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Rešavanje pravnih sporova, materijalna ispravnost i moralni objektivizam

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Rad istražuje vroblevskijevsku klasičnu razliku između unutrašnjeg i spoljašnjeg opravdanja, naglašavajući dva tumačenja. Prema prvom, odluka je interno opravdana ako proizilazi iz izabranih premisa i eksterno opravdana ako su i te premise opravdane. Iz ove perspektive, neki teoretičari tvrde da je unutrašnje opravdanje dovoljno za lake slučajeve, dok teški slučajevi zahtevaju spoljno opravdanje. Međutim, pokazaće se da je reč o grešci koja proizilazi iz dvosmislenosti termina „opravdanje“, a razjašnjavanje ove dvosmislenosti otkriva da i laki i teški slučajevi zahtevaju istu vrstu opravdanja. Prema drugom tumačenju, odluka je iznutra opravdana ako je izvedena iz postojećeg zakona i eksterno opravdana ako je njen sadržaj moralno prihvatljiv. Ovo dovodi do ispitivanja odnosa između pravnog i moralnog opravdanja. S tim u vezi, tvrdnja Karlosa Nina da je pravno rasuđivanje oblik moralnog rasuđivanja biće kritički ocenjena tako što će se pokazati da ono na kraju spaja prirodu normi sa prirodom razloga za njihovo prihvatanje. Konačno, biće argumentovano da je moralni objektivizam irelevantan za snažno opravdanje sudskih odluka (što zahteva valjano rasuđivanje sa ispravnim premisama). Metaetički skepticizam ne podriva suštinske moralne sudove niti slabi moralnu debatu, kao što ih metaetički objektivizam ne jača.

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Legal Adjudication, Material Corecctness, and Moral Objectivity

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The paper explores Wróblewski's classical distinction between internal and external justification, highlighting two interpretations. According to the first, a decision is internally justified if it follows from the chosen premises and externally justified if those premises are also justified. From this perspective, some theorists have claimed that internal justification suffices for easy cases, while hard cases require external justification. However, it will be shown that this is a mistake arising from an ambiguity in the term "justification", and clarifying this ambiguity reveals that both easy and hard cases require the same kind of justification. In the second interpretation, a decision is internally justified if it is derived from existing law and externally justified if its content is morally acceptable. This leads to an examination of the relationship between legal and moral justification. In this regard, Carlos Nino's claim that legal reasoning is a form of moral reasoning will be critically assessed by showing that it ultimately conflates the nature of norms with the nature of the reasons for their acceptance. Finally, it will be argued that moral objectivism is irrelevant for strong justification of judicial decisions (which requires valid reasoning with correct premises). Metaethical scepticism does not undermine substantive moral judgments or weaken moral debate, just as metaethical objectivism does not strengthen them.

1. INTRODUCTION*

Since Jerzy Wróblewski's contributions (see 1971, 1974), it has become traditional to distinguish between what is called *internal* and *external justification* of a judicial decision. However, the way in which this distinction is interpreted by different authors is not uniform. Sometimes the expression "internal justification" is used to refer to the justification of the conclusion of the judicial reasoning on the basis of the premises that the judge takes into account, while the expression "external justification" refers to the justification of the very same premises used to derive such a decision. In this sense, Wróblewski argues that internal justification is linked to the validity of the inference from the premises to the conclusion, so that this type of justification would be purely formal. External justification, on the other hand, would verify *"not only the validity of the inferences"*, but also the correctness of the premises, so that external justification would be linked to the choices of directives and evaluations for the establishment of the premises (interpretation of the norms at stake, evaluation of the evidence for the facts, and determination of the legal consequences of such facts), so that it *"could hardly be reduced to formal techniques*" (see 1971).

According to this reading, it is generally understood that the judge internally justifies her decision when she constructs a formally correct reasoning on the basis of the applicable rules of the legal system and the facts of the case. This basic idea could be called the *classical deductivist theory of judicial decisions*. The problem is that frequently legal systems do not provide a clear and unambiguous answer for every given case, and there might also be difficulties in establishing the factual premises of legal cases. Faced with these "hard cases" judges will not be able to derive a simple conclusion from the applicable rules and the facts of the case. In such situations – it is argued – they have to justify the premises they use as a basis for their decisions.

The idea would be, then, that in hard cases the premises would in turn require justification. According to some of the supporters of the so-called *theory of legal argumentation* – Aarnio, Alexy, Atienza, among others – the justification of judicial decisions would be different in easy or routine cases and in hard cases, the former being called "internal justification" and the latter "external justification" (see Atienza 1991, 26). According to this criterion, the difference between internal and external justification lies in the concept of justification and in the type of argumentation used in both cases (see Redondo 1996, 220). From this point of view, deductive logic would be insufficient to account for judicial reasoning because, although

* The translations to English of all the direct quotes that were originally in other languages have been made by the author.

it would allow a more or less adequate reconstruction of easy cases, in hard cases it would not be enough to justify the content of the judge's decision on the basis of the premises chosen. In these cases, it would be necessary to justify the normative or factual premises in turn, a justification that might not be deductive.[1]

This criticism is based on a misunderstanding, since it confuses two senses in which the expression "justification" can be understood. In a theoretical reasoning it is essential to differentiate between its *validity* and the *truth* of its conclusion. A reasoning is deductively valid if the truth of the premises guarantees the truth of the conclusion. In other words, the connection between the validity of the reasoning and the truth of the conclusion is only conditional: a valid reasoning is such that its structure guarantees the truth of its conclusion only *if the premises are true.* Thus, a valid reasoning can have true premises and true conclusion, false premises and true conclusion, or false premises and false conclusion. The only combination that cannot be verified if a reasoning is valid is that the conclusion is false when the premises are true.

Accordingly, two senses of "justification" should be distinguished: a *weak* sense, according to which a certain conclusion will be justified if it follows logically from certain premises, and a *strong* sense, according to which a conclusion will be justified if it follows logically from *true* premises. In logic it is common to refer to the *validity* of a reasoning to refer to the first sense of justification and to the *soundness* of a reasoning to refer to the second (see Navarro, Rodríguez 2014, 3–8).

Anyone who considers it reasonable to speak of the truth or falsity of norms will have no difficulty in projecting these two concepts of justification onto the field of legal argumentation. If, on the other hand, one rejects the idea that norms can be ascribed truth values, one could at best speak of justification of the conclusion of a judicial argumentation in a weak sense, provided one recognizes the existence of logical relationships between norms. But regardless of this, if the justification of the conclusion of a judicial argument is to be understood in a weak sense, it will be relative to the premises chosen and independent of the problem of whether or not the premises themselves are justified in the same sense. In this respect, no distinction should be made between easy and hard cases. In an easy case, the conclusion will be weakly justified if it follows logically from the applicable general rules of the system and the facts of the case. In a hard case, on the other hand, the judge will have to solve problems prior to the derivation of the solution, such as problems of interpretation, evidence or systemic problems (gaps or contradictions). It is clear that

1 On the alleged limitations of deductive logic because it *would* not "*produce new knowledge*" and because it would not reflect "*how we actually argue in law and in everyday life*", see Atienza 2013, 174. I would just like to point out here that it is not one of the tasks of logic to generate new knowledge or to describe how we actually reason, so such objections are misplaced.

in cases such as these the judge will have to do more than simply logically derive a solution from the clear core meaning of a pre-existing rule in the system. However, once she has solved problems such as those outlined above, the conclusion of the reasoning will be weakly justified if it is logically derived from the premises chosen. And although the judge may have a wide margin of discretion in the choice of premises, if in hard cases the "hardness" does not lie in the step from the premises to the conclusion, and if the weak justification refers only to this step, then in both easy and hard cases the conclusion is justified in this sense if it simply follows from the chosen premises.

Now, it seems intuitively obvious that if one can speak in any sense of the "justification" of judicial decisions in hard cases, it is not enough to present the content of the decision as logically derived from the premises that the judge chooses, regardless of how and from where she chooses them. Some justification of the premises is also required. But, if what has been said so far is correct, underlying this intuition is a use of the strong sense of the notion of "justification": that according to which the conclusion of a judicial reasoning will be considered justified if it is derived from "true" or "correct" premises. If this is the sense in which the term "justification" is used in the objection under consideration here, then it should be noted that according to this version, "justification" of the premises should be required in hard cases as well as in easy cases. It cannot be said that in easy cases it is sufficient to deductively derive the content of the decision from a clear norm of the reference system in order to speak of a justified decision, since such a norm could be questioned from the point of view of its moral correctness, unless, of course, it is assumed that all positive legal norms are morally correct. Deductive logic would always be insufficient to analyse the justification of judicial decisions in this strong sense, since even in easy cases – for the very identification of a case as "easy" – a criterion of correctness of the premises would be required.

To sum up, if one qualifies as "easy cases" those in which it is possible to reach a clear decision on the basis of a clear rule that is part of the legal system and, by opposition, as "hard cases" those that do not possess such characteristics, bearing in mind the weak sense of "justification", the contingent circumstance that judges sometimes provide reasons in support of the premises they use to derive their conclusions will be irrelevant because even in a hard case the decision will be justified if its content is logically derived from the premises chosen by the judge. If, on the other hand, one has in mind a strong sense of "justification", which incorporates the requirement that the premises be "true" or "correct", it will be irrelevant whether a clear rule can be found in the system which allows deriving an unambiguous solution for the case, because even in an easy case it will be necessary to justify the "truth" or "correctness" of the premises. According to this criterion for differentiat-

ing between easy and hard cases, there would be no independent objection against the deductivist reconstruction of judicial decisions based on such a distinction.

On other occasions, it has been interpreted that the individual rule dictated by the judge must be both internally and externally justified, so that it would be subject to both types of justification (see Redondo 1996, 218). From this point of view, it would be the origin of the reasons that would make it possible to draw the distinction, the internal or external character of the domain of the relationship of justification. If we take into account the judicial decision itself, internal justification would then be that which is based on the premises recognised by the judge, and external justification would be that which is based on external reasons in relation to the decision. If, on the other hand, one takes the totality of the rules of a particular legal system as a parameter, then "external justification" would, according to this version, be an extra-legal justification, so that this criterion of distinction would coincide with the distinction between legal and moral justification: a judicial decision is internally justified if it can be derived from the general rules that make up the legal system of reference, if it is legally justified, and it is externally justified if its content corresponds to a particular moral system, if it is morally justified. It is this latter distinction that I wish to explore in this paper.

2. ON THE JUSTIFICATORY CONNECTION BETWEEN LAW AND MORALITY

As a preliminary step to considering the incidence of moral evaluations in the justification of judicial decisions, it is necessary to dwell on an argument developed by Carlos Nino, who argues not simply that legal justification must conform to certain guidelines of moral correctness. More strongly, he claims that legal reasoning *is a* kind of moral reasoning.[2] As he himself puts it:

> "In other writings I have tried to explain exhaustively what I consider to be a proposition so crucial for understanding the legal phenomenon that I have called it as 'the fundamental theorem of the philosophy of law'. The proposition states that legal rules do not themselves constitute operative reasons for justifying actions and decisions, such as those of judges, unless they are conceived as deriving from moral judgments [...]" (Nino 2007, 144).

According to Nino, the structure of judicial reasoning under a rudimentary legal system could be schematized as follows:

2 An interesting critique of Nino's idea can be found in Moreso, Navarro, Redondo, 1992.

"1) Those who have been democratically elected to legislate must be obeyed.
2) Legislator L has been democratically elected.
3) L has issued a legal rule stipulating 'Whoever kills another person must be punished'.
4) Those who kill another person should be punished.
5) John killed someone.
6) John should be punished" (Nino 1985, 139).

On the basis of this reconstruction, Nino attempts to support his thesis that all legal justification is ultimately a moral justification in the following way. Premise (1) would not be a legal norm, but a value or moral judgement in a broad sense, and would therefore have its distinctive features, which according to Nino would include autonomy, generality, universality and integration. The last feature would mean that this moral judgement – as well as those derived from it, such as the conclusion – would only have a *prima facie* character, as there could be other moral judgements based on principles of higher hierarchy that may prevail over it.

Premise (3) mentions a legal norm, which would constitute for Nino an auxiliary reason that could be identified with a linguistic act or with a set of symbols, and that in other cases could consist of a social practice (a custom). The conclusion of the reasoning – judgement (6) – would be of the same nature as the judgement that constitutes the operative reason: a moral judgement in the broad sense, which would derive from a general moral judgement – premise (1) – and from the description of the existence of a legal norm – premise (3). Nino calls this type of statements "judgments of normative acceptance", since they would express moral acceptance to a legal norm. Given that such statements would be the justificatory legal judgements *par excellence*, the conclusion that practical legal propositions would be a kind of moral judgements would be confirmed. They would be distinguishable from other moral judgements simply because a certain factual source would be relevant for their derivation, and because they would have only a *prima facie* character.

Premise (4) would be an intermediate conclusion, a judgement of normative acceptance like (6), since it would be a moral judgement derived from such a principle and a normative proposition. If such a judgement were to appear as a major premise, i.e. as an operative reason, the judge's subsequent conduct would not involve observing what a legislator has stipulated by virtue of the fact that she has established it. There would simply be a coincidence between the judge's conduct and the content of that stipulation, perhaps because she shares its underlying reasons. According to Nino, if the judge were to take as the ultimate reason for her decision that those who kill another person should be punished, she would not be observing a legal norm because that reason would have the characteristics of autonomy, gener-

ality, universality and integration necessary to be an operative reason and, because of its final character, it would be a moral reason. The judge's reasoning would not be practical legal reasoning but ordinary moral reasoning. Moreover, if the judge were to assume that those who kill another person must be punished because the legislator has so established, this would imply that she conceives this judgement as an intermediate conclusion based on a factual judgement and a moral principle, that is to say, as a judgement of normative acceptance. From this it follows that for a norm to be accepted as a legal norm, the judge's reasons for taking it into account in her decision should be different from the reasons that the legislator had for issuing it. The judge would develop a legal reasoning insofar as she does not reason as the legislator did (see Nino 1985, 139 ff).

Then, according to Nino's position, in order to consider a judicial decision justified, it would be logically necessary to go back to moral norms, since only moral norms would constitute genuine norms. The fact that a legislator formulates a statement such as: "Whoever kills another person should be punished" cannot be used as a premise to justify the conclusion of a judicial argument, since it is a fact. And from facts, according to Hume's principle, normative conclusions cannot be derived. The normative premise of judicial reasoning would be given by a moral norm that would establish the *prima facie* duty to obey the legislator, and "legal norms" would only be auxiliary reasons in judicial reasoning.

This idea deserves several remarks. First, it should be noted that Nino reserves the expression "norm" exclusively for moral norms. Legal norms could not constitute the ultimate justification for a judge's decision simply because they would not be norms: they would not generate genuine duties. Of course, although assigning this meaning to the expression "norm" presupposed in Nino's reasoning seems extremely restrictive, nothing prevents anyone from formulating the conceptual stipulations that she pleases. What is not admissible is to attempt to challenge a simple and elegant reconstruction such as the one offered by what I have called the classical deductivist theory of judicial decisions, and to settle the controversy on whether there is a necessary connection between law and morality, on the basis of a simple conceptual stipulation.

Second, there is a more serious problem with Nino's idea, because on this basis he accuses the classical deductivist theory to be incurring in Hume's fallacy, that is, to derive a normative conclusion from purely descriptive premises:

> "A legal norm or a law can be conceived as a social practice (Hart), as a linguistic act (Austin), or as a text – in the way that jurists assume that the same norms can have different interpretations [...] under these concepts, legal norms or laws are events or factual entities, and neither facts nor their descriptions

> can justify an act or a decision, since no normative judgment can be derived from them that is the content of the decision or volition that determines the action" (Nino 2007, 145).

But here the only one who is incurring in a fallacy (of equivocation) is Nino himself, because on the one hand he refuses to qualify as norms the prescriptions dictated by a legislator, but at the same time he considers that the content of a judicial decision, which like the legislator's directive is a prescription emanating from someone who is recognised as having the authority to do so, does express a norm. Pablo Navarro has made this clear:

> "The simplest answer to the question of the *normative* nature of legal norms is constructed in two steps. On the one hand, the criteria used to determine that the operative part of a judicial decision is a norm has to be the same as that used to establish the normative nature of the justificatory premise. At the very least, if a fallacious conclusion is to be avoided, it is necessary that the meaning of one of the key terms of the reasoning is not altered [...] Once the prescriptive nature of legal norms is admitted, it must also be admitted that there is no violation of Hume's principle when justifying legal reasoning is exemplified by the scheme defended by the simple conception. If a judge formulates a rule in the operative part of his judgement, it is sufficient to avoid the fallacy denounced by the complex conception that the justification of that individual rule is another general rule. If legal rules formulated by legislators are rules as we as individual rules of judges, then there is no 'logical leap' in legal justification" (Navarro 2017, 229).

Moreover, it is correct that the *fact* that the legislature has formulated a rule cannot be taken as a normative premise for judicial reasoning because it is not possible to derive normative consequences from a fact alone. But what is to be concluded from this? For Nino, that the identification of the normative premise of judicial reasoning requires going back to the norm that imposes the duty to obey the legislator. This norm could in turn be a norm formulated by another authority, but in that case, it would also be necessary to go back to the norm that confers competence on that authority. This regression would necessarily refer ultimately to some norm whose acceptance does not depend on its formulation by an authority[3]. Such a norm, which is accepted by virtue of its content, would be a moral norm.

> "That is to say that the moment comes when it is necessary to accept the proposition that a certain authority or social practice must be obeyed, not because of the origin of the formulation of the proposition but because of its

3 Bayón uses a similar argument (see 1991a, 268–270).

intrinsic merits. But a normative judgement that is accepted not for reasons of authority but for reasons relating to its merits or the validity of its content, is precisely a moral judgement [...]" (Nino 2007, 147).

It is undoubtedly true that the judge cannot justify her decision simply on the basis of the fact that the legislator has issued a norm. The judge must *use* that rule to decide the case and not merely mention it on the grounds that it was issued by the legislator. But then, if, as said, accepting that judges create genuine individual norms requires accepting that legislators also issue genuine general rules, judicial reasoning does not require going back further than premise 4) in Nino's reconstruction ("Those who kill another must be punished"), which expresses the content of a general legal norm, the remaining premises being completely unnecessary. One could, of course, ask the judge for what reasons she accepts the norm she has used as the basis for her decision, and her answer may ultimately refer to moral reasons. One could also ask the judge for what reasons she believes, if at all, that an area of 120,000 m^2 is larger than 10 hectares, a statement that might be necessary to justify a decision on the application of a norm imposing a duty to pay a tax on areas larger than 10 hectares, and the answer will refer to mathematical reasons. But this does not lead to the conclusion that such a decision is, for that reason, a kind of mathematical justification.

Furthermore, as has been said, according to Nino, if the judge directly uses the norm expressed in premise 4) ("Those who kill another person must be punished") by virtue of what it provides, if she accepts it by virtue of its content, then "*she would not be observing a legal norm*" but a moral norm. This, however, implies a confusion that has been well pointed out by Cristina Redondo: attributing moral character to the normative premise of judicial reasoning involves not noticing the asymmetry that exists between the character of the accepted normative content and the reasons why it is accepted (see Redondo 1996, 196).

To claim that judges always accept legal norms on moral grounds is in itself controversial. If this thesis is interpreted as a descriptive proposition, it is empirically false: judges can accept legal norms for the most diverse reasons. The only way to interpret it in any meaningful way is to attribute a normative character to it: it is not that judges in fact always accept legal norms because they believe that what they require is morally justified, but that it is considered that this *should be the case* (see Redondo 1996, 208). But even if it were true that judges accept legal norms by virtue of a belief in their moral rightness, this has no magical aptitude to turn legal norms into moral norms.[4]

4 Nino does not seem to realise that if the judge takes as the ultimate reason for her decision, for example, that those who kill another person should be punished, she is observing a legal norm, not a moral norm: that which obliges her to base her decisions on the primary system. The rea-

Moreover, if the judge uses the norm "as a legal norm", that is, uses it as a basis for her reasoning because the legislator so provided, according to Nino she would be presupposing a *prima facie* moral duty to obey the legislator. In order to be able to use a norm, it would be necessary to first identify it, and to identify a norm, Nino seems to believe, necessarily requires the prior acceptance of another norm.

This point is also controversial. Nino argues that the binding force of legal norms cannot ultimately be established by legal norms themselves, since this would not allow to predicate binding force on the highest legal norms in the system. In turn, if such legal norms lacked binding force, they would not be able to transmit it to other norms (see Nino 1994, 78). From this Nino concludes that there are no legal reasons that can justify actions and decisions independently of their derivation from moral reasons. Since there would be no reason to accept that a constitution is binding by definition, its binding nature would have to be based on non-legal norms. Moral norms would constitute the basis for the binding nature of legal norms, possessing themselves absolute and self-evident normative validity (binding nature).

However, if from the point of view of their binding nature it is not accepted that there are ultimate legal norms, i.e. legal norms whose binding nature does not depend on other norms, why should one accept the existence of ultimate moral norms instead of continuing the chain of justification ad infinitum? And if one is prepared to accept that there are ultimate, absolute and self-evident norms – for Nino the moral norms – then why not break the chain of justification at the sovereign legal norms and interpret them as the last link in the legal justification of the other norms of the system? This is, of course, irrespective of the fact that one reserves the possibility of critically evaluating legal solutions from a moral point of view.

But even if this is not accepted, Nino is here confusing validity as binding force with validity as membership to a legal system.[5] The judge's use of a norm "as a legal norm" does not presuppose the acceptance of the duty to obey the authority that dictated it, but in any case, the acceptance or use of a *conceptual criterion* that makes it possible to identify that norm as a legal norm. Legal systems impose on judges the duty to justify their decisions in general legal norms. Thus, in a weak sense of justification according to which a conclusion is considered justified if it follows logically from certain premises, the decision the judge adopts in a case will be justified if it is derived from the general norms of the legal system of reference,

sons that the judge has for taking into account the rules of the primary system are in fact different from those that the legislator has for issuing them, since among them is also the secondary rule that obliges her to base her decisions on law.

5 On this point, see Bulygin 1990 and 1999, among others.

identified using certain conceptual criteria and, in this sense, the reconstruction developed out by Nino becomes unnecessary.

One could certainly ask about the basis of this duty of judges to justify their decisions in the norms of the system. The answer to that question will ultimately refer to a non-legal norm; to simplify, to a moral norm. Of course, a moral norm imposing an absolute duty to apply the norms of a certain legal system would not make sense, since such norms might conflict with the provisions of other moral norms. Remember that Nino attributes a *prima facie* character to the duty imposed by the moral norm that would constitute the normative premise of the judge. This is an attempt to account for the problem of unjust law. Now, if the moral obligation to resolve a case in accordance with legal norms is a *prima facie* obligation, and it is this obligation that justifies the conclusion of judicial reasoning, this conclusion would also have a *prima facie* character, as Nino himself expressly acknowledges. But this seems inadmissible: the judge cannot uphold or reject *prima facie* a given claim, nor can she condemn or acquit *prima facie*. She must do so conclusively.

The conclusion of judicial reasoning cannot be a *prima facie* duty, but a normative judgement all things considered, at least all things that can be considered within the limitations imposed by the secondary rules regulating the judicial decision-making process. But then the reconstruction offered by Nino is not even an adequate presentation of the requirement of strong justification according to which a conclusion is justified if it follows logically from correct premises, since his argument does not suffice to consider the conclusion of the judicial reasoning as justified in this sense. At most, it could be regarded as a reconstruction of the judge's *prima facie* duty to apply to the case the solution that follows from legal norms. That solution will be the one that she must assign to the case as long as there is no stronger moral duty that imposes a different solution. The justified or unjustified nature of a decision in this strong sense will then depend on the "correctness" of the normative premise, and this is the question that will now have to be assessed.

3. MATERIAL CORRECTNESS OF LEGAL ADJUDICATION AND META-ETHICAL STANCES

As has been pointed out, the term "justified judicial decision" sometimes seems to refer to something more than a simple deductive derivation from certain premises. For a decision to be considered justified in the strong sense, it would also be necessary for its content to be derived from premises that meet certain parameters of "correctness". As far as the normative premise of judicial reasoning is concerned, this correctness could be examined both from an exclusively legal point of view and

from a perspective external to the law itself, i.e. from a moral point of view. This being so, the examination of the problem of the correctness of the normative premise of judicial reasoning makes it necessary to address, at least very briefly, the analysis of moral discourse.

As is well known, when discussing moral issues, such as whether euthanasia is justified, or whether it is a moral duty to abstain from meat, there are at least three different kinds of questions that can be pondered: descriptive questions about what each of the parties to the dispute holds; normative questions about which of the parties to the dispute is right and why; and second-order questions about what the parties are doing when they argue about moral issues. The first are the subject of *descriptive ethics*, the second are the subject of *normative ethics*, while the third are the domain of *metaethics*.[6] Simplifying discussions in the domain of metaethics as much as possible, a distinction could be made between *non-cognitivist* or *sceptical* positions and *cognitivist* or *objectivist* positions. As far as our problem of the possibility of judging the correctness or incorrectness of the normative premise of judicial reasoning is concerned, the *non-cognitivist* or *sceptical* positions would argue that this question could not be settled rationally, i.e. it would not be possible to justify that the content of the normative premise of judicial reasoning and, consequently, of its conclusion, is better, more correct or fairer than another alternative in an objective way. The *cognitivist* or *objectivist* positions, on the other hand, would consider that an objective answer to that question would be possible, which would be independent of the question of whether the users of law are able to verify it.[7]

Theories of legal argumentation have argued that only those premises that can be considered "substantively correct" justify. Such theories admit that legal formulations express norms in a practical sense (as reasons for action) and can formally justify decisions. But since the justification they are interested in is the one that guarantees the adequacy of the justified content, legal reasoning should be complemented or corrected by the consideration of moral norms (see Redondo 1996, 170–171). Thus, argumentation theorists would agree in trying to justify the existence of a necessary connection between legal justification and moral justification on the basis of the so-called "principle of unity of practical reasoning". According to Cristina Redondo (see 1996, 240–247), this requirement of unity of practical reasoning could be interpreted in several different senses:

> a) As a descriptive ethical thesis with respect to a certain social group, it is a contingent feature with respect to that group that would not allow any objection to be directed against anyone who postulates the existence of different justificatory frameworks.

6 See Smith 1994, 2; similarly, see Miller 2003, 21.

7 See Comanducci 1999. See also Moreso 1997: chapters II and V.

b) As a thesis of descriptive ethics with respect to the subjective reasoning of a certain agent, it would be limited to sustaining that the same person could not split her own hierarchy of preferences. In this sense, morality would only be a unifying parameter of the agent's reasoning if it is empty of content, attributing such a character to every principle that occupies the highest rank in the scale of preferences accepted by the agent.

c) As a metaethical proposal in a weak sense it would claim that the condition any conception of normative ethics has to satisfy is the requirement of systematic unity. At this level it would postulate that within a given ethical theory the correctness of a reasoning could be settled unambiguously. However, this position would not exclude the possibility of there being more than one normative conception, which would also open the door to the fragmentation of practical discourse.

d) As a metaethical proposal in the strong sense it would claim the existence of a single set of ultimate principles within which there would be no incompatible guidelines with the same rank or incomparable. This would be the view of radical objectivism. However, even assuming the existence of a single correct set of criteria for the validity of practical arguments, epistemic limitations in identifying that set would lead to fragmentation.

From all this, Redondo concludes that none of these versions allows us to conclude that in order to give a strong justification the judge must go back to an ideal, true or correct morality. Indeed, if the notion of unity is interpreted in the weak sense, i.e., that legal justification presupposes certain ultimate premises that are called "moral" because of this characteristic alone, the claim would be empty. If it is interpreted in a strong sense, even admitting a single critical or ideal morality, the various attempts to identify it would lead to the rejection of the principle of the unity of practical reasoning.

Despite this, Redondo argues that the rejection of the principle of unity does not close off all possibility of "objectively" assessing a justification in the strong sense. This would be possible if there is agreement on a certain normative theory:

> "The rejection of essentialism, and with it the rejection of the principle of unity, does not close off the possibility of devising normative theories, i.e. theories of substantive reasons for action, to resolve practical conflicts. Only agreement on a given theory would make it possible to provide or criticise 'objectively' a substantive justification and, if necessary, to demand its fulfilment" (Redondo 1996, 251–252).

However, this does not seem to be a very satisfactory way out. Objectivity within a given normative theory would be subject to two important limits: on the

one hand, one could only speak of objectivity within a certain moral system, which would not mean much given that innumerable alternative moral systems can be conceived. But, moreover, objectivity within the system would be limited to the values or norms derivable from its basic principles, not to the system as a whole (see Comanducci 1999). And even with these caveats, it should be noted that when reference is made to the possibility of agreement on very general moral principles, this is often associated with the assumption of certain problematic presuppositions.

Joseph Raz has argued that in the reasoning behind their decisions, when judges appeal to moral norms or values, they seem to want to persuade us that the values they adhere to do not merely express their personal views but represent the general consensus. This rhetoric would be harmless to Raz if taken as such, but a literal interpretation would only be possible if one were willing to accept that judges subscribe to two myths that he considers truly dangerous:

> "One is the myth that there is a considerable body of specific moral values shared by the population of a large and modern country. The myth of the common morality has made much of the oppression of minorities possible. It also allows judges to support a partisan point of view while masquerading as the servant of a general consensus. The second myth is that the most general values provide sufficient ground for practical conclusions. This myth holds that, since we all have a general desire for prosperity, progress, culture, justice, and so on, we all want precisely the same things and support exactly the same ideals; and that all the differences between us result from disagreements of fact about the most efficient policies to secure the common goals. In fact, much disagreement about more specific goals and about less general values is genuine moral disagreement, which cannot be resolved by appeal to the most general value-formulations which we all endorse, for these bear different interpretations for different people" (Raz 1972, 850).

This seems to pose a serious obstacle to the proposal of a moderate objectivism as considered by Redondo. Moderate objectivism only allows us to speak of a strong justification if it presupposes an agreement on the moral principles of reference. Unfortunately, the possibility of a moral agreement and the effectiveness of its results are two aspirations that are in tension with each other: the more precise the content of the principles, the more difficult it will be to reach a general agreement, and the more general and indeterminate the principles are, the less effective they will be in guaranteeing the resolution of concrete controversies (see Rodríguez 2002, 327–331). Thus, an agreement on very elementary moral principles would generally be ineffective in practice, and thus would not serve as a basis for a strong justification of judicial decisions. It seems that this objection can only be overcome

by appealing to a form of radical objectivism, i.e., the idea that moral "rightness" or "truth" is identifiable independently of the moral convictions of individuals.

4. MORAL IRRELEVANCE OF OBJECTIVISM IN METAETHICS

However, contrary to what has been argued so far, in order to consider a judicial decision to be justified in a strong sense, i.e. to assess the correctness of the normative premise of judicial reasoning, it is not necessary to assume any form of objectivism in metaethics, neither strong nor weak. In fact, assuming an objectivist stance in metaethics is entirely irrelevant as far as the justification of judicial decisions is concerned.

In a review of his main theses on judicial reasoning and legal argumentation, Manuel Atienza argues among other things that:

> "The notion of good motivation (or simply motivation) implies that there are objective criteria for evaluating judicial arguments of a justificatory nature. But are they purely formal criteria or do they also have a substantive scope? Do they presuppose any reference to morality and, in particular, the assumption of a minimum moral objectivism? Are they sufficient to support the thesis of the only correct answer in any of its versions? A positive answer to these questions is a necessary condition for taking judicial motivation seriously and presupposes a non-positivist conception of law" (Atienza 2017, 34).

The central argument he uses to support this idea is that if there were no objective criteria for evaluating the normative premise of the justification of judicial decisions, then judicial practice would have no meaning, or else it should be concluded that judges can never make mistakes, so at least the decisions of the highest courts would not only be final but also infallible. From this, Atienza concludes that a judge cannot properly motivate her decisions if she thinks that morality lacks objectivity.

To put it more generally, this question has sometimes been described as the *schizoid attitude problem*: how is it possible to take morality seriously if moral judgements are mere projections of our own feelings and attitudes? Blackburn presents it as follows:

> "Can the projectivist take such things as obligations, duties, the 'stern daughter of the voice of God', seriously? How can he if he denies that these represent external, independent, authoritative demands? Mustn't he in some sense have a schizoid attitude to his own moral commitments – holding them, but also holding that they are ungrounded?" (Blackburn 1984, 197).

In other words, the rejection of moral objectivism would imply that all moral systems are equally valid, i.e. that every moral system is as good as any other (see Rescher 2008), which would prevent a sceptic from being able to offer serious moral arguments.

That conclusion is, however, incorrect. Moral objectivism is a metaethical stance, not a normative ethics claim. Whoever rejects objectivism then rejects a thesis *about* moral discourse, in this case, that there are objective guidelines for settling moral disputes. But the acceptance or rejection of such a metaethical thesis is of no consequence in the field of normative ethics. To defend her moral convictions, to argue in favour of a certain thesis of normative ethics, what the sceptic needs, to put it in Hartian terms, is to *assume the internal point of view of a certain moral system*, not to abandon her scepticism. The arguments that may be adduced, for example, against the death penalty, will not be more convincing, sound or admissible depending on whether they are defended by a moral objectivist or a sceptic: they will be more or less convincing, sound or admissible according to the substantive reasons that support them. The sceptic does not undermine with her scepticism the basis for defending moral arguments, because her metaethical stance only commits her to the claim that there may be several competing moral systems and that we have no objective criteria for singling one out as the right one. But that does not inhibit her from adopting one of those systems as her own and formulating and defending moral judgements on that basis. Her scepticism prevents her from qualifying that system as objectively correct or true, but it does not prevent her from offering substantive reasons for defending it and for privileging it over others. In other words, the sceptical thesis that there can be several competing moral systems in no way implies that all such systems are 'equally valid', that each is 'as good' as any other, because 'valid' and 'as good' are clearly normative expressions, and the sceptic's claims are limited to the conceptual level.

Put the other way round, moral objectivism usually assumes that its position is necessary or at least useful at the level of normative ethics. However, this assumption is mistaken. This has been called the *paradox of the inanity of objectivism*. In the words of Pierluigi Chiassoni (2012):

> "For the paradox of the inanity of objectivism, even if, hypothetically, the existence of the one true morality were proven, this would have no decisive effect on moral controversies. Objectivist: 'Here are the precepts of the one true morality. They say: "You shall not admit the interruption of vital therapeutic treatments, not even if requested by the patient capable of understanding and willing to do it"'. Non-objectivist: 'Of course, but why should I do that? And by the way, you will agree with me that the presence (the "existence") of mountain ranges does not morally oblige one to become an expert mountaineer, that the presence of

> oceanic abysses does not morally oblige one to become an expert diver, and that, to come to us, the presence of a digestive apparatus does not morally oblige one to become a *maître à manger*. Genuine objectivism – might add a neophyte voice – is the paradigmatic fruit of a mental collapse, favoured by a poor command of language, generated and reinforced by well-known psychological approaches: *horror vacui, metus libertatis, cupiditas servitutis* [...]'" (243, fn 6).

The point is intimately connected with what Michael Smith (1994) has called *the moral problem*: our talk of moral objectivity seems to suggest that there are moral facts that are completely determined by circumstances, and that our moral judgements express *beliefs* about what those facts are. However, the idea that moral judgments express beliefs leaves completely unexplained how or why the possession of certain moral convictions can have a special link to our motivations to act, because mere beliefs do not motivate behaviour (see 1994, 11).

Jeremy Waldron has pointed out, with concurring judgement, that objectivists seem to panic about the consequences of adopting a sceptical position in metaethics and accuse sceptics of not taking morality seriously (see 1998[8]). However, he rightly warns that "taking seriously" our moral judgements can mean two different things. First, it can mean being willing to *act in* accordance with them, to be motivated by them, to assign them an important role in our lives and actions, and to actually do what one believes to be right, even when tempted to do otherwise. Secondly, it can mean being unwilling in debate and argument to abandon our moral claims, to hold on to one's moral judgements, to refuse to accept the possibility of modifying one's views.

Waldron argues that what objectivists seem to have in mind is this second sense of "taking moral judgements seriously". If moral judgements describe or report on an objective reality, then one who considers oneself a reliable observer should stick to one's description and refuse to adopt a different position since it is likely to be less faithful to reality. However, this is incompatible with a defence of objectivism on non-realist grounds, since it is not reconcilable with the argumentative character of moral discourse, and the consequent commitment to revise one's moral convictions based on better arguments. Moreover, it might be compatible with a defence of objectivism on realist grounds, but in the latter case it is still necessary to stress that the existence of facts that make moral judgements objectively true or false is not yet a valid basis for not being willing to modify *one's beliefs* about them based on better arguments.

In any case, Waldron observes that what is really attractive is not "taking moral judgements seriously" in this sense of discursive rigidity and dogmatism, but in

8 In fact, Waldron speaks of realists and emotivists.

the first sense indicated above: we admire those who are willing to *act in accordance with* their moral convictions. A characteristic of moral judgements that many authors have emphasised is precisely that their sincere adoption entails a commitment to action. But it is now paradoxically the case that those who are best placed to account for this feature of moral judgements, for this way of "taking them seriously", are not the objectivists but, on the contrary, the sceptics. If one considers that moral judgements do not inform or describe anything, but express emotions, feelings, preferences, prescriptions or other propositional attitudes in the direction of fit of reality to language and not the other way around, then one has a simple and clear explanation of why they motivate us to act. For objectivism, trying to explain this disposition to action present in moral judgements is a very difficult challenge, which has been used by authors such as Mackie to outline an argument against it (see 1973, 40).

Mackie himself offers another significant argument against objectivism, centred on factual disagreements between people on ethical issues, which is difficult to reconcile with the idea that moral judgements capture objective truths (see 1973, 36). Of course, it does not follow from the fact that there are disagreements on moral matters that scepticism is true, nor does it serve to show that there are no facts that determine the truth of our moral judgements. But as Waldron rightly points out, the existence of disagreements remains a pressing difficulty for objectivism as long as it fails to establish a connection between the idea of objective moral truths and the existence of procedures for resolving disagreements. This is not to point out that there is no generally agreed method in ethics, since there is no such methodology in science either. The relevant difference is that at least in each dominant scientific paradigm there is a methodology that is broadly recognised by most scientists, who regard this recognition as independent of the disagreements that remain among them (see Waldron 1998). In ethics there is nothing comparable, for the different positions in normative ethics disagree not only about what is morally good or right but also about what counts as an adequate justification for it.

5. CONCLUSIONS

Michael Moore, speaking of scepticism in general, argues that when a sceptic wants to engage in a moral debate honestly, she is forced to qualify his value judgements with expressions such as "I believe" or "Of course, that's just my opinion". And referring to judges in particular, he argues that they must believe in moral objectivity in order to dispel the suspicion of arbitrariness in their moral judgements:

> "Judges are subject to these debilitating psychological consequences of skepticism no less than the rest of us. The institutional role may even intensify these effects, for judges must not only make value judgements, but also must impose them upon other people. If one's daily task is to impose values on others, to think that these are only one's own personal values doubtlessly makes the job hard to perform at all" (Moore 1982, 1064).

What Moore fails to notice is that even if the objectivist is strongly convinced of the truth of his metaethical thesis, that is, that there are objectively true moral judgements, when defending *her* moral judgements in a discussion of normative ethics, that is, when trying to justify not simply that there are objectively true moral judgements but that the ones she defends are true, if she is to be honest she cannot but qualify them equally with expressions similar to the ones Moore indicates. For from the truth of the thesis "There are objectively true moral judgements" it does not follow at all that "moral judgement *j*, which curiously and coincidentally is the one I defend, is objectively true". In other words, irrespective of whether one is an objectivist or a sceptic, in formulating and attempting to defend moral judgements at the level of normative ethics one cannot but give one's own opinion about what one believes to be morally right. As Waldron (1998) points out:

> "Since, on any account, there is moral disagreement, and since we do not agree even in principle on any way of settling such disagreements, a judge who is assigned the task of making moral judgements ought to be saying, 'I think', and;Of course, it's only my opinion', *even if realism is true*. If she pays any attention to the fact that she is not the only person in society with an opinion on the issue she is addressing, she will certainly be conscious of some arbitrariness in her opinion's prevailing, whether she is a realist or not" (178).

Here it can be seen how Dworkin is partly right in arguing that the objectivist, in asserting such things as "Slavery is *objectively* unjust", would be doing nothing more than making an internal moral claim by which the proposition "Slavery is unjust" would be emphasised, that is, the language of objectivity would not be used to give moral judgements a metaphysical basis, but simply to give them greater emphasis (see 1986, 78–85; 1996; 2004, 141–143; 2011: 40–68). Dworkin's critique of scepticism (which he describes as *external*) and, in general terms, of the distinction between the domain of metaethics and that of normative ethics, on such grounds, is untenable since it gives the sceptic everything she needs (that the objectivist cannot seriously defend the thesis that there are moral facts or qualities to determine the truth or falsity of our moral judgements), and is also self-refuting (it denies the possibility of speaking from outside morality by speaking from outside morality).

Nevertheless, the starting point of Dworkin's argument is partially correct. Contrary to what Dworkin thinks, it makes perfect sense to defend objectivism as a metaethical thesis according to which there would be objective standards of rightness in our moral discourse. But *in the context of a discussion of normative ethics*, if an objectivist says, "Slavery is *objectively* unjust", her qualification can only be understood as a mere indication of emphasis. Similarly, in the context of a discussion of normative ethics, it is not possible to stand outside of morality to try to support substantive moral theses. The only way to support our moral judgements is with substantive moral reasons, not with metaethical considerations.

For the same reason, it is incorrect to argue that for a judge to be able to justify her decision, and for a theorist to be able to evaluate a judicial decision as justified, in the strong sense that the normative premise as well as the conclusion can be regarded as morally acceptable or well-grounded, they must necessarily assume an objectivist position in metaethics. What is really required of anyone who seeks in this sense to justify or evaluate a judicial decision as justified is to assume a certain position in normative ethics, defends it with substantive moral arguments, and take them seriously enough to be willing to *act in accordance with* them.

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