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A "DEFENSE" OF COGNITIVISM AND THE LAW

Abstract. This paper consists of a journey marked by three important milestones: (i) an overview of the controversy between cognitivism and non-cognitivism, (ii) a review of the different theoretical positions around this controversy, and (iii) an assessment on the impact of such controversy in theory of law and in the way the work of the jurist is understood. The ultimate objective is to demonstrate that, if followed coherently, non-cognitivism can only lead to the unintelligibility of the legal phenomenon. Jointly, and as corollary of the latter, it will be revealed that even highly convinced advocates of non-cognitivism implicitly or unintentionally ground their legal theorization in cognitivist-type of assumptions. The author adds that a non-cognitivist judge has a serious risk of incurring in a certain type of professional hypocrisy that would consist in camouflaging the real reasons that led her to choose for the application of a norm instead of another, or to choose one method of interpretation over others, with empty formulas that have nothing to do with those real reasons.

As we will see, a non-cognitivist jurist approaches legal norms from a very different perspective than a cognitivist. Although it may sound shocking, justice has little or nothing to do with the work of the non-cognitivist from his perspective. This means that laws can have whatever moral content, that their reasonableness and/or their justice value is defined by the legislator, and that most of the time there are no strict reasons that justify what is that the legislator did when passing a law.

Keywords: cognitivism; non-cognitivism; practical reason; moral judgments; skepticism.

Some years ago, Professor Jacinto Valdés in his "Decalogue of the Contemporary Jurist" addressed 'all of those jurists who undertake the challenges posed by Modernity within the objectivity required by legal science'. While explaining the meaning of the "Alfonso X el Sabio" medal awarded by

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the Universidad Panamericana of Mexico to those professors with more that fifteen years of tenure, Valdés proposed his challenge to objectively-scientific-jurists in the form of ten demands or "commandments". Commandment number seven stated that such a jurist 'defends a cognitivist position, according to which goods or values belong to the world of reason and not of emotions so, therefore, are the object of legal argumentation'[1]. I will dedicate the next pages to address his proposal. I will do it in a three-milestone journey where I pretend to give: (i) an overview of the controversy between cognitivism and non-cognitivism, (ii) a review of the different theoretical positions around this controversy, and (iii) an assessment on the impact of such controversy in theory of law and in the way the work of the jurist is understood. The ultimate goal is to contribute with a sound foundation to Professor Valdés's demand. It is also intended to show that even highly convinced advocates of non-cognitivism implicitly or unintentionally assume cognitivist assumptions.

What is Non-cognitivism?

Man seeks knowledge. However, it does not necessarily follow from this fact that knowledge is possible, considering that knowledge consists of a certain interaction between and external reality and the cognitive subject. Since Pyrrho (360-270 BC)[2] many scholars have denied the possibility of this type of knowledge and, hence, the notion of truth. If there is no certainty that something external to the cognitive subject exists, then, to affirm the truth or falsity of a judgment about that external something is not possible either. Pyrrho stated that judgments are radically subjective, i. e. that there are no constitutive elements that enable us to affirm or deny the existence of the supposedly cognized object and, furthermore, its influence and the measure of such in the cognitive subject's judgement. For example, a judgment that 'the wall is white' would be nothing more than an occurrence articulated by a cognitive subject, neither it would manifest any relation with an object external to that subject, nor it would be verifiable in terms of truth or falsity. In other words, all judgments about reality would be conventional, since they are based on sensations, which are evanescent as they are. Any cognitive subject facing a white wall should limit himself to assert 'I see a white wall', and then it should restrain from any judgment *(epojé, εποχή)* about the existence of the wall and about whether it is white or not. According to Pyrrho, the latter is the attitude of the wise, which would allow him to reach the 'ataraxy' and, eventually, to the authentic and only possible happiness. A Pyrrhonist epistemology as such

[1] Gómez Bisogno and Francisco Vázquez, *Decálogo del Jurista Contemporáneo: memorias del pensamiento ius-filosofico de Jacinto Valdés Martínez* (Tirant lo Blanch 2019).

[2] Frank Copleston, *Historia de la Filosofía I. Grecia y Roma* (Ariel 2000–2004) XXXVIII; Richard Bett, 'Pyrrho' in Zalta Edward N. (ed), *The Stanford Encyclopedia of Philosophy* (2018) <https://plato.stanford.edu/archives/win2018/entries/pyrrho> (accessed: 27.01.2021).

becomes, thus, ethics. In other words, theoretical skepticism leads to practical skepticism.

For it to be sound, Pyrrhonist skepticism needs to defeat a first and evident counterargument, i. e. how is it possible to accept the judgment according to which all judgments are completely self-referential and based on mere sensations, if by doing so we necessarily surpass the limits of mere sensations. The same applies to the postulate that the only wise attitude consists in not holding any judgment at all, because it can only be formulated if based on shared starting points. As an answer to this first objection it could be argued, perhaps, that skepticism should not be considered refuted if only theoretical judgment and only practical judgment are not self-referential and go beyond sensations. However, if this were the case, both judgements would need a different grounding, or it would be needed to show how they are evident. Any assertion that abdicates to this demand is utterly meaningless, even if its conclusion is that thought itself is meaningless[3]. Pyrrho didn't carry out this attempt, nevertheless it may be found in later versions of his central theses.

Non-cognitivism is related to the initial skepticism, although it is not limited, as the latter is, to be a vital attitude, but a theory of knowledge. In general terms, non-cognitivism does not deny the possibility of knowledge, if, as Massini Correas explains, it is understood as an 'act of cognizance by which it makes to itself intentionally present some element or aspect of reality', being such presence one that 'has the constitutive characteristic of intentionality'[4], the latter being a 'spontaneous certainty that when knowing something the cognized object possesses a real existence in itself, independent of the act by which we cognize it'[5]. The claim of non-cognitivism is more limited than that. Robert Hartmann, for example, understands that non-cognitivists deny the following two propositions: (i) that value exists and (ii) that such value is knowable[6]. Mark van Roojen, meanwhile, portrays that non-cognitivists accept the following two negative assertions or thesis. The first one is the "non-factualist semantics thesis", according to which moral judgments do not express propositions or do not have substantive conditions of truth; in other words, neither truth nor falsehood of moral judgments can be ascertained "in a strong way". The second thesis is the "psychological non-cognitivism thesis", according to which, mental states conventionally uttered as moral affirmations

[3] See John Greco, 'La virtud, la suerte y el problema pirrónico' in Eraña Á and García C L and Kin P, *Teorías contemporáneas de la justificación epistémica. Volumen I: Teorías de la justificación en la epistemología analítica* (UNAM 2012) 439–67.

[4] Massini Correa Carlos Ignacio, 'La interpretación jurídica como interpretación práctica' (2005) 52 Persona y Derecho. Revista de fundamentación de las instituciones jurídicas y de derechos humanos 413–43, 416–7.

[5] Ettiene Gilson, *Constantes philosophiques de l'être* (Vrin 1983) 108 (as cited by Massini Correas, op. cit.). From this perspective, knowledge is "an intellectual operation by which the intellect appropriates or apprehends in a spiritual, objective or intentional way any reality or any aspect of reality, and not in a physical or material way" (Correas and Ignacio, (n 4) 417).

[6] Hartmann Robert S, *El conocimiento del bien. Crítica de la razón axiológica* (Fondo de Cultura Económica 1965) 37.

are mental states or beliefs that do not belong to the cognitive domain. Non-cognitivists generally accept both theses, although they frequently differ in the degree to which they do so, and there are even some who accept only one or the other thesis but not both[7]. Consequently, a wide range of diverse positions are encompassed under the umbrella of non-cognitivism, regardless the important variances among them. Cognitivism, as a counterpart, is characterized by affirming the existence of values and goods, and the possibility of its cognition.

This is a fundamental philosophical dissimilarity. As Francesco Viola puts it, 'cognitivism or non-cognitivism results in <…> the only dichotomy that practical reason cannot avoid and must face properly. This divergence divides the entire universe of practical reason in two: a cognitivist version and a non-cognitivist one <…>'[8]. Starting from here everything, even its objects of study are disconnected:

> <…> a non-cognitivist practical reason will turn its attention to the means and not the ends of human action. Thus, value judgments can be formulated referring only to means related to ends that are presumed but which, nevertheless, cannot be objectively cognized <…>. On the other hand, cognitivism affirms that also the choice of the ends is open to rational inquiry[9].

The Impact of the Debate about the Possibility of Knowledge in the Realm of Law

In the specific field of law, the distinction between cognitivism and non-cognitivism has important consequences in the way of describing, explaining and understanding the legal phenomenon. As a way to give a clearer view of the current discussion, the various positions on the subject will be classified into the four major groups that will be discussed below.

a. Positivism and Its Attempt to Create a Legal Science According to the Scientific Standards of Non-Cognitivism

Exclusive legal positivists postulate a radical form of non-cognitivism, which assumes both of van Roojen's theses. For these, the strictest adherents to the positivist separation thesis, there are no values, and the judgments that refer to them are beliefs without any objective bedrock. On this basis, the most well-known exclusionary positivists have tried to build up a theory of law free of moral/political values. To do it, they designated the norm as the exclusive object of legal discourse and, at the same time, advocated for an exclusively formal type of discourse. From this perspective, any underlying values in this

[7] 'Moral Cognitivism vs. Non-Cognitivism First' v Hegel W G F and Zalta E N, *Stanford Encyclopedia of Philosophy*, 2010 <http://dx.doi.org/10.1111/1467-9973.00225> (accessed: 27.01.2021).
[8] Viola Francesco, 'Ragione pratica e diritto naturale' (1993) 1 Ragion Pratica 63–4.
[9] Ibid.

type of discourse give rise to a vast arbitrariness without any rational limits and whose results have no real or objective grounding.

Ricardo Guibourg is one of the contemporary authors who subscribes to a very coherent positivist position like the one I have just presented. As he explains it,

> the frontiers of legal theory are determined by the definition of its object. If law is a normative system, legal theory will be limited to considerations about its structure, beginning in its logical basis, passing by its institutions and fundamental concepts, in the analysis of the mechanisms that determine the unity or plurality of systems, and ending in the creation and removal of standards as well as in the crucial phenomenon of jurisdiction and competence. But if the law is a value system, the legal theory will develop as an ethical theory, or at least as a moral proposal. And if the law is a state of affairs in the social sphere, legal theory will be a sociological theory or a political theory (the latter, particularly if the last two approaches are mingled)[10].

Within this context, Guibourg declares: 'I am a declared subscriber of the first and most strict of such borders', and adds 'I ask perhaps, as the last will of a condemned man, to be allowed to explain this position'. Thereafter he affirms that

> the law can be faced from any of these three points of view. In fact, it is addressed from the three, and it seems to be a very good thing that all three approaches coexist. But each one of them give rise to a different theory, closely connected to a different method. One is sociology as an empirical science; another is moral as a set of reflections that, no matter how much we share them (and this is not always the case), they are not subject to an ultimate verification procedure; and a very different thing is the study of law as law, which is a knowledge in constant construction and exercise by jurists[11].

Precisely in this last sentence it becomes evident that Guibourg's reasoning, and that of positivist authors like him, postulates a moral skepticism which hides a regress circularity that seems not to be justifiable whatsoever. It seems that the scope of legal science is reduced to what jurists do, and that this is verifiable according to modern practices on the basis of preferences which are intended to be rationally based in the fact that such is the way in which jurists 'construct and exercise' the law. The regress puzzle arises when we consider that the judgment according to which the cognitive reality is limited to the empirical facts is not itself empirically verifiable at all, and for that reason ends

[11] Francesco (n 8) 63–4.

up being an option based only on ideology[12] or, in some cases, even in prior moral decisions[13].

b. The Critical Legal Studies and the Law as a Tool for Emancipation

Andrés Molina Ochoa defines CLS, as a

> left-wing movement of legal thought originated in the late seventies and early eighties in some law faculties of the United States. More than a dogmatic school in which all participants adhere to a set of theses, CLS should be understood as a platform used by American law professors to spread their philosophical and political agenda, to transform the hierarchical structure of the law faculties in their country[14].

Critical authors object Exclusive Positivism, and argue that the legal discourse is inevitably evaluative. They understand, however, that the values that underlie it are purely cultural products, without any reference to objects in reality, and sustain that these values are generally, although not necessary, perverse. From this perspective, the law is no more than a mechanism of domination from those in power to safeguard status quo and control over others, as well as to prevent the liberation of the oppressed. In that state of affairs, the task of legal theory would be to unmask this oppression and transform the legal system into a tool that generates social equality and a better distribution of goods. All this explains why they give such a great importance to legal teaching[15].

Carlos Massini Correas refers to the American critics with the following words:

> <…> the CLS borrowed from the American realists the idea that real law, i. e. the one applied by the courts of justice, is highly irrational, indeterminate and is only minimally dependent on the wording and structure of the legal system. As they see it, the road for solving legal disputes is found in other

[12] Pedro Serna, 'Sobre las respuestas al positivismo jurídico' (1997) 37 Persona y Derecho 296; Andrés Ollero, ¿Tiene razón el Derecho? in *Entre método científico y voluntad política* (Congreso de los Diputados 1996) chp. I y II.

[13] Cristóbal Orrego, *Hart, abogado del positivismo jurídico* (Eunsa 1997).

[14] Andrés Molina Ochoa, 'Estudios críticos del Derecho' in *Enciclopedia de Filosofía y Teoría del Derecho, vol I* (UNAM 2015) 435–58, 435.

[15] 'Crits are the product of a generation that grew with the revolutionary and emancipatory hopes of the 1960's but became skeptical of the transformative impact that certain legal institutions as human rights or the rule of law could have. The crits, moreover, constitute a generation of professors aware of both the transforming role of the academia in society, and of its role in the replication of the most oppressive forms of power. Therefore, the ground for battle of the members of the CLS is mainly academic. The idea is to change not only the bureaucratic structures that prevail in the universities, but to review and oppose to those disciplines of knowledge that contribute to perpetuate systems of domination. The crits, therefore, maintain confrontational relations with the schools of thought which have influenced them most. What is sought is not only to take advantage of the most useful of their theses, but to reject those elements of their theories that hinder the dynamics for the realization of the necessary societal change. Among the many and heterogeneous theories that crits have appropriated, perhaps the two most important are the American legal realism, and neo- and classical Marxism' (Molina Ochoa (n 14) 442).

non-legal elements, which are hidden and reside in psychology, political ideology or social status of the judges. However, what really distinguishes CLS with realists is that for the former this legally and rationally skeptical view about the facts of legal cases and about the meaning of legal norms is part of a comprehensive scheme under a hermeneutics of suspicion; in other words, what in a realist view appears to be just as the mere result of a naked cynical acceptance of the experience of the juridical life in the courts of justice, becomes for the CLS an integral explanation of the law in critical-skeptical and emancipatory terms[16].

CLS formulates a strong and in-depth criticism against positivism[17]. Its analysis of juridical discourse makes it clear that the once acclaimed asepsis of non-legal values in the juridical science is not more than a naïve and never satisfied aspiration that hides pure irrational ideology or, what is worst, irreflexively assumed values. However, CLS argument doesn't goes unscathed, since it also incurs in a reductivism that frustrates their attempt to provide the law with rationality. It is, in fact, a triple one: on the one hand, it affirms that all values in law are merely political, or, in a greater extent, social; on the other hand, it denies or, strongly undermines the possibility of a scientific approach to morality; and finally, it rejects the possibility of a connection between politics and morality. As a consequence of this, and as another type of reductivism it appears inevitable the idea that there is a right to violence. The latter it is explained in terms of fundamental rights, in the sense that every "battle in the political arena" and all the "emancipation" process undertaken by the law has the essential task of the realization of democracy and the respect for human rights. Nonetheless, the problem is that neither democracy nor human rights are justified without recourse to superior, i.e. moral, reasons[18], or, in a concept of human dignity with a solid foundation that permits its absolute and consistent respect[19]. All of this cannot be achieved if morality is reduced to an ideology or to a desire of domination.

[16] Massini Correas Carlos Ignacio, 'El cierre de la razón en el Derecho' (2011) 64 Persona y Derecho 121–142, 125.

[17] See, for example, Carlos María Cárcova, *Las teorías jurídicas post positivistas* (2nd ed, Abeledo Perrot) cap. 3. This author expresses in a different place that 'vernacular positivists usually incur <…> in theoretical equivocations and rhetorical excesses, self-presenting themselves as the only ones that exhibit a complete and systematic thought, capable of being considered an "authentic" theory of law. Being necessary to refute this argument, it should be said that on the contrary, which facilitates the systematicity of this legal theory is its reductive and, therefore, insufficient character which only considers the legal phenomenon from a normative perspective, leaving "outside" and deeming irrelevant, its ethical, political, teleological dimensions, etc. A long time ago, such an equivocal conviction was put at jeopardy by the fine analysis of some of its most lucid representatives' (Cárcova Carlos María, 'Notas acerca de la teoría crítica del Derecho' (2003) 38 Revista Jurídica Universidad Interamericana de Puerto Rico 187–97, 187).

[18] See Carlos S. Nino, *Derecho, moral y política. Una revisión de la teoría general del Derecho (*Ariel 1994).

[19] Pedro Serna, 'El derecho a la vida en el horizonte cultural europeo de fin de siglo' en Serna P and Correas M and Ignacio C, *El derecho a la vida* (Eunsa 1998) 23–79.

ПРАВО УКРАЇНИ • 2021 • № 1 • 139-153

c. Transpositivism: A Wager in Favor of a Possible, but Weak, Reason

Transpositivism embraces a weak cognitivism[20]. In general terms, it accepts the first of van Roojen's thesis, but not the second. That is to say, they affirm that moral judgments refer to reality, specifically to values, but, at the same time, that this reality is merely a human construction, i. e. the product of a procedure or of a discourse. Therefore, such values cannot be true or false, but only procedurally correct or incorrect. In the specific realm of law, this attitude postulates that when a judge or a court has to resort to morality to clarify any indeterminations in the law she is guided by a justified and knowable morality. This morality is the same that also works as the criteria for evaluating the judicial decision at a posterior stage. As Atienza puts it:

> <…> in moral philosophy there are competing proposals of normative ethical theories that sustain a moral objectivism (with different levels of intensity), and that could be apt to <…> provide a method to ascertain which is the correct morality. In my opinion, the most appropriate position is the so-called constructivism or moral proceduralism, as subscribed by Rawls, Habermas or Nino, which, incidentally, are substantially coincidental. All of these approaches maintain that the principles of a justified morality should be agreed by consensus of a number of agents according to some more or less idealized rules. Thus, the criteria for evaluating judicial reasoning refer, at some point, to a rational argumentation. On the flip side, it is important to note that defending such objectivist position on morality is not the same as defending moral absolutism. An objectivist would argue that though moral judgments tend to correctness, they are open to criticism and subject to rational discussion and, therefore, can be modified, i. e. there is no such a thing as absolute moral judgements. Also, the correctness in moral judgments is not at the same level of the truth in scientific judgments; in other words, moral objectivity is analogous, but not equivalent to scientific objectivity[21].

Transpositivism face numerous objections, I will briefly refer two of them. First, it is said that it incurs in the proceduralist fallacy. Carlos I. Massini Correas puts it this way:

> [the proceduralist fallacy] consists of trying to justify the conclusions of an argument by an exclusive resort to the argumentation procedure. This is problematic, considered that it is impossible to obtain a rationally justified substantive content in the side of the conclusion, without reference to a rationally justified substantive content in the side of the premises. Thus, if the content of the premises lacks foundation, then the content of the conclusions cannot be considered as true[22].

[20] See Massini Correas Carlos Ignacio, *Filosofía del Derecho,* tomo I (Abeledo Perrot) 222–3.
[21] Manuel Atienza, *Curso de argumentación jurídica* (Trotta S. A. 2013) 561–2.
[22] Massini Correas Carlos Ignacio, *Constructivismo ético y justicia procedimental en John Ralwls* (UNAM 2004) 120.

A rather similar concern has been expressed by Arthur Kaufmann, for whom 'it is not possible to obtain substantive contents solely based on a procedure or on formalities, or at least by counting solely on these. The circular nature of such demonstration is evident'[23]. Similarly, Otfried Höffe[24] claims that constructivists incur in a "normativist fallacy". In short, this means that each time a moral content appears as a result of the procedure, it is because the latter has ceased to be a mere procedure and at some point, has conceded strictly substantive evaluative premises, i.e. premises that address certain vision about the good[25].

A second objection is related to the moment of the decision. According to this vision, the process undertaken by the judge to clear out the gaps, indeterminations or opacities of the law will never lead to a correct response; at its most, it will reduce the dimness of these obscurities, but it won't eliminate them completely. A proceduralist approach is unable to give a sound answer to this objection. Therefore, despite reducing a "strong" voluntarist view akin to Kelsen's positivism, a weak but pervasive voluntarist indetermination is still present; in other words, in the final moment of the argumentation the obscurity persists and the decision turns out to be irrational, because the arguments used to sustain the decision elude a coherent and smooth transition from the supporting legal principles to the final content of the resolution[26].

d. Iusnaturalism Against the Challenge of Non-Cognitivism

The Natural Law Theory rejects the two main theses of non-cognitivism and, according to its theorists, it does so without incurring in the naturalistic fallacy, i.e. it doesn't claim any such thing as "moral facts". John Finnis, one of the most prominent authors of the New Natural Law Theory, is the one who has discussed these issues with more depth and impact in the recent decades. He and his followers aim to the rehabilitation of practical reason, that has been discarded as an object of study since modernity. Among the authors that follow Finnis in this intent we found Prof. Jacinto Valdés and his decalogue. In the following, we will try to show such a position may be considered as the definitive one in this debate.

Natural Law theorists admit: (i) that the good is not verifiable in the sense that moderns verify things (for example, in the sense used by Guibourg some paragraphs above); (ii) that there are no "moral facts"; and, (iii) that from nature considered as a set of describable and empirically verifiable data

[23] Arthur Kaufmann, 'En torno al conocimiento científico del derecho' (1994) 31 Persona y Derecho 19; Arthur Kaufmann, *La filosofía del derecho en la posmodernidad* (Temis 1992) 43.
[24] Otfried Höffe, *Estudios sobre teoría del derecho y la justicia* (Alfa 1988) 127.
[25] See Juan Carlos Bayón, *La normatividad del derecho: deber jurídico y razones para la acción* (Centro de Estudios Constitucionales 1991) 228.
[26] See José-Antonio Seoane, 'Un código ideal y procedimental de la razón práctica: la teoría de la argumentación jurídica de Robert Alexy' in Bermúdez P S (coord), *De la argumentación jurídica a la hermenéutica: revisión crítica de algunas teorías contemporáneas* (Comares 2005) 105–96.

(an "is"), one cannot derive moral propositions (an "ought"). Natural Law theorists argue that neither the Classical Natural Law Theory, nor the New Natural Law Theory have or have ever affirmed this kind of derivations of propositions from descriptions. On the contrary, it appears that in the debate between positivism and natural law theory, a kind of strawman fallacy has taken place, whereas, because of lack of rigor or perhaps, in some cases, due to lack of scruples, one part of the debate tends to tailor its opponent according to its own criticism[27].

For Finnis, practical reasoning has as its starting point a series of evident goods, which cannot be proven but only shown, which he calls "basic human goods", "values" or simply "goods". He lists seven goods: life, knowledge, play, aesthetic experience, sociability or friendship, practical reasonableness and religion[28], nonetheless, he acknowledges that the door is open for the deepening or broadening of this enumeration[29]. He also explains that whoever tries to reject any of these basic human goods incurs in a performative contradiction.

Therefore, since at the starting point of the natural law stands a set of goods, and as according to the first principle of practical reasoning (or synderesis) "the good must be done and the evil must be avoided", there is no logical leap from the "is" to the "ought", or from the field of descriptions to the real of prescriptions, because the departure point of practical reason is always located in the latter.

The insistence of Finnis in the idea of the non-derivative nature of the human goods may be due to his education and teaching context that has always been strongly influenced by the analytical legal tradition. For this he has been strongly criticized and even accused of being excessively rationalist by other natural law theorists more related to the classical tradition of Aristoteles and Aquinas[30]. Nonetheless, such critics fail to notice, as Massini Correas points out, that

> Finnis's fundamental position in this point has a epistemological and a non-ontological character <…> and therefore Finnis does not deny either of the following: (a) the existence of human nature; (b) the possibility to get to know the structure and main notes of this human nature; (c) that this human nature necessarily corresponds to the central dimensions of human flourishing (i. e., that life is a human good because the human person is a living being, that knowledge is a human good because the human person is a rational being, that sociability or friendship is a human good because the human person is constitutively social, and so on and so forth); and, (d) that any affirmations

[27] See John Finnis, *Natural Law and Natural Rights* (2nd ed, OUP) 23–49.
[28] Ibid 85–95.
[29] Ibid 90–2.
[30] See, for example, the critics of R Hittinger, *A Critique of the New Natural Law Theory* (University of Notre Dame Press 1987), and F Di Blasi, *Dio e la legge naturale. Una rilettura di Tommaso d'Aquino* (Edizione ETS 1999) 17–51.

about the essential attributes of man are not suitable for dialectic argumentation and for the elucidation of the principles of the natural law[31].

The Jurist and the "Cognitive Posture"

Prof. Valdés addresses his commandments to law professors. The vast majority of them are also attorneys or judges. His choice of the imperative "defends" in his seventh commandment insinuates that the defense of cognitivism consists of a moral obligation for his audience. In the following paragraphs, I will highlight why this mandate of defense is rightly justified.

A non-cognitivist jurist approaches legal norms from a very different perspective than a cognitivist. Although it may sound shocking, justice has little or nothing to do with the work of the non-cognitivist from his perspective. This means that laws can have whatever moral content, that their reasonableness and/or their justice value is defined by the legislator, and that most of the time there are no strict reasons that justify what is that the legislator did when passing a law. Maybe there are motives, but these are irrational and, thus, they are no true reasons. Getting to know these motives might be useful or even crucial in order to understand what the legislator meant when saying what she said but it is irrelevant towards the evaluation of the reasonableness/unreasonableness of her words, or of its correctness/wrongness. Any refusal to introduce any kind of evaluation to the material content of the law is usually justified by two theses: (i) first, the of lack of legislative power; (ii) and second, the impossibility of addressing the reasonableness of the motives that inspire legislation. The latter, which was mentioned above, suggests that any evaluation of reasonableness would introduce arbitrariness and would involve the imposition of one's moral criteria and views of the world (which are all irrational) to others. According to the former, if the jurist is to evaluate the reasonableness of the motives of any legislation, by doing so she would exceed her judicial power, and thus, she would become in a way a legislator. There is still a third thesis, related to the previous ones, although, paradoxically moral: if every evaluations is always irrational, then trying to evaluate the legal reasoning of the judges or legislators on the basis of a particular idea of the good will always be an attempt of imposing one's will to another person or group of persons, i.e. it constitutes an unjustified attempt of domination that the lawyer (jurist, attorney or judge) has an ethical duty to avoid.

A cognitivist jurist, on the other hand, upholds the possibility of getting to know the reasonableness of the aims that the legislator is seeking with the laws she enacts. This has two immediate consequences. The first is that discretion is not arbitrariness, because when the judge acts on a discretionary basis she has always the guidance of her reason. In other words, it is possible to show the

[31] Massini Correas Carlos Ignacio, 'Sobre bienes humanos, naturaleza humana y ley natural. Reflexiones a partir de las Ideas de Javier Hervada y John Finnis' (2015) 71 Persona y Derecho 229–56, 243.

reasons she had when choosing one of the possible courses of action over the others in the process of solving indeterminacies and gaps in the law. The second consequence is that the judge may decide that the reasons that the legislator had when enacting a particular legislation are not strong enough and may decide to displace them by other more powerful reasons which were not considered or were considered irrelevant by the latter. For example, if those most powerful reasons had a constitutional impact, we would face a constitutional case, and the judge would have the obligation to declare the unconstitutionality of the challenged legal rule or to seek for a declaration of its unconstitutionality, depending on the role assigned to her by the constitution of a particular legal system.

A cognitivist jurist would tend to refute both theses of non-cognitivism as follows. Against the first thesis, she would argue that ruling in favor of the reasonableness of the law and of the acts of the legislature is not becoming a legislator. She would accept that a multitude of laws, which are inspired by weak reasons but that have no impact on fundamental rights or that lack any relevance of a constitutional nature, might not be struck down and should be obeyed, even if there are other better ways to achieve justice. However, when laws have a constitutional nature or have an impact on fundamental rights, her duty as a judge is to strike down the law. The latter does not convert her in a legislator, but strengthens her role as a constitutional judge, rather than a judge limited to review solely the legislation. Against the second thesis, a cognitivist would affirm that it is possible to know the reasonableness of the reasons that guided the legislator to enact a rule, and that any declaration of unreasonableness of the motives argued by the legislator in such enactment is not only not arbitrary, but it is the only way to avoid any arbitrariness at all.

After explaining all the above, I would add that a non-cognitivist judge has a serious risk of incurring in a certain type of professional hypocrisy that would consist in camouflaging the real reasons that led her to choose for the application of a norm instead of another, or to choose one method of interpretation over others, with empty formulas that have nothing to do with those real reasons. Frequently, cryptic formulas, cumbersome paragraphs, and a tortuous language constitute the apparatus used in this camouflaging procedure. Luigi Lombardi Vallauri several years ago referred to this way of proceeding as an "esoteric legal technicality"[32]. The real reasons that underlie the course of action and reasoning of the judge, I argue, remain hidden behind the veil of this technicality. Of course, acting in this way makes the law deeply undemocratic, because getting to know the real reasons the judges have for their decisions turns out to be extremely difficult and, because of the complicated

[32] Luigi Lombardi Vallauri, *Corso di Filosofia del Diritto* (CEDAM 1981). About this author, see Luigi Lombardi Vallauri (ed), *Scritti per Luigi Lombardi Vallauri* (Wolters Kluwer-Cedam 2016).

language used in its argumentation, only other professional jurists are able to understand them.

Furthermore, a greater threat on the horizon of a non-cognitivist jurist is her irresponsibility. For Lombardi Vallauri, a non-cognitivist jurist calms her conscience by voluntarily ignoring the justice or reasonableness of the solutions to which she arrives with her decisions. For her, the problem of justice is exclusively a problem for the legislator to solve. This transfer of responsibility more often than not leads to the implantation of discouraged and skeptical judges, at first, and cynical, not much later.

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"ЗАХИСТ" КОГНІТИВІЗМУ І ПРАВО

Анотація. Стаття складається із трьох важливих частин: (i) огляд полеміки між когнітивізмом і некогнітивізмом; (ii) огляд різних теоретичних поглядів навколо цієї полеміки; (iii) оцінка впливу такої полеміки на теорію права та на те, як розуміється праця юриста. Кінцева мета полягає у тому, щоб продемонструвати (якщо дотримуватися послідовно) некогнітивізм може призвести лише до незрозумілості феномену права. Одночасно, і як наслідок останнього, буде виявлено, що навіть переконані прихильники некогнітивізму побічно або ненавмисно обґрунтовують свою юридичну теорію на когнітивістських положеннях. Автор додає, що захисник некогнітивізму має серйозний ризик спричинити певний тип професійного ли-

цемірства, яке полягало б у маскуванні справжніх причин, які змусили його вибрати для застосування одну норму замість іншої або надати перевагу одному з методів інтерпретації перед іншими, із порожніми формулами, які не мають нічого спільного з цими реальними причинами.

Як ми побачимо, юрист-некогнітивіст підходить до правових норм із зовсім іншої точки зору, ніж когнітивіст. Хоча це може здатися шокуючим, справедливість має мало або взагалі нічого спільного з роботою некогнітивіста із його точки зору. Це означає, що закони можуть мати будь-який моральний зміст, що обґрунтованість та/або цінність їхньої справедливості визначає законодавець, і що у більшості випадків немає чітких причин, які виправдовують те, що робив законодавець під час прийняття закону.

Ключові слова: когнітивізм; некогнітивізм; практичний розум; моральні судження; скептицизм.