Ratio Juris. Vol. 22 No. 1 March 2009 (62–73)

# Legal Positivism and Legal Disagreements

JOSÉ JUAN MORESO

*Abstract.* This paper deals with the possibility of faultless disagreement in law. It does this by looking to other spheres in which faultless disagreement appears to be possible, mainly in matters of taste and ethics. Three possible accounts are explored: the realist account, the relativist account, and the expressivist account. The paper tries to show that in the case of legal disagreements, there is a place for an approach that can take into account our intuitions in the sense that legal disagreements are genuine and at times faultless.

## I.

The Spanish Parliament recently passed a statute permitting marriage between people of the same sex. A significant proportion of the public in Spain and the right-wing opposition argue that this decision is unconstitutional, and members of the parliamentary opposition have brought an action before the Spanish Constitutional Court challenging the constitutionality of same-sex marriages. Article 32 of the Spanish Constitution lays down that:

1. Men and women have the right to contract matrimony with full legal equality.
2. The law shall regulate the forms of matrimony, the age and capacity for concluding it, the rights and duties of the spouses, causes for separation and dissolution, and their effects.

In fact, there is a pervasive disagreement in the Spanish legal culture on the truth-value of the proposition of law that the Spanish Constitution authorizes or rules out same-sex marriage. What is the nature of this disagreement? It is not an empirical disagreement: There is no doubt that the required majority of the Parliament voted in favour of same-sex marriage. However, many lawyers, judges, and professors of law consider this decision unconstitutional and, therefore, legally void.

It is well known that this kind of disagreement gives rise to one of the most convincing criticisms of the legal theory of legal positivism. In Dworkin's words (Dworkin 1986, 6): "Incredibly, our jurisprudence has no plausible theory of theoretical disagreement in law."[1] Moreover, Dworkin argues against the defence of the conventional nature of the law as, for instance, in Coleman's approach (Coleman 2001), Dworkin (2006, 194) says: "His statement [Coleman's statement] I just quoted suggests that American judges agree, as a matter of convention, that the Equal Protection Clause and other provisions of the Constitution make the validity of particular laws depend on moral tests, and disagree only about what those moral tests actually require. But that is certainly not true. On the contrary, this proposition that the Equal Protection Clause makes law depend on morality is itself deeply controversial."

The standard answer to this critique of legal positivism is that such disagreements are rather uncommon and in these cases judges have discretion. This is the well-known view of H. L. A. Hart (1961, chap. 7), summarized by K. Greenawalt (1975, 386), for instance, that "discretion exists as long as no practical procedure exists for determining if a result is correct, informed lawyers disagree about the proper result, and a judge's decision either way will not widely be considered a failure to perform his judicial responsibilities." We can say that discretion exists in the case of *faultless disagreement*.

In this paper, I shall deal with the possibility of faultless theoretical disagreement in law. And I shall do so by looking at other spheres in which faultless disagreement seems possible. Matters of taste seem the area in which this phenomenon is more acceptable. We can think on people disagreeing on the truth-value of these propositions:

1. Snails are delicious.
2. Homer Simpson is funny.

The fact that I believe that 1. and 2. are true and you believe that 1. and 2. are false does not seem to indicate that one of us has made a mistake. Nonetheless, we can accept two plausible commitments such as[2]:

[ES] It is true that $p$ iff $p$,

and

[T] It is a mistake to believe a proposition that is not true.

[1] For instance, S. Shapiro (2007, 50) considers that "Positivism is particularly vulnerable to Dworkin's critique in *Law's Empire*."

[2] I am here following Kölbel 2003. But, see also Wright 2001; MacFarlane 2005, 2007; López de Sa 2007.

 

Given that [ES]—the equivalence schema—allows us to derive (being "T($p$)" an abbreviation for "It is true that $p$"):

[ES1] If $p$, then not-T(*not-p*)
[ES2] If *not-p*, then not-T($p$),

we could obtain an argument according to which there is no faultless disagreement:

| | |
|---|---|
| (1) *A* believes that *p* | Assumption |
| (2) *B* believes that *not-p* | Assumption |
| (3) *p* | Assumption |
| (4) Not-T(*not-p*) | 3, ES1 |
| (5) *B* has made a mistake | 2, 4, T |
| (6) *Not-p* | Assumption |
| (7) Not-T(*p*) | 6, ES2 |
| (8) *A* has made a mistake | 1, 6, T |
| (9) Either *A* or *B* has made a mistake | 3–8, Constructive Dilemma |

What can we say about the apparent contradiction between "Snails are delicious," as believed by *A*, and "Snails are not delicious," as believed by *B*; or about the disagreement between *A* and *B* on whether Homer Simpson is funny or not? I think we have three possible answers: (a) These apparent faultless disagreements are not faultless, and, in fact, one of the propositions is false and, therefore, either *A* or *B* has made a mistake. This is the *realist* approach. (b) These apparent faultless disagreements are not disagreements because when A says "Snails are delicious" it only means "I like snails" and when *B* says "Snails are not delicious" it only means "I don't like snails." This is the *relativist* approach. (c) These apparent faultless disagreements are not genuine disagreements because both judgments do not express propositions, truth-apt entities, but they only express attitudes, something like "Up with snails" and "Down with snails." This is the *expressivist* approach.

In the following, I shall try to show that in the case of legal disagreements there is a place for an intermediate approach, able to take into account our intuitions in the sense that legal disagreements are genuine disagreements and that sometimes these disagreements are faultless. First of all, however, I shall argue why the three answers to the problem do not seem to us completely satisfactory.

## II.

The realist approach sounds implausible when applied to matters of taste. Deliciousness does not seem a convenient candidate to integrate the structure of the world. The property of being delicious is not independent

 

of us, it is a response-dependent property. However, sometimes the disagreement about the tastiness of snails makes sense. If I disagree about the deliciousness of snails with my daughter, Júlia, who hates them, then it does not seem that we can hope for any reconciliation. But, if the disagreement is with my friend Jaume who, like me, likes snails, then perhaps we could start a debate about the best way to cook them or the tastiest sauce for them. I shall turn to this question later.

## III.

The relativist approach sounds quite good when applied to matters of taste. "Romanesque churches are better than Gothic churches" sounds, in many contexts, like "I prefer Romanesque churches to Gothic churches" and the same goes for the other aesthetic propositions. However, there are contexts where rational debate on music, art, or literature makes sense and there is room for improving our beliefs. If this is the case, there should be room for mistakes too. This is the aspect that this approach cannot grasp. This relativism is an indexical relativism and there is no contradiction between "I am tired" when I say it, and "I am not tired," when you say it. Here there is no disagreement at all (Wright 1992, 51). Moreover, this approach to moral matters is highly controversial.[3] It is really not the case that our moral controversies, for example, on the moral rightness of euthanasia, end up with "I am sorry, I consider euthanasia morally right from my (utilitarian) perspective, and I now realize that you speak from your (catholic) perspective."

## IV.

The expressivist approach is well known in matters of value. It is the traditional emotional response in ethics.[4] It presupposes a clear distinction between disagreement in belief and disagreement in attitude (see Stevenson 1944). Whereas the first presupposes that there is a cognitive shortcoming[5] on the part of one of the parties, disagreement in attitude should be characterized as a crude fact of our constitution, not solvable by reason. This view, nonetheless, cannot take our pre-theoretical intuitions into account. For crude expressivism, all our ethical or aesthetical disputes are

[3] Although defended, for instance, by Harman 1996.
[4] The *locus classicus* in Ayer 1971, chap. 6.
[5] For the notion of cognitive shortcoming see Wright 1992, 144: "It is a priori that differences of opinion formulated within (that) discourse, unless excusable as a result of vagueness in a dispute statement, or in the standards of acceptability, or variation in personal evidence thresholds, so to speak, will involve something which may properly be regarded as a cognitive shortcoming." In this case, according to Wright, a discourse exerts *cognitive command*.

 

mere differences of attitude, feeling, and reaction, without resort to propositional content.[6]

## V.

In short, even in matters of taste we feel that there should be room for disagreement and mistakes. Maybe not always, but sometimes our disagreements are faultless. How can we draw a line between the two kinds of cases? The appearance of disagreement in matters of taste arises from the presupposition of *common ground* in our conversation.[7] When I say "Snails are delicious" and my friend Jaume says "Snails are not delicious," we consider ourselves similar in relation to our taste for snails, and we think that one of us could be mistaken because, for instance, he does not consider the contribution of the sauce to the taste of snails. On the contrary, if the dispute is with my daughter Júlia, who—as we know—hates snails, then there is no common ground, and the presupposition fails. As is well known, a proposition $p$ presupposes a proposition $q$ if, and only if, when $q$ is true then $p$ is either true or false; when $q$ is false, $p$ lacks truth-values. And, as Stalnaker reminds us:

> To presuppose something is to take it for granted, or at least to act as if one takes it for granted, as background information—as *common* ground among the participants in the conversation. What is most distinctive about this propositional attitude is that it is a social or public attitude: One presupposes that Φ only if one presupposes that others presuppose it as well. (Stalnaker 2002, 701)

With this notion of common ground, we can distinguish between *genuine* and *spurious* disagreements. A disagreement is *genuine* if and only if the presupposition of common ground is non-defective. A disagreement is *spurious* if and only if the presupposition of common ground is defective.

In the case of genuine disagreements, we have reason to continue looking for the basis of our disagreement in a more suitable account of our common ground. And there is a legitimate hope of finding a justification to revise our beliefs. It seems to me that it is usual in aesthetical disputes and in other matters of taste. The same happens often, in my opinion, in moral debates. In these cases there is disagreement, but there is a fault. On the contrary, in the case of spurious disagreements there is no common ground and the appearance of disagreement comes from our erroneous belief in this common ground. That happens, in my view,

[6] Recent developments of expressivism, like Blackburn 1984, 1998 and Gibbard 1990, 2003, are more sophisticated, but the problem is now how to display the propositional surface of moral argument in this account. See Wright 1992, 52.

[7] See López de Sa 2007 in a similar context. The idea of common ground in Grice 1989, is developed by Stalnaker 2002.

 

sometimes with the taste of food. In this case, there is faultlessness, but no real disagreement.

Unfortunately, the distinction between genuine and spurious disagreements is not easy. For instance, if someone does not like wine and, for this reason, does not appreciate a very textured wine, it is still possible for her to improve her taste in wine in order to share the common ground and discover the taste of that wine. But how can we be sure that we have a common ground for our aesthetic or ethical disputes? We are not totally dissimilar and nobody, in suitable and reasonable conditions, considers that torturing babies for fun is morally right or that Las Vegas is prettier than Paris. However, this is not a warrant for a single common ground in these spheres. Maybe all that we can aspire to here as common ground is a *hybrid resonance*[8] of the diverse contexts of assessment.[9]

Let me put forward an analogy that will allow us to connect disagreeement with vagueness (see also Wright 2001, 45). Accepting the excluded middle (for any *x*, *x* is *F* or *x* is *not-F*) together with the apparently harmless equivalence schema [ES] entails the acceptance of the logical principle of bivalence. The equivalence schema asserts:

(1) *p* is true iff *p*
(2) *p* is false iff *not-p*.

If we add to these premises the law of the excluded middle:

(3) *p* or *not-p*

then we should accept the principle of bivalence: *p* is either true or false. If we accept the principle of bivalence, then we will accept that there are no propositions with indeterminate truth-value. Propositions that contain vague predicates are good candidates to be indeterminate propositions. But could we accept the law of the excluded middle while rejecting the principle of bivalence? The supervaluationist approach has tried to explore this possibility.[10] We can, but obviously we should reject [ES].

The analysis of vagueness carried out by supervaluationism can cast light on the analysis of disagreement. A vague predicate fails to divide things precisely into two sets, its positive and its negative extensions. When this predicate is applied to a borderline case, we obtain propositions

[8] David Lewis said that our languages are only a hybrid resonance of all the possible and ideal languages that live in them (Lewis 1969, 202). See also, for the application of this idea to the law, Moreso 1998, 221–2.
[9] The notion of context of assessment in MacFarlane 2005, 2007.
[10] See, for instance, Mehlberg 1958, 256–69; Van Fraassen 1966; Fine 1975; Dummett 1978, 340–2; Lewis 1983, 189–232; Williamson 1994, chap. 5; Sainsbury 1995, chap. 2; Keefe and Smith, 1996; Keefe 2000.

 

that are neither true nor false. This gap reveals a deficiency in the meaning of a vague predicate. We can remove this deficiency and replace vagueness with precision by stipulating a certain arbitrary boundary between the positive and negative extensions, a boundary within the penumbra of the concept. Thus, we get a *sharpening* or *completion* of this predicate. However, there is not only one, but many possible sharpenings or completions. In accordance with supervaluationism, we should take all of them into account. For supervaluationism, a proposition *p*—containing a vague concept—is true if and only if it is true for all its completions; it is false if and only if it is false for all its completions; otherwise it has no truth-value—it is indeterminate. A *completion* is a way of converting a vague concept into a precise one. So now we should distinguish between two senses of "true": "true" according to a particular completion, and "true" according to all completions, or *supertrue*. If a number *x* of grains of sand is in the penumbra of the concept of a heap, then it will be true for some completions and false for others that *x* is a heap and, therefore, it will neither be supertrue nor superfalse.

Completions should meet some constraints. In particular, propositions that are unproblematically true (false) before completion should be true (false) after completion is performed. In this way, supervaluationism retains a great part of classical logic. Thus, for instance, all tautologies of classical logic are valid in a theory of supervaluations, "*x* is a heap or *x* is not a heap"—a token of the law of excluded middle—is valid, because it is true in all completions independently of the truth-value of its disjuncts. Perhaps one could try to construct a supervaluationist approach for matters of taste and matters of value (not only for those containing vague concepts). The idea is suggested by Allan Gibbard in the following way:

> A person who accepts only an incomplete system of norms is, in effect, undecided among complete systems of norms that are compatible with it. He is undecided on how to extend or sharpen his incomplete system of norms to make it complete. We might, then, represent an incomplete system of norms by the ways it could be sharpened without change of mind. Speak, then, of the various possible *completions* of the incomplete system N of norms an observer accepts. A *completion* of an incomplete system *N* of norms will be a complete system of norms that preserves everything which *N* definitely settles. With this terminology, we can say things like this: Let *N* be an incomplete system of norms and let X be an act or attitude. Then X is *N-permitted* if and only if for every completion *N** of *N*, X is *N*-permitted*. (Gibbard 1990, 88)

In a similar way, we can take contradictions into account. We could regard as completions all those that manage to eliminate at least one of the contradictory propositions. Since there is a plurality of possible completions satisfying this requirement, these propositions are undecided, in some contexts of assessment they are true, and in others they are false. The

 

debate is now about the reasons to accept one context of assessment or the other.[11]

This is the idea of *accuracy* developed by J. MacFarlane (2007). An acceptance (rejection) is *accurate* in the case that the accepted proposition is true (false) at the circumstances of evaluation that are relevant to the context of assessment. As MacFarlane notes, our discourses require accuracy, accuracy is our aim. We can always continue debating the accuracy of our propositions, and, in this way we could eliminate our spurious disagreements.

## VI.

We come back to the law. What is the nature of disagreement about allowing same-sex marriage in Spain? And, in general, what is the nature of legal disagreements? In legal theory we can find three approaches to disagreement: the realist approach, the relativist approach, and the expressivist approach.

Sometimes it is argued that the Dworkinian approach to legal disagreements and his well-known right-answer thesis (Dworkin 1977) require a realist reading. The metaphysical abstinence that Dworkin (1996) advocates makes his theory vulnerable to semantic criticisms (Raz 2001) and it does not provide sufficient resources for justifying his robust conclusions. According to Rodríguez-Blanco (Rodríguez-Blanco 2001, 670), Dworkin needs to assume a realist element in order to make intelligible his notion of *genuine* disagreements.[12] However, it is not clear what should be shown in order to detect a cognitive shortcoming in the case of legal disagreements.

Positivist views, on the contrary, advocate a relativist or an expressivist approach. Recently, Shapiro (Shapiro 2007) has tried to respond to the Dworkinian critique by arguing that legal theory should find the underlying and shared ideologies and methodologies to a particular legal system. In Shapiro's words:

> To be sure, it is a consequence of this approach that in the absence of these shared understandings, disagreements about proper interpretive methodology will be irresolvable. [. . .] [A] theory of law should account for the *intelligibility* of theoretical disagreements, not necessarily provides a resolution of them. (Shapiro 2007, 49)

As a result, legal disagreements only mirror the underlying ideologies of the legal participants and there is no solution for them. In fact, to the extent

[11] A similar intent, not by means of the supervaluationist approach, but through the intuitionist logic in Wright 2001.
[12] For a realist reading of the Dworkinian approach, see Stavropoulos 1996.

 

that ideological debates have no rational solution, legal disputes are not genuine legal disagreements because there is no common ground: There are only diverse grounds that are not shared.[13]

Leiter does not agree with Shapiro on the compelling character of Dworkin's critique. In his view legal positivism can respond perfectly to the challenge of legal disagreements:

> According to positivists, either theoretical disagreements are *disingenuous*, in the sense that the parties, consciously or unconsciously, are really trying to *change* the law, that is, they are trying to say, as Dworkin puts it, "what it should be" not "what the law is"; or they are simply in *error*, that is, they honestly think there is a fact of the matter about what the grounds of law are, and thus what the law is, in the context of their disagreement, but they are mistaken, because, in truth, there is no fact of the matter about the grounds of law in this instance precisely because there is no convergent practice of behavior among officials constituting a Rule of Recognition of this point. Call the first the Disingenuity Account and the second the Error Theory Account. Notice that the Disingenuity Account presupposes the *truth* of the Error Theory: A judge cannot be disingenuous in arguing *as if* there were a clear criterion of legal validity operative in a dispute without knowing that, in fact, there is no such criterion. (Leiter 2007, 10–1)

For this account, it is not only that there is no common ground, but also that there is no fact of the matter about the common ground. It is for this reason that I identify this position with expressivism, in the same way that error theory in ethics (Mackie 1977) is an inspiration for contemporary expressivist theories of ethics. Again, it is contrary to our pre-theoretical intuitions that in cases of legal disagreement all the participants are either mistaken or disingenuous.

## VII.

It is well known that Dworkin (1986, 4–7) distinguishes between propositions of law and grounds of law. Propositions of law are propositions about the content of the law in a particular legal system, about what the law requires or permits. Their truth or falsehood depends on the grounds of law, and the grounds of law are the reason for the legal disagreements. Some people think that the grounds of law incorporate the moral reasons that justify our legal practice, others deny this incorporation. In this sense, knowing what the constitution requires enables us to know what the constitution presupposes. It is a matter of fact, as noted by Dworkin, that our practice of understandings of what the constitution presupposes are

[13] However, sometimes it is argued that legal theory and practice agree on the binding force of final decisions of the Supreme or Constitutional Court. On this point there is no disagreement. The importance of this aspect to explain the stability of our legal systems cannot be analyzed here. For a perspicuous development of this idea, see Himma 2003, 2005.

 

not convergent. This divergence explains our legal disagreements. For instance, does the constitution presuppose retrieving the original intent of our founding fathers? Are the intentions of the framers of the Spanish Constitution related to same-sex marriage relevant in order to evaluate the constitutionality of this kind of marriage? In this connection, Murphy asserts[14]:

> I conclude that the area of overlap between plausible different accounts of the category of law is significant. This allows us to say that, where a proposition of law comes out as true for all plausible concepts of law, it is true; where it is false for all plausible concepts, it is false. Where there is no overlap among the plausible concepts, we cannot say that the proposition is false. We cannot even say that there is no right answer to the question of law; what we have to say is that it is indeterminate whether the proposition of law is true, or false, or neither. (Murphy 2006, 57–8)

Therefore, the supervaluation account is useful to manage our clear conscience of the multiplicity of the grounds of law. It is useful for understanding why, however, in a lot of cases, there is convergence in the truth-value of our propositions of law. When there is divergence, we do not need to classify all our disagreements as *spurious* disagreements, because if we consider accuracy as an aim, then we will try to revise the elements of our common ground, the grounds of law, and in this way we will deal with our disagreements as *genuine* ones.

## VIII.

As a result, I do not read Dworkin as a realist, I read *law as integrity* as an invitation to deal with our disagreements as if they were *genuine* disagreements, as an invitation to revise unendingly the grounds of law in order to find a *reflective equilibrium* between our legal practices and our practical convictions.

A final comment: In order to solve the question of the constitutionality of same-sex marriage in Spain, I do not consider it necessary to establish whether the Spanish Constitution incorporates only heterosexual marriage as a constitutional right. I consider it sufficient that the Spanish Constitution does not rule out the possibility of legislative regulation of same-sex marriage. In my view, nobody doubts that Parliament can extend our rights, and our legislative rights can be more, but not less, extensive than our constitutional rights. For instance, in Spain the right to public medical assistance for all is a legal, but not a constitutional, right. However, this

[14] Murphy (2006, 58–9) also suggests the analogy of this situation and the supervaluation account of vagueness.

 

view is, I am afraid, not uncontroversial and on this point there is a legal disagreement that should be taken to be a genuine disagreement.

*Universitat Pompeu Fabra*
*Faculty of Law*
*Ramon Trias Fargas, 25–27*
*08005 Barcelona*
*Spain*
*E-mail: josejuan.moreso@upf.edu*

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