

Prezadas e prezados colegas,

Este texto foi uma elaboração e atualização de uma carta que escrevi para um processo de doutorado sanduíche, tentando resumir minha pesquisa. Por isso, ele está em inglês. Peço desculpas por qualquer perda de clareza ou erros gramaticais que acompanham a execução dessa proposta por mim. Ainda, como não qualifiquei, penso que o texto pode servir de base para meu projeto de pesquisa que está em revisão. Gostaria de saber o que acham. Uma última observação é que, como verão, apresento dois modelos teóricos sem declarar assertivamente qual defenderei. Isso se deve ao fato de que intuitivamente defendo Fuller, mas ainda não estava completamente seguro quanto à teoria de Raz, o que me fez ser mais modesto. Não obstante, penso que o caminho está em explorar a ideia fulleriana de articular forma e agência (apresentada ao final), para elaborar um argumento (normativo) de integridade pessoal. Gostaria de saber o que acham, pois certamente precisarei integrar isso ao texto.

Espero que, apesar do meu esforço involuntário de dificultar excessivamente as coisas, a leitura seja, senão agradável, pelo menos, interessante.

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Introduction:

Is the idea of a legal system necessarily connected to specific decision-making methods and procedures? If so, do the reasons that justify creating and maintaining legal institutions affect how we are to understand the content of legal norms? In my PhD research I intend to investigate how the concepts of legal system, norms and role obligations are interrelated.

The investigation starts with the ordinary intuition that legal practice is marked by legal practitioner's attempts to justify the legal outcome of a given case by deploying arguments about what is the applicable law. They thereby assume that law provides a form of justification. However, what legal justification means is still unclear. One reason for that might be that the very idea of what is a legal norm is still unclear. In a similar way, it is a difficult task to build a case for a judicial duty to apply the law in deciding legal disputes. I am interested in how these questions are articulated in the debate regarding the limits of law and specially how they affect an explanation of what is a legal system. Two models are compared: (1) the theory of legal systems set forth by Joseph Raz; and (2) an interactionist approach largely inspired in Lon Fuller's understanding of law. The two models have been chosen because in each the idea of legal authorities' duties towards the law are given central place in explaining what is a legal system. Moreover, the different routes through which each theory ground those duties show different forms of explaining the relation of legal systems to the Rule of Law.

Methodology:

Before presenting the two models, some methodological commentaries. The limits of law debate discuss whether it makes sense to try to provide a test for distinguishing what is law from what is not (Raz, 1972, p.842-843). In *The Model of Rules I*, Ronald Dworkin (1977, p.39-45) challenges Hart's rule of recognition for its alleged inability to explain forms of legal justification other than rules (i.e. legal principles), which leads the latter to defend that judges are unbounded by law in cases not clearly covered by rules. We have in this version of Dworkin's thought a theory of legal norms (rules and principles) that implies that there are not clear limits to the law (a

negative thesis concerning legal systems). Plainly, a prominent place is given to the distinction between rules and principles. Raz (1972, p.823-839) have shown that this is not promising as an alternative to Hart's theory. In subsequent works Dworkin himself does not give much attention to the logical distinction between rules and principles (Bustamante, 2022). What matters for present purposes is that the limits of law are connected to the limits of legal justification. It doesn't matter then whether we are talking about rules or principles, but what their qualification as *legal* rules, principles, standards, adds concerning justification. Thus stated, the matter is a practical one. This leads us to two possible approaches to a theory of legal systems.

For Raz (1979, p.79), we should distinguish between two concepts of the unity of a legal system: the material unity and the formal unity. "The material unity of a legal system consists in its distinctive characteristics; it depends on the content of its laws and on the manner in which they are applied." (Raz, *ibid.*). I think Dworkin's theory can be elaborated to fit this model. Raz, however, does not think this is a good way to proceed, because

[w]hen trying to explain the characteristic features of a legal system we are not, of course, looking for the detailed regulation of every legal institution. Rather, we are looking for the all-pervasive principles and the traditional institutional structure and practices that permeate the system and lend it its distinctive character (Raz, 1979, p.79).

The formal unity approach provides, then, "the all-pervasive principles and the traditional institutional structure and practices that permeate the system and lend it its distinctive character". One central task for such approach is exactly to explain the identity of the system as a set of criteria that determines which laws are part of the system and which are not (Raz, 1979, p.79).

Raz prefers the formal unity approach because it is more in line with what he sees as legal philosophy's task in contrast to legal sociology. For him, legal philosophy is concerned with the necessary and the universal features of all the intuitively clear instances of municipal legal systems. On the other hand, sociology of law is concerned with the contingent and with the particular (Raz, 1982, p.104.). I think the contrast he draws is exaggerated. There are elements associated with material unity that, despite being contingent, are so characteristic of legal systems that must be part of a general theory of legal systems. Here I refer to the procedures through which norms are applied. In his late theory, Dworkin (e.g. 1986, p.147 and 2011, p.151-155) emphasizes the

process of interpretation and legal reasoning, and that is fundamental, but one must also look to the institutional framework that disciplines and frames that reasoning. To explain that I turn to Lon Fuller.

Fuller's jurisprudence is often called a sociological one (e.g. Lacey, 2010 p.28; Rundle, 2014, p 134). The best explanation for that is his goal to produce a 'science or theory of good order and workable social arrangements' that he named *eunomics* (Fuller, 1954, p.457). This approach leads to a theory of legal system once we see that *eunomics* is how Fuller proceed to explain the distinctiveness of different forms of law. Fuller, then, has a theory on law's institutional distinctiveness that is aimed at illuminating how this distinctiveness rests upon the particular attitudes, capacities and commitments that different legal forms ask of the agents who participate within them (Rundle, 2016, p. 23-24). The fact that these forms are not universal is not an embarrassment, if they are capable of explaining what is central in modern legal systems.

Now we are in conditions to present the two models and to seek answers to the questions: Is the idea of a legal system necessarily connected to specific decision-making methods and procedures? If so, do the reasons that justify creating and maintaining legal institutions affect how we are to understand the content of legal norms?

Two models

Joseph Raz explains that understanding what is a legal norm requires identifying a set of principles which provide an answer to the question "What is to count as a complete law?" (Raz 1972, p.825). He calls these principles "principles of individuation". Principles of individuation serve the purpose of carving "small and manageable units" out of legal materials, and thus are part of an important preliminary step to classifying legal provisions into different normative types and to "showing how laws interrelate and interact with one another" (Raz 1972, p.831). For Raz, a theory concerned with principles of individuation is not only relevant to shed light in the concept of a law, but also in the concept of a legal system. Actually, the two concepts are intertwined: every law necessarily belongs to a legal system. Accordingly, to understand what "a law" is requires defining a legal system (Raz 1980, p.2). Moreover, all elements of a theory of norms are crucial to explain the nature of legal systems,

given that the existence of a system of laws entails the existence of the laws belonging to it (Raz 1980, p.45).

Nonetheless, Raz is mainly concerned with one relation between legal systems and laws: identity. For him, “The problem of the individuation of laws--the question of what is one complete law--is one of the most controversial in jurisprudence. It would, therefore, be desirable to separate the problem of identity of legal systems from that of the individuation of laws” (Raz, 1979, p.80). This is odd, given that Dworkin’s contentions in *The Model of Rules I* and Raz’s responses to them show that the debate on individuation impacts what we conceive as identity of legal systems. Even still, Raz proposes an alternative which is not incompatible with my proposal that what mattered in that discussion was the idea of legal justification and its limits, and not a discussion between types of norms.

Raz avoids talking about individuation by introducing the idea of pure normative statements. A statement is a normative statement if and only if the existence of a norm is a necessary condition for its truth. A normative statement is pure if and only if the existence of certain norms is sufficient for its truth. The set of all the pure statements referring to one legal system provides a complete description of that system (Raz, 1979, p.80-81). “The problem of identity of legal systems is the quest for a criterion or set of criteria that provides a method for determining whether any set of normative statements is, if true, a complete description of a legal system.” (Raz, *ibid.*) What then are the criteria Raz proposes as relevant to the identity of a legal system?

“The identity condition of a law's membership in a legal system is a counterfactual: if presented with the appropriate case the courts would act on the law” (Raz, 1979, p.88). To be sure, that claim does not entail that these organs create the law. They may be merely recognizing and enforcing laws previously created by legislation, precedent, or custom. Neither does it entail that laws are descriptions or predictions of what the courts are doing or will do (Raz, 1979, p.89). But it does imply that it is by examining the courts' opinions that one finds the laws on which they act. The counterfactual test assumes that laws themselves are normative (Raz, *ibid.*). And they are normative in so far as they are not only recognized by the courts but are recognized as a previously existing law. The distinction between the application of a new law and the application of a previously existing one turns on the existence or absence of a duty to apply the law (Raz, 1979, p.90). That duty demands that law be applied regardless of its merits, otherwise law contains norms guiding behavior but the institutions responsible for

evaluating and judging behavior employ other types of standards (Raz, 1979, p.111-113). The existence of a legal system is then tied with a special method for settling disputes: institutions are empowered power to determine the normative situation of specified individuals, by applying existing norms, but their decisions are binding even when wrong (Raz, 1979, p.109-110)

Lon Fuller also believes that what distinguishes law is its institutional aspect. But, strikingly differs from Raz in advancing a theory on the methodological principle that Law is a purposeful practice, and that as such one cannot understand it properly without having its purpose in view (Fuller 1954, p.468-470). He ascribes to the law the purpose of furnishing baselines against which citizens are able to organize their lives with their fellows (Fuller, 1969a, p.24). Law thus contributes to and is dependent on interactional expectations. This characterization has a direct implication to Fuller's idea of a legal system. For him, "A purpose is a fact, but it is a fact that sets a target; it is a direction-giving fact. [In other words] within the limits of its framework a purpose is at once a fact and a standard for judging facts" (Fuller, 1954, p.470). Applied to the idea of a legal system, "[...] this view treats law as an activity and regards a legal system as the product of a sustained purposive effort" (Fuller, 1969b, p.106). But whose activity? And what is distinctive in this activity?

It is a moral and cooperative activity carried by legislators, judges and citizens. For Fuller is especially concerned with the *demands* that animate the structure of legal authority, that is, his focus is what possessing and exercising legal authority asks of 'human insight and effort' (Rundle, 2018, p.32). Given that, his idea of a legal system is not equated to the presence of an observably interactional structure, but goes beyond in giving central place to the conduct of appropriately framed and effortful relationships within that structure. A legal system exists in so far as a moral relationship exists between government and subjects, that relationship has as its defining feature:

[...] the status that is enjoyed by the subjects of a legal as opposed to some other kind of order. [Thus, t]o be a legal subject, Fuller insists, is not merely to be a member of 'a subservient populace ready to do what they are told to do', but rather to be a participant in a distinctly constituted social condition in which one is respected as an agent (Rundle, 2012, p.2).

To be governed by law is not only to be under the power of another, but to be into a governing relationship that is distinctively moral, insofar as it grounds obligations, performances and accommodations in the subject's status as self-sufficient source of

claims. This is not a state of affairs we can take for granted. The relational understanding of a legal system also implies that what it takes to bring a condition of lawful authority

into existence is equally what it takes to keep it in existence (Rundle, 2018, p.30). Therefore, relational demands must shape all interactions between legal officials and legal subjects, if law is to govern and a legal system to exist. This gives prominence to how procedures, processes and institutional forms are shaped and respected with an eye to the kind of agency they foster when it comes to the subjects. One cannot understand what a legal system is without looking at how law's institutional character is tied up with procedures, processes and institutional forms. And one cannot understand those forms of social ordering without inquiring how law's distinctiveness are incorporated in their operation.

References:

Bustamante, T. (2022). Legal Principles (Contemporary Debates). In: Sellers, M., Kirste, S. (eds) *Encyclopedia of the Philosophy of Law and Social Philosophy*. Springer, Dordrecht. https://doi.org/10.1007/978-94-007-6730-0_362-1

Dworkin, Ronald (1977). *Taking rights seriously*. Cambridge, USA: Harvard University Press.

Fuller, L. (1954). American Legal Philosophy at Mid-Century. *Journal of Legal Education* 6: 457–85.

Fuller, L. (1969a). Human interaction and the law. *American Journal of Jurisprudence*, volume 14, p. 1-36.

Fuller, L. (1969b). *The Morality of Law*. 2nd ed. New Haven: Yale University Press. (1st ed. 1964.)

Lacey, Nicola (2010). Out of the Witches' Cauldron?: Reinterpreting the Context and Re-Assessing the Significance of the Hart-Fuller Debate. In: P. Cane (ed), *The Hart-Fuller Debate Fifty Years On*. Hart Publishing, p.1-42

Raz J (1972) Legal Principles and the Limits of Law. *Yale Law Journal* 81: 823-854.

Raz, J (1979). *The authority of law: essays on law and morality*. Oxford: Oxford University Press.

Rundle, Kristen (2012) *Forms Liberate: Reclaiming the Jurisprudence of Lon Fuller* (Hart Publishing).

Rundle, Kristen (2012). Reply. In: REVIEW SYMPOSIUM Kristen Rundle, Forms Liberate: Reclaiming the Jurisprudence of Lon Fuller (Hart Publishing, 2012).

Rundle, Kristen (2018). Fuller's Relationships. In: TAKIKAWA, Hirohide (org.) The Rule of Law and Democracy. Kyoto.