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The method and ob theory according to Redondo

Paula Gaido
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This article is a translation of:

El método y el objeto de la teoría del derecho según Cristina Redondo [es]

Abstract

In *'Internal' Legal Positivism*, Cristina Redondo attempts to articulate the metatheoretical presuppositions of an approach directed to the study of law that explains its specific normative character. In doing so, she argues for, among others, two main theses: (i) legal norms necessarily constitute reasons in a formal sense, regardless of the substantive correctness of the content they express; (ii) legal theory can be morally neutral with respect to its object. This means that, according to Redondo, it is possible to formulate purely descriptive statements that refer to the content of law; that is, it is possible to formulate them from a point of view that does not presuppose the acceptance of that content. The expression "'internal' legal positivism" is the terminology chosen by Redondo to account for the type of methodological approach necessary for a positivist theory of law *à la Hart* to be possible. In this article, I will summarize the main theses defended by the author in her book and trace the central questions that have been at the heart of the discussion at the *Symposium* on *'Internal' Legal Positivism* published in this journal.

Introduction

1 In *'Internal' Legal Positivism* (ILP),[1] Cristina Redondo attempts to articulate the metatheoretical presuppositions of an approach directed at the study of law that explains its specific normative character. In doing so, she argues for, among other things, two main theses: (i) legal norms necessarily constitute reasons in a formal sense, regardless of the substantive correctness of the content they express; (ii) legal theory can be morally neutral with respect to its object. This means that, according to Redondo, it is possible to formulate purely descriptive statements that refer to the content of law; that is, it is possible to formulate them from a point of view that does not presuppose the acceptance of that content. The expression "'internal' legal positivism" is Redondo's chosen terminology to account for the type of methodological approach necessary for a positivist theory of law *à la Hart* to be possible.

2 Redondo maintains that she does not seek to argue that it is only from a specific methodological approach that it is possible to account for what law is. She assumes, rather, that law is an abstract normative entity that is not reducible to empirical or natural facts, and wonders what the methodological approaches from which it is possible to account for this kind of object could be. Law, however, could be initially configured in another way, and this would lead to other methods being suitable for its study.[2] In her words:

> The conclusion is that there is no single method of study in legal theory and that this method depends on the way in which its object is configured...[3]

3 At the end of the book, she maintains:

> the enterprises that identify these different types of concepts do not presuppose each other and are relatively autonomous. Autonomy that the aforementioned positions seem not to notice when they strive in the search for 'the' essence of concepts. Essence that obviously -and in this they are not mistaken- the method itself is the only one that is in a position to grasp.[4]

4 In articulating her arguments, developed throughout the five chapters that make up the book, Redondo starts from the "aspect of Hart's work that is most illuminating and enduring [and that] refers to the need to understand rule-governed behavior from the 'internal point of view'" (the translation is mine).[5] She focuses on the ambiguity raised by the distinction between internal point of view (IPV)/external point of view (EPV), starting from the discussion generated around Herbert Hart's work.[6] She then develops her arguments from theses provided by Riccardo Guastini, Alf Ross, Eugenio Bulygin, Ronald Dworkin, Fernando Atria, and Bruno Celano, among others, to introduce nuances that lead us to her own theses on law, which rest, in a related way, on the defence of a possible method for its study.

5 The fruitfulness of Redondo's book made it the subject of a *Symposium* presented in *Revus - Journal for Constitutional Theory and Philosophy of Law,* for the discussion of some of the theses sustained therein.[7] It was a *Symposium* "in progress", which spread over 2020-2022. The incisive articles by Jorge Rodríguez, Santiago Legarre, Rodrigo

Sánchez Brigido, María Gabriela Scataglini, Ezequiel Monti, Pablo Rapetti, and Veronique Champeil-Deplats tested some of its main arguments.[8] The development of this *Symposium* concludes with a response to the criticisms by Redondo,[9] and this preliminary paper. In this article, I will summarize the main theses defended by the author in *Positivismo jurídico 'interno'* and trace the central questions that have been at the heart of the discussion.

2 Main thesis defended in 'Internal' Legal Positivism

6 The arguments Redondo offers to support the main theses set forth in her book are complex, and I do not aspire here to fully reconstruct them. Rather, I will limit myself to set out the conclusions of such arguments, i.e., the theses themselves. As I have already mentioned, the main theses that Redondo develops in her book, at a methodological and substantial level, are a follow up to the discussion developed around the IPV/EPV distinction Hart used to account for the method and object of legal theory.[10]

2.1 The legal method according to ILP

7 Regarding the method to be followed in legal theory, Redondo criticizes the point on which legal realists and interpretivists coincide, which consists in pointing out that if the object of study is normative, the discourse that identifies it is in itself a practical discourse and presupposes the adoption of the IPV, understood as a practical attitude of acceptance or justifying belief with respect to the object to which it refers.[11] Legal realists and interpretivists would adhere to the thesis of the impossibility of a strictly theoretical discourse of law, when it is conceived as a normative object. The author, on the contrary, defends the thesis of the possibility of both internal and external knowledge of social institutions.[12] To this end, she proposes to account for the ambiguities that affect the distinction at stake and that, according to her approach, permeate the arguments for the conceptions of law just mentioned.

8 Redondo also notices that the IPV/EPV distinction has been used with different meanings; she distinguishes between a semantic sense and a pragmatic sense. In a semantic sense, the IPV/EPV distinction has been used to account for two ways of understanding the theoretical approaches that seek to describe social institutions.[13] Those who seek to describe social institutions from an IPV, try to capture and explain, from the perspective of the third person, *the concepts with which the participants refer to the institution, which they accept in the first person*.[14] Those who seek to describe social institutions from an EPV are trying to capture and explain, from the third-person perspective, only empirical aspects referring to the institution, in terms of causal relationships.[15] When the distinction is used in this sense, the author suggests using the expressions "IPV_1/EPV_1".

9 In a pragmatic sense, the IPV/EPV distinction would be used to account for the presence or absence of an agent's practical attitude of acceptance of the normative content of certain social institutions.[16] Those who adopt the IPV with respect to these normative contents not only use them, but also accept them, in the sense of justifying them. Those who adopt the EPV with respect to these normative contents neither

accept nor justify them, but limit themselves *to giving an account of them*.[17] When the distinction is used in this sense, the author suggests using the expressions "IPV_2/EPV_2".

10 With these distinctions in mind, Redondo argues that while the existence of normative contents presupposes the adoption of an IPV_2, their knowledge does not presuppose it.[18] To know normative contents, choosing between adopting a IPV_2 or EPV_2 remains, for the author, an open methodological choice.[19] In her approach to the study of law, Redondo opts for the IPV_1/EPV_2 methodological approach, which according to her characterization, as we have seen, aims to explain what legal norms are according to the point of view of the participants of legal practices, leaving aside any justificatory enterprise.[20] Thus, according to this proposal (which follows Hart), the theory adopts the point of view of the participants in order to understand the practice in a meaningful sense, but this does not imply an acceptance or justification of the institution. In the author's words:

> internal positivism admits that the existence of an institution presupposes the existence of a justifying theory that attributes some value or function to it. Otherwise the institution in question would not exist. What this position holds is that it is possible to identify an institutional concept, i.e. a set of properties that is exemplified in every instance -or in every paradigmatic instance- of the same kind of institution, and that this does not mean offering a theory that rationalizes, makes intelligible, or justifies the content of them... [21]

11 She adds:

> The identification of an institutional concept always presupposes the adoption of an internal point of $view_1$, however, it does not necessarily presuppose the adoption of an internal point of view2.[22]

12 The adoption of the methodological approach Redondo promotes has in its background a potential practical implication: if it were not possible to adopt IPV_1/EPV_2 as a methodological approach, it would not be possible to refer to institutions that totally lack justification and deserve to be ignored in the determination of how one should act.

13 It is important to emphasize that Redondo (following Hart and, in particular, Raz) [23]is thinking that even if one has *to participate* in a common language or way of life in order to account for the understanding of law from the internal point of view, this does not necessarily imply *sharing* such a point of view.[24] The author's idea is that the concept of law (and concepts in general) held from the internal point of view, that is, from the point of view of those participants who constitute the practice, can be apprehended by any rational being willing to make the necessary effort to do so.[25] Whoever has this interest can carry out exercises of translation between the concepts she observes and her own, learn them in a direct way, introduce herself into the practice, etc... Her thesis is that objective knowledge of such concepts is possible.[26]

2.2 The object of legal theory according to PJI

14 The assumed starting point is that the object of legal theory is constituted by a specific type of norm, which can be qualified as legal. The legal duties that these norms impose must be understood as institutional objects. In turn, the author maintains that law is constitutive of legal reasons, and that these reasons must be understood as

formal ones. In other words, from IPV_1/EPV_2 the author detects that legal rules that are constitutive of reasons for action are recognized as premises of formal arguments in each of the cases in which they apply (and not necessarily as substantive reasons to act as they require). I will devote the next sections to breaking down these theses.

2.2.1 Existence and knowledge of legal content

15 Redondo argues that although the existence of law rests on empirical facts, the knowledge of the legal duties it imposes is not empirical, but conceptual. Her arguments aim to show why enterprises that reduce legal duties to the individual practices and/or actions that gave rise to them are mistaken. Legal duties supervene on the individual practices and/or actions that support them, and have to be understood as institutional objects/concepts. This implies, on the one hand, that they are not empirical facts and, on the other hand, that they are not necessarily conventional facts.[27] An institutional object, in the author's words, is something that:

> originates from and depends on people's beliefs and attitudes, but is not necessarily a conventional object, and is not necessarily identified as conventions are identified.[28]

16 They are ideal entities, contents of meanings dependent on the empirical facts that give rise to them, but that are not reducible to them.[29]

17 Regarding the knowledge of legal duties, the author agrees with Hart that the determination of the content of law consists in a cognitive exercise.[30] However, she disputes a possible reading of Hart's thesis that what the law commands leaves out disagreement.[31] The author is interested here in stressing that one thing is (i) the identification of what the law commands, given a specific generic case (as a cognitive exercise); and another is (ii) the determination of the solution to a supposed individual case, when the law establishes different duties that are incompatible with each other (as a creative exercise).[32]

18 In relation to (i), she points out that it is not true that the cognitive exercise ends when a disagreement arises with respect to what the law prescribes. The cognitive exercise is extended when there is disagreement about it.[33] In these cases of disagreement, a "multiplicity of mutually incompatible true interpretative statements" may arise. For the author, a commitment to cognitivism does not imply a commitment to the thesis that law offers a single correct answer. And she would dispute those who argue that Hart is committed to the thesis that when law offers more than one contradictory answer it leaves the case unresolved: "The possibility of multiple interpretations does not imply that any interpretation is possible,"[34] she argues. The law resolves the question, Redondo would say, only in a contradictory way. The need to choose between different contradictory normative solutions, and give rise to a new normative scenario, only arises if one arrives at (ii), that is, at the application of the law: when a solution must be given to a particular case.[35]

19 The truth of legal statements is directly determined by existing legal duties, which depend on (are relative to) a given practice of recognition but that are not reducible to it.[36] That is, what makes them true are the rules followed by the practice, not the practice itself. This leads the author to argue that the practice might misapprehend the rule it aspires to follow, and that it is up to legal theory to unfold the full content of the legal rule and the duty it imposes, a task that is not based on empirical, but conceptual, inquiry.[37] In her words:

> The aim is to identify the contents or criteria that are (explicitly or implicitly) used as a basis in a practice of argumentation or justification of actions. These contents have a normative or justifying character, insofar as they are offered as support for demands, rewards or sanctions. The explicitness of these significant contents and their qualification as legally due, although it has a semantic aspect, does not consist in semantic analysis, but in an attempt to grasp - starting from certain contents explicitly admitted as the basis of legal criticisms and demands- what other contents we have reason to consider implicitly connected to legal sources, i.e. the correct way to extend, restrict or partially replace the contents explicitly used in the argumentation practice.[38]

20 And she adds:

> the effort is aimed at ascertaining which contents are legal reasons within this practice.[39]

21 Finally, Redondo argues that there is no definitive test or infallible ideal point of view for determining the truth of statements expressing legal propositions. She proposes understanding legal knowledge as any other non-formal knowledge, and that, in order to be considered founded, it is sufficient to exhibit public reasons, accessible to any rational being "who is willing to make the effort to learn the necessary concepts for it".[40]

2.2.2 Legal norm as formal reasons

22 In the contemporary debate, the question of legal normativity has been understood as a question of the type of reasons for action that law rises.[41] Redondo is a pioneer and central author in the discussion on the type of reasons constituted by law.[42] She argues that law is necessarily constitutive of reasons in a formal sense, irrespective of its conclusive force on what ought to be done.[43] From her IPV_1/EPV_2 methodological approach, legal rules that are constitutive of reasons for action are "genuine rules", which implies that they invariably establish reasons for what ought to be done in legal terms.[44] In doing so, she rejects the need for a commitment to a moral value from the point of view of the participants in legal practices.

23 To say that legal norms constitute invariably relevant reasons means that, for the author, they are logically undefeatable and used as premises in formal arguments in each of the cases in which they apply. With this, the author alerts us that under the expression "defeasibility of legal norms", two different types of problems are pointed out: a formal one, related to the defeasibility of the statements that express norms in logical reasoning; and a substantial one, related to the defeasibility of the weight of norms in a process of the balancing of reasons.[45] The invariability or indefeasibility constitutive of the concept of legal norms, from the methodological approach IPV_1/EPV_2, for the author, is the formal one. Legal rules, insofar as they are genuine rules, have invariable practical relevance because it is possible *to identify* the content of the legal statement that describes it, being it opaque to any additional, underlying or supervening, condition. That is to say, it leaves out the possibility of identifying any exception not made explicit by the legal system beforehand.[46] This is the way in which, for Redondo, legal normativity for a legal positivism *à la Hart* would be best reconstructed.

24 The author, however, takes an additional step in her argument on this point, which seems not to circumscribe the idea of practical invariability to a strictly formal question. She adds that the practical invariability of legal norms understood as the possibility of

identifying the content of the legal statement that describes it, being it opaque to additional considerations, implies that they have the capacity to offer *some resistance* for the normative solution they propose.[47] In her words:

> The theses of exclusionary and invariably relevant character that are needed to account for the specific character of "genuine" norms do not refer to the substantial weight that they may or may not in fact have, either from an objective (moral) point of view or from a subjective point of view, in the process of making a decision by an agent. Those who ought to follow a legal rule are ought to offer it as a reason-premise whenever it is applicable and *to respond for the expectation that the generality the rule produces, that is, to use it in all cases in which it is applicable, and, if it is the case, to show the reasons that prevail over the rule by imposing a conclusion that departs from it* (the underlining is mine). [48]

25 Redondo emphasizes that their *final weight or force* in the justification of a decision-making process remains, in principle, an open question, and a definition in this respect would not be necessary for an explanation of their practical character.[49] However, even if the final weight of legal norms could indeed remain an open question, the author does not explain why, from her methodological approach, legal norms constitute a contributing reason at all. To say that the generality of the norm triggers an expectation of applicability as something that can be explained in purely linguistic terms would not seem to be sufficient. The idea of a reason "contributing" to the construction of a justification, which includes having “to show the reasons that prevail over the rule by imposing a conclusion that departs from it," to be something more than a mere postulation, would seem to presuppose some substantive theory. This is because in order to account for its defeasible substantive weight, it seems necessary to explain the sense in which it has any weight at all, at least initially.[50] The question that it is thus possible to put to the author is, in what sense, from a theory that only seeks to account for the point of view of the participants of legal practices in neutral terms, is the reconstruction of legal normativity in formal terms merely informative?

3 Key questions that structure the debate

26 It is possible to identify a common observation among the critics, and this is the stimulating experience that always comes from reading Cristina Redondo’s wirtings, and *'Internal' Legal Positivism* in particular. The criticisms articulated by Rodriguez, Legarre, Sanchez Brigido, Scataglini, Monti, Rapetti, and Champeil-Deplats were sharp and developed around the following questions: What is the scope of the thesis of the plurality of methodological approaches to law? Is a neutral theory of law possible and relevant? What are the tools with which a neutral theory of law can be undertaken? What place do disagreements play in the ontology and epistemology of law? What concept of "participant" is assumed? What kind of statements can be ascribed to the distinguished points of view? What is the relevant concept of legal normativity? Redondo responds to the objections received, qualifying and clarifying her initial arguments, in "Internal legal positivism refined: A reply to the critics". Everyone is invited to repeat the stimulating experience, this time enhanced by the critical comments, and then draw her own conclusions.

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Notes

1 Redondo 2018.

2 In a similar sense, Nino 1994; Alexy 1992. I analized the limits of methodological pluralism in the context of Alexy's work, in Gaido 2009.

3 Redondo 2018: 196. All the English translations of the quoted fragments of ILP are mine.

4 Redondo 2018: 246.

5 Atienza 2006: 482.

6 Hart 1961.

7 This Symposium, in turn, has its origin in a workshop around her book, which was attended by the author and included the participation of Marcelo Alegre, Juan Bautista Etcheverry, Santiago Legarre, Ezequiel Monti, Gabriela Scataglini, Jorge Rodríguez and Rodrigo Sánchez Brigido, at the University of Buenos Aires Law School. The event was sponsored by the Argentine Association of Legal Philosophy, on 10 September 2019. Redondo's book was widely discussed; among other forums, in a webinar organized by the group *Law & Philosophy* - Universidad Pompeu Fabra, coordinated by Alba Lojo on 4 December 2020, with critical remarks by Carrió Sampedro 2022; Alba Lojo 2022; Sebastián Agüero-San Juan 2022; de la Fuente Castro 2022; Ramirez Ludueña 2022; Moreso 2022; and within the framework of the Project "Escritores abogan por sus libros", coordinated by Sebastián Agüero-San Juan and Sebastián Figueroa Rubio, at the Austral de Chile University on 26 September 2019 (the papers discussed there will be published in the *Anuario de filosofía jurídica y social*, Santiago de Chile, in press). For further critical reviews of the main theses of her book, cf. Zorzetto 2021; Kristan y Lojo 2021.

8 Rodriguez 2020; Santiago Legarre 2020; Rodrigo Sánchez Brigido 2020; María Gabriela Scataglini 2020; Ezequiel Monti 2020; Pablo Rapetti 2021; Champeil-Deplats 2022.

9 Redondo 2022a (in Spanish) and Redondo 2022b (in English).

10 Julieta Rábanos refers to an earlier use of this distinction in the legal field by Scandinavian authors in her doctoral dissertation; cf. Rábanos 2020.

11 Redondo 2018: 197-8.

12 Redondo 2018: 201.

13 Redondo 2018: 206.

14 Redondo 2018: 203.

15 Redondo 2018: 203 (emphasis mine). Here, Redondo follows Winch 1958.

16 Redondo 2018: 211.

17 Redondo 2018: 209-210.

18 Redondo 2018: 215. For a similar recent reading in this regard, cf. Scavuzzo 2021.

19 Redondo 2018: 237.

20 Redondo 2018: 230.

21 Redondo 2018: 230.

22 Redondo 2018: 237.

23 Hart 1994; Raz 2004; Raz 1998.

24 Redondo 2018: 70. I developed a critical review of this aspect of Raz's theory in Gaido 2011; Gaido 2012.

25 Redondo 2018: 74.

26 Redondo 2018: 70 y ss.

27 Redondo 2018: 46, 164.

28 Redondo 2018: n. 156, 151

29 Redondo 2018: 13 y ss. To support this thesis, the author makes use of Searle's theory of institutional facts (Searle 1995).

30 Redondo 2018: 29.

31 Hart 1961: ch. VII; Dworkin: 1986.

32 Redondo 2018. 28.

33 Redondo 2018: 27.

34 Redondo 2018: 34.

35 Redondo 2018: 28.

36 Redondo 2018: 54-55.

37 Redondo 2018: 68.

38 Redondo 2018: 56-7.

39 Redondo 2018: 57.

40 Redondo 2018: 74.

41 Raz 1990.

42 Redondo 1996.

43 Redondo 2018: 107 y ss., 133

44 Redondo 2018: 97.

45 Redondo 2018: 93 y ss.

46 Redondo 2018: 110.

47 Redondo 2018: 105.

48 Redondo 2018: 135.

49 Redondo 2018: 105 y ss.

50 Raz, for example, seems to notice this when, along with his theory of legal norms as protected reasons, he develops his conception of (legal) authority as service. I analyzed the limits raised in Raz's argumentation in Gaido 2021.

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About the author

Paula Gaido
National Research Council of Argentina (CONICET). National University of Córdoba (UNC), Córdoba (Argentina).

Address: CIJS Unidad Ejecutora CONICET, UNC - Caseros 301, 1er piso – Ciudad de Córdoba, 5000 – Argentina

E-mail: paula.gaido (at) conicet.gov.ar

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