alexy 1999b: 374.

84 See Alexy 2021d: 103.

85 Alexy 2021d: 104.

86 "The legal system of the democratic constitutional state is an attempt to institutionalize practical reason". Alexy 1999b: 383.

87 Bertea 2007: 74.

necessary inclusion of substantive morality in the criteria for law-identification as a feature that somehow emerges from the very concept of law, then Alexy must surely be enlisted among the non-positivists. In other words, if we ignore the crucial importance of the "all law is positive law" answer to the "what is law 'in'?" question for legal positivists, it will be difficult to find an argument that would undermine Alexy's commitments to non-positivism. However, as I have shown in this paper, in order to fully understand his theory of law's nature, it is necessary to take into account all the relevant starting points from which this theory was elaborated. Alexy's rather explicit and recurrent emphasis on positivity as a necessary feature of all manifestations of law, that is, his adherence to the thesis that "all law is positive law", denotes a relevant starting point that has been largely ignored by his commentators and critics. His arguments proceeding from this starting point suggest that there are some important – indeed, typically positivistic – boundaries to his non-positivism, which should not be overlooked in a comprehensive account of his legal-philosophical approach.

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Una teoría conjuntista de la derogación: sistemas y conjuntos

En nuestra tradición iusfilosófica, en materia de cambio normativo, probablemente, la propuesta teórica más influyente es la elaborada por Carlos Alchourrón y Eugenio Bulygin. Uno de sus rasgos característicos es el uso de distintos conceptos de la teoría de conjuntos para explicar los sistemas normativos. Sin embargo, los intentos por determinar cuál es el rol de los elementos básicos de la teoría de conjuntos utilizados en la explicación de los sistemas jurídicos aún resultan insuficientes. Por ello, el presente trabajo busca comenzar a subsanar dicha deficiencia a través de explicitar estos elementos básicos, darles contenido desde la teoría axiomática de conjuntos, para luego mostrar su rol en la propuesta teórica del cambio normativo, en general, y la derogación, en particular.

Parablas clave: sistemas jurídicos, teoría de conjuntos, derogación, relación

1 INTRODUCCIÓN

Es posible rastrear el origen de la derogación desde el derecho romano hasta la actualidad sin apreciar grandes controversias en su uso como mecanismo de cambio normativo. Sin embargo, su dilatada historia y extendido consenso no han resultado suficientes para encontrar acuerdos en torno a su teorización. Son los autores que persiguen explicarla, quienes desacuerdan al momento de cómo conceptualizar esta institución.[1]

En nuestra tradición iusfilosófica, en materia de dinámica de sistemas jurídicos, en general, y sobre derogación, en particular, probablemente, la propuesta teórica más influyente es la elaborada por Carlos Alchourrón y Eugenio Bulygin. Uno de sus rasgos característicos está en el uso de diversos conceptos propios de la teoría de conjuntos para explicar los sistemas normativos y su carácter dinámico. Por ejemplo, las nociones de conjunto, familia de conjuntos, identidad de conjunto, orden y orden parcial (estricto, transitivo y simétrico), pertenencia, identidad o criterios de identificación del conjunto, solución maximal o minimal y función selectiva o selección minimal.

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1 Algunas de las distintas reconstrucciones teóricas están en los trabajos de Kelsen 1962, Mazzarese 1981, Hilpinen 1981, Guastini 1987, Mendonca 1993, y Aguiló 1996, entre otros.

Sin embargo, resulta interesante constatar que existen múltiples elementos de la teoría de conjuntos que aún no han sido utilizados para explicar la reconstrucción teórica de los sistemas normativos.[2] El porqué de esta situación puede tener diversas razones, las cuales van desde las desventajas filosóficas de la teoría de conjuntos, sugeridas por Alchourrón (1987), hasta la relevancia adquirida por las bases de creencias en una teoría de cambio de creencias, destacadas por Navarro y Rodríguez (2014: 219), pasando por el rumbo que tomaron las investigaciones teórico-jurídicas durante la década de los noventa y los años sucesivos. En cualquier caso, más allá de las razones de esta situación, si la citada teoría de los sistemas jurídicos utiliza elementos de una teoría de conjuntos para explicar el carácter dinámico del derecho ¿por qué no intentar determinar cuál puede ser el rol de la teoría de conjuntos en la explicación de los sistemas jurídicos?

En este trabajo sugiero comenzar a responder dicha pregunta a través del estudio de la reconstrucción dinámica del derecho, en general, y la derogación, en particular. Por lo mismo, la propuesta es solo un primer paso dirigido a complementar la teoría de los sistemas jurídicos propuesta por Alchourrón y Bulygin a partir de sus propias bases conceptuales, las cuales están influenciadas por una teoría de conjuntos.

Para alcanzar el objetivo, el trabajo se distribuye en los siguientes tres apartados. El apartado 2 presenta la derogación dentro de una teoría dinámica de los sistemas jurídicos de Alchourrón y Bulygin, con especial explicitación de los elementos de una teoría de conjuntos. El apartado 3 explica los elementos básicos de la teoría de conjuntos utilizados en la explicación del cambio normativo mostrando cómo este tipo de análisis contribuye a explicar la teorización en materia de derogación. Finalmente, el apartado 4 recapitula los principales aportes del trabajo a modo de conclusión.

2 LA DEROGACIÓN Y LA DINÁMICA DE LOS SISTEMAS JURÍDICOS

Transcurridos prácticamente cincuenta años desde la publicación de las primeras propuestas teóricas en torno al carácter dinámico del derecho, el balance que se puede hacer es sumamente provechoso. Se ha producido una próspera simbiosis entre los trabajos de Alchourrón y Bulygin y un amplio conjunto de propuestas de revisión, ajuste y perfeccionamiento proveniente desde distintos sectores iusfilosóficos.

Por lo mismo, resulta imposible abordar en este trabajo todo lo que se ha escrito, pero sí es factible presentar esquemáticamente algunos de los principales

2 Una excepción a esto está en Ratti 2013 y Ratti 2019.

hitos de la propuesta teórica con base en dos consideraciones.[3] Por un lado, presentar las ideas de Alchourrón y Bulygin destacando aquellas nociones que son propias de una teoría de conjuntos y, por otro lado, mostrar la citada simbiosis a través de alusiones a las propuestas de distintas autores y autoras. Lo dicho lo haré centrándome, primero, en la distinción entre sistema y orden jurídico (2.1) y, segundo, en el concepto de derogación (2.2).

2.1 Sistema y orden jurídicos

Si bien *Normative Systems* es un libro dedicado fundamentalmente al análisis de los sistemas jurídicos estáticos, Alchourrón y Bulygin (1974[1971]: 32, 37, 86, 92 y 103), en algunas de sus páginas desarrollan los primeros elementos de su teoría del cambio normativo. Allí caracterizan al sistema normativo como un sistema deductivo (axiomático), es decir, como un conjunto de enunciados que contiene todas sus consecuencias lógicas. El sistema es normativo porque contiene al menos un enunciado normativo. Un enunciado es normativo cuando correlaciona casos con soluciones normativas y estas últimas son las posibles respuestas a cuál es el estatus normativo de ciertas acciones o conductas. Dichas soluciones se clasifican en dos categorías: (i) obligatorio, prohibido y facultativo son consideradas como "soluciones maximales"; (ii) permitido y no facultativo se denominan como "soluciones minimales". Como la noción de sistema descansa en la noción de consecuencia lógica y esta última depende de la existencia de reglas de inferencia, necesariamente, también las reglas de inferencia integran el sistema.

A partir de lo anterior, Alchourrón y Bulygin (1974[1971]: 137-140) sugieren que el sistema normativo cambia cuando cambian sus consecuencias normativas, sea por un cambio en la base o en las reglas de inferencia. Por ende, si no se afecta el contenido del sistema normativo tampoco se afecta su identidad, como ante una reformulación que solo modifica la presentación del sistema manteniendo la equivalencia de su base normativa. En ambos casos, el término "cambio" alude a la generación de un sistema distinto del anterior, i.e., cambio significa sustitución de un sistema por otro y no modificación dentro del sistema.

El sistema tiene su base axiomática integrada por un conjunto finito de enunciados normativos a partir de los cuales se derivan los otros enunciados del sistema (consecuencias) con base en las reglas de inferencia. En el libro *Normative Systems*, las reglas de inferencia están constituidas por las reglas lógicas, porque Alchourrón y Bulygin (1974[1971]: 87, 119 y 143) adhieren a la denominada descripción del "sistema normal". A su vez, los enunciados de la base

3 Con la vastedad aludo a un amplísimo conjunto de autores y autoras que han dedicado una parte de su obra al análisis de las propuestas de Alchourrón y Bulygin, por ejemplo, Ricardo Caracciolo, Tecla Mazzarese, Pablo Navarro, María Cristina Redondo, José Juan Moreso, Jorge Rodríguez, Juan Ruíz Manero, Juan Pablo Alonso, Daniel Mendonca, Giovanni Battista Ratti, Riccardo Guastini, Pierluigi Chiassoni, Josep Maria Vilajosana, y Fernando Atria, entre muchos otros y otras.

axiomática se identifican mediante los criterios de identificación usados por los juristas. Estos criterios contextuales establecen los requisitos que debe cumplir un enunciado para ser derecho válido y comprenden dos tipos de reglas. Las reglas de admisión que determinan las fuentes de derecho (legislación, jurisprudencia, costumbre, etc.) y las reglas de rechazo que establecen las formas (i.e. derogación, desuso, etc.) en que un enunciado pierde su validez.

Al poco tiempo y como un segundo paso, a partir de las sólidas bases de *Normative Systems,* los autores precisan algunas nociones.[4] Primero, diferencian entre normas explícitamente formuladas y normas derivadas de ellas. Segundo, consideran que el carácter dinámico del derecho deriva de actos de promulgación y derogación de normas. Tercero, proponen capturar dicho carácter dinámico mediante la diferenciación entre sistema jurídico, entendido como un conjunto de normas, y orden jurídico, entendido como una secuencia de sistema jurídicos. La identidad del primero depende de sus elementos; mientras que la identidad del segundo se determina por los criterios utilizados para la identificación de los sistemas que integran su secuencia. De esta manera, la dinámica jurídica se presenta mediante distintos sistemas jurídicos (en adelante S_j) que pertenecen a un orden jurídico (en adelante O_j). Los S_j se suceden en el tiempo y son generados a partir de actos de promulgación y/o derogación, y de esta manera se conforma el O_j (Alchourrón & Bulygin 1977[1975]: 300-302).

En este contexto, el S_j se presenta como Cn(A) donde A simboliza un "conjunto de normas formuladas", las cuales son entendidas como su base axiomática, y Cn todas sus consecuencias lógicas, las cuales son aludidas como normas derivadas. Así, para determinar los efectos de los actos de promulgación y derogación en un S_j se debe considerar, principalmente, tres posibilidades: promulgación de nueva norma, derogación de norma formulada y derogación de norma derivada:

(a) Si la autoridad promulga la norma N_2, el sistema resultante se constituye por "la suma de tres conjuntos": las consecuencias de la base axiomática A, las consecuencias de N_2 y las consecuencias de {A+N_2}, es decir, {Cn(A+N_2}.[5]

(b) Si la autoridad deroga N_2, el sistema resultante se constituye por la "sustracción de tres conjuntos": la norma N_2, las normas derivadas de N_2 y las normas para cuya derivación N_2 es necesaria.

4 Idénticas consideraciones en Alchourrón & Bulygin 1976. Como es ampliamente conocido, la distinción entre sistema y orden jurídicos deriva de la propuesta raziana de diferenciar entre sistemas momentáneos y no momentáneos (Raz 1980).

5 Alchourrón & Bulygin (1979: 67-71) sugieren también que la autoridad al momento de promulgar una nueva norma no solo debe consideran las consecuencias de la norma que se pretende promulgar, sino también de las normas preexistentes, es decir, establecer las consecuencias de las normas existentes, de la norma proyectada y de las que se derivan de ambos conjuntos. Un interesante análisis de estas propuestas en Redondo & Navarro 1990.

(c) Si la autoridad deroga N_4 que se deriva de N_2 y N_3, el sistema resultante está lógicamente indeterminado, porque no existen criterios lógicos para decidir qué norma sustraer entre aquellas que posibilitan su derivación. Si bien el sistema resultante no debe contener N_4, las normas derivadas de N_4 y las normas para cuya derivación N_4 es necesaria, no es claro si debe sustraer la norma N_2 o la norma N_3, ya que ambas posibilitan su derivación (Alchourrón & Bulygin 1977[1975]: 302-306).[6]

Un tercer paso en este proceso de precisión y desarrollo de una concepción dinámica del derecho se produce a los pocos años del segundo. A partir de la noción de afirmación racional se sostiene que, al prescribir expresamente una norma, se prescriben implícitamente todas las consecuencias lógicas de las normas expresamente prescritas.[7] Así, son formuladas las normas que son objeto de un acto expreso de promulgación y derivadas las normas que son consecuencias lógicas de las primeras. Esta distinción permite reflejar en un sistema normativo la distinción entre axiomas y teoremas propia de los sistemas deductivos axiomáticos, ya que los primeros se corresponderían con las normas formuladas y los segundos con las derivadas. Así, un sistema axiomático normativo tiene, al menos, un axioma normativo, es decir, una norma-sentido formulada (Alchourrón & Bulygin 1979: 44-45 y 58-59).[8]

Entendidas como entidades abstractas, la existencia de las normas se reformula en términos temporales a través de la noción de pertenencia a un sistema. Un sistema dinámico (como O_j) está sujeto a cambios a lo largo del tiempo a través de actos de promulgación y derogación de normas. De manera que, si su contenido es distinto en cada momento temporal, la existencia de las normas puede ser definida en términos de su pertenencia a un sistema. A cada momento temporal corresponde un acto de promulgación y/o derogación, de modo que, en cada momento se presenta un S_j distinto. Dichos actos generan nuevos S_j que integran la "secuencia de conjuntos" que forma el O_j cuya identidad descansa en los "criterios de identificación" de las normas que pertenecen a cada S_j en cada momento. Estos criterios constan de reglas de introducción que determinan cuándo una norma pertenece al sistema, junto con reglas de eliminación

6 También, ver Alchourrón & Bulygin 1976. En relación con este punto Kristan (2017: 67 ss) ha sugerido que sería igualmente posible sustraer ambas normas.

7 Más adelante Navarro (2005: 184) complementaria este estándar de racionalidad con consecuencias prácticas: «Algunas veces los legisladores no son conscientes de las consecuencias que se siguen de sus normas, y cuando advierten ciertos efectos perjudiciales o indeseables de sus normas, no es infrecuente que deroguen o enmienden la legislación original. Esto muestra que las consecuencias lógicas –incluso aquellas que el legislador no ha previsto– también pertenecen al sistema. En caso contrario, no tendría sentido derogar o modificar las normas originales».

8 Posteriormente, esta precisión (solo aquellos conjuntos de normas a los cuales pertenece, al menos, una norma expresamente formulada, pueden ser objeto de reconstrucción en término de sistemáticos) será denominada "cláusula de adecuación", ver Moreso & Navarro 1993: 36.

que determinan cuando una norma deja de pertenecer al sistema (Alchourrón & Bulygin 1979: 57-60).[9]

En relación con las reglas de introducción los autores presentan tres "criterios de pertenencia de las normas a un S_j": (i) pertenencia directa en el caso de las normas soberanas; (ii) validez en el caso de las normas formuladas; y (iii) deducibilidad en el caso de las normas derivadas (Alchourrón y Bulygin 1979: 61-66).

El primer criterio alude al hecho de que todo sistema contiene normas que no son válidas ni inválidas, sino más bien definidas por, o determinadas a través de, enumeración. El segundo refiere a que, en un S_j determinado, una norma es válida si hay al menos otra norma perteneciente al mismo sistema en conformidad con la cual es válida. Y el tercer criterio contiene la noción de promulgación implícita. Por ende, en razón de su carácter, la identidad del O_j descansa en las normas supremas o soberanas.[10] En cambio, las reglas de eliminación serán presentadas en el apartado siguiente (2.2) relativo a la derogación.

Un cuarto paso en la reconstrucción teórica se establece explicitando la relevancia de las relaciones entre las normas que integran el S_j, principalmente, en dos aspectos: ordenación y aplicabilidad.

Fue al comenzar la década de los ochenta, cuando Alchourrón enfatizó el carácter jerárquico de los S_j (Alchourrón 1982: 56-68). Las fuentes del derecho no solo proporcionan normas sino también criterios jerárquicos para determinar la importancia relativa de las normas que forman parte de los S_j. Se amplía así el ámbito de elementos que componen un S_j, porque se incluyen una serie de relaciones que determinan el peso específico de cada elemento. Por ejemplo, el criterio basado en el nivel jerárquico de la autoridad que dicta la norma. De ahí que, en la reconstrucción de los S_j se deben introducir una serie de "relaciones ordenadas" que proporcionan jerarquías a sus elementos, caracterizándose los

9 Bulygin (1982: 66) lo dice con claridad más adelante: «It seems natural to asume that a norm, once derogated, ceases to be a member of a system; on the opposite view all legal sytems would be full of inconsistences, because when a legislature enacts a new statute the latter is almost always incompatible with some norms which it derogates».

10 A partir de lo anterior, los comentadores de Alchourrón y Bulygin han señalado que un Sj es un conjunto de normas vinculadas a una estructura, esto es, condicionadas por relaciones específicas definidas en esos conjuntos. Estas relaciones definen la estructura del sistema y proporcionan sus "criterios de pertenencia" (legalidad y deducibilidad). Si bien ambos criterios son empleados como criterios de identificación normativa, el criterio de legalidad además estructura relaciones dinámicas entre normas y sistemas. Por ejemplo, ver Caracciolo 1994: 48, Moreso 1997b: 8, Moreso & Navarro 1998: 276, y Moreso & Vilajosana 2004: 97. Además, ellos enfatizan que, para evitar la circularidad en la determinación de los elementos que integran un sistema, resulta necesario asumir dos presupuestos: (i) la existencia de normas independientes o sobernas, ver Redondo 2017; y (ii) debilitar la relación entre existencia de normas y su formulación en un lenguaje determinado para diferenciar entre normas formuladas y derivadas, las primeras son objeto de un acto expreso de promulgación y las segundas son consecuencias lógicas de las primeras, ver Caracciolo 1988: 31, y Moreso & Navarro 1993: 35-37.

sistemas como una tupla [A, $>_1 \ldots >_n$] donde el primer elemento (A) es el conjunto de normas y el resto ($>_1 \ldots >_n$) las diferentes relaciones jerárquicas, siendo cada jerarquía un orden parcial estricto, transitivo y simétrico.

Sin embargo, las relaciones jerárquicas no deben ser consideradas como normas del S_j, porque no imponen el deber de realizar o no una determinada acción, más bien su función es selectiva respecto de los elementos que integran un S_j, i.e., en ciertas circunstancias, producen el desplazamiento de un elemento por otro. Y la eficacia de la relación jerárquica en la selección normativa está condicionada por la existencia de normas que prescriben cómo manipular otras normas del sistema cuando hay relaciones jerárquicas entre ellas. Por lo mismo, se debe reconocer la existencia de un segundo nivel normativo vinculado con la utilización de las relaciones jerárquicas, el cual puede definir su importancia y desempeño en las distintas disciplinas jurídicas (Alchourrón 1982: 57-58).

En el mismo periodo, dadas las importantes consecuencias teóricas, Bulygin (1982: 65-66) enfatiza dos sentidos descriptivos de validez: como pertenencia y como aplicabilidad. Un sentido descriptivo alude a la pertenencia de una norma a un S_j, de modo que, afirmar "*p* es válido" constituye una proposición descriptiva acerca de la relación diádica entre una norma y un sistema determinado. Y el otro sentido descriptivo refiere a que una norma debe ser aplicada en conformidad con otra norma, de manera que, sostener "*p* es válido" es afirmar la existencia de una prescripción de acuerdo a la cual la norma en cuestión debe ser aplicada a un cierto caso (relación tríadica).

Así, a partir de la distinción entre S_j y O_j, es posible diferenciar entre todo el tiempo durante el cual una norma pertenece a los distintos S_j de un O_j y la secuencia de todos los momentos temporales en los que la norma es aplicable a algún caso. El primero se denomina tiempo externo y la segunda tiempo interno de las normas. Al ser el tiempo externo una función de pertenencia y el tiempo interno una función de aplicabilidad, ambos tiempos son independientes entre sí. Por ende, no es necesaria su coincidencia y las normas que una autoridad normativa aplica a un caso en un momento determinado pueden no pertenecer al sistema correspondiente a ese momento (Bulygin 1982: 67-68).

De esta manera, el S_j presente al tiempo de resolver el caso (S_{jP}) cobra preponderancia, porque las normas que resuelven el caso son determinadas por los criterios de aplicabilidad que pertenecen a él. Dentro del S_{jP}, el juez debe identificar tanto los criterios que señalan qué normas son aplicables a un caso concreto como los criterios de aplicabilidad que señalan qué criterios (de aplicabilidad) deben ser aplicados. Estos criterios identifican los momentos temporales a los que corresponden los sistemas que deben ser tomados en cuenta y a partir de ellos permiten comparar sus normas pertenecientes para determinar cuál resulta aplicable (Bulygin 1982: 70-71).

Finalmente, a comienzos de los años noventa, ocurre un quinto paso en la reconstrucción a través de un esquema definicional, cuando Bulygin postula (de manera canónica) el criterio de identidad de un O_j. Este se formula a través de cinco reglas genéricas que determina la estructura de un O_j, a saber:

> (1) El conjunto de normas [N_1, N_2…N_3] es el sistema originario (primera constitución) de O_i; (2) Si una norma N_j es válida en un sistema S_t que pertenece a O_i, y N_j faculta a la autoridad x a promulgar la norma N_k y x promulga en el momento *t* la norma N_k, entonces N_k es válida en el sistema S_{t+1} (es decir, en el sistema correspondiente al momento siguiente a *t*) y S_{t+1} pertenece a O_i; (3) Si una norma N_j es válida en un sistema S_t que pertenece a O_i, y N_j faculta a la autoridad x a derogar la norma N_k que es válida en S_t y x deroga N_k en el momento *t*, entonces N_k no es válida en el sistema S_{t+1} (correspondiente al momento siguiente a *t*) que pertenece a O_i; (4) Las normas válidas en un sistema S_t que pertenece a O_i que no han sido derogadas en el momento *t*, son válidas en el sistema S_{t+1} de O_i (que corresponde al momento siguiente a *t*); y (5) Todas las consecuencias lógicas de las normas válidas en un sistema S_t, que pertenece a O_i también son válidas en S_t… (Bulygin 1991: 263-264).[11]

Esta manera de concebir la noción de O_j representa solo aquel uso de la expresión que hace depender la identidad del orden en la legalidad del cambio entre los sistemas que a él pertenecen. En otras palabras, la identidad del O_j, definida a partir de un S_{j0}, depende de la identidad del procedimiento de generación y eliminación de normas, esto es, de la legalidad del cambio de un sistema a otro a lo largo del tiempo. Si bien no cualquier modificación ilegal de normas produce un cambio de O_j, únicamente puede producir tal efecto la alteración ilegal de las normas de la Constitución originaria que regulan el procedimiento de sucesión de S_j, es decir, la alteración ilegal de las normas independientes de un S_j produce un cambio de orden, por ser ellas las que componen su primera Constitución. En concreto, la infracción de las normas de competencias que regulan la promulgación, la derogación y la reforma dentro del O_j es aquello que produce un cambio de orden (Bulygin 1991: 265).[12]

2.2 Derogación[13]

Los criterios de identificación de un sistema se componen de reglas de introducción y reglas de eliminación, porque para determinar las normas que in-

11 Un desarrollo de estas ideas en el libro de Moreso & Navarro 1993.

12 La reconstrucción sistémica obtiene mayor precisión si se distingue entre O_j y orden estatal (O_e), entendiendo este último como una sucesión de O_j. No obstante, para establecer esta distinción se debe proponer un criterio de identificación de los O_j que integran un O_e, que no solo permita identificar sus normas independientes y dependientes dentro de los Sj, sino también diferenciar si dos S_j pertenecen al mismo O_j. Cuestiones que al exceder los propósitos de este trabajo solo son enunciadas, ver Caracciolo 1988: 19-20, Vilajosana 1995: 334, Moreso 1997a: 148, y Moreso & Navarro 1998: 278.

13 Si bien tomo como eje de la explicación a Alchourrón & Bulygin 1979, es posible encontrar explicaciones equivalentes en Alchourrón & Bulygin 1981 y Alchourrón 1982, entre otros de sus trabajos y dentro de sus comentadores en Navarro 1993: 389.

tegran un Sj en un momento determinado se debe saber cuáles son las normas supremas, cuáles han sido promulgadas y cuáles han sido derogadas. Se habla de derogación porque es el medio más utilizado para eliminar normas, aunque no es el único, y ella se describe como un proceso realizado por la autoridad normativa competente que se integra por dos actividades: el acto de rechazo y la operación de eliminación (Alchourrón & Bulygin 1979: 60 y 73-78).

Acto de rechazo. Es un acto lingüístico expresado a través de formulaciones lingüísticas mediante el cual la autoridad competente manifiesta su voluntad de que cierto(s) contenido(s) normativo(s) no sea(n) parte de los sistemas sucesivos. Cabe destacar, que el acto de rechazo es conceptualmente independiente de la derogación, porque ambos se pueden presentar sin el otro, v.gr., en el rechazo (anticipado) de una norma inexistente, o bien, en la derogación de una formulación normativa (Alchourrón & Bulygin 1979: 74-84; 1981; 1984a).

El acto de rechazo abarca tanto la norma expresamente rechazada como todas las otras normas que implican a esta última. De ahí que se rechace implícitamente todos los conjuntos de normas que implican a la norma rechazada o de los que ella es consecuencia. El conjunto rechazado está formado por todos los conjuntos de normas que implican a alguna de las normas expresamente rechazadas; mientras que, "el conjunto de los conjuntos" rechazados en un sistema es el conjunto de todos los subconjuntos de los enunciados formulados del sistema que son rechazados. En ambos casos, siempre lo rechazado por una autoridad normativa competente es un conjunto de conjuntos, es decir, una familia de conjuntos. Consecuentemente, la derogación se cumple al eliminar todos los conjuntos de normas que implican a alguna de las normas del conjunto rechazado, i.e., un conjunto es rechazado cuando implica a alguna de las normas expresamente rechazadas. De otro modo, solo cambiaría el estatus de la norma rechazada de expresamente formulado en el S_{j1} a derivada en el S_{j2} (Alchourrón & Bulygin 1979: 74-78 y 85-88; 1976; 1981).

Operación de eliminación. De acuerdo con Alchourrón y Bulygin, la derogación se satisface con la eliminación de todos los conjuntos rechazados. Si bien para eliminar un conjunto es suficiente con eliminar una de sus normas, al ser un caso especial de eliminación de conjuntos, la derogación de un conjunto requiere la eliminación de todas sus normas, no solo una o algunas de ellas (Alchourrón & Bulygin 1979: 88).

De ahí que la regla de eliminación debe satisfacer un criterio de adecuación integrado por dos condiciones: (i) debe eliminarse por lo menos una norma de cada conjunto rechazado; y (ii) solo deben eliminarse la normas estrictamente necesarias para satisfacer la primera condición (derogación minimal) (Alchourrón & Bulygin 1979: 88).

Para seguir el criterio de adecuación se deben eliminar todos los conjuntos rechazados mínimos. Estos son los conjuntos en que ninguno de sus elementos puede ser eliminado sin que el conjunto deje de ser rechazado, porque todas sus normas son necesarias para la implicación de la norma expresamente rechazada y cuando una de ellas es eliminada esta implicación ya no se da (Alchourrón & Bulygin 1979: 89-90).

De esta manera, según Alchourrón y Bulygin, la derogación puede ser entendida como:

> [U]na derogación en α en base a π donde α es el conjunto de todas las normas formuladas del sistema y π el conjunto de las normas expresamente rechazadas: [una derogación] es el conjunto formado tomando *por lo menos* una norma de cada conjunto rechazado de α [...] [N]os interesa encontrar la *derogación minimal*, es decir, satisfacer la segunda condición del criterio de adecuación […] [P]ara dar cuenta de esta dificultad [conjuntos superpuestos] tenemos que definir la *derogación minimal* como una derogación tal que ninguna de sus partes propias es una derogación. En otras palabras, si un conjunto de normas que es una derogación (en α en base a π) es tal que no se le puede restar ningún elemento (ninguna norma) sin que el resultado deje de ser una derogación, ese conjunto es una derogación minimal (Alchourrón & Bulygin 1979: 90-92).[14]

A partir de lo anterior, la regla de eliminación se define como la realización de una derogación minimal, i.e., deben eliminarse todas las normas que pertenecen a una derogación minimal, cuando una norma o conjunto de normas pertenecientes a un sistema son rechazadas a través de una derogación. Por lo mismo, es que un acto de derogación requiere la eliminación de la totalidad de los contenidos de alguna selección minimal desde el sistema. Se deben remover desde el sistema todos los elementos del conjunto rechazado mínimo y nada más, asegurando así el cumplimiento del criterio de adecuación y el establecimiento de una derogación minimal (Alchourrón & Bulygin 1979: 94).

Si bien la reconstrucción podría continuar en relación con las distintas maneras de realizar una derogación minimal y la indeterminación lógica del sistema, para efectos de este trabajo el propósito ya ha sido cumplido. Por un lado, se han explicitado las principales nociones de la teoría de conjuntos utilizadas en el contexto de una teoría de la dinámica de los S_j y, por otro lado, se ha destacado el hecho de que dentro de esta teorización la derogación constituye un tipo de relación entre conjuntos: "derogación en α (el sistema) en base a π (conjunto de normas expresamente rechazado)". Por consiguiente, ahora es posible esbozar una explicación de dicha relación (derogatoria) en el contexto de una teoría (axiomática) de conjuntos.[15]

14 En algunos casos es posible remover solo una norma de cada conjunto rechazado para satisfacer el criterio de adecuación (selección), sin embargo, cuando los conjuntos son superpuestos, al realizar esta actividad, se pueden eliminar todas las normas del sistema.

15 A modo de recordatorio, las nociones de la teoría de conjuntos explicitadas con entrecomillado son: conjunto, familia de conjuntos, identidad de conjunto, orden y orden parcial (estricto, transitivo y simétrico), pertenencia, identidad o criterios de identificación del conjunto, solución maximal o minimal y función selectiva o selección minimal, entre otras.

3 TEORÍA DE CONJUNTOS

En los ordenamientos jurídicos contemporáneos, la derogación puede ser entendida como una "relación", ya que la derogación de una ley o norma necesita de la existencia de otra ley o norma. Por ello, cuando se afirma que "L_2 deroga a L_1" se está diciendo que un particular par de objetos constituye la relación de la derogación a través de su entrada en ella. Por lo tanto, como el concepto de derogación siempre pone en relación dos o más objetos, puede ser entendido como una entidad relacional o relación. De ahí que, desde un marco teórico diverso, la "explicación relacional" de Alchourrón y Bulygin no entra en tensión con una de las intuiciones jurídicas más básicas y generalmente compartidas en torno a la derogación.

Este carácter relacional puede ser analizado desde, al menos, dos perspectivas. Por un lado, a través de los trabajos destinados al análisis de los predicados relacionales[16] y, por otro lado, mediante las propuestas de una teoría de conjuntos. Si bien ambas perspectivas presentan coincidencia, de ello no se sigue que sean equivalentes. Esto, entre otras razones, porque en la actualidad la teoría de conjuntos presenta un carácter axiomático, precisamente, para sortear las dificultades de una teoría de conjuntos sustentada en propiedades (o teoría *näive* de conjuntos).[17] De ahí que, en lo que sigue, al ser la versión estandarizada, cada vez que se alude a la teoría de conjuntos se está refiriendo a la teoría axiomática de conjuntos.

3.1 Algunas nociones básicas[18]

Historia. En un sentido ordinario, un "conjunto" puede ser entendido como una colección de entidades de algún tipo e incluso se podría considerar como equivalente con las nociones de "clase", "agrupación" o "aglomeración". Considerado el fundador de la teoría de conjuntos como disciplina matemática, Georg Cantor sigue esta noción intuitiva para formular su principio de comprensión, según el cual: la colección de todo objeto que comparte una propiedad forma un conjunto (Suppes 1972; Hernández 1998: vii; Cunningham 2016).

Si bien las propuestas de Cantor no trabajan desde axiomas, sirvieron para demostrar y descubrir diversos teoremas matemáticos hasta que Bertrand Russell anuncia la paradoja que llevará su nombre. Si las propuestas de Cantor aceptan que, dada una propiedad cualquiera hay un conjunto cuyos miembros

16 Son ejemplos de este tipo de análisis McBride 2020 y Brower 2018, entre otros.

17 En esta línea, siguiendo a Ramsey 1926, para mostrar la diferencia entre los distintos análisis de la relación, puede resultar ilustrativo distinguir entre las paradojas lógicas o matemáticas, por un lado, y las paradojas lingüísticas o semánticas, por el otro. Mientras que las primeras surgen de consideraciones puramente matemáticas, las segundas surgen desde el lenguaje utilizado para hablar sobre matemática o lógica.

18 Una didáctica introducción a la teoría de conjuntos, en Halamos 1960.

son solo aquellas entidades que tienen tal propiedad, Russell pregunta por el conjunto de todas las cosas que tienen la propiedad de no ser miembros de sí mismos. La relevancia de esta paradoja está en que impulsó la búsqueda de una respuesta a la pregunta: ¿cómo es posible construir adecuadamente un conjunto? (Suppes 1972; Hernández 1998: 4; Cunningham 2016).

En esta búsqueda se desarrolló una teoría de conjuntos circunscrita a determinados axiomas, los cuales fueron formulados por Ernest Zermelo y precisados por Abraham Fraenkel.[19] Por ello en la actualidad la teoría de conjuntos es conocida como Teoría de Conjuntos de Zermelo-Fraenkel. Esta teoría axiomática no solo evita las denominadas paradojas semánticas (v.gr., del mentiroso, el barbero y la heterológica, entre muchos otros), sino que además permite entregar profundidad y versatilidad a las investigaciones matemáticas, al punto de que la mayor parte de la matemática contemporánea puede desarrollarse dentro de ella (Suppes 1972).[20]

El principal logro de este ejercicio intelectual colectivo radica en, por una parte, mostrar el nivel de precisión que es posible obtener a través de una definición exacta de las fórmulas de una teoría que se apliquen a un esquema axiomático y, por otra parte, establecer que el método axiomático es el modo más claro y preciso para dar una representación del mundo (Suppes 1972; Hernández 1998: 5).

De este modo, las explicaciones que siguen tienen por objeto mostrar rápidamente cómo, sin determinar el concepto de conjunto ni recurrir a las nociones intuitivas de sus términos primarios o primitivos, esta teoría deduce todos los teoremas a partir de axiomas. En dichas explicaciones (i) se utilizan las letras mayúsculas para representar los conjuntos, v.gr., A, B, C… , y se emplean las letras minúsculas para simbolizar sus elementos x, y, z…; (ii) la pertenencia se representa a través de la letra épsilon $\in$ y significa ser elemento de, v.gr., $x \in A$ (x pertenece a A), y su negación significa que algo no es elemento de, v.gr., $x \notin A$ (x no pertenece a A); por último, (iii) las conectivas de la lógica proposicional de primer orden mantienen su significado habitual ($\wedge$, $\vee$, $\Rightarrow$ y $\Leftrightarrow$) (Hernández 1998: 10). Presento ahora algunos trazos centrales de la teoría.

Axiomas, definiciones, operaciones y precisiones. Si bien no existe un consenso pleno al momento de formular los axiomas de la teoría axiomática de conjuntos de Zermelo-Fraenkel, al menos existe un acuerdo parcial en relación con los siguientes siete axiomas:

19 En sentido estricto, sus propuestas no son axiomas sino esquemas axiomáticos, ya que permiten un tipo de sustitución general de fórmulas, es decir, no son solo una afirmación definida sino un esquema que permite formular múltiples afirmaciones, ver Suppes 1972.

20 Es del caso recordar que hay otras axiomatizaciones de teorías de conjuntos como: (i) Neumann-Bernays-Gödel (sistema BG); (ii) Russell y Whitehead (teoría de tipos); (iii) Quine; y (iv) Morse y Kelley.

(i) *Axioma de existencia*. Hay un conjunto que no tiene elementos.[21]

(ii) *Axioma de la extensionalidad*. Dos conjuntos son iguales, si y solo si, ellos tienen los mismos elementos, i.e., si todo elemento de A es elemento de B y todo elemento de B es elemento A.[22]

(iii) *Axioma esquema de la comprensión*. Sea **P**(x) una propiedad de x. Para cualquier conjunto A hay un conjunto B tal que $x \in B$ si y solo si $x \in A$ y **P**(x).[23]

(iv) *Axioma del par*. Para cualquier a y b hay un conjunto C tal que $x \in C$, si y solo si, x=a o x=b, i.e., todo conjunto es un elemento de algún conjunto y dos conjuntos cualquiera son simultáneamente elementos de algún mismo conjunto.

(v) *Axioma de la unión*. Para cada conjunto S existe un conjunto U tal que $x \in U$, si y solo si, $x \in X$ para algún $X \in S$, i.e., S es un sistema de conjunto o familia de conjuntos cuando sus elementos son conjuntos, de ahí que, la unión de familia de conjuntos S sea el conjunto de todos los x que pertenecen a algún conjunto que forma parte de la familia S.

(vi) *Axioma del conjunto potencia*. Para cualquier conjunto X existe un conjunto S tal que $A \in S$, si y solo si, $A \subseteq X$, esto es, dado un conjunto cualquiera es posible formar un nuevo conjunto cuyos miembros son exactamente subconjuntos de un conjunto dado y este es el conjunto S de todos los subconjuntos de X, llamado conjunto potencia X y denotado por **P**(X).[24]

(vii) *Axioma de fundación (o regularidad)*. En cada conjunto no vacío A existe $u \in A$ tal que u y A no tienen elementos en común (para cualquier x, si $x \in A$, entonces, $x \notin u$). Por ende, se postula que ciertos conjuntos no existen, v.gr., a modo de teorema se deprende que dos conjuntos no vacíos A y B no puede concurrir simultáneamente ($A \in B$ y $B \in A$) y ningún conjunto no vacío puede ser elemento de sí mismo ($X \neq \emptyset$, $X \notin X$).[25]

21 En algunas presentaciones el conjunto vacío es subconjunto de todo conjunto, v.gr., $\emptyset \in B$ (Cunningham 2016), y en otras se incluye mediante la definición de conjunto, entendido este como algo que tiene elementos o está vacío, ver Suppes 1972.

22 Hernández (1998: 11) sugiere que este axioma no es solo una propiedad lógica de la igualdad, sino más bien una propiedad no trivial de la pertenencia.

23 Este es un esquema porque permite producir axiomas o colecciones infinitas de proposiciones y su propósito es postular la existencia del conjunto de todos los objetos que tienen una propiedad dada, los cuales pertenezcan a otro conjunto ya dado de antemano. Por ende, para especificar un conjunto no basta con dar una propiedad, sino también disponer de un conjunto a cuyos elementos puede aplicarse esa propiedad. Se evita así la paradoja de Russell, ver Hernández 1998: 11.

24 Se debe recordar que el conjunto vacío es miembro del conjunto potencia de cualquier conjunto y, además, cualquier conjunto es miembro de su conjunto potencia, en Suppes 1972.

25 La presentación de estos siete axiomas está basada en Hernández 1998: 10-19.

Es importante recordar cuatro consideraciones propias de la teoría axiomática de conjuntos de Zermelo-Fraenkel. La primera consiste en que el par no ordenado de a y b es el conjunto que tiene los elementos a y b, y es denotado por {a,b}, y el par no ordenado {a,a} puede ser denotado como {a} conjunto unitario. La segunda sugiere no confundir los conjuntos de un solo elemento con el elemento en sí, $\varnothing \neq \{\varnothing\}$, porque $\varnothing$ no tiene elementos, pero $\{\varnothing\}$ sí y, a su vez, x ≠ {x}, ya que {x} tiene un solo elemento; mientras que, x puede tener cualquier número de miembros. La tercera recuerda que las familias de conjuntos tienen por propósito enfatizar que sus elementos son conjuntos y, en consecuencia, son tratados como tales, para ello se utilizan letras mayúsculas en cursiva (v.gr., *F*, *A*, *B*…). Finalmente, la cuarta consideración entiende que el par ordenado es un conjunto de dos objetos en un orden específico, el cual se caracteriza por: (i) dados dos objetos a y b existe un objeto, el cual puede ser denotado por {a,b}, que está unívocamente determinado por a y b; (ii) si {a,b} y {c,d} son pares ordenados, entonces {a,b} = {c,d} si y solo si a=c y b=d; y (iii) la coordenada del par {a,b} es el elemento que pertenece a ambos conjuntos (a) y la segunda coordenada es el elemento que pertenece solo a un conjunto (b), porque el par ordenado {a,b} = ({a}, {a,b}) (Cunningham 2016; Hernández 1998: 14-15).

Además, si A y B son conjuntos algunas definiciones a considerar son: (i) subconjunto impropio, $A \subseteq B$ o $B \supseteq A$ cuando cada elemento A es también elemento de B;[26] (ii) subconjunto propio, $A \subset B$ cuando cada elemento A es también elemento de B, pero hay al menos un elemento en B que no es elemento de A; y (iii) disjuntos, A y B son disjuntos si ellos no tienen elementos en común $A \cap B = \varnothing$. Asimismo, tres operaciones básicas son: (i) unión, operación que une en un conjunto los elementos que pertenecen tanto a A como a B $A \cup B$; (ii) intersección, operación que forma un conjunto con los elementos que pertenecen a A y B $A \cap B$; y (iii) diferencia, operación que entre A y B (en ese orden) formula el conjunto de todos los elementos que están en A y no están en B (A~B); y (iv) producto cartesiano es el conjunto formado por los conjuntos A y B, tal que $A \times B$ es el conjunto de todos los pares ordenados (a,b) si $a \in A$ y $b \in B$, es decir, $A \times B = \{(a,b) : a \in A \wedge b \in B\}$y, además, para cualquier A y B, $A \times B$ es un conjunto (Suppes 1972; Cunningham 2016; Hernández 1998: 16 y 30-32).

Hasta aquí es posible vincular claramente las nociones utilizadas por Alchourrón y Bulygin con algunas nociones básicas de la teoría axiomática de conjuntos de Zermelo-Fraenkel. Por ejemplo, la definición de Sj se condice con el axioma de la extensionalidad, al punto de tener el mismo énfasis, en el sentido de que este axioma no es solo una propiedad lógica de la igualdad entre conjuntos, sino más bien una propiedad no trivial de la pertenencia a un conjunto. Además, la conexión entre ambas propuestas se aprecia en cómo la propuesta

26 No se debe confundir la ∈ con la ⊆, porque la pertenencia es transitiva, pero la contención no y, a su vez, la contención es reflexiva, pero la pertenencia no.

de conjuntos rechazados se explica a partir de la noción de familia de conjuntos, la propuesta de ordenación jerárquica descansa en la noción de par ordenado y, además, es posible apreciar el uso de la misma simbología. Así también, de un modo implícito es posible asumir la compatibilidad de las propuestas de los autores argentinos con el axioma de la existencia a través del reconocimiento expreso del conjunto vacío en sus propuestas.

Relación. Una relación puede ser definida como un conjunto de pares ordenados, es decir, la relación **R** es una proposición acerca de que para cada par ordenado (a,b) es posible determinar cuándo a y b están en una relación **R**. Si un conjunto A es una relación **R** cada uno de sus elementos es un par ordenado (Suppes 1972; Badesa, Jané & Jansana 1998: 42-45; Hernández 1998: 43).

Como una relación, la derogación puede ser entendida como el conjunto de los pares ordenados (L_2, L_1), en que L_1 es derogada por L_2. La relación entre los elementos del conjunto es también un conjunto de pares ordenados de elementos de un conjunto determinado. Así, si **R** es una relación y se presenta $L_2\mathbf{R}L_1$, es posible decir que L_1 está relacionada con L_2 por **R**, o bien, que la relación **R** se presenta entre L_2 y L_1.

Al ser entendidas como conjuntos, se puede aplicar a las relaciones el axioma de extensionalidad y el producto cartesiano. Según el primero, las relaciones **R** y **S** son idénticas (son la misma) si a ellas pertenecen los mismos pares, es decir, que frente al par (L_2, L_1), si (L_2, L_1)**R**, si y solo si, (L_2, L_1)**S**. Por ende, se estará ante la misma relación de derogación $\mathbf{R_D}$ cuando los mismos pares ordenados entran en ella y esta puede ser representada como $\mathbf{R} \subseteq L_2 \times L_1$ (Badesa, Jané & Jansana 1998: 45; Hernández 1998: 44).

Dentro de las partes de una relación se diferencia entre el dominio, el recorrido y el campo. El "dominio" de una relación **R**, dom(**R**), es el conjunto de los primeros componentes de los pares de **R**. El "recorrido" de **R**, rec(**R**), es el conjunto de los segundos componentes de los pares de **R**. El "campo" de **R**, campo(**R**), es la unión de su dominio y su recorrido, es decir, el conjunto de todos los componentes de los pares de **R**. Por ejemplo, L_2 pertenece al dom(**R**), si y solo si, hay un objeto L_1 tal que $L_2\mathbf{R}L_1$; a su vez, L_1 pertenece al rec(**R**), si y solo si hay un objeto L_2 tal que $L_2\mathbf{R}L_1$; en cambio, L_1 pertenece al campo(**R**) si y solo si es un componente de la relación $L_1\mathbf{R}L_2$ o $L_2\mathbf{R}L_1$ (Badesa, Jané & Jansana 1998: 46; Hernández 1998: 45).[27]

A partir de una relación cualquiera, es posible obtener su "relación inversa" **Я**, la cual se da entre los elementos que la integran, i.e., se obtiene al invertir el orden de los miembros de todos los pares ordenados que constituyen la relación. Frente a los objetos $L_2\mathbf{R}L_1$ su relación inversa es L_1**Я**L_2, es decir, la relación inversa L_1**Я**L_2 se da, si y solo si, se presenta $L_2\mathbf{R}L_1$. De esta manera, es posible

27 Como sugiere Suppes (1972), en relaciones con más constituyentes, v.gr., en **R** = {($L_{1,}$ $L_{\cdot 3}$) ($L_{2,}$ L_4)}, el dom(R) es ($L_{1,}$ L_2) y rec(R) es (L_3, L_4).

señalar que el dominio de **R** es el recorrido de **Я** y el dominio de **Я** es el recorrido de **R**. Por ejemplo, en la relación **R** «L_2 deroga a L_1», la relación inversa **Я** es el caso en que «L_1 deroga a L_2»**. Así, en R** L_2 es el dominio, pero en **Я** es el recorrido (Suppes 1972; Badesa, Jané & Jansana 1998: 47).

3.2 Derogación como relación[28]

Según Alchourrón y Bulygin, la derogación constituye un caso particular de eliminación de conjuntos, sin embargo, dados los axiomas de la teoría axiomática de conjuntos de Zermelo-Fraenkel resulta difícil explicar qué quiere decir eliminar un conjunto. Por ello, la noción de conjunto rechazado puede tener mayor asidero y la idea de "eliminación" aludir más bien a la identificación de los elementos rechazados que pertenecen al sistema.

Aprovechando un ejemplo propuesto por los mismos autores argentinos se pueden precisar o clarificar algunas de las nociones de la teoría axiomática de conjuntos de Zermelo-Fraenkel empleados por ellos, a saber: (i) el conjunto de normas iniciales I está integrado por las normas {p, q, p≡q} y la autoridad rechaza {q}; (ii) los subconjuntos del conjunto inicial son ({p, q, p≡q}, {p, q}, {p, p≡q}, {q, p≡q}, {p≡q}, {p}, {q} y {∅}); (iii) el conjunto rechazado *CR* es ({p, q, p≡q}, {p, q}, {p, p≡q}, {q, p≡q}, {q}); (iv) el conjunto de derogaciones *D* es ({p, q, p≡q}, {p, q}, {q, p≡q}); (v) el conjunto rechazado mínimo *CRM* es ({p, p≡q}, {q}); y (vi) el conjunto de derogación mininal *DM* es ({p, q}, {q, p≡q}) (Alchourrón & Bulygin 1979: 92).[29]

Al estar integrado tanto por normas formuladas como derivadas, el conjunto de los subconjuntos del conjunto inicial es una manifestación del axioma del conjunto potencia, es decir, si el conjunto inicial es I su conjunto potencia es **P**(I) y, en consecuencia, se debe explicitar que el símbolo ∅ alude al conjunto vacío. Además, todos los conjuntos de conjuntos (rechazados, rechazados mínimos, derogados y derogados mínimos) son familias de conjuntos, de manera que, deben ser representados a través de letras mayúsculas en cursiva (*CR*, *D*, *CRM* y *DM*).

La derogación ejemplificada puede ser explicada a partir de tres operaciones conjuntistas. En un primer momento la derogación será el conjunto formado por los elementos que pertenecen a la intersección de los conjuntos **P**(I) y *CR* (**P**(I)∩*CR*); y luego, una vez es identificado dicho conjunto, se obtiene un conjunto diferencia, el cual contiene las normas remanentes y se forma por todos los elementos que están en **P**(I) y no están en *CR* (**P**(I)~*CR*). De este modo, el conjunto remanente T es aquel que no tiene elementos en común con **P**(I) ni *CR* (conjunto disjunto), v.gr., {p}, {p≡q} y ∅. De esta manera, al conjunto formado por **P**(I)∩*CR* se aplican las reglas de eliminación, cuestión que modifica-

28 Una versión preliminar de las ideas aquí presentadas se encuentra en Agüero-SanJuan (2015).

29 En este ejemplo, Alchourrón y Bulygin (1979) utilizan el símbolo Λ para representar el conjunto vacío, sin embargo, para efectos de mayor claridad he optado utilizar el previamente indicado: ∅.

rá por razones o consideraciones jurídicas (y no conjuntistas) tanto el conjunto remanente final como el conjunto efectivamente rechazado o eliminado.

Adicionalmente, la idea de derogación puede ser precisada a través de la noción de diferencia simétrica, operación según la cual a partir de dos conjuntos (I y *CR*) se forma un tercer conjunto (T) que contiene aquellos elementos que no pertenecen a ambos. Si bien en casos como el recién presentado la utilidad de la diferencia simétrica parece trivial, en otros supuestos muestra mayor utilidad, v.gr., en la "derogación anticipada". No es posible eliminar una norma inexistente, pero si es posible rechazar anticipadamente ciertos contenidos normativos, como ocurre con las normas superiores que impiden o prohíben la promulgación de ciertas normas a las autoridades inferiores (Alchourrón & Bulygin, 1979: 83-84). Así, si I (*Oq, Pq, Op, Pp*) y *CR* (*Op*, *Op, Or*, *Pr*), por diferencia simétrica se forma un tercer conjunto remanente T (*Oq, Pq, Or, Pr*).

Si las familias de conjuntos tienen por propósito enfatizar que sus elementos son conjuntos y, en consecuencia, ser tratados como tales, la derogación tiene este carácter no por estar integrada por conjuntos de normas que implican a alguna norma del conjunto rechazado, sino más bien por ser el conjunto integrado por el conjunto de las normas iniciales I y el conjunto de las normas rechazadas *CR*. Ahora es posible caracterizar esquemáticamente rasgos ampliamente compartidos de ambos conjuntos que entran en la relación derogatoria $\mathbf{R_D}$.

Relación de relaciones. La derogación presenta un carácter relacional entre, al menos, dos elementos $\{L_1, L_2\}$ o conjuntos ($\{L_1\}$, $\{L_2\}$). Sin embargo, esta relación se presenta cuando concurren los requisitos generalmente exigidos para su ocurrencia: tiempo y jerarquía. Excluyendo el caso de la derogación anticipada, en términos generales, en los derechos contemporáneos la ocurrencia de la derogación exige una específica relación temporal o cronológica entre los objetos involucrados en ella y, al mismo tiempo, ciertas específicas relaciones jerárquicas entre sus constituyentes.

La relación temporal se puede presentar a través de la anterioridad $\{L_A\}$, posterioridad $\{L_P\}$o simultaneidad $\{L_{Si}\}$ y al ser un predicado relacional configura un conjunto de pares ordenados $\mathbf{R}_T$ ($\{L_A, L_P\}$ $\{L_P, L_A\}$ $\{L_{Si}, L_{Si}\}$). Sin embargo, según es generalmente entendida, la derogación se presenta cuando el conjunto de las normas inicial $\{L_1\}$ presenta un carácter anterior $\{L_{1A}\}$ y el conjunto de las normas rechazadoras un carácter posterior $\{L_{2P}\}$. De ahí que, de los tres pares ordenados, solo se deba considerar el primero $\mathbf{R}_T$ $\{L_{1A}, L_{2P}\}$.

A su vez, la relación jerárquica se presenta mediante el carácter inferior $\{L_I\}$, superior $\{L_{Su}\}$ o congénere $\{L_C\}$ y al ser un predicado relacional configura un conjunto de pares ordenados $\mathbf{R}_J$ ($\{L_I, L_{Su}\}$ $\{L_{Su}, L_I\}$ $\{L_C, L_C\}$). No obstante, de acuerdo con la manera en que habitualmente es entendida, la derogación se presenta cuando el conjunto de las normas inicial L_1 presenta un carácter inferior $\{L_{1I}\}$ o congénere $\{L_{1C}\}$ y el conjunto de las normas rechazadoras un carácter superior $\{L_{2Su}\}$ o congénere $\{L_{2C}\}$. De modo que, solo se deben considerar el primer y el tercer par ordenado $\mathbf{R}_J$ $(\{L_{1I}, L_{2Su}\}\ \{L_{2C}, L_{2C}\})$.

Si bien las relaciones de temporalidad y jerarquía se pueden presentar de manera independiente, para el caso de la derogación deben concurrir de un específico modo confluente. Como reiteradamente señala la literatura jurídica, el conjunto de normas inicial debe ser anterior y de igual o menor jerarquía $\{L_{1AC}\}$ $\{L_{1AI}\}$ que el conjunto de las normas rechazadoras que debe ser posterior y de igual o superior rango jerárquico $\{L_{2PC}\}$ $\{L_{2PS}\}$.

Al explicar estas relaciones, el axioma de la comprensión posibilita sostener que el conjunto L_1 se especifica a través de las propiedades: anterior y congénere o inferior; mientras que, el conjunto L_2 se especifica a través de las propiedades: posterior y congénere o superior. Y, con base en la definición de relación y sus componentes, la derogación será el conjunto formado por los pares ordenados: $\mathbf{R_D} = (\{L_{2PC}, L_{1AC}\}\ \{L_{2PSu}, L_{1AI}\})$, en donde el dom($\mathbf{R_D}$) es $\{L_{2PC},L_{2PSu}\}$ y el rec($\mathbf{R_D}$) es $\{L_{1AC},L_{1AI}\}$.

En la teoría axiomática de conjuntos de Zermelo-Fraenkel una función es una manera de asociar elementos de un conjunto A con elementos de un conjunto B y puede ser entendida como una relación muchos-a-uno, es decir, una relación en que cualquier elemento del dominio se relaciona con un elemento de su rango, i.e., una relación F es una función si para todo $a \in domF$ hay exactamente un b tal que $(a,b) \in F$ (Suppes 1972; Cunningham 2016; Hernández 1998: 50-52).

De esta manera, a través de las funciones es posible explicar la derogación, dado que en la relación derogatoria $\mathbf{R_D}$ $\{L_2, L_1\}$ más de un elemento del dominio $\{L_2\}$ puede estar relacionado con un elemento del recorrido (L_1). Esto no impide que distintos elementos del dominio puedan estar relacionados con el mismo elemento del recorrido. Esta situación permite explicar con mayor claridad cómo las normas rechazadoras se pueden relacionar con más de una norma inicial.

Orden. Las relaciones más básicas son reflexividad, simetría y transitividad. Una relación es reflexiva si cada elemento de un conjunto A está vinculado a sí mismo por **R**. Una relación es simétrica en A si para cada par de objetos {a,b} se dan las relaciones a**R**b y b**R**a. Una relación es antisimétrica en A si para todo par de elementos $a,b \in A$, tal que a**R**b y b**R**a implica a=b. Una relación es asimétrica en A si para todo par de elementos $a,b \in A$, tal que a**R**b implica que no ocurre b**R**a, es decir, (a,b) y (b,a) no pueden ambos ser elementos de A. Una relación es transitiva si cada vez que un elemento a está relacionado con otro elemento b, y b está relacionado con otro elemento c; entonces, a está relacionado con c (Suppes 1972; Hernández 1998: 78-79; Badesa, Jané & Jansana 1998: 68-70; Cunningham 2016).

Así, un orden puede ser definido como una relación con características especiales. Por ejemplo, un orden parcial es una relación **R** que es reflexiva, antisimétrica y transitiva; mientras que, un orden estricto es una relación solo transitiva y asimétrica. En cambio, un orden lineal o total se presenta si dos elementos cualesquiera de un conjunto A son comparables. En general, los símbolos utilizados para representar órdenes son $<$, $\leq$, $>$, $\geq$ y su lectura es, por ejemplo, a es menor que b ($a<b$), y a es menor o igual que b ($a\leq b$), b es mayor que a ($a>b$), y b es mayor o igual que a ($b\geq a$) (Hernández 1998: 77-78). Se podría explicar así de un modo más preciso a qué se alude con la ordenación jerárquica de las normas a través de una tupla, junto con precisar las nociones de maximal, minimal, mínimo, y máximo.

Si frente a un orden $\leq$ en el conjunto A y $B\subseteq A$ (cada elemento de B es elemento de A) uno de sus elementos b ($b\in B$) es (i) el elemento mínimo de B en el orden $\leq$, si para todo $x\in B$, tal que $b\leq x$; (ii) el elemento minimal de B en $\leq$, si para todo $x\in B$, tal que $x\leq b$ y $x \neq b$; y (iii) el elemento máximo de B en $\leq$, si para todo $x\in B$, tal que $x\leq b$; (iv) un elemento maximal de B en $\leq$, si para todo $x\in B$, tal que $b\leq x$ y $x \neq b$.

El elemento mínimo o máximo (si existe) solo puede ser uno a diferencia de los elementos minimales y maximales, porque los primeros son comparables con todo el elemento B; mientras que, de la definición de los segundos no se sigue que deban ser comparables con cualquier elemento de B (v.gr., si un conjunto tiene dos elementos maximales estos son incomparables) (Hernández 1998: 79-80). Esta breve precisión contribuye a determinar cuál es el sentido de los adjetivos mínimos, minimales, máximos y maximales empleados por Alchourrón y Bulygin a lo largo de sus explicaciones sobre la dinámica de sistemas jurídicos, especialmente, al tiempo de explicar la actividad de eliminación.

Seguramente es posible continuar *ad infinitum* con las explicaciones de fenómenos jurídicos a través de la teoría axiomática de conjuntos de Zermelo-Fraenkel, sin embargo, en este trabajo opto por detenerme aquí, dado que el objetivo de este apartado ha sido alcanzado: explicar los elementos básicos de la teoría de conjuntos utilizados en la explicación del cambio normativo mostrando cómo este tipo de análisis puede contribuir a explicar la propuesta de teorización en materia de derogación entregada por los aludidos Carlos Alchourrón y Eugenio Bulygin.

4 CONCLUSIÓN

El desarrollo del presente trabajo ha sido impulsado por la pregunta ¿cuál puede ser la utilidad y el alcance de los elementos básicos de la teoría de conjuntos en la explicación del cambio normativo? Ante esta pregunta, como un primer paso, este trabajo se propuso enriquecer y complementar la teoría de los sistemas jurídicos propuesta por Alchourrón y Bulygin a partir de sus propias bases conceptuales, las cuales son deudoras de una teoría de conjuntos, y, en este trabajo, opto por vincularlas con la teoría axiomática de conjuntos de Zermelo-Fraenkel.

Con este objetivo en vista, fueron explicitadas las principales nociones de la teoría axiomática de conjuntos de Zermelo-Fraenkel utilizadas en el contexto de una teoría de la dinámica de los S_j, a saber: conjunto, familia de conjuntos, identidad de conjunto, orden y orden parcial (estricto, transitivo y simétrico), pertenencia, identidad o criterios de identificación del conjunto, solución maximal o minimal y función selectiva o selección minimal. Luego, fueron presentados algunos elementos básicos de la aludida teoría de conjuntos para con base en esta presentación explicar las propuestas de Alchourrón y Bulygin en materia de cambio normativo a la luz de sus bases conceptuales conjuntistas. A modo de ejemplificación, se buscó mostrar cómo este tipo de análisis contribuye a explicar la teorización en materia de derogación.

Por último, si durante las primeras décadas del siglo pasado la teoría axiomática de conjuntos de Zermelo-Fraenkel mostró por qué el método axiomático es el modo más claro y preciso para dar una representación del mundo, las explicaciones sobre el cambio normativo aún tienen un inmenso ámbito de acción, el cual se podría encaminar a través de un mayor diálogo con una teoría axiomática de conjuntos. Quizá, un buen comienzo sería a través de la (re)lectura y análisis del Apéndice de *Normative Systems* aprovechando que, quizá, no ha sido discutido en igual medida que las otras partes de la misma obra.

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Synopsis

Maciej Juzaszek

Durkheimian utilitarianism and legal moralism

SLOV. | *Durkheimovski utilitarizem in pravni moralizem.* Članek obravnava klasični problem pravnega moralizma, tj. ali je uveljavljanje morale s strani države upravičeno, tudi če nihče ni oškodovan. V članku analiziram durkheimovski utilitarizem, tj. normativno teorijo javnih politik in prava Jonathana Haidta, ki temelji na njegovi teoriji psiholoških moralnih temeljev. Najprej opišem durkheimovski utilitarizem in utemeljim, kako ga je mogoče razumeti kot teorijo pravnega moralizma. Nato ga podvržem kritiki, pri čemer uporabim pet izzivov, ki jih je razvil Petersen (2019): izziv relativizma, empirični izziv, izziv "brez razlik", izziv izenačevanja in izziv tehtanja. To pripelje do sklepa, da ima durkheimovski utilitarizem, četudi se uspešno spopade z nekaterimi izzivi, še vedno nekaj težav, zaradi katerih ne more biti v celoti razvita teorija pravnega moralizma

Ključne besede: pravni moralizem, durkheimovski utilitarizem, uveljavljanje morale, Haidt (Jonathan), Durkheim (Emile), moralni temelji

ENG. | The paper concerns the classical problem of legal moralism, i.e. whether enforcement of morality by the state is justified, even if nobody is harmed. In the article, I analyze Durkheimian utilitarianism, Jonathan Haidt's normative theory of public policies and the law, based on his psychological moral foundations theory. First, I describe Durkheimian utilitarianism and argue how it can be understood as a theory of legal moralism. Then, I subject it to criticism, using five challenges developed by Petersen (2019): the challenge from relativism, the empirical challenge, the no difference challenge, the levelling-down challenge, and the weighing challenge. It leads to the conclusion that Durkheimian utilitarianism, even if it deals with some of the challenges, still suffers from problems that do not allow it to be a fully developed theory of legal moralism.

Keywords: legal moralism, Durkheimian utilitarianism, enforcement of morality, Haidt (Jonathan), Durkheim (Emile), moral foundations

Summary: 1 Introduction – 2 What is Durkheimian utilitarianism? – 3 Durkheimian utilitarianism as legal moralism – 4 Challenges – 4.1 Challenge from relativism – 4.2 Empirical challenge – 4.3 No difference challenge – 4.4 Levelling-down challenge – 4.5 Weighting challenge – 5 Conclusion

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Synopsis

Silvina Álvarez Medina

Beyond discrimination
A reply to Añón

SLOV. | *Onkraj diskriminacije*. Po avtoričinem razumevanju predloga Marie José Añón je za izboljšanje učinkovitosti pravnih sodb in odločitev v zvezi z vprašanji, ki se tičejo interesov žensk, potreben kritičen premik v naši pravni perspektivi. S takšnim premikom bi presegli standarde diskriminacije, ki temeljijo na primerjavi posameznikov brez upoštevanja njihovega umeščenega delovanja – kar pomeni, da primerjamo tudi takrat, ko to ni primerno –, in prešli h h kontekstualni analizi posameznih primerov. Omenjeni prenik vključuje usvojitev strukturnih temeljev diskriminacije in pomena analize spola za premagovanje neenakosti. Avtorica tega članka nadaljuje v isti smeri, ki jo je začrtala Añónova, z osredotočenjem na dva bistvena vidika njene analize, in sicer na primerjalnik in stereotipe. Poleg tega obravnava intersekcionalnost in prispevek strokovnjakov, podrobno pa analizira tudi metodologijo poimenovanja in kontekstualno razlago pravic žensk.

Ključne besede: standardi diskriminacije, primerjalna metodologija, stereotipi, intersekcionalnost, prispevek strokovnjakov, interdisciplinarna in kontekstualna analiza

ENG. | According to my reading of Añón's proposal, a critical shift in our legal perspective is required for improving the performance of legal judgments and decisions vis-à-vis women's concerns. Such a shift would entail overcoming standards of discrimination based on a comparison between unencumbered individuals, without their situated agency being considered—which results in comparing even when such comparison is impracticable—in order to embrace a contextual analysis of individual cases. The move from one pattern to the other implies assimilating the structural bases of discrimination, as well as the relevance of gender analysis for overcoming inequality. In the following I would like to keep arguing in the direction traced by Añón. I will focus on the two main aspects of her analysis: the comparator and stereotypes. In addition, I will consider intersectionality and the contribution of experts, and will analyse in detail the methodology of naming and the contextual interpretation of women's rights.

Keywords: standards of discrimination, comparator methodology, stereotypes intersectionality, the contribution of experts, interdisciplinary and contextual analysis

Summary: 1 Introduction – 2 The comparator and the trap of individual facts – 3 Reasoning about gender stereotypes, intersectionality, and complementary methodological approaches – 4 The relevance of interdisciplinary and contextual analysis

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Synopsis

Diego Dei Vecchi

Judicial rulings with false factual premises
Between *flaws*, *errors* and exaggerations

SLOV. | *Sodne odločbe z neresničnimi dejanskimi premisami. Med pomanjkljivostmi, napakami in pretiravanji.* Pravniki pogosto trdijo: »Sodne odločbe, ki vsebujejo neresnične dejanske premise, so napačne.« Ta prispevek ponuja kritično obravnavo podlage za takšne trditve. Avtor izhaja iz predpostavke (ute¬meljene v drugem prispevku), da resničnost dejanskih premis ni nujen pogoj niti za pravilno uporabo pravnih norm niti za utemeljitev sodnih odločb. Tudi ob tej predpostavki bi bila trditev, da so sodbe z neresničnimi dejanskimi pre¬misami napačne, lahko smiselna. Avtor tega prispevka zato razčleni in pojasni različne pomene zgornje trditve. Izkaže se, da jo moramo precej omiliti, če že ne kar zavrniti.

Ključne besede: utemeljitev, sodna odločba, napaka, resnica, dokaz

ENG. | It is a common assertion among lawyers that "judicial decisions containing false statements about facts constitute *errors*". This paper examines the basis for such claims. The analysis starts from the assumption (substantiated in another paper) that the truth of factual premises is not a necessary condition for either the correct application of legal norms or the justification of judicial decisions. However, the claim that judgments with false factual statements *are erroneous* could make sense even if one accepts the above assumption. This paper therefore aims to elucidate and analyse the various senses in which claims such as the above might be plausible. It will be shown that the claim, however intuitive it may seem, must be highly nuanced if it is not to be rejected out of hand.

Keywords: justification, judicial decision, error, truth, proof

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Synopsis

Petar Popović

Are there any elements of juridicity beyond positive law in Robert Alexy's non-positivism?

SLOV. | *Ali so v Alexyjevem ne-pozitivizmu elementi pravnosti onkraj pozitivnega prava?* Namen tega članka je oceniti Alexyjev nepozitivistični prikaz dvojne narave prava z vidika vprašanja, ali ta dopušča obstoj elementov pravnosti, ki ne izpolnjujejo meril za opredelitev veljavnega pozitivnega prava. Pritrdilen odgovor na to vprašanje bi ustrezal običajnemu nepozitivističnemu stališču, ki zanika tezo pozitivistov, da je "vse pravo pozitivno pravo". Avtor članka trdi, da Alexy vendarle sistematično zanika obstoj nepozitivističnih elementov pravno¬sti. Najprej razišče Alexyjevo temeljno zavezanost tezi o družbenih virih prava pri opisovanju narave prava. Nato predstavi Alexyjevo trditev, da načela pra¬vičnosti sama po sebi ne morejo tvoriti prava, ne da bi izpolnjevala zahteve po izvorni pozitivnosti pravnih norm. Nazadnje pa avtor še pojasni, da ne glede na nepozitivistično strukturo svojih ključnih argumentov Alexy ne trdi, da se pravo lahko nahaja "v okviru" nepozitivnih realnostih.

Ključne besede: narava prava, Alexy (Robert), pravičnost, nepozitivizem, človekove pravice

ENG. | The aim of this article is to assess Alexy's non-positivist account of the law's dual nature from the viewpoint of the question of whether he permits the existence of the elements of juridicity that do not meet the criteria for identifying valid positive law. An affirmative answer to that question would fit within the ordinary non-positivist stance that denies the positivists' thesis that "all law is positive law". In the article, I argue that Alexy, however, systematically denies the existence of non-posited elements of juridicity. I first explore Alexy's foundational commitment to the social thesis in describing law's nature. Next, I present his claim that the principles of justice cannot themselves constitute law without meeting the requirements of source-based positivity of legal norms. Finally, I clarify that, regardless of the non-positivist structure of his crucial arguments, Alexy does not ultimately hold that law may be "in" non-posited realities.

Keywords: nature of law, Alexy (Robert), justice, non-positivism, human rights

Summary: 1 Introduction – 2 The importance of law's positivity in Alexy's theory – 3 The juridical status of justice in Alexy's account of the ideal dimension of law – 4 Clarifying some further doubts – 5 Conclusion

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Synopsis

Sebastián Agüero-SanJuan

A set-theoretical account of repeal: Systems and sets

SLOV. | *Na teoriji množic osnovano pojmovanje derogacije: sistemi in množice.* V tradiciji pravne teorije je teoretični opis normativnih sprememb, ki sta ga ponudila Carlos Alchourrón in Eugenio Bulygin, verjetno najbolj vpliven. Ena od njegovih značilnosti je uporaba različnih pojmov iz teorije množic za razlago pravnih sistemov. Žal pa so bili doslej poskusi, da bi določili vlogo bistvenih elementov teorije množic pri pojasnjevanju pravnih sistemov, nezadostni. Avtor tega članka želi to nezadostnost popraviti. V ta namen oriše bistvene elemente aksiomatske teorije množic in prikaže njihovo vlogo v splošnem teoretičnem opisu normativnih sprememb, posebej pa v opisu derogacije.

Ključne besede: pravni sistemi, teorija množic, derogacija, zveza

ENG. | In the tradition of legal theory, the theoretical account of normative changes, which was offered by Carlos Alchourrón and Eugenio Bulygin, is probably the most influential. One of its distinctive features is the use of various concepts from set theory to explain legal systems. However, previous attempts to determine the role of the essential elements of set theory in explaining legal systems have been insufficient. This article therefore aims to remedy the inadequacy by explaining these elements, providing them with the content of an axiomatic set theory, and showing their role in the theoretical account of normative change in general and repeal, in particular.

Keywords: legal systems, set theory, repeal, relation

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