Introduction: Reason(s), Reasonableness, and Law

*Mauricio Maldonado Muñoz**

The Poet smiled, and shook his head:
«Is REASON, then, the missing jewel?».

Lewis Carroll, *Rhyme? And Reason?*

Just over 30 years ago in the city of Bologna, Norberto Bobbio presented a lecture entitled "Reason in Law", which opened a homonymous congress. At that conference, Bobbio argued that there are at least two ways to address the relationship between the terms "law" and "reason", as referring to either "rational law" ("law of reason") or "legal reasoning":

> «In the first case, the concept of reason helps to distinguish one type of law from another (which is not characterized by its being the product of reason). In the second case, the concept of law helps to distinguish between the various uses of reason (so that, alongside legal reason, reason may be mathematical, logical, scientific, political, and so on) [...] If we refer to the law of reason, the problem raised by the expression "reason in law" is that of the place of reason in the legal universe, if reason indeed has a place in it, and what that place may be. If we refer to legal reasoning, the same expression sends us back to the problem of determining the characteristics of legal reasoning, as no one would even think of denying that jurists and judges use some form of reasoning» (Bobbio 1988: 99).

The problem regarding the "law of reason" concerns the very existence of such a law. The problem regarding "legal reasoning" consists in determining the characteristics of reasoning in law and what differentiates it from other types of reasoning. However, from the days of Bobbio's essay, the debate has become at once richer and more complex. In the contemporary discussion about a specific role for reason in law, the borders between the idea of a "rational law" and the idea of "legal reasoning" are progressively fading. Whether this is the correct path to follow or not I left the question to our readers.

The conference "Reason(s), Reasonableness, and Law", held at Genoa on December 5-6, 2016, intended to be, on the one hand, an homage to Bobbio's

* Facultad de Derecho, Universidad de las Americas, Quito (Ecuador), Av. De los Granados E12-41 y Colimes esq., 170125, Quito, Ecuador, e-mail: *mmaldonadomunoz@gmail.com*.

I am indebted to Pierluigi Chiassoni and Luís Matricardi for their help in the organization of the conference.

memory and, on the other hand, an opportunity to discuss 'Reason in Law' as it is addressed nowadays. In the contemporary debate we can find a heterogeneous 'mix' of different arguments about the complex relations between reason(s), reasonableness, and law. To my mind, the proceedings of this conference, deal with all these issues in a very interesting and profound way. Old and new problems are faced with analytical rigour. Fresh perspectives and new solutions are provided.

In his paper, Giovanni B. Ratti offers two models of «Rational Law-Giving»: the structural (logical) model and the reason-based model. To wit, the ideal behind *le bon législateur*[1], according to which the lawgivers ought to be rational can adopt at least two forms: the first one in which the lawgiver is supposed to provide «a logically consistent and complete set of regulations of the human conduct», and the second one which is predicated on the twofold idea that «(a) rationality depends on reasons-giving, (b) legal norms are [reasons] and/or are founded on reasons». The problems implied in each of these two positions are critically analysed, especially in its relation with legal interpretation.

Frederick Schauer makes an interesting analysis about three different aspects of reasons for action. Three different ways —the author says— in which reasons appear in practical reasoning in general and in law in particular. Being a reason, having a reason, giving a reason can be seen, in Schauer's perspective, as three different roles of reasons. The first issue raised is related with the problem about what it is for some fact, some factor, some consideration, or some goal to be a reason. The second one —in a relevant sense, distinct from the first one pointed out— has to do with an individual motivated by a reason to do something (as Schauer says: «One the advantages of distinguishing something being a reason from someone having a reason in this immediate sense is that the distinction enables us to be careful in not confusing the reasons that people ought to have with the reasons that they in fact do have»)[2], the third one is not about merely possessing a reason (i.e. having a reason) but to asserting it: «When an agent gives a reason, she tells someone (perhaps truthfully and perhaps not) why she did something». Some implications about this distinction in law are discussed.

Silvia Zorzetto deals with a familiar topic in her bibliography: reasonableness in law. Here she defends reasonableness from scepticism («Skeptics accuse it of being just a meaningless *passe-partout*»). The main point of the paper is that reasonableness in law relies on —has its roots in— ordinary common sense; i.e. «the ordinary intuitions, beliefs, perceptions on what is (un)reasonable in each circumstance». Reasonableness is, in this sense, «a pragmatic concept that presupposes multifaceted assumptions about human actions and entails an implicit chain of reasons. This means that what is (un)reasonable is a context-dependent

[1] "Le bon législateur" is the title of a famous Bobbio's paper (1971).

[2] One shall not forget G. H. von Wright's (1999: 26) statement: «The schema for a rational explanation is a reversed practical inference, one could say. It understands an individual action against the background of its reasons, i.e. the agent's wanted ends and estimated means for their attainment».

issue. It necessarily depends both on the circumstances of use [...], as well as on a certain previous value-choice».

Marco Brigaglia and Bruno Celano advance a "psychological account" of rule-based reasoning and decision-making, or, more specifically, of the relationship between rules and exceptions. A psychological account, they hold, «explains rules and rule-oriented reasoning —a normative issue, concerning what justificatory reasons we have— in terms of plain psychological matters of fact», to the effect that something is correct that *appears* to be correct —because and insofar as it appears to be correct. The authors' claim is that such an account dissolves the paradox "of rules" facing exceptions («in order to discover whether the rule should be reconsidered it is necessary to reconsider it»). The claim is: whether a rule (that sets the "normal case") is a reason for action or not depends on our psychological makeup: normal cases are those that *appear* to be normal. Whereas Brigaglia and Celano acknowledge that no conclusive reasons exist for endorsing the psychological as a general theory, they argue that it is the one route presently available for the empiricist's project of "naturalizing jurisprudence"[3].

Adriano Zambon, based on Hart's distinction between rational and causal connections between natural facts and legal or moral rules[4], sets out to pave the way for a cognitive approach to the study of rules and normative (legal) reasoning, as one concerning the connections of the second type. More specifically, he wants to flesh out the specific rationality emerging from the cognitive approach by focusing on the causal connections between psychological facts posited to explain how human mind works (i. e. how people reason) and the content of legal rules. These causal connections can be used by cognitive scientists to show how to influence people's normative reasoning, as Zambon illustrates with the example of mental models' theory.

Sebastián Reyes puts forward three critiques to Michael Pardo's account of "second-order" proof rules. With them Pardo's seeks to solve the problem of indeterminacy —which Reyes presents as of "ambiguity"— that undermines the standard of proof, i. e. on the sufficient conditions that evidence should meet so to the fact it supports be taken as proven. While Pardo claims second-order proof rules contributes in constraining and guiding the interpretation of the standards of proof rules (first-order proof rules), Reyes thinks otherwise. According to the author, *a)* Pardo confuses matters of interpretation with those of epistemology: while his second-order proof rules aims at fixing the best explanation for a set of evidence (that concerns statements of facts), it leaves the threshold for sufficient evidence —a normative affair— unaccounted for, thus overlooking the problem of *legal* indeterminacy; *b)* yet second-order proof rules do not (for they cannot) resolve the indeterminacy of the standards of proof rules because they are themselves indeterminate, leading to an infinite regress; *c)* moreover, taken as interpretative directives for standard of proof rules, they are also redundant.

[3] Leiter 2007.
[4] Hart 1994: 193 ff.

Eventually, Reyes briefly considers an alternative reading of second-order proof rules that seems to cope with the criticism.

Fabrizio Esposito dwells on the use of economic concepts by Alexy and others in the analysis of proportionality reasoning, which he eventually presents as «a step in the direction of considering Principle Theory as a form of economic jurisprudence». Esposito identifies two claims concerning the relation between legal and economic concepts, underpinned by homonymous theses. According to the weaker, "Similarity Thesis", economic concepts are useful as long as they help in making explicit features of the actual legal reasoning —they work, as it were, analogically—. According to the stronger, "Identity Thesis", some concepts are used in legal reasoning *as they are used* in economic literature, thus conveying they have must have the same applicative conditions. He further claims that that an author is making a Similarity or an Identity Claim can be shown by three types of evidence: *a)* the terms used in the claim, *b)* its object and *c)* the arguments used to support it. In the course of the analysis, two problems concerning the Identity Claims arise, i.e. their proneness to *a)* the distortion of the concepts involved and *b)* the elaboration of weak legal arguments. Esposito then argues for a fixed, humbler version of the Identity Claim that fits the proportionality reasoning.

References

Bobbio, N. (1971). *Le bon législateur*, «Logique et Analyse», XIV, 243-249.
— (1988). *Reason in Law*, «Ratios Juris», 1, 97-108.
Hart, H. L. A. (1994). *The Concept of Law*, Clarendon Press, Oxford, II ed.
Leiter, B. (2007). *Naturalizing Jurisprudence*, Oxford, Oxford University Press.
von Wright, G. H. (1999). *Value, Norm, and Action in My Philosophical Writings. With a Cartesian Epilogue*, in Meggle, G. (ed.), *Actions, Norms, Values: discussions with Georg Henrik von Wright*, Berlin, De Gruyter, 11-33.