

ON WALDRON'S NORMATIVE POSITIVISM*

SOBRE EL POSITIVISMO NORMATIVO DE WALDRON

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Resumen: Primero, ofrezco una reconstrucción del positivismo normativo de Waldron tal como él lo defendiera principalmente en "Positivismo normativo (o ético)" (2001) y "Derecho y desacuerdo" (1999), pero también más adelante en su respuesta a Marmor en 2014. En segundo lugar, presento algunos argumentos dirigidos a desafiar su concepción del derecho y la democracia: no nos ofrece una descripción adecuada del derecho al por menor (aquí sus afirmaciones solo podrían ser normativas, lo cual no es suficiente para una teoría del derecho). Y nos da una concepción estrictamente procesal de la legitimidad democrática que no puede dar cuenta de las democracias procesalmente justas, pero sin embargo ilegítimas en función del nivel de injusticia de las circunstancias o el nivel de alienación de la sociedad donde funciona el procedimiento. Para el análisis de esta última cuestión me apoyaré en algunas ideas de "La Forma del Derecho" de Fernando Atria.

Palabras-clave: Jeremy Waldron - Fernando Atria - Positivismo Normativo - Positivismo Ético.

Abstract: First, I offer a reconstruction of Waldron's normative positivism as he defended it mainly in "Normative (or Ethical) Positivism" (2001) and "Law and Disagreement" (1999) but also later in his response to Marmor in 2014. Second, I present some arguments addressed to defy his conception of law and democracy: it can't give us a proper descriptive account of the law at the retail level (here its claims could only be normative, which is not enough for a theory of law). And it gives us a strictly procedural conception of democratic legitimacy which can't account of procedurally fair but nonetheless illegitimate democracies in function of the level of injustice of the circumstances or the level of alienation of the society where the procedure works. Regarding this last issue, I will rest on some ideas from Atria's "La Forma del Derecho".

Keywords: Jeremy Waldron - Fernando Atria - Normative Positivism - Ethical Positivism.

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Sumario: I. Reconstructing normative positivism. II. Does Waldron's normative positivism give proper account of our practice? III. Waldron and Atria on democracy. IV Bibliography.

I. Reconstructing normative positivism

In this paper I will make a direct approach to Waldron's normative (or ethical) and exclusive positivism as defended in his *Law and Disagreement* (1999) and in papers of the same time such as, precisely, *Normative (or Ethical) Positivism* (2001).¹ First, I will reconstruct his main theses (which I consider plausible and interesting). Second, I will challenge them, and, in order to solve that challenge, using some ideas of Fernando Atria, I will try to push them further.

Let us start remembering that Herbert Hart, in the postscript to *The Concept of Law* (Hart, 1994) wrote that his approach was "descriptive and morally neutral". By this he meant that law is a social phenomenon existent in mostly every society and, consequently, that it was possible (and required indeed) to make a general theory of law, ie., a conceptual analysis accounting for the necessary and sufficient conditions for its existence, conditions which were identifiable with complete independence of moral judgment.

Waldron and others (mostly Postema, Campbell, Perry and, among us, Fernando Atria) had recently developed a new² and interesting positivist doctrine incompatible with Hartian descriptivism, neutrality and even generality: Normative or ethical positivism. It asserts that "the separability of law and morality (...) is a good thing, perhaps even indispensable (from a moral, social or political point of view), and certainly something to be valued and encouraged" (Waldron, 2001, 411). They are also interested in developing a *special* theory of law, focusing in modern states of law and democracies (Waldron, 2009). There are in fact much more differences than similarities between, for example, the *ancient regime* and the modern law. Moreover, if we focus on the latter, the similarities, we are condemned to superficiality (Atria, 2016).

According to the sentence quoted above, this is a theory about what the law should be (I shall consider below whether it is also a theory about what the law is). Moreover, it is a theory that claims that law should be so (positivist, even exclusive positivist) for moral reasons. This is quite astonishing for us, used to understand positivism as a doctrine about what the law is, not about what it should be. So let's try to make sense of it.

(1) Later he made a Dworkinian shift. But that is another story. For this shift, see Gallego Saade, 2019.

(2) By "new" I mean a theory that restates theses and arguments that were forgotten or anyway not present in the debate before this discussion. But as everyone recognizes, the first positivists, mainly Jeremy Bentham, were normative positivists rather than conceptual.

One approach to the problem could go as follows: As a conceptual matter, legal positivism can be conceived, in a strong version, as the assertion that law is necessarily separate from morality. Alternatively, more weakly, that law is not necessarily related to morality. This second position (known as inclusive positivism) admits, as a contingent issue, that some systems (perhaps ours) may include moral rules, or legal rules (eg. constitutional) that cannot be rightly interpreted except by reference to moral rules. Normative positivism would presuppose that this weak definition of positivism is correct and condemn for moral reasons those systems which in fact introduce moral criteria for the determination of legal validity (Waldron, 2001, 414).

However, this is not the position espoused by Waldron: as presented, it would be a normative thesis *about*, not *of* legal positivism: not related to its essence, its core. In order to grasp his account adequately, let us introduce a distinction crucial to his thought: that between a *wholesale* account of law and a *retail* one. As Waldron asserts “(...) the phrase ‘the account of what the law is’, is ambiguous. It could mean the *wholesale* account of what, the law, the institution, is (as opposed to other methods of governance); or it could mean the *retail* account of what the law on some particular subject is in a particular jurisdiction”. Legal positivism in the Hartian mode was mainly interested in determining the validity of particular laws, ie. the law at the retail level, by reference to the rule of recognition and without mixing of moral criteria. But this is compatible with an account of what law as a whole is, an account sensible to the question of why it is important to identify individual norms independently of moral judgment. This question about importance can clearly be a moral one and be so without contaminating with morality individual judgments of validity (see Waldron, 2001, 415)³.

(3) The distinction between *wholesale* and *retail* accounts of law is, I believe, central to our continental tradition of legal thought, deeply marked as it is by Bobbio’s distinction between, conceptual, methodological and ideological positivism. We may think that Waldron’s normative positivism is quite the same than Bobbio’s ideological positivism. Is it so? In fact, the retail/wholesale distinction is quite similar to his distinction between two forms of ideological positivism. First, as the doctrine that the criteria for judging about the validity of particular norms matches perfectly with the criteria for judging about the justice of those norms. Second, as the idea that the law, as the system of rules imposed by the power exercising the monopoly of violence in a given society, by its mere existence, apart from the moral value of its particular rules, serves for obtaining certain desirable ends such as order, peace, certainty and, in general, legal justice (Bobbio, 1997,47). Regarding the first form of ideological positivism Waldron wouldn’t say that validity is equal to justice but, certainly, he would claim that it implies a duty of respect. Regarding the second form, I would say that Waldron could embrace it without hesitation. The difference between Waldron’s normative and Bobbio’s ideological positivism relies, as we shall see, in how they understand the possibility of a distinction between a pure conceptual and descriptive analysis by one side and a normative one by the other. While Waldron denies that possibility, Bobbio accepts and endorse it.

With this distinction in mind, we can return to the question of whether normative positivism is a thesis *about* legal positivism⁴ or, as Waldron wants, a version of legal positivism. I will somehow follow Marmor in presenting Waldron's argument. According to Marmor (Marmor, 2011, 126), it relies in three main premises. First, that, it is central for jurisprudence to determine criteria of validity at the retail level. Here we can disagree as to whether we can introduce moral standards among those criteria. How are we to solve this disagreement? The second premise asserts that such disputes cannot be solved but by "testing the respective theories (about the correct criteria of validity) against our sense of why it is important whether something counts as law or not" (Waldron, 2001, 420)⁵. Third, according to Waldron, this "Why" question is bound to be normative. It is bound to rely on certain views about what makes law as institution, law wholesale, good or worthy of our appreciation. We must conclude, according to Waldron, that our concept of law necessarily relies on normative considerations. Normative positivism is not a thesis *about* law but *of* what law as an institution is. But we cannot identify what law is without looking to normative standards.

Waldron's example could help to enlighten the question. Suppose an armed organization with a strong man that dictates commands and is obeyed by his followers out of interest and by the people out of fear. The organization may even have judges which apply and enforce the strong man's commands when they are disobeyed. Here we have a society with primary and secondary rules, both respectively applied and accepted without any reference to moral judgment. Would we have law in this society? (Waldron, 2001, 420-21).

A soft or inclusive positivist, as long as she asserts that the connection between law and morality is not necessary but contingent would be forced to accept that here we are facing a legal system. But opponents to this analysis would ask what its point is if it cannot distinguish this pure command-based system as a non-legal mode of administration (Waldron, 2001, 421). Even more, the normative positivist would deny that in this case we are facing a system of law: "The claim of the normative positivists is that the values associated with law, legality, and the rule of law (coordination, predictability, autonomy, respect for the dignity of persons as separated individuals, reduction of political conflict or whatever values normative positivists may endorse) can be best achieved if the ordinary operation of such a system does not require people to exercise moral judgment in order to find out what law is" (Waldron, 2001, 421)⁶. But for this to be the case, the law, wholesale, must make these values more possible or probable than with no law at all. And

(4) If this were the case, normative positivism would presuppose a normatively neutral conceptual analysis which would allow us to identify instances of law which, in a second stage, we could commend or condemn for complying or not with our normative standards.

(5) The addition in brackets is mine.

(6) The addition in brackets is mine.

the system of the example doesn't promote any value whatsoever (other than the promotion of the interests of the strong man and his allies). Then, according to normative positivism, it cannot be law. Therefore, the argument for normative and exclusive legal positivism must be normative from the very beginning.

The proper way of doing legal theory, according to Waldron, is "to grasp the internal point of view in relation to the point or function of a legal system." "If the legal theorist is not presenting those beliefs and attitudes in his own voice, then he is doing legal theory in *oratio obliqua* (...) grasping what is like to do legal theory but (...) not doing it himself" (Waldron, 2001, 426).

So far, so good. Let's move one step forward. What is the point, function or value of law, on Waldron's eyes? Let's focus on modern, democratic, states of law, which are, after all, our concern. Let's focus even more. What is the point or function of legislation, ie., the main source of law (perhaps competing with constitutions in every day practice) in modern states? Looking for an answer to these questions, we mainly have to pay attention to chapter 5 of Waldron's *Law and Disagreement*. (Waldron 1999). There Waldron highlights that in modern societies we face two problems which he called *the circumstances of politics*. These are, first, the felt need of a common decision on some matters regarding our shared life and, second, the existence of wide disagreements among the members of the society about how the issue should be decided (Waldron, 1999, 102). In modern societies, this problem is mostly solved by democracy: deliberation about the correct way of solving the issue we are facing and voting applying a majority rule for adopting the authoritative decision. We may say that this mechanism has the function of making uncontroversial what before the procedure and the decision was controversial (now we can solve concrete problems not by reference to our disputed theories of justice or rights but to the enacted law) and doing this in a way that respects the equal dignity of each of the members of the society. As every opinion is taken into account, we show respect for the holders of those opinions by respecting the decision taken according to a procedure designed for making honor to that dignity. In Waldron own terms: "A piece of legislation deserves respect because of the achievement it represents in the circumstances of politics: action in concert in the face of disagreement... It may also deserve our respect because it is a *respectful* achievement... - because it is achieved in a way that is respectful of the persons whose action in concert it represents" (Waldron, 1999, 108-9).

Consequently, exclusive positivism follows: we cannot go back to reconsider the (moral) reasons for the decisions taken because there was precisely where the disagreement reigned.

II. Does Waldron's normative positivism give proper account of our practice?

My first point against Waldron's theory goes as follows. As he says, his theory is a theory of law, ie., it intends to grasp the concept of law as a normative concept. But

even if it seems to work well at the wholesale level, catching the point or function of the law as an institution and, consequently, allowing us to identify instances of law and distinguish them from other forms of governance as the strong man system, it doesn't seem to do such a good job at the retail level. At this point our neo-constitutional system of law, plenty of moral norms or legal norms required of moral (and controversial) interpretation, is more adequately described by anti-positivism or by inclusive positivism. At the retail level, normative positivism seems to make just a prescriptive claim, ie., to recommend how law should be, even recognizing that it is not so. Isn't this a problem to a theory which intends to grasp the core of law? Shouldn't it allow us to grasp paradigmatic instances of law also at the retail level? But aren't morally loaded legal norms or jurisdictional decisions (mainly but not only taken at the Supreme Court level), even if they are not but a little percentage of the total amount of decisions, central to our comprehension of our law at the retail level? Would Waldron disqualify all of them as mere mistakes?

Let's, for a moment, assume that I have a point here: Waldron's normative concept of law does not give proper account of our law at the retail level. Let's see what happens if we add another premise that Waldron espouses: we shall have an institutional, (nor conceptual, neither about words), approach to the law (Waldron, 2014). But institutions, I assume, are groups of norms, norms which are an essential part of the legal practice, practiced norms. In other words, an institutional approach focuses on the practice, its concept of law must account for the practice.⁷ But our practice, as we noticed, is one that includes at a central level moral interpretation and adjudication. And the law, wholesale, is just the sum of norms, institutions and practices. But if Waldron theory can't give proper account of the law at the retail, individual, level, and if the law, wholesale, isn't but the addition of all that retail law, it follows that Waldron can't give proper account of the law at the wholesale level neither.

III. Waldron and Atria on democracy

In Waldron's theory, a suitably democratic procedure is designed to show the proper respect to individual's equal agency and dignity. As we saw, according to him this implies that we must respect the law and treat it as it deserves to be treated:

(7) Waldron quotes affirmatively this sentence by Postema: "Jurisprudential theory (...) even when it appears to be engaged in conceptual analysis is focused on the task of giving an account of legal institutions and the practice and sensibility that breathe life into them (...). For these practices are not mere and mindless habits, or behavioral routines with no intrinsic significance to those who execute them. They are intelligible social enterprises with certain, perhaps very complex, meaning or point" (Postema, Bentham and the common law tradition, 334, quoted by Waldron at Waldron, 2001, 424). Maybe Postema was thinking (and surely Waldron quotes him as he where thinking) in the institution of law wholesale. But the point seems also valid to retail law. If so, Waldron's theory seems incapable to enlighten the sensibility that breathes life into our practice of moral interpretation of particular legal norms.

as excluding moral and controversial reasons. But is this enough for political legitimacy and for giving for granted the normativity of law at the retail level? I will use some ideas by Fernando Atria to try to strain Waldron's philosophy over this point.

A procedure designed to recognize our common status as agents, working under ideal conditions, would necessarily reflect in its decisions the equal dignity of the parties. However, working in our world, where usually the conditions of justice (conditions not related to the procedure but to the reality where it works) does not meet, it can produce distorting results. Atria exemplifies this point with the development of modern labor law. The idea that the worker and the employer are recognized as agents under equal conditions, given the conditions in which work is developed in our capitalist societies, is oppressive for the worker: it denies his agency instead of recognizing it. Under capitalism the worker is reified, lacks agency or has the agency diminished (Atria, 2016: 384). So the law must account for this circumstance and do not treat the worker as an agent on equal terms with his employer. It must, on the contrary, compensate the deficit.

Now we can universalize the problem of labor law: All of us, in our world, are (figuratively) workers.⁸ Therefore we live under conditions of diminished autonomy: we are alienated. Let's suppose that this is the case (as I believe it is). If this is so, do authentically democratic structures of government, structures that under ideal conditions would imply an effective recognition of our equal dignity and autonomy but that, *ex hypothesi*, operate under our real, non-ideal, conditions, recognize those values? Or is this, as it would be the recognition of a full equality between worker and employer, an underground way of oppression? To answer this question it is necessary to make use of the theological idea of *anticipation*.

According to Atria "(...) the categories of contract law are anticipatory, that is, they are built from the idea of radical autonomy and thus anticipate it. That they anticipate it means that using the categories that correspond to radical autonomy to understand us in our present conditions of incomplete autonomy, makes us more autonomous. Our current recognition of autonomy to the contracting parties, despite the fact that under the conditions in which that autonomy must be exercised are incompatible with true and complete autonomy, shows us what it means to be truly autonomous" (Atria, 2016: 385).

As we can see, according to Atria, even in our conditions of incomplete autonomy, it makes sense to understand contract law in an anticipatory way, anticipatory of a situation of full recognition. It makes sense insofar as, using these categories, we learn what autonomy means and we bring closer, as it were, the moment of full autonomy, of its consummation. But in labor law we cannot use in this anticipatory way the legal categories. We cannot because our reality is beyond the threshold at which those categories can be used anticipatorily with meaning. What, then, marks

(8) See, Jünger, 2017.

the possibility of the anticipatory use of legal categories is partly internal to them: they are designed in order to recognize our common agency and dignity. And, on the other hand, something external, a property of reality: how far are our ways of life from radical recognition. Atria seems to understand that although alienation is our general condition, it has degrees, and that in certain areas of our life in common or at certain historical moments, it exceeds a threshold such that using anticipatory categories has no meaning or has an effect opposed to the expected one.

Now, when we speak of the institutions of formation of the political will of the people, what side of the threshold are we on? Does it make sense to use the anticipatory mode of language there? In other words, democratic legislation in general, is like the law of contracts or like the labor law? Let's listen to the dilemma in Atria's terms: "The political is the space that arises when we reciprocally recognize each other, and political decisions are such because they are (...) our decisions. If they are our decisions (that is, if they are political decisions in this radical sense of the term) they correctly reflect our interests, because then they go effectively in everyone's interest. Only by understanding our decisions in this way we can understand ourselves as a political community with agency. But this understanding is anticipatory, because in the conditions in which we live, radical recognition is not possible. Here one could say (...) that that means that in our conditions of life the political has become impossible. Or that although our political life forms are not totally political, they are political enough to understand us through them, which means: to understand them anticipatorily, in the sense that living under these forms of life imperfectly political we live more political lives. If today the political cannot be understood anticipatorily, then our initial dilemma regains all its strength and nothing remains but (...) to abandon our political practices (which are not such) and form small communities where it be possible to practice the virtues. If the political can still be understood anticipatorily, then we can reject as false the initial dilemma and affirm that the moral is dissolved, anticipatory, in the political. And it is in this anticipatory dimension where the normativity of the political is to be found (Atria, 2016: 386).

We saw that the possibility of the anticipatory use of legal categories and, therefore, of recognizing normativity to the law depends, on the one hand, on something internal to them: if the legal institutions recognize in its design our common agency and dignity. Regarding this issue there is agreement, I believe, between Waldron and Atria. If the formal conditions are given, both consider the law as excluding subjacent or dependent reasons. Let's see this point in Atria's thought.

For him, at the level of the institutional structure such recognition will depend on whether "our will" is not a euphemism but actually includes "my will" in a relevant way. The legitimate law "is possible insofar as the will in which the law consists is, in some significant sense, my will" (Atria, 2016: 386). In turn, whether this is the case depends both on the form and the substance of the legislative decision. Formally, that the decision be the result of a procedure in which I have participa-

ted, or in any case, that it treat me as an author. Substantively, the decision has to be justified by common reasons: it must be in the interest of all. But if the form respects our common agency, and given that what is in the interest of all is, before the institutional decision, essentially controversial, then once the decision is made, for operational purposes it must be taken as if in fact it were in the interest of all: "(...) our decisions count as ours not because they are correct but because they have been formally produced" (Atria, 2016: 387).

But Atria adds an element external to the democratic procedure as condition of the normativity of its product, ie., law at the retail level: how political, how human, are our ways of life (Atria, 2016, 415). As far as I know this element is absent in Waldron's perspective. There is no space in his thought for the possibility of a full democratic procedure which, given certain social conditions, is not but an underground mode of oppression.⁹ The very idea of a totalitarian democracy (present both in left- and right-wing thought) seems to be an oxymoron in his thought.

Let us focus for a moment on this external condition of legitimacy of our institutions, of our law: that the current conditions of life are sufficiently political, imply sufficient reciprocal recognition, so that it makes sense to use the anticipatory mode of language when those institutions are applied to these conditions. Are we, Chileans, Argentineans, Americans, Spaniards, etc., in such a situation? Given our current forms of common life, does the law effectively work to make reciprocal recognition more likely or is it a mere instrument of oppression? "[N]or will it be that our material conditions of life have made the political impossible?" (Atria, 2016: 390). Given that our current condition is the market society, and given that the self-understanding of the individuals in the market society is that of subjects with pre-politically formed preferences, (preferences over which it is not possible to deliberate but must be added in order to make a collective decision when we need it), we may have a skeptical, emotivist vision of the political: the reciprocal recognition contained in the idea of deliberation and law based on deliberation, law as a unification of interests, has become impossible. The only thing left is to add preferences.

But this is the self-understanding of the individuals in the market society. Are we people defined by that condition? Are we mere subjects of the market? Or is there still some space in our lives for the political, for the common, for the question of the general interest? The inquiry can be translated in these terms: "Is it possible

(9) We can see this idea in McCabe's assertion that "[a] certain distortion of the nature of man is built into the capitalist culture which makes it difficult for us to recognize ourselves for what we are, to recognize, in fact, what we want." (McCabe, 1968, 60). I ought to thank Fernando Atria to point me this quotation from McCabe which also appears in his book (Atria, 2016, 394). In a nutshell, the idea is that totalitarianism may appear under new dresses, even under democratic ones. On the issue see Trueba, 2018 and Soljenitzen <https://www.lanacion.com.ar/210950-el-totalitarismo-tambien-puede-surgir-de-la-democracia> among many others.

today the unification of interests that the deliberation was supposed to provide?" (Atria, 2016, 391). And without this unification there is no normativity in the law. Why would I differ my preferences by the mere fact that those preferences contrary to mine add up more? So, do we still have reason to believe in deliberation and the pursuit of general interest, at least in an anticipatory way?

What would Waldron answer to this question? "I believe (he says) (...) that it is true empirically that citizens and representatives often do vote on the basis of good faith and relatively impartial opinions about justice, rights, and the common good (...). At any rate, I shall proceed throughout this book on the assumption that people sometimes or often do vote their considered and impartial opinions. It is by no means invariably true, but a normative theory of law and politics needs an aspirational quality, and this is mine. I shall assume that in order for law to claim authority along the lines that I think it can and should, those who participate in making it ought to do their best to address in good faith the issues on which they know they disagree with others" (Waldron, 1999, 14-15).

It is curious. Waldron says that he "believes" that this is the case, ie, that people vote with the sight put in the common interest. And that, at any rate, that is his "aspirational quality". We must assume that, on his view, we are facing an issue which cannot be decided by empirical research or other noncontroversial procedure. Exactly the same is asserted by Atria. To the question posed above about if it is still possible the unification of interest that deliberation was supposed to provide, he says that the answer to this question is polemical and, consequently, that it is not a task for his book to provide it" (Atria, 2016, 391). Even more, in terms quite similar to Waldron, Atria says that his books suppose (but doesn't give an argument for asserting) that deliberation is possible (Atria, 2016, 348). But from an ungrounded belief, from an aspirational quality or from a supposition we cannot derive the normativity of law.

Maybe we can deliberate about the right answer to this question. Is it genuine deliberation still possible in our actual conditions? Anyway, which kind of question is it? Why authors as clever as Waldron and Atria refuse to address it directly?

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