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L'insicurezza e lo stato costituzionale. Per una teoria del diritto impura

Mauro Barberis *

Sommario

Anzitutto, s'ipotizza una teoria del diritto impura, che dall'analisi concettuale si estenda a ricerche empiriche e anche esplicitamente normative. Come esempio tipico di oggetto di tale teoria, poi, si adduce il problema della sicurezza. Quindi, si analizza il lessico della sicurezza, inglobando nella distinzione di Zygmunt Bauman fra *safety*, *certainty* e *security* le dimensioni reale/percepito e individuale/collettivo. Ancora, si ricostruisce la disciplina costituzionale italiana in materia, escludendo che essa preveda un autonomo diritto individuale alla sicurezza. Infine, dopo aver riformulato la tesi normativa della prevalenza della libertà-sicurezza individuale sulla sicurezza collettiva in caso di irriducibile conflitto, il fuoco del discorso è spostato sulla sicurezza sociale.

Parole chiave: Teoria del diritto. Sicurezza. Sicurezza sociale.

Abstract

First of all, it is argued for the possibility of a impure theory of law, which extends from conceptual analysis to empirical and even explicitly normative inquiries. Then, the problem of security is adduced as a typical example of such a theory's subject. Subsequently, the lexicon of security is analyzed, incorporating the real / perceived and individual / collective dimensions into the Bauman's distinction between safety, certainty and security. Furthermore, the Italian constitutional discipline on the subject is rebuilt, by excluding it provides an autonomous individual right to security. Finally, after the reformulation of normative thesis that, in Constitutional state, individual security must prevail on collective security in case of irreducible conflict, the focus of discourse is redirected on social security.

Keywords: Jurisprudence. Security. Social security.

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Taking Context Seriously

Pierluigi Chiassoni *

Abstract

The paper is part of a larger project that aims at arguing for a construction conception of legal meaning. The basic claim I wish to make may be phrased as follows: the meaning of legal provisions neither is simply discovered, nor is a matter of wholesale creation, though it may involve significant pieces of interpretive creativity; rather, it is constructed out of pre-existing materials through a typically reflexive and holistic process. In support of the construction picture, four different, conspiring, arguments seem worthwhile considering: an argument from interpretive games (and Grice-inspired interpretive maxims); an argument from the dispute between literalism and contextualism; an argument from the failure of semantics-driven legal pragmatics, and, finally, an argument from the failure of semiotic vindication of "texts' rights" and "the limits of interpretation". Only the second argument, the argument from the dispute between literalism and contextualism, will be deployed here. In the first part of the paper, I will provide an outline of two competing jurisprudential theories about legal meaning and interpretation: semantic quasi-cognitivism and pragmatic non-cognitivism. In the second part of the paper, I will offer a bird-eye account of the dispute between literalism and contextualism in contemporary philosophy of language and linguistics. In the third, and last, part of the paper, I will pause to reflect on what a jurist concerned with legal meaning and legal interpretation could get out of the dispute between literalism and contextualism. I will claim that the dispute provides substantive suggestions for getting rid of semantic quasi-cognitivism and endorsing a sophisticated, meaning construction version of pragmatic non-cognitivism.

Keywords: Legal Interpretation. Contextualism. Literalism. Interpretive Cognitivism. Interpretive Non-Cognitivism.

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A Methodized Discretion. L'analisi del ragionamento giudiziale negli scritti teorici di Benjamin Nathan Cardozo

Luca Malagoli *

Sommario

L'articolo si concentra sull'analisi di alcuni dei temi fondamentali oggetto dei maggiori scritti teorici di Benjamin Nathan Cardozo, quali *The Nature of the Judicial Process* (1921), *The Growth of the Law* (1924), *The Paradoxes of Legal Science* (1928) e *Jurisprudence* (1932). In particolare, il primo paragrafo prende in esame proprio quest'ultimo lavoro, tanto rilevante quanto curiosamente trascurato dalla letteratura successiva (con la sola seppur considerevole eccezione di Llewellyn), nel tentativo di mostrare come la concezione ampia di realismo giuridico lì tratteggiata possa tuttora rivelarsi una proficua prospettiva analitica attraverso cui indagare quella composita stagione teorica. Il secondo paragrafo si concentra invece sui quattro metodi di ragionamento giudiziale delineati da Cardozo, nonché sulla loro complessa (e sovente problematica) interazione, in relazione alla cruciale questione della creazione giudiziale di diritto. L'ultimo paragrafo, infine, è dedicato ad alcune interessanti osservazioni di Cardozo circa il rapporto fra legislatore e giudice costituzionale, con lo scopo di mettere in luce come la riflessione sviluppata al riguardo dall'autore di *The Nature of the Judicial Process* sia assai meno *naif* di quanto talune critiche formulate da Richard A. Posner non paiano disposte a riconoscere.

Parole chiave: Cardozo. Ragionamento giudiziale. Realismo giuridico. *Judicial review.*

* Assegnista di ricerca in Filosofia del Diritto presso il Dipartimento di Giurisprudenza dell'Università degli Studi di Genova. Ringrazio Pierluigi Chiassoni, Riccardo Guastini e Giovanni Battista Ratti per aver letto (e per aver formulato molti suggerimenti utili a migliorare) una prima versione del presente articolo. Ringrazio, inoltre, due recensori anonimi per le puntuali indicazioni critiche che mi hanno fornito. Ringrazio anche Giovanni Tuzet, Damiano Canale, Alessio Sardo, Francesca Poggi e Francesco Ferraro per i numerosi e preziosi suggerimenti formulati in occasione di un seminario tenutosi presso il Dipartimento di Studi Giuridici A. Sraffa dell'Università Commerciale Luigi Bocconi il 5 dicembre 2017. Ringrazio, in ultimo ma non ultimi, Persio Tincani, Massimo Cuono, Leonard Mazzone, Nicola Riva e tutti i partecipanti al seminario *Giustizia. Teorie, principi, definizioni*, tenutosi presso l'Università degli Studi di Bergamo il 22 maggio 2017, per avermi offerto l'occasione di presentare e discutere alcune delle tesi qui sviluppate.

The Meaning of "Literal Meaning"*

Lorena Ramírez Ludeña **

Abstract

Although references to literal meaning are frequent in the legal field, it is not easy to determine what "literal meaning" means. In general, it seems to be considered as unproblematic not only by many legal scholars but also by lawyers and other participants in the legal practice. In this paper I will show that this position comes about because an intuitive view of language is assumed according to which words are related by competent speakers to descriptions that determine reference. However, this descriptivist approach is shown to be problematic in reconstructing our linguistic practices. In contrast, New Theories of Reference (NTR) provide a plausible account of our common and legal uses of words. In this paper I will present a version of NTR that avoids the criticisms that are normally addressed to them. I will also show that this version of NTR has advantages when compared to the traditional descriptivist model. In the legal field, this version of NTR allows us a better understanding of how legal interpretation works.

Keywords: Literal Meaning. Descriptivism. New Theories of Reference. Legal Interpretation.

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* The title of this paper is intentionally similar to Hilary Putnam's *The Meaning of 'Meaning'* (Putnam, 1975). Whereas in his work Putnam analyses the impact of New Theories of Reference on the meaning of words, here I analyse the impact of New Theories of Reference on literal meaning. However, it is important to note that my interest is not primarily in literal meaning, but in presenting a plausible version of New Theories of Reference, to show their incidence in legal interpretation. I would like to thank Josep M. Vilajosana, Diego Papayannis, Alberto Carrio, Jose Juan Moreso, Jordi Ferrer, Lucila Fernandez, Pablo Rapetti, Andrej Kristan, Esteban Pereira, Pere Camprubí, Marisa Iglesias and Verónica Rodriguez-Blanco for their comments and suggestions regarding a previous version of this paper. I presented this paper in the University of Milan in May, 2017. I am very grateful to the participants of the seminar for their insightful comments. Special thanks to Genoveva Martí for many valuable discussions on these issues.

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Teoria e politica della dottrina pura del diritto. Su alcune critiche di Ferrajoli a Kelsen

Giulio Itzcovich *

Sommario

Allo scopo di difendere Kelsen dalle critiche avanzate da Ferrajoli nel libro *La logica del diritto*, il saggio si propone di chiarire la "politica del diritto" alla base di alcune caratteristiche scelte epistemologiche e teoriche di Kelsen: il postulato dell'unità della conoscenza giuridica, la teoria della norma giuridica come condizionale ipotetico avente a oggetto l'uso della forza, la teoria della clausola alternativa tacita, lo scetticismo interpretativo. Queste tesi della dottrina pura permettono a Kelsen di argomentare alcune conclusioni interessanti sul compito della scienza giuridica, sulle opportunità e i rischi della giustizia costituzionale e sul ruolo del potere giudiziario. A differenza di quanto sostenuto da Ferrajoli, nessun di queste tesi è auto-contraddittoria o incompatibile con il positivismo giuridico.

Parole chiave: Kelsen. Ferrajoli. Politica del diritto. Unità della conoscenza giuridica. Giustizia costituzionale.

Abstract

In order to defend Kelsen from the criticisms advanced by Ferrajoli in his book *La logica del diritto*, the essay intends to clarify the "politics of law" underlying some basic epistemological and theoretical choices of Kelsen: the postulate of the unity of the legal knowledge, the theory of legal norms as hypothetical-conditional prescriptions on the use of force, the "tacit alternative clause" theory, and interpretive scepticism. These theses of the pure theory of law allow Kelsen to argue for some interesting conclusions on the mission of legal science, on the opportunities and risks of constitutionality review, and on the role of the judiciary. Contrary to what Ferrajoli maintains, none of these theses is either self-contradictory or incompatible with legal positivism.

Keywords: Kelsen. Ferrajoli. Legal policy. Unity of legal knowledge. Constitutional review.

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Tre aporie (e qualche altra perplessità) nell'opera di Luigi Ferrajoli

Giorgio Pino *

Sommario

In un recente lavoro, Luigi Ferrajoli ha offerto una critica dettagliata della filosofia del diritto di Hans Kelsen. In tal modo Ferrajoli fa emergere con particolare risalto, per contrasto, le proprie tesi teoriche e filosofiche. In questo mio intervento, proverò a mia volta a discutere criticamente alcune tesi di Ferrajoli. Il mio obiettivo non è di difendere Kelsen da Ferrajoli, ma piuttosto di mettere alla prova alcune delle tesi portanti della filosofia del diritto di Ferrajoli: in particolare, in relazione al modo in cui Ferrajoli definisce la democrazia, la validità sostanziale, e i diritti fondamentali.

Parole chiave: Luigi Ferrajoli, Hans Kelsen, democrazia, validità, diritti fondamentali

Abstract

Luigi Ferrajoli has recently engaged in a comprehensive critical assessment of Hans Kelsen's legal philosophy, and in the process he uses Kelsen's (allegedly) mistaken ideas as a sort of springboard to make his own jurisprudential stance more compelling. In the present occasion I try, in turn, to put to test some key ideas from Ferrajoli's legal philosophy, in particular Ferrajoli's concepts of democracy, validity, and fundamental rights.

Keywords: Luigi Ferrajoli, Hans Kelsen, democracy, validity, fundamental rights

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Normative Propositions Reconsidered

Riccardo Guastini *

Abstract

The author discusses and criticizes the idea that normative propositions (i.e., propositions about norms) can be expressed by means of deontic sentences echoing the norms they claim to describe. He argues that such sentences do not contribute in any way to legal cognition, since they do not express normative propositions – rather, they repeat norms and/or apply them. If this is true, the logic of deontic sentences is a logic of norms, not of normative propositions.

Keywords: Norms. Normative Propositions. Deontic Sentences. Deontic Logic.

1. Normative propositions are propositions about norms (von Wright 1963: 106; Bulygin 2015: 188-189) such as, for example,

(1) The norm N exists (whatever the sense of "existence" may be[1])

(2) The norm N was actually issued by a given authority

(3) The norm N belongs to the normative system S

(4) The norm N is valid within the normative system S

(5) The norm N is effective

(6) The norm N is in force

(7) The norm N was actually applied in case C

and so forth. All the mentioned sentences give expression to genuine normative propositions.

According to Bulygin, however, a normative proposition can also be expressed

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[1] See, e.g., Bulygin 2015: 243 ff.

Los principios fundamentales de la lógica en el derecho

Giovanni Battista Ratti *
Jorge L. Rodríguez **

Resumen

Para algunos teóricos (a quienes podríamos denominar *Creyentes*), ciertos principios fundamentales de la lógica, tales como el principio de no contradicción y el de tercero excluido, valen también en su transposición normativa en el derecho. Sobre tales bases, se ha sostenido que la lógica permitiría justificar la tesis de que los sistemas jurídicos satisfacen necesariamente ciertas propiedades formales como la consistencia y la completitud. Si en cambio se considera que los sistemas jurídicos habitualmente presentan contradicciones normativas y acciones sin regulación jurídica, ello parecería forzarnos a rechazar que puedan verificarse relaciones lógicas entre las normas y que, en general, la lógica pueda desempeñar un papel significativo para el análisis del derecho, tal como otros autores (los *Escépticos*) han postulado. En el trabajo se intenta mostrar que este es un falso dilema. Lejos de ser intrínseca al derecho, la lógica no puede justificar que los sistemas jurídicos carezcan de defectos tales como las contradicciones o lagunas. Pero, por otra parte, es precisamente la lógica la que nos brinda un poderoso y necesario arsenal teórico para desmitificar la idea de que el derecho constituya un todo completo y consistente.

Palabras clave: Derecho. Lógica. Principio de identidad. Consistencia. Completitud.

Abstract

According to some authors (that we can dub "Believers"), some fundamental principles of logic, such as the principle of non-contradiction and the law of excluded middle, are also valid in their normative transposition into the legal domain.

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- Articles published in books: If the article appears in a collection of essays by the same author: Feinberg, J. (1980). *The Idea of a Free Man*, in Id., *Rights, Justice, and the Bounds of Liberty*, Princeton, Princeton University Press, 3-29. If the article appears in a collection by different authors or an encyclopaedia: MacCallum, G.C. (1972). *Negative and Positive Liberty*, in Laslett, P., Runciman, W.G., Skinner, Q. (eds.), *Philosophy, Politics and Society. Fourth Series*, Oxford, Basil Blackwell, 174-193.

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