Normative Legal Positivism: from Metaphysics to Politics

Positivismo jurídico normativo: de la metafísica a la política

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Abstract: Taking as its starting point María Cristina Redondo's book *Positivismo jurídico "interno"*, this article proposes an alternative conception of normativist legal positivism. The article argues that legal theory can be neutral to the extent that it is intersubjective and transparent regarding its own metaphysical premises. On the one hand, thus, the article aims to shed light on the role of metaphysics and common sense in the construction of the concept of law. On the other hand, it seeks to make more transparent the ethical-political choices that constitute legal discourses, including theoretical ones. To pursue these goals the article first analyzes Redondo's theses on the ontology / epistemology distinction and the possibility of objective knowledge, and advances the idea that inter-subjectivity, and not objectivity, should be the appropriate criterion for normativist legal positivism. Second, the article examines the role of normativity in normativist legal positivism, focusing on the metaphysical nature of the thesis that law belongs to the fields of normativity and practical reason. The following sections then discuss reductionist and anti-reductionist conceptions of legal "entities" (norms, normative statements, propositions, and beliefs) and the theory of legal sources. The final section addresses the question of the axiological neutrality of legal theory and discusses the possibility of describing participants' internal point of view without committing to existing legal practice(s).

Keywords: common sense, legal method, legal positivism, metaphysics, normativity.

Resumen: El presente trabajo toma como punto de partida el libro *Positivismo jurídico "interno"*, de María Cristina Redondo, y propone una concepción alternativa de positivismo jurídico normativista. En el artículo se sostiene que la teoría del derecho puede ser neutral en la medida en que sea intersubjetiva y transparente en cuanto a sus propias premisas metafísicas. Los objetivos del trabajo, entonces, son, por un lado, el de echar luz acerca del papel que cumplen la metafísica y el sentido común en la construcción del concepto de derecho; por el otro lado, el de hacer más abiertamente transparentes las elecciones ético-políticas que constituyen a los discursos jurídicos, incluidos los teóricos. El trabajo analiza las tesis de Redondo acerca de la distinción entre ontología y epistemología y la posibilidad de conocimiento objetivo: la idea

central defendida es que la inter-subjetividad, y no la objetividad, debería ser el criterio apropiado para el positivismo jurídico normativista. Luego se examina el rol de la normatividad en el positivismo jurídico normativista, enfocándose en la naturaleza metafísica de la tesis de que el derecho pertenece a los campos de la normatividad y la razón práctica. Las secciones siguientes examinan las concepciones reduccionistas y anti-reduccionistas sobre las "entidades" jurídicas (normas, enunciados normativos, proposiciones y creencias) y la teoría de las fuentes del derecho. La sección final aborda la cuestión de la neutralidad valorativa de la teoría jurídica y analiza la posibilidad de describir el punto de vista interno de los participantes sin asumir compromiso alguno con la práctica jurídica existente.

Palabras clave: sentido común, método jurídico, positivismo jurídico, metafísica, normatividad.

I. Introduction

Positivismo jurídico "interno" (Redondo 2018, hereafter: 'PJI') is a striking and complex volume, consisting of five chapters, each of which deals with fundamental questions of contemporary legal theory.

A first general merit of the book is that it defends an original and unorthodox position that goes beyond the usual discussions in the literature, focusing obsessively on the debate between legal positivism (inclusive and exclusive) and anti-positivism.

A second merit is its unity. It condenses Redondo's research, the origins of which go back to the author's dissertation (Redondo 1994-1995), and which has developed in several directions that find further development in this volume. I refer to her studies devoted to normativity and the notions of reason and rule (Redondo 1996, 1999, 2003), as well as to the notion of (legal) duty (Redondo 1998a, 2001); to her work on the distinction between internal and external points of view and the acceptance of law (Redondo 2002, 2014); and to her reflections on legal positivism (Redondo 1998b, 2005, 2007). The *fil rouge* that connects Redondo's contributions is reflected in the sequence of chapters and their conclusions, which lead the reader to the fifth and final chapter, specifically dedicated to the theme expressed in the book's title. To limit oneself to the last chapter, however, is not sufficient for a thorough understanding of Redondo's *positivismo jurídico normativista*.

As the preface makes clear, the analysis has a critical-reconstructive purpose aiming to defend what Redondo calls "internal" ("*interno*")[1] or "normative" ("*normativista*") legal positivism.

On the one hand, Redondo defends the positivist standpoint against some of the

main criticisms in the literature. She responds by pointing out the difficulties encountered by the antipositivist theses advanced by natural-lawyers and interpretivists (PJI: *e.g.* 9, 149, 157).[2]

On the other hand, PJI debunks the criticisms directed at normativism, focusing specially on the criticisms of the so-called "realist" positivists who defend a purely empirical conception of jurisprudence (Redondo calls this view "*positivismo escéptico*"; see PJI: 9).[3]

The legal positivism proposed by Redondo can be summarized as follows:

i. Legal norms are nothing but content/meaning; as long as their content is abstract, legal norms are not empirical entities; the existence of a valid norm corresponds to the existence of a legal obligation (Chapter 1).

ii. Ontological problems (questions about the existence of legal norms) must be distinguished from epistemic problems (questions about the determination of their content) and vice versa (Chapter 1).

iii. The existence of duties and legal norms is an institutional fact. It is relative to a practice, but it is neither limited to it nor completely determined by it. The identification of a legal duty/norm does not depend on the interpretation of normative statements nor on the demonstration in all cases. The existence of a norm and the belief in its existence are independent of one another. The possibility of identifying a duty/norm presupposes that we can grasp or understand directly the criterion followed in practice. There is no definitive test for knowing whether we grasp such a criterion, i.e., when the propositions expressing norms are true or false in this respect (Chapter 1).

iv. Knowledge of duties is objective insofar as it rests on an absolute notion of truth. It is not necessary to adopt a correspondence theory of truth. The truth conditions of a legal rule consist in the existence of a duty, *i.e.* a normative entity. The required notion must respect the equivalence thesis, *i.e.*, the distinction between the ontological question of the existence of a duty and the epistemic question of knowing the truth-value of the propositions expressing it (Chapter 1).

v. Knowledge of legal norms is based on public reasons, which are open to any reasonable person who takes the trouble to learn the concepts necessary for such a process of knowledge (Chapter 1).

vi. The notion of "genuine" normativity can be explained in terms of reasons for ac-

tion; law proposes generalizations that are treated and used as exclusionary reasons in a discourse of justification. The theses of the exclusionary and immutably relevant character of norms do not refer to the substantial weight they may or may not actually have in the process of decision-making, either from an objective (moral) or subjective point of view (Chapter 2).

vii. The notion that the content of the law is determined according to the criteria established by the existing conventions of interpretation must be supplemented by exclusive positivism, which has "authority" as its essential element (Chapter 3).

viii. The Author discusses the dichotomy that either the theoretical status of internal and/or normative discourses or the theoretical status of external and/or descriptive discourses. Such dichotomy is deemed a false dilemma (Chapter 4).

ix. Also rejected is the thesis that the study of social institutions is something that can be done from a single standpoint. In particular, this implies the rejection of both (a) the internal point of view thesis, according to which it is impossible to identify or use an institutional term without accepting the institutions to which the term refers; and, (b) the contrary thesis that in order to identify and understand a social institution, one must adopt the external point of view of the observer (Chapter 5).

Since I share many of the author's theses expounded in the book (i.e., some general premises as well as some specific views on legal language and interpretation), I will focus mainly on chapters 1 and 5 which are the most controversial and, as the author herself explains (PJI: 9), contain the core of Redondo's *positivismo jurídico normativista*.

The structure of my essay is as follows.

In section 2, I discuss Redondo's theses on the objective knowledge of norms and legal duties and claim that inter-subjectivity and not objectivity should be the proper criterion for normative legal positivism.

Then, in section 3, I examine the role that normativity plays in normative legal positivism and clarify the metaphysical character of the thesis according to which law belongs to normativity and practical reason.

Section 4 is devoted to the discussion of Redondo's conception of legal entities and her anti-reductionist approach.

In section 5, I point out a gap in PJI concerning the theory of sources of law and authority.

Finally, in section 6, I address what I deem to be PJI's main flaw: its defence of the epistemic neutrality of legal theory. A feature which, according to Redondo, enables legal theory to describe the internal point of view of participants without committing to the values of the existing legal practice(s).

II. Knowledge: objectivity vs inter-subjectivity

PJI rightly highlights two problems that are crucial to legal positivism: the ontological problem regarding what is it that legal norms consist in, and the epistemic problem regarding the possibility of obtaining objective knowledge of legal norms (PJI: 13).[4] In my view, these problems are but two sides of the same coin: cognitive propositions about law or norms are no different from propositions about their existence or nonexistence. So if norms cannot be known on grounds of skepticism, then they do not exist as norms (from a skeptical point of view, which is not mine, they may exist as statements, or as something else).

Redondo appropriately takes a liberal approach by presenting her own theses as based on given assumptions (PJI: *e.g.* 201, 204, 214). She shows a clear awareness that any conception of law is derived from more general epistemological and ontological assumptions.

In this respect, I think that the notion of "objective knowledge of norms and legal duties" (PJI: *e.g.* 9, 69-70, 84-85, 90-91) is misleading and dissonant in relation to the conception proposed there. If this "objective knowledge is knowledge supported by public reasons, available to any rational human-being who is willing to make the effort to learn the concepts needed to do it" (PJI: 90-91)[5], it is confusing to frame this knowledge as objective. Knowledge as such is more properly seen as intersubjective, as it is based on interactions between people and mediated through human communication, *i.e.* the use of language. To consider knowledge (related to legal phenomena) as intersubjective allows, on the one hand, to set a limit to extreme relativism or skepticism and, on the other hand, to avoid a slide into essentialism.

To speak of the intersubjective rather than the objective dimension of law and legal knowledge is not a mere lexical preference. The difference in terminology reflects a fundamental disagreement about the epistemological requirements of a normative positivist approach to law. Redondo takes an epistemic view based on "an absolute concept of truth" ("*un concepto absoluto de verdad*", PJI: 72, 90). However, this claim to *epistéme* is not necessary for her *positivismo jurídico normativista* and, more generally,

not a prerequisite for legal positivism.

This reference to objectivity and an absolute concept of truth also seems at odds with the book's conclusions, where Redondo clearly and rightly rejects "the thesis according to which the study of social institutions is something that can be done from a single point of view" (PIJ: 244)[6], and notes that it is misleading to think that "only a single method can accomplish 'the' goal of grasping the true nature of law" (PJI: 247).[7]

I agree with Redondo that any investigation of legal phenomena is conditioned by the method employed, and also that any positivist approach cannot ignore the ontological-epistemological issues. However, I do not agree that legal positivism displays a necessary connection to an objective knowledge of legal phenomena, or that it must presuppose an epistemic basis of (legal) knowledge.

Positive law is something that exists outside and beyond the sphere of any individual, but that does not mean that one should assume absolute objectivity. Behind our idea that the law exists and that it makes sense to say so – and that we know in some sense what law is and prescribes – is not a neutral (as a kind of detached "God's eye"), but a normative standpoint. Legal phenomena exist to the extent that they are known and experienced in an intersubjective perspective.[8] This reflects a principle of common sense and realism.[9]

To consider oneself a positivist implies a genuine interest in positive law as the relevant main subject of inquiry. If we assume that positive law exists beyond individual perception and is in some way cognizable in an intersubjective manner, then the theoretical (and practical) research of legal positivists makes sense. Moreover, it becomes necessary to address the problems of the existence and knowledge of legal norms that Redondo places at the beginning of the book (PJI: 9, 13, 88).

While Redondo is right when she says that "there is no definitive test to know whether we have rightly grasped the criterion underlying the practice" (PJI: 89)[10], I disagree with the assertion that:

> The positivist thesis according to which the existence of duties is relative to a practice and the thesis according to which knowledge of such duties is objective, insofar as it is based on an absolute concept of truth, may be jointly submitted (...) only on the basis of [the] distinction (...) between the ontological question of the existence of a duty and the epistemic question of the truth-value of duty-statements (PJI: 90).[11]

At first, this thesis seems at odds with Redondo's general aims. While the book is concerned with explaining the sense in which legal norms and duties exist and how we

can know precepts and normative meanings, Redondo shifts her analysis to an epistemic inquiry into the truth-value of deontic propositions and modalities. This epistemic turn, however, seems to be a means of trying to bring objectivity into a normative context that is fundamentally value-laden. Furthermore, in my opinion, this turn does not benefit the theory and is not coherent with the general explanation of legal normativity and the general thesis about public justification mentioned in the book (PJI: 91; Ch. II, esp. 133-136).

Second, the proposed view leads to a fallacious claim of exclusivity. If it were true that a coherent normative positivism can only be constructed by adopting Redondo's epistemological view, the only legitimate normative legal positivism would be Redondo's theory. On the one hand, this is inconsistent with the approach proposed in the book; on the other hand, the literature on deontic logic presents many theories that differ from the truth-value theory conceived by Redondo.

Finally, Redondo aims to offer an antidote to skepticism by means of her truth-value theory, but this epistemic turn does not fulfil the proposed target. The truth-value theory does not solve the problem of legal indeterminacy, which depends on the nature of legal language and the law as an institutional practice. Therefore, her assumption of "an absolute concept of truth" is not an antidote to rule skepticism, as well as to skepticism about jurisprudence and interpretation. Instead, it risks hiding indeterminacy and discretion.

III. Normativity: a metaphysical tenet

In addressing the two problems mentioned above, Redondo assumes that "the content of a norm consists mainly in types of permitted, forbidden or obligatory actions" (PJI: 13).

This assumption reveals the underlying premise on which Redondo's positivism rests, namely, that law is a normative phenomenon.

The theoretical hypothesis that normativity is one of the necessary, though not sufficient, properties of law is not explained in the book; however, it appears between the lines[12], especially in the second chapter.

To prevent possible misinterpretations: in my legal positivist view, this theoretical hypothesis that law is something normative is a descriptive metaphysical thesis in Strawson's sense. Common sense beliefs tell us in what realm of social reality we must

look to find the law in force. This common experience is supported by an abundance of material clues that replace eyes and hands. Our senses as sight and touch are pertinent to our process of knowing material objects, but not to the existence of the law, except in the form of metaphors. This view is consistent with a realist (*i.e.*, descriptive metaphysical) explanatory stance of what exists for individuals.[13] That law is something and is designed to regulate human behaviour is a general and empirical fact that legal theory (especially positivism) must face. As such, it has no essentialist implications. It does not imply adherence to the idea that an essence of normativity or law exists somewhere.[14] The assumption that law is necessarily normative does not preclude the possibility of examining it in other ways or from other points of view.

It should be made clear that the theoretical hypothesis that normativity is one of the necessary, though not sufficient, properties of law does not imply a necessary connection between law and morality. On this point, I agree with Redondo's notion of normativity, which is not reductive.

Normativity does not collapse into the moral sphere and cannot simply be identified with ethics (thus, "the concept of normativity does not make reference necessarily and solely to a moral property", PJI: 40). The universe of normativity consists of many spheres. Legal normativity is one of them. From this point of view, Redondo reveals an idea of normativity – that is, practical reason – as a general category, of which morality (or ethics) and law are specifications.[15] From this setup, she coherently derives the thesis of the "non-reducibility [*no reducibilidad*] of legal norms, either to social facts, on the one hand, or to moral norms, on the other" (PJI: 46).

The concept of normativity defended by Redondo and myself is also anti-dogmatic in the sense that it takes upon itself the burden of proof to show its explanatory capacity in relation to positive law.[16]

I cannot here go into the details of Redondo's reply to the critics of normativism. However, it will be useful to recall some major errors or misunderstandings that can be avoided if the premises outlined above are accepted.

As stated, Redondo's normative legal positivism warns against confusing ontological and epistemic issues in relation to legal norms (PJI: cap. I, 88).

Redondo defends this distinction by pointing out that normativism does not imply that the question of the existence of norms collapses into the question of their knowledge, or vice versa.[17] It is beyond the scope of this paper to discuss this philosophical cornerstone.[18] It should be pointed out, however, that adherence to normativism affects

the way in which the relation between existence and knowledge of what is being investigated or speculated upon is conceived.

As stated, the metaphysical assumption of normative legal positivism, i.e., that the existence of legal norms is practical-conceptual in nature, fundamentally affects the method that can be used to know them.

Thus, there is no way to prove or verify the existence of legal norms empirically or logically/formally, nor can the relevant cognitive faculty be conceived according to the methods and the tools that apply to empirical phenomena or logical-formal questions. Any explanation of the existence and understanding of legal norms from a normative perspective should begin by considering law as part of social practice and its institutional dimension, within which legal norms are grounds for action. In this regard, Redondo contends that:

> [t]he existence of a legal duty is relative to a social practice, but it is neither reduced nor totally determined by it. Equally, the identification of such a (legal) duty cannot always depend on an interpretation of normative formulations, nor in a demonstration. The possibility of identifying a duty presupposes that the criterion which is followed in the practice can be grasped or directly understood (PJI: 89).[19]

I would, however, suggest a partial modification of this position.

I agree that the existence of legal obligations and, more generally, of legal norms is relative to a social practice. In particular, those who participate in the same social practice agree on how to identify the associated domain of law. This ability to identify law is permanent and embedded in common sense as long as ordinary language contains the Stone-Age heritage of human species (Austin 1956-1957). This process is two-faced. It has an internal side, but it also has an external side. The attitudes of other people influence those of the people taking part in a social practice.

Moreover, participants' beliefs about what is *not* their own law in a particular time and space (*e.g.*, past historical experiences, different legal systems, some idiosyncratic moral beliefs, etc.) influence the law itself. In addition, people (lawyers, legal scholars, as well as anyone who is not competent and active in the field of law) also contribute to determining the specific boundaries and content of positive law from time to time in a continuous process of law-making.

This activity is not comparable to any demonstration, deduction, induction, or any other method used in the natural and formal sciences. While the ability to discern law is almost primitive and unreflective, even if it is culturally charged, the ability to identi-

fy a legal norm is sophisticated and reflective.[20] It requires grasping and understanding a vast set of conventions, rules, and criteria dedicated to the determination that is followed in practice. Determining legal rules is a reflective activity that follows the path of learning by doing, both by legal experts and non-experts.

IV. Law as facts or legal entities: anti-reductionism and empiricism

A general mistake to avoid according to PJI concerns the way normative propositions, i.e., propositions that refer to norms and thus ultimately to deontic positions, are conceived. Redondo writes:

> [a] normativistic theory cannot hold – without contradiction – that normative propositions are reducible to empirical propositions or, what is the same, that they are true or false only in virtue of certain more or less complex empirical facts. If a 'normativist' proposes an empirical analysis of 'normative propositions' we cannot understand what he accepts when he says he accepts the existence of norms as something different from empirical facts (PJI: 87-88).[21]

I disagree with Redondo because there is no necessary connection between the reductive position, reducing normative propositions to empirical propositions, and the thesis that normative propositions are true or false only in virtue of their relation to certain more or less complex empirical actions. The reductive position has numerous variants, and only some of them lead to an overlap with empirical propositions. Redondo claims that there is independence between the existence of a norm and the belief in its existence.[22] However, this claim is highly controversial in that a norm is a social fact based on beliefs. Of course, there are many ways in which norms and normative propositions and statements "exist", as many studies by paleo linguists and anthropologists show.[23] Also, there are different notions of truth depending on what criteria we use – as said, the criteria of common sense and empirical sciences are relevant to understand our concept of law and legal norms. For semiotic entities such as statements, etc., there are also specific criteria, different from those appropriate for material objects. The overuse of metaphors that treat semiotic entities as material objects obscures such a complex examination of the criteria needed for knowing them.

In any event, it should be noted that the foregoing does not imply that normativists cannot perform empirical analyses, nor that normative propositions and (legal) norms can only exist either as empirical facts or as something else. This thesis is circular to the extent that PJI postulates that all facts are either empirical facts or something different (i.e., non-empirical facts).

Normative legal positivism does not preclude empirical investigations and socio-anthropological explorations in the legal field, considering normative propositions and legal norms as facts, beliefs, stimuli, and so on. In other words, it does not exclude, for example, empirical investigations of law-related phenomena, such as people's beliefs about legal facts, how they affect behaviour, and so forth.

On the contrary, since positive law is fundamentally designed to guide human behaviour, the empirical domain cannot be neglected. The empirical facets of positive law deserve refined analysis. It goes without saying that the latter must be carried out using methods that are distinct from conceptual analysis and coherent with its specific scope. In other words: in the eyes of normative positivists, laws, legal statements, and legal norms are and should be analysed as they stand in the space and time of human history. But they are in any case institutional, not just brute facts. More precisely, they are conceptual artefacts that have a practical function.[24]

As Redondo points out (PJI: e.g., 136, 180 ff.), the functional dimension is part of the legal phenomenon itself, which is primarily a social institution. Against this background, legal norms have the function of guiding human behaviour by considering each individual not as a monad but as a social animal living together in relation to others and in stable and differentially organized forms.

This frame of reference is often over- or under-appreciated by opposing advocates of empirical studies and purely conceptual investigations. In my view, this philosophical frame of reference provides a coherent explanation of why positive law must be analyzed in the context of practical justification and using a teleological approach. Although this view differs from that of empirical or social disciplines, it is complementary to empirical studies. In short, according to normative legal positivism, the normative lens can offer its own contribution to the pursuit of a better explanation of positive laws and legal norms among other types of social facts.

A second mistake that PJI helps to avoid is the useless multiplication of entities. I refer to the triad: (i) normative legal propositions; (ii) legal norms; and, (iii) legal content or meaning. In this respect, the book follows the widely held philosophical assumption that simplicity is a theoretical virtue. The regulative idea is that *entia praeter necessitatem non esse multiplicanda*.[25]

In the realization of this regulative idea, the conceptual resources of the philosophy of language are fundamental. In this sense, the distinction between object language and metalanguage is of particular importance. According to the theory of levels of dis-

course, it is always possible to create further levels of discourse and conceptual entities that from a meta-linguistic level refer to other concepts that, it is hypothesized, exist at a lower linguistic level. By abstraction alone, we are able to construct meta-conceptual constructions and generate further abstract entities. This process could continue *ad infinitum*[26]. However normative theory must take into account the explanatory value of the terms it uses.

Redondo is therefore right to say that "the reduction of normative-legal entities into the propositions referring to them is ultimately possible"; while I believe that it is not correct to say that "they could be reduced to data of a sole empirical reality" (PJI: 91).[27] From a normative point of view, normative-legal propositions can themselves be conceived as normative entities (norms) belonging to a higher level of normative discourse; in any case, however, both normative-legal propositions and legal norms are normative-conceptual entities, not empirical ones.

With regard to the distinction between norms and their normative content, it should be noted that the former are conceptual entities that cannot be separated from their corresponding normative meanings and conceived as something else. In Redondo's words: "while a normative-positivist view can admit that asserting the existence of a valid norm is not the same as identifying its content, it cannot accept that norms and their contents are entities different in kind" (PJI: 89).[28]

Thus, to speak of norms in the context of practical argumentation is the same as to speak of normative meanings. This is also true in the legal field, where legal norms are, in abstract-general terms, directives or prescriptive meanings.

In other words, if one restricts the notion of legal norms to those valid in particular legal systems, it is clear that there can be a divergence between legal norms and legal normative meanings/contents considered independently of any criteria of legal validity. On the other hand, it is equally obvious that no such divergence can exist if the same criteria of legal validity that govern legal norms also govern the relevant legal normative meanings/contents.

From a normative positivist perspective, it is specious to speak of norms that have no meaning and no normative content[29], because normative meanings *are* norms.[30] One and the other may be valid or invalid, and it is a contradiction to speak of a valid norm with invalid meanings or vice versa (unless we refer to and apply different criteria of validity for different purposes).

It is remarkable how widespread is the tendency to multiply conceptual items, both

in jurisprudence and in ordinary discourse. Such proliferation occurs due to the universal human need to render concrete abstractions. This explains the familiar metaphor of meanings as normative contents, which as such evoke the image of the norm as the vessel or form that contains them.

This same tendency to objectify abstractions is reflected in another ambiguity discussed in PJI, which often leads to confusion between valid norms and invalid meanings.

If, as said, talking about valid norms and invalid meanings in relation to one and the same norm would lead to an internal contradiction, it is not a contradiction at all to claim, for example, that invalid meanings (i.e., legally impermissible) can be attributed to legal norms validly produced according to certain procedures (*i.e.*, meta-rules of jurisdiction and production).

In this case, the comparison is not between a particular norm itself and its meanings. Rather, it is a comparison between different entities: on the one hand, the process of legal norm-production, which in itself corresponds to the corresponding meta-norms, and on the other hand, the meanings attributed to the validly produced norm. Its content may be invalid due to error, ignorance, or other reasons, but this has nothing to do with the formal process of norm-creation.

In light of the above, it is important to emphasize that the notion of validity is relative and relational. It serves both a comparative and a classificatory function[31], dependent on a certain criterion (of validity). This criterion is not established once and for all, and it is not itself part of the norm whose validity is to be determined. As is well known, in many legal norms there are a variety of criteria of legal validity which bring different facets to bear. Therefore, the validity or invalidity of legal norms (as meanings) varies according to the criteria adopted in each circumstance.

Once this clarification is made, we can safely say that a valid norm is synonymous with its legal content or its legally permissible meanings. Finally, explaining all this in terms of the existence of legal entities does not seem to add anything of value to the discussion.

V. Sources of law and authority

A central problem for any positivist conception is who produces or creates legal norms. To evoke the image of a game used in the book, it is essential for positivists to clarify

who the participants in the legal game are and what roles they play. Redondo addresses the problem by discussing primarily the positions of Eugenio Bulygin and Fernando Atria (chapters three and four). From the analysis of the theses of these authors, but also of the other theorists mentioned in the book, such as H.L.A. Hart and R. Dworkin, it is clear that ethical-political choices play a prominent role in all legal theories discussed.

Redondo shows very clearly the extent to which Bulygin's theory, in stating that "everything not relevant in the 'legislator's system' is descriptively irrelevant" (PJI: 154)[32], makes a determinant political choice that assigns to the legislature a privileged importance among other legal actors. Similarly, it clearly shows the primacy that both Atria and Dworkin ascribe to judicial adjudication over the legislative sphere.

This suggests that philosophical analysis is not neutral and that any normative positivist approach is committed to its object of analysis. Theoretical speculations about legal methods affect positive law directly and indirectly because they affect jurisprudence, the doctrines of legal scholars, the behaviour of people, and so on. On this point, I note a certain opacity in the approach proposed in the book.

I agree with Redondo that discretion is not synonymous with creativity in a vacuum. Moreover, from a normative perspective, comparing reasons and justifications in the context of a public and open debate[33] enables the possibility of intersubjective control and makes it possible to reasonably assert that the law (though partially indeterminate) exists and that it is knowable (with varying degrees of certainty depending on the extent of indeterminacy).

Nevertheless, the book does not articulate a sources theory, and thus, does not elaborate on who is legitimated to produce legal norms. This omission is, in my view, unjustifiable, even if PJI is developing a metatheoretical inquiry rather than a theory of law.[34] The key question, even for a metatheoretical inquiry into law, is which sources of law are there and what is the role of the principle of separation of morality and law among them. Every normative legal positivist should address the question: in what way should morality (which morality?) influence law? The principle of separation of law and morality is itself a moral and political principle.[35] Far from excluding morality from law, it would be impossible to avoid a moral stance even in the most trivial issues: the separation principle regulates the incorporation of moral values into law primarily or exclusively through legal "forms" (authorities and procedures). The problem of the sources of law and the relationship between law and morality cannot be reduced, as

has often been done in the recent debate on legal positivism, to the question of the implications of the significant presence of explicit and general formulations of moral principles in legal texts or of value-laden principles implicit in statutes or constitutions. The principle of separation exists in many variations, depending on the answer given to certain basic moral questions concerning the law, such as whether we prefer a law open to the influence of social morality or other particular moral concepts, or whether we think it is right in principle to limit as much as possible legal indeterminacy by introducing specific requirements into law. Do we think it is right that officials be strictly bound by relatively specific general rules, or do we want them to have and exercise discretionary powers?

As the conclusions of Chapter 2 show, Redondo suggests that the concept of legal sources as defined by Bulygin in *Normative Systems* should be supplemented by a kind of exclusive positivism ("*un tipo de positivismo excluyente*"), which is not precisely identified. The only specification of this idea in the book is the relevance attributed to the notion of authority that exclusive legal positivism generally assumes (PJI: 153-155).[36] In this respect, it is also not entirely clear the thesis that "exclusive positivism can face the argument of the 'contrasting practice' precisely because, in its perspective, this way of understanding the law captures an *essential* feature of the concept such as it is generally understood by participants" (PJI: 155).[37]

I think it would be more accurate to say that a theory of legal positivism must be able to explain both those situations in which interpretive and applicative conventions converge and those in which they diverge. This ability is not an exclusive virtue, nor is it always a necessary consequence, of exclusive legal positivism. In any case, clarifying which the (legal) authorities are under a given positive law is the first step of any theory of legal positivism (including exclusive legal positivism).[38]

Moreover, the author's belief that exclusive legal positivism is capable of explaining the limits of the legal domain is not sufficiently well founded. In particular, it is not clear on what basis Redondo claims that "every jurisprudential theory operates with a concept that establishes the limits of what can be legally relevant in a descriptive sense" (PJI: 154).[39] In my view, this statement needs to be emended, since every jurisprudential theory starts from a concept of law that establishes the limits of what can be legally relevant in normative or prescriptive terms, not in descriptive terms.

VI. Points of view: neutrality and values

The final chapter of the book, which forms the core of Redondo's PJI, proposes a revised version of Hart's distinction between the internal and external points of view. The proposal is to double the division, creating four different possible viewpoints: internal$_1$; external$_1$; internal$_2$; and external$_2$.

In truth, the last viewpoint –external$_2$– is almost entirely neglected throughout the whole analysis, being mentioned only in cross-reference with the internal viewpoints.

Since Redondo does not provide a paradigmatic example or definition for each case, I sketch here a matrix of possibilities that I assume illustrate the four views proposed in the book.

In brief:

i. internal$_1$ point of view (PJI: 206): philosopher A affirms the validity and applicability of a certain legal norm p in a certain legal order B on the basis of the internal statements$_2$ of the participants in that legal order, without, however, engaging in said argument in practical terms;

ii. internal$_2$ point of view (PJI: 203 ff.): participant A in a legal order B asserts that a certain legal norm p is valid and applicable in B, compromising himself in practical terms with regard to said argument;

iii. external$_1$ point of view (PJI: 206): observer A reports that a certain state of affairs (the fact that some people act in a certain way) occurs in a certain place and at a certain time, without regard to internal statements$_2$ of the participants and without regard to an institutional dimension, as well as without making practical compromises with respect to the survey.

iv. external$_2$ point of view (PJI: 210-212): observer A reports that a certain circumstance (the fact that some people act in a certain way) occurs in a certain place and at a certain time, taking into account the internal statements$_2$ of the participants and the institutional dimensions associated with the circumstances, but without any compromise in practical terms.

In the author's view, the above viewpoints may intersect as follows:

> The internal point of view of the accepter would include, for example, those who follow the rules out of custom – with an irreflective adherence – those who adopt towards them a conscious supportive stance although they do not believe in their correctness, and the true believer – who believes in the moral correctness of the norms. In any event, it may be said that the accepter is

> committed in practical terms. It is she who believes, or presupposes, that the norms she accepts are justified. To refer to this way of understanding the distinction I will speak of the adoption of the internal$_2$ or external$_2$ points of view (PJI: 210).[40]
>
> Thus, nothing excludes that a true accepter of an institution, on a certain occasion, formulate statements referring to it but not committed to their justification, i.e., formulate internal$_1$ statements from an external$_2$ point of view. Correspondingly, it is possible for an agent not participating of, or not accepting, an institution, to refer to it on a specific occasion presupposing that it is indeed justified. That is, it is possible for her to formulate internal$_1$ statements from an internal$_2$ point of view (PJI: 212).[41]

The purpose of this original proposal is to defend the theoretical possibility of analyses of various kinds. In particular, Redondo is concerned to defend the possibility that a jurisprudential theory can identify and explain the content of a legal system, legal phenomena, legal concepts, etc., without necessarily accepting or justifying them (PJI: 195). Redondo's claim is that the assumption of an internal$_1$ point of view plays a purely epistemic role (PJI: 206; 215).

Against this background, PJI promotes the possibility of neutral normative-conceptual analyses. Legal positivist scholars are portrayed as engaging in purely theoretical or conceptual analyses that are in no way connected to "the content of the legal institutions which the participants of a specific practice are interested in" (PJI: 178). The legal positivists could carry out their analyses of positive law without any commitment towards their subject matter, without providing any kind of even indirect justification of the law, nor expressing any form of substantial or evaluative acceptance of it.[42]

Redondo's proposal is based on a contested reading of Hart's internal point of view, which is taken to be "an internal (moral) point of view".[43] However, I will not discuss Hart's exegesis here.[44]

For my purposes, it is important to outline some difficulties that affect the neutrality thesis of the internal$_1$ point of view.

First, Redondo acknowledges that the external$_2$ point of view is not value-free either:

> Adopting an external$_2$ point of view with regard to a certain institution means that such institution is not accepted, that no theory justifying it is presupposed as true. Now, this says nothing about the commitments which she who adopts such stance has regarding other concepts or independent institutions. And, above all, it does not imply that whoever adopts this external$_2$ attitude does not assume moral commitments in general. For this reason, it is wrong to link the idea of an external$_2$ point of view to an Archimedean or neutral stance in absolute terms. Consequently, showing that it is impossible to refer to normative contents from an Archimedean or absolutely

> neutral perspective does not amount to prove that it is impossible to refer to normative contents from an external$_2$ point of view, simply because the external$_2$ point of view is no Archimedean stance, nor it is evaluatively neutral in absolute terms (PJI: 214).[45]

In other words, Redondo recognizes that the attitude of the external$_2$ observer is also influenced by the internal$_2$ point of view. That is, any analysis (even if carried out by uninvolved parties) is influenced by its normative object.

A similar observation applies to the external$_1$ point of view because, as the empirical and social sciences teach, it is impossible to identify legal phenomena in terms of pure, brute fact without reference to some normative criteria, some idea of convention or rule, or some parameter of rule-following, etc.[46]

With direct reference to the internal$_1$ point of view, Redondo roots her proposal in Peter Winch's conception of action (PJI: 11, 204).

I think, however, that Winch's ideas cannot be a philosophical pillar of Redondo's theory. According to Winch[47], human and social behavior cannot be understood without referring to the concept of rule. Rules are used to evaluate what someone does. The notion of rule-following is logically inseparable from the notion of error and misbehavior. If it makes sense to say that a certain person follows a rule, it means that we can also ask whether what one does is correct or not. Otherwise, it would be impossible to say that a particular behavior is right (*i.e.*, correct) or wrong or that someone is following a rule in what she is doing.

Moreover, Winch notes that the Anarchist avoids explicit rules as much as possible and considers each proposed action on the basis of its intrinsic value. His choice is not determined *a priori* by a rule he may follow, but his behavior should be distinguished from foolish behavior, for example.[48] In this respect, the notions of rule and universalizability are fundamental analytical tools, according to Winch.[49] In his view, in order to understand social phenomena, social scientists cannot imitate natural scientists, and should therefore participate in the practice.[50] This view is very far from the neutral and epistemic view proposed by Redondo.

Apart from this problematic reference to Winch in PJI, the crux of the matter is that the identification of fundamental concepts such as those of norm, duty, social practice, institutional act, etc., is not an activity of mere cognition, but the result of choices that depend on the methodological, ethical, and political attitudes espoused by the theorist.[51]

In keeping with her concern for neutrality, Redondo does not tap into the axio-

logical background behind her *positivismo jurídico normativista*. She merely refers to the institutional and teleological-functional perspective that lies beyond her normative legal positivism (PJI: 246). For Redondo, law is an institutional concept, and it is so because of a fundamental practical consideration: positive laws are social institutions that have a practical function and find their *raison d'être* in this practical function.

But even this perspective is not neutral or value-free. Analyses carried out from Redondo's point of view have to deal internally$_1$ with questions related to, for example, what a legal institution is and the notion of (legal) authority, which are not purely theoretical or epistemological.

Similarly, the *positivismo jurídico normativista* denies the political dimension of law at the methodological level and especially in relation to jurisprudence. There are no references to the political dimension of legal theory in the book. This is a direct consequence of Redondo's belief that legal theory involves a conceptual enterprise that does not interfere with positive law and existing legal institutions.

The main flaw of Redondo's theory lies in forgetting that jurisprudence, and especially a normative theory of legal positivism, cannot conceive of sterilizing its own connection with the legal practice of which it is a part, to which it addresses its own analyses, and which is in constant dialogue with other legal experts (judges, legal scholars, etc.). From a theoretical point of view, it is conceivable to have a theory (of law) that is concerned only with ideal analyses, fully divorced from the laws actually in force here and now (and perhaps in every time and place). In my view, such a theory ends up sterilely and almost contradictorily as a futile exercise, abusing the title of a theory of law. However, even allowing for this hypothesis *in abstracto*, this is not true of all the theories of law examined in Redondo's book and of her own theory. Redondo's *positivismo jurídico normativista* is neither a theory meant to be sterile, devoid of any impact on positive law and legal method, nor a theory that lives in a vacuum. Rather, PJI is a theory that does indeed have a normative character, not only because of its object – law – but also because of the goals of the prescriptive methodology that it proposes, even if somehow covertly.[52]

This is one of the main differences with many other conceptions of legal positivism and, for example, with the one proposed by Scarpelli in 1965.[53] Scarpelli clearly exposed the axiological and political compromise of legal positivism *vis-à-vis* positive law, emphasizing that "the normative standpoint is constituted by the political commitment to norms", functioning as exclusive criteria to guide behaviour and are always pro-

duced and re-produced involving teleological judgments directed to specific purposes and values (Scarpelli 1983: 297-300).[54]

In conclusion, my main criticism of Redondo's *positivismo jurídico normativista* concerns her attempt – misleading, in my opinion – to present the internal$_1$ point of view as neutral, failing to explain explicitly the evaluative choices that underlie its methodological proposal.

I think that the majority of the theses presented in the book (those on normativity, the role of practical reason, authority, institutions, their functional relevance from the pragmatic point of view, the anti-skeptical approach to legal interpretation, etc.) could be defended even after abandoning the illusory ideal of the neutrality of legal theory.[55]

In this respect, I agree with Schauer[56] in that a concept of law is something that is made and continually remade by society: whether this is done, and on what grounds and for what purposes, is itself a normative matter, and in this sense legal positivism is normative like the other theories and doctrines of general jurisprudence. Each of them may have its descriptive side, but every choice of a legal concept and every argument for its conceptual determination has a normative underpinning.

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Notas

1 (Editor's Note: all translations in the present contribution are made by the Author). Redondo's "internal" positivism does not imply an adherence to Hart's point of view and theory, from which she both takes inspiration and distances herself. Besides, as said, the book falls conveniently outside the classical diatribes between Hart's and Dworkin's epigones as well as the inclusive/exclusive legal positivism debate. Among an extensive literature, some notable references are *e.g.* Celano 2013; Coleman 1982; Perry 1996; Waluchow 1998 and 2001; Himma 2004; Priel 2005.

2 The "interpretative" position is discussed in particular in the fourth chapter, and in paragraph 4.2 with regard to the antagonists to legal positivism. As can be seen from the analysis of Bulygin's theory carried out in the third chapter, the positions advocated by legal positivists differ regarding the role played by legal interpretation and the importan-

ce given to it in relation to the concept of law (for a more in-depth analysis see *e.g.* Ruiz Manero 2014).

3 The label "skeptical positivism" used by Redondo evokes the tendency of theoretical skepticism towards legal interpretation shared by some positivist scholars and legal realists (a main reference here is the Genoese school). However, between interpretative skepticism, on the one hand, and the legal positivist conceptions that embrace descriptive or empirical methods and methodology, on the other hand, there is at the most only a contingent connection. This is because the category of "skeptical positivism" overlaps different levels of analysis, concerning namely ontological and epistemological questions about the law and legal interpretation.

4 The way in which Redondo formulates the ontological question may raise the doubt that, to be more precise, she is rather dealing with a metaphysical question. "According to a certain, familiar way of dividing up the business of philosophy, made popular by Quine, ontology is concerned with the question of what entities exist (a task that is often identified with that of drafting a 'complete inventory' of the universe) whereas metaphysics seeks to explain, of those entities, what they are (i.e., to specify the 'ultimate nature' of the items included in the inventory" (Varzi 2011: 407). In any case, the same distinction between ontology and metaphysics is an open philosophical problem that goes beyond the scope of the present analysis.

5 In the conclusions of chapter 1, Redondo writes: "En este capítulo sólo se han presentado algunas consideraciones muy breves con respecto a la posibilidad de conocimiento objetivo de normas o deberes jurídicos. En cualquier caso, sí se ha mostrado que algunas objeciones y dificultades se pueden responder adecuadamente. En particular, se ha mostrado que el conocimiento de normas jurídicas es un conocimiento apoyado en razones de carácter público, abierto a cualquier ser racional dispuesto a hacer el esfuerzo de aprender los conceptos necesarios para ello" (PJI: 90-91).

6 Original: "la tesis según la cual el estudio de las instituciones sociales es algo que puede realizarse desde un único punto de vista".

7 Original: "solo un método está en condiciones de lograr 'el' objetivo de captar la verdadera naturaleza del derecho".

8 The idea that law is something intersubjective and essentially linked to our common sense is developed by Jori (2010).

9 We can also speak of the methodical principle of charity. To put it more prosaically: before we believe that there is no law and that therefore part of our reality is an illusion, it is reasonable to try to explain it. On the importance of common sense and realism as a principle of philosophical and scientific investigation, see De Caro 2015: 197-214.

10 Original: "no hay un test definitivo para saber si hemos captado bien el criterio subyacente a la práctica".

11 Original: "se pueden afirmar conjuntamente la tesis positivista según la cual la existencia

de deberes es relativa –a una práctica– y la tesis según la cual el conocimiento de dichos deberes es objetivo, en la medida en que se basa en un concepto absoluto de verdad (...) sólo sobre la base de [la] distinción (...) entre la cuestión ontológica acerca de la existencia de un deber y la cuestión epistémica acerca del conocimiento del valor de verdad de los enunciados de deber".

12 Significant, for example, is the incipit of the second chapter, where two fundamental theses are defended: (i) that law proposes/offers rules and (ii) that the normativity or practical character of rules is analyzed in terms of their functioning as reasons ("el derecho propone reglas" y "la normatividad o carácter práctico de las reglas se analiza en términos de su funcionamiento como razones": PJI: 93). In addition, Redondo rejects those conceptions and theories which deny the possibility of normativity in general and legal normativity in particular ("que niegan la posibilidad de la normatividad sin más y jurídica en particular"; PJI: 36).

13 The notion of metaphysics applied here belongs to Strawson (1959). Elsewhere, Strawson (1961: 16-17) has developed the useful idea of practical universe: "[T]he main practical implications for moral and political philosophy are, I think, that more attention should be concentrated on types of social structure and social relation, and on those complex inter-relationships which I have mentioned as well as others which I have not. For instance, it is hard not to believe that understanding of our secular morality would be enhanced by considering the historical role that religion has played in relation to morality. Or again, I doubt if the nature of morality can be properly understood without some consideration of its relationship to law. It is not merely that the spheres of morality and law are largely overlapping, or that their demands often coincide. It is also that in the way law functions to give cohesiveness to the most important of all social groupings we may find a coarse model of the way in which systems of moral demand function to give cohesiveness to social groupings in general. Similarly, in the complexity of our attitudes towards existing law we may find a model of the complexity of our attitude towards the systems of moral demand which impinge upon us in our social relations at large -or upon others, in theirs".

14 All this means that jurisprudence, unlike the empirical sciences, is not endowed with foundations independent of common sense. This is not because jurisprudence has not developed sufficiently as a science, but rather due to the fact that the relationship with common sense is intrinsic to legal practice and legal knowledge as we practice it: the law in force is a normative practice because we regard it as such. See for a more detailed analysis Jori 2018.

15 On this point, Redondo's view of practical reason seems close to that held by Hare and Scarpelli. In particular, the tripartite view of practical reason as structured in ethics, law, and politics conceived by Scarpelli (1972 and 1986) might strengthen Redondo's *positivismo jurídico normativista*.

16 In other words: "the law constitutes reasons for action, independently of that which is morally correct to do" (PJI: 125; original: "el derecho constituye razones para la acción, independientemente de aquello que es moralmente correcto hacer"). This position is

confirmed by Redondo in her latest writings published after PJI. See, e.g., Redondo 2019: 33, where she claims: "when a legal positivist thinks that normativity is a defining property of legal systems that should not be reduced to an empirical or a moral property, by the same token she is committed to rejecting the moralist conceptual thesis and has to provide an appropriate analysis of what this property precisely means".

17 The statement of Redondo according to which "views rejecting the idea that deontic statements may express knowledge of norms, i.e., normative propositions making reference to duties, need to radically deny the existence of duties or norms" (PJI: 87; original: "Las posiciones que rechazan la idea de que los enunciados deónticos pueden expresar conocimiento de normas, i.e. proposiciones normativas que hacen referencia a deberes, necesitan negar radicalmente la existencia de deberes o normas") does not appear to be consistent with the premises and the argumentation carried out in the first chapter of the book. The aforementioned statement aggravates, rather than avoids, a problem: the reductionism of ontological issues into epistemic ones (i.e., "the ontological question is reduced to an epistemic one"; PJI: 88).

18 Everybody is well aware of the very broad philosophical debate – which also flourishes within analytical philosophy, practical philosophy, and the philosophy of science – about the relationship between ontological and epistemological questions. I do not wish to enter into the merits of these never-ending discussions regarding the concepts of ontology and epistemology, and the different ways in which we speak of existence and knowledge in relation to reasons (practices) and norms (Vega 2017: 1-24; van Hoecke-Ost 2010: 187-204). If norms – as conceptual entities and especially reasons for action – are identified with the corresponding normative meanings, then the former share with the latter the same problems (and answers) regarding their existence and possibility of knowledge.

19 Original: "[l]a existencia de un deber jurídico es relativa a una práctica social, pero no se reduce a ella ni está totalmente determinada por ella. Asimismo, la identificación de este deber no puede depender siempre de una interpretación de las formulaciones normativas, ni de una demostración. La posibilidad de identificar un deber presupone que se pueda captar o comprender directamente el criterio que se sigue en la práctica".

20 I do not intend to support the dualism, widespread in contemporary literature, between reflective and unreflective thinking,. However, cognitive and behavioural studies about mental processing enlighten some angles of the explanation of human behaviour in relation to rules and normative social domains. See, e.g., Kahneman 2011; Evans and Stanovich 2013: 223-241.

21 Original: "[u]na teoría normativista no puede sostener –bajo pena de entrar en contradicción– que las proposiciones normativas son reducibles a proposiciones empíricas o, lo que es lo mismo, que son verdaderas o falsas sólo en virtud de ciertos hechos empíricos, más o menos complejos. Si un "normativista" propone un análisis empírico de las "proposiciones normativas" no se comprende qué acepta cuando dice que acepta la existencia de normas, como algo distinto de los hechos empíricos". The criterion of truth-falsehood cited by Redondo in her book is not always construed in light of the correspondence theory of truth or in a way that corresponds to

the empirical basis, as the book suggests. She also advocates a different concept of truth: see PJI 90.

22 Redondo (PJI: 90) states that "in a non-skeptical position, as should be taken by normative positivism, norms are ideal entities dependent on or relative to a social practice, but not dependent on or relative to its knowledge. Their existence is an institutional fact. The recognition of the existence of a norm as an object of knowledge presupposes independence between the existence of the norm and the belief in its existence. This means admitting the possibility of error, which is another condition of the possibility of objective knowledge. That I believe that "x" should be done does not imply or constitute that "x" should be done". Original: "En una posición no escéptica como la que debe asumir el positivismo normativista las normas son entidades ideales dependientes de, o relativas a, una práctica social, pero no dependientes del, ni relativas al, conocimiento que se tenga de ellas. Su existencia es un hecho institucional. El reconocimiento de que existe una norma como objeto de conocimiento, presupone la independencia entre la existencia de la norma y la creencia en su existencia. Esto significa admitir la posibilidad de error que es otra de las condiciones de posibilidad del conocimiento objetivo. Que yo crea que se debe hacer "x" no significa ni constituye que se deba hacer "x"".

23 See e.g. Fitch 2017, and Duranti 2003.

24 See in particular, among many theories about law and legal entities as artifacts, the conception proposed by Roversi (2019), which is of uttermost importance for its clarity and capacity of explanation.

25 The reference here is to Kant (1781/1787: 538-539).

26 About formal languages see, e.g., Fitch 1964. Regarding normative languages, see, e.g., Priest 1984 and Gibbard 1994.

27 Original: "en última instancia la reducción entre las entidades normativas jurídicas y las proposiciones que hacen referencia a ellas es posible (...) en efecto, podrían ser reducidas a datos de una realidad empírica única". The adjective "empirical" seems misleading at this point and contradicts the correct thesis that a normative-positivist perspective "cannot accept (...) that legal norms are empirical entities whereas their contents are abstract entities" (PJI: 89; original: "no puede aceptar (...) que las normas jurídicas son entidades empíricas mientras sus contenidos son entidades abstractas").

28 Original: "una posición positivista normativista, si bien puede admitir que afirmar la existencia de una norma válida no es lo mismo que identificar su contenido, no puede aceptar que las normas y los contenidos son entidades de tipo diferente".

29 In such cases we could speak of empty norms or impossible norms or norms that however do not exist, which in any case means that there is no normative content, as long as there is no reason to act or to guide human behaviour.

30 This does not mean that norms are only meanings, nor that they can only be conceived as meanings. This semiotic approach does not exclude other analyses and other possible

ways of looking at norms. The analysis of Max Black (1958) is still very revealing.

31 See Hempel 1952 and 1965; Marradi 1990.

32 Original: "todo lo que no es relevante en 'el sistema del legislador' es descriptivamente irrelevante".

33 "In particular, it has been shown that the knowledge of legal norms is a kind of knowledge supported by reasons which are public in character, available to any rational being willing to make the effort in learning the concepts needed to acquire it" (PJI: 91; original: "En particular, se ha mostrado que el conocimiento de normas jurídicas es un conocimiento apoyado en razones de carácter público, abierto a cualquier ser racional dispuesto a hacer el esfuerzo de aprender los conceptos necesarios para ello").

34 See, e.g., Jori 2003: 405-434.

35 The question of what and which are the general sources of law, even if traditionally conceived as theoretical, is meta-theoretical. Moreover, the 'principle of separation', even if traditionally conceived as conceptual or epistemic, is a meta-ethical principle.

36 According to Redondo: "exclusive positivism assumes a conceptual premise according to which, whereas all legal validity criteria are of a conventional origin, not every criterion of a conventional origin may be a legal validity criterion. Our concept of law, which includes a claim to authority, imposes a specific restriction which prevents moral – i.e., non-conventional – criteria to function as a base/grounds for asserting the existence or content of legal norms" (PJI: 151; original: "el positivismo excluyente asume una premisa conceptual según la cual, si bien todos los criterios de validez jurídica son de origen convencional, no todos los criterios de origen convencional pueden ser criterios de validez jurídica. Nuestro concepto de derecho, que comprende una pretensión de autoridad, impone una específica restricción e impide que criterios morales, i.e. no-convencionales, sirvan de base para establecer la existencia o el contenido de las normas jurídicas").

37 Original: "el positivismo excluyente puede afrontar el reclamo del 'contraste con la práctica' justamente porque, en su perspectiva, esta forma de entender el derecho capta un rasgo esencial del concepto tal como efectivamente lo entienden los participantes".

38 Although it is not obvious, I argue that the question of what the sources of law are is meta-theoretical, since it depends on more fundamental ideas upheld on the nature and concept of law. Moreover, the debate, as well as the contested demarcation between inclusivists and exclusivists, is not primarily theoretical, but meta-theoretical. The mere fact that both (inclusivists and exclusivists) are positivists does not imply that the relevant debate is theoretical in nature. On the contrary, meta-theoretical questions concerning law are disputed between them, and the fact that this fact is not disclosed generates spurious and never-ending discussions.

39 Original: "Toda teoría del derecho opera con un concepto que establece los márgenes de aquello que puede ser jurídicamente relevante en sentido descriptivo".

40 Original: "el punto de vista interno del aceptante, incluiría, por ejemplo, a quienes siguen las reglas por costumbre, con una adhesión irreflexiva, a quienes adoptan frente a ellas una política de apoyo consciente, aunque no crean en su corrección y, al verdadero creyente: quien cree en la corrección moral de las normas. En todo caso, puede decirse que el aceptante es quien se compromete en términos prácticos. Es quien cree, o presupone, que las normas que acepta están justificadas. Para hacer referencia a este modo de entender la distinción hablaré de la adopción de un punto de vista interno$_2$ o un punto de vista externo$_2$".

41 Original: "En tal sentido, nada excluye que un verdadero aceptante de una institución, en una determinada ocasión, formule enunciados que se refieren a ella, pero que no se comprometen con su justificación, i.e. formule enunciados internos$_1$ desde un punto de vista externo$_2$. Del mismo modo, es posible que un agente que no participa, o no es un aceptante de una institución, en una específica ocasión, se refiera a ella presuponiendo que, en efecto, está justificada. Es decir, es posible que emita enunciados internos$_1$ desde un punto de vista interno$_2$".

42 Among many significant excerpts from the book, please consider the following quotations: "the methodological proposal of internal positivism is that, in order to achieve this descriptive goal, the scholar adopts the external point of view, that is, she does not propose or presuppose any theory justifying the kind of institution she refers to" (PJI: 229; original: "la propuesta metodológica del positivismo interno es que, para alcanzar este objetivo descriptivo, el estudioso se coloque en un punto de vista externo$_2$, es decir, que no proponga ni presuponga ninguna teoría que justifique el tipo de institución a la que se refiere"). Moreover, "internal positivism admits that the existence of an institution presupposes the existence of a justificatory theory ascribing to it some value or function. Otherwise, such institution would not exist. What this view holds is that it is possible to identify an institutional concept, i.e., a set of properties which is exemplified in every instance –or every paradigmatic instance– of the same class of institution, and that this does not amount to offering a theory which rationalizes, makes intelligible or justifies their content. Briefly put: A concept applicable to facts, objects or institutional properties is a set of (relevant, especially interesting, or distinctive) properties that, according to the participants' self-understanding, describes every instance –or every paradigmatic instance– falling under its scope" (PJI: 230; original: "el positivismo interno admite que la existencia de una institución presupone la existencia de alguna teoría justificativa que le atribuye algún valor o función. De lo contrario la institución en cuestión no existiría. Lo que esta posición sostiene es que es posible identificar un concepto institucional, i.e. un elenco de propiedades que se ejemplifica en toda instancia –o en toda instancia paradigmática– de la misma clase de institución, y que ello no significa ofrecer una teoría que racionaliza, hace inteligible, o justifica el contenido de las mismas. En pocas palabras, un concepto aplicable a hechos, objetos o propiedades institucionales es un elenco de propiedades (relevantes, especialmente interesantes, o distintivas) que, conforme a la auto-comprensión de los participantes, describe toda instancia (o toda instancia paradigmática) que cae bajo su alcance").

43 See PJI: 70; cf. e.g., 197 ff. where participants' internal point of view is discussed as a

practical attitude of acceptance or a justificatory belief with respect to the object it refers to.

44 A critical line of interpretation that I believe could have been useful to Redondo in developing her own theory is traced in Jori 1985: 107-151. Jori highlights the possibility of revising Hart's distinction between internal and external standpoints by looking more closely at the internal discourse in two ways. On the one hand, Jori emphasizes the internal normative aspect embedded in individual and social actions and related common sense normative language use (the main points of reference are the theories of Winch and Wittgenstein and anthropological studies); on the other hand, he reflects on the possibility that internal discourses may refer to accepted judgement criteria in a purely intellectual sense, as based on existing legal norms and/or a broader concept of law rooted in the common sense of the social group concerned.

45 Original: "Adoptar un punto de vista externo$_2$ respecto de una institución significa que no se la acepta, que no se presupone la verdad de ninguna teoría que la justifique. Ahora bien, esto nada dice acerca de los compromisos que quien se encuentra en tal posición asume respecto de otros conceptos o instituciones independientes. Y, sobre todo, no implica que quien adopta esta actitud externa$_2$ no asuma, en general, compromisos morales. Por este motivo, es erróneo asociar la idea de punto de vista externo$_2$ a una posición arquimediana o neutral en términos absolutos. En tal sentido, mostrar que es imposible referirnos a contenidos normativos desde una perspectiva arquimediana o absolutamente neutral no equivale a demostrar que es imposible referirnos a contenidos normativos desde un punto de vista externo$_2$, sencillamente porque el punto de vista externo$_2$ no es una posición arquimediana ni una posición valorativamente neutral en términos absolutos".

46 We can recall in particular Peter Winch's theses: "the conception of a human society in general cannot be grasped except in terms of the concept of rule-following and that rule-governed behaviour constitutes one of the most interesting fields for investigation by the social sciences. Moreover, even in cases such as those just mentioned one is never very far away from rule-governed behaviour. Even if a man's actual voting behaviour is random, to grasp what he is doing as an instance of voting is impossible unless one has some understanding of the organization of political affairs in his society. Even if he casts his vote in a random way, his behaviour is not completely random and arbitrary if what he is doing is voting. He is participating in a form of social life and his behaviour is guided, perhaps unreflectively, by considerations of what is and what is not appropriate in that form of activity. The political scientist can be assumed to be familiar with those considerations and most of the time he has no need to bring them into the open. But the results of his scientific and statistical methods of investigation are relevant and important only in virtue of his and his readers' understanding of the way of life in the context of which they are applied. Otherwise one has merely a rag-bag of facts without significance or cohesion" (Winch 1956: 25).

47 Winch 1958: 45.

48 Winch 1958: 69-70.

46 Winch 1965: 151-170.

50 See Winch 1956: 32: "One of the chief tasks of the social scientist who wishes to understand a particular form of human activity in a given society will be, as I argued earlier, to understand the concepts involved in that activity. It would appear then that he cannot acquire such an understanding by standing in the same relation to the participants in that form of activity as does the natural scientist to the phenomena which he is studying. His relation to them must rather be that between the natural scientist and his fellow natural scientists; i.e. that of a fellow participant. It is of course possible to observe regularities in human behaviour and to express them in the form of generalizations. But my point is that it is not possible to understand the principles according to which such behaviour is carried on purely by this method. For understanding those principles involves understanding the concepts involved in that behaviour, and these are mastered not by observing and theorizing, but by actually taking part in that activity together with the other people involved in it".

51 A passage from Redondo's work seems to confirm this reading (PJI: 245-246): "If the considerations offered in this chapter are correct, then there is no single appropriate method to approach the study of the law and social institutions in general. Every time we adopt the internal$_2$ point of view we will 'see' that the concept of law and institutional concepts in general have a functional nature. And it will be thus precisely because, on such perspective, the concept is a set of principles that rationalize or justify the institutions to which it applies. When this approach is assumed, the object of inquiry is demarcated on the basis of certain evaluative properties which are considered essential features of it" (original: "Si las consideraciones presentadas en este capítulo son correctas, no hay un único método adecuado para afrontar el estudio del derecho y de las instituciones sociales en general. Toda vez que adoptemos el punto de vista interno$_2$, 'veremos' que el concepto de derecho y los conceptos institucionales en general tienen naturaleza funcional. Y será precisamente así porque, en dicha perspectiva, el concepto es un conjunto de principios que racionaliza o justifica las instituciones a las que se aplica. Cuando se asume este enfoque, el objeto de estudio se delimita sobre la base de ciertas propiedades valorativas que se consideran rasgos esenciales del mismo". In addition, Redondo affirms: "Every theory aiming to analyse social institutions requires the formulation of value judgments on the part of the theorist –which does not imply assuming a justificatory stance towards the object of inquiry" (PJI: 214; original: "Toda teoría que tiene por objeto el estudio de instituciones sociales exige la realización de juicios de valor por parte del teórico, lo cual no implica asumir una posición justificativa respecto del objeto estudiado").

52 On prescriptive methodology see, e.g., Bobbio (1967: 235-262) and Scarpelli (1971: 553-574).

53 Scarpelli 1965.

54 See also Scarpelli 1965: 99-100. Spanish translation 2021: 142: "Según esta interpretación, los juristas iuspositivistas no pueden ser reducidos al rol de simples espectadores, sino más bien deben ser considerados actores en la historia del estado moderno –si bien

no protagonistas– políticamente comprometidos para su afirmación y conservación. En contraposición a la interpretación científica, la interpretación política del positivismo jurídico puede ser sintetizada de la siguiente manera. En efecto, para la interpretación científica del positivismo jurídico, la positividad está en función de la cientificidad: se hace una ciencia del derecho como ciencia del derecho positivo porque interesa hacer la ciencia del derecho e, identificando en el derecho positivo el objeto que la hace posible, se le asigna precisamente este objeto, aproximándose al hecho con la ciencia y, encontrando al derecho positivo como hecho, este hecho se conoce en la ciencia. Sin embargo, para la interpretación política, por el contrario, la cientificidad está en función de la positividad. Esto quiere decir que se hace un trabajo científico sobre el derecho positivo: existe la preocupación de entenderlo, precisarlo y reconstruirlo en un sistema riguroso, elaborándose el aparato conceptual capaz de traducir las normas interpretadas en expresiones rigurosas y de formular relaciones internas al sistema. Lo anterior para servir a la voluntad política que en aquel derecho positivo se ha manifestado: para actuar el régimen de las relaciones sociales a la que tiende aquella voluntad política, y para hacer eficaz y funcional la estructura de normas de derecho positivo que forma la espina dorsal de la organización política. El jurista iuspositivista, ateniéndose a esta interpretación del positivismo jurídico, no es un científico inspirado por puro amor por la ciencia, sino que más bien pliega las formas científicas de pensamiento, lenguaje y acción, a los fines e intereses políticos: los fines y los intereses políticos del estado moderno. ("According to this interpretation, jurists should not be reduced to the role of mere spectators, but should rather be seen as actors in the history of the modern state – if not protagonists – politically engaged in its affirmation and preservation. In contrast to the scientific interpretation, the political interpretation of legal positivism can be summarized as follows. While for the scientific interpretation of legal positivism, positivity is a function of science, on the other hand, for the political interpretation of legal positivism, science is a function of positivity. That is, scientific work is done on positive law. Efforts are made to understand it, to specify it, and to reconstruct it in a rigorous system, developing the conceptual apparatus capable of translating the norms into rigorous expressions and formulating the internal relations to the system. All this in order to serve the political will manifested in this positive law: to act the regime of social relations to which this political will tends, and to make effective and functional the structure of the norms of positive law that constitutes the political organization. According to this interpretation of legal positivism, the legal positivist is not a scientist animated by a pure love of science, but rather folds scientific forms of thought, language and action into political goals and interests: the political goals and interests of the modern state").

55 Here the ideas of Schiavello may also shed light on legal positivism. In an essay purposely entitled "Scienza giuridica, metodo, giudizi di valore" (2007: 1-19), he suggests the adoption of a perspective that bases the conception of law upon an ethical choice, placing therefore legal theory within meta-ethics.

56 Schauer 2021: 61-78.

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