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The Autonomy Challenge: Examining the Pre-emption Thesis in Judicial Reasoning and Precedent**

El desafío de la tesis de la autonomía: examinando la tesis de la exclusividad en el razonamiento judicial y el precedente

O desafio da tese da autonomia: examinando a tese de exclusividade no raciocínio judicial e no precedente

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Abstract

This article reflects on one of the challenges Gerald Postema's account of the autonomy thesis poses to Raz's pre-emption thesis in judicial practice and precedent. Certain flaws in the pre-emption thesis, as applied to courts, come to light upon analyzing the *autonomy challenge*, whereas some aspects of the former are better understood from the perspective of the latter. This work shows that, although these two theses seem to clash, the autonomy challenge leads instead to an alternative approach to the pre-emption thesis that allows exploring some disregarded relationships between judicial practical reasoning and precedent. Drawing from this Raz-Postema debate, I argue for an alternative reading of the autonomy challenge by introducing the hermeneutic strategy of courts (HeSCo) as a tool to analyze the role of officials as addressees of exclusionary legal directives and its explanatory force. The HeSCo ultimately unravels the paradox by holding the pre-emption thesis as central to the proper understanding of judicial practice and precedent.

Keywords: Precedent; Authority; Judicial Reasoning; Pre-emption Thesis; Autonomy Thesis; Practical Reasoning; Exclusionary Reasons.

Resumen

Este artículo reflexiona acerca de uno de los desafíos que la *tesis de la autonomía* le presenta a la *tesis de la exclusividad* en el contexto de la práctica judicial y el precedente. Analizaré el desafío de la tesis de la autonomía para revelar algunos defectos de la tesis de la exclusividad en el contexto judicial. El trabajo busca mostrar que, más allá del aparente conflicto entre ambas tesis, el desafío de la tesis de la autonomía abre la puerta a una perspectiva distinta y enriquecida de la tesis de la exclusividad, según la cual algunos aspectos de esta última pueden comprenderse mejor desde la perspectiva de la primera. Defenderé, entonces, una lectura alternativa del desafío, en la cual la tesis de la exclusividad es central para la adecuada comprensión de la práctica judicial y el precedente.

Palabras clave: precedente; autoridad; razonamiento judicial; tesis de la exclusividad; tesis de la autonomía; razonamiento práctico; razones excluyentes.

Resumo

Este artigo reflete sobre um dos desafios que a *tese da autonomia* apresenta para a *tese da exclusividad*e no contexto da prática judicial e do precedente. Analisar-se-á o desafio da tese da autonomia para revelar alguns defeitos da tese da exclusividade no contexto judicial. O trabalho procura demonstrar que, além do aparente conflito entre ambas as

teses, o desafio do teste da autonomia abre o caminho para uma perspectiva distinta e enriquecida da *tese da exclusividade*, segundo a qual alguns aspectos desta última podem ser mais bem compreendido desde a perspectiva da primeira. Defender-se-á, portanto, uma leitura alternativa do desafio segundo a qual a tese da exclusividade é central para a adequada compreensão da prática judicial e o precedente.

Palavras-chave: precedente; autoridade; raciocínio judicial; tese da exclusividade; tese da autonomia; raciocínio prático; razões excludentes.

Introduction

For a long time, precedent has been one of the most controversial topics in legal theory. The discussion about its nature, elements, foundation, justification and identification is ongoing and dynamic (Goldstein, 1984). According to Stone (1959, p. 598), "The doctrine of *stare decisis*, in addition to whatever it may enjoin upon the intellect, certainly evokes an atmosphere and a mood to abide by ancient decisions, to follow the old ways, and conform to existing precedents."

There have been attempts to clarify what exactly is implied by "to be abide by previous decisions." Interestingly, any attempt to talk about a theory of precedent faces challenging questions that have been debated since the early days of common law origins (Stone, pp. 597-599), and theorists continue to shed light on the different dimensions[1] of the precedent,[2] as well as on related topics such as judicial reasoning and interpretation.

Continuing those efforts, Gerald Postema examines the central tenets of what he called the *autonomy thesis*. According to this thesis, law alters an individual's practical reasoning, because the very existence of law provides the subject with new and different reasons for action (Bix, 2011).[3] By adding reasons, law defines a special limited domain of legal reasons and norms[4] that demand special attention, given that they are the set tool used in public practical reasoning.

According to Gerald Postema, it is common for courts to resort to non-sourced principles to justify interpretations that go beyond the established or plain meaning of legal norms, distinguishing or even overruling precedents, and that is why the "features of (this) familiar legal practice threaten the descriptive

1 Naturally, common law theorists have covered different dimensions of the discussion: Goodhart (1930); Simpson (1957); Stone (1959); Cross et al. (1961); MacCormick (1978); MacCormick et al. (1991); Alexander et al. (2008); Duxbury (2008); Schauer (1991), to name just a few well known authors. However, precedent has become a central discussion topic for civil law legal scholars as well, as shown by the academic production in the last two decades: Moral Soriano (2002); Bernal et al. (2009/2015); Bustamante (2016); Pulido (2018); Gómora-Juárez (2018); Gascón et al. (2020); Núñez-Vaquero et al. (2021); Rojas (2021); Camarena (2022).

2 For possible explanations of the precedent as a concept used in common law and civil law legal systems, see Gómora-Juárez and Núñez-Vaquero (2017).

3 Bix elaborates on this *approach* as a trend of contemporary discussions that analyze issues regarding the normativity of law or the authority of law in terms of reasons for action.

4 Throughout "Law's Autonomy and Public Practical Reason", Gerald Postema uses "legal norms" in reference to any institutional provision directed to guide people's conduct. In this paper, I will use "legal directive", "legal rule" and "legal provision" interchangeably to convey the same meaning and sometimes to preserve the cited author's original wording.

adequacy of the Pre-emption Thesis, for it appears that in these cases legal norms fail to exercise pre-emptive force on the deliberations of the courts." (Postema, 1999, p. 99)

This paper discusses a central question that the autonomy challenge poses to the pre-emption thesis: whether it is possible to explain practical judicial reasoning and precedents by applying the pre-emption thesis. The answers obtained bear theoretical implications beyond the scope of this discussion and will not be addressed here.

My aim, then, is threefold. First, I explain the framework of the autonomy challenge in Section 2; I then examine the autonomy challenge in Section 3, where the analysis shows how it sheds light on crucial but overlooked aspects of judicial practical reasoning and precedent. In Section 4, I explore the autonomy challenge outcomes on three interconnected aspects of judicial practice, and how it fails to cover all the dimensions of the nature, force and application of precedent. Finally, I discuss an alternative way to the challenge and a better approach to understand judicial practice by showing that the autonomy challenge ultimately complements the pre-emption thesis and helps to reconcile the conflicting points between both theories.

The Autonomy Thesis Framework

In a thought-provoking paper, Gerald Postema examines the central tenets of what he called the *autonomy thesis*, explaining how "the creation myth" has led us to believe in the need to unify people's judgments to enable them to speak in the language of law. As such, several theorists (otherwise divergent) think the fundamental task of the law consists of "supply[ing] a framework of practical reasoning designed to unify public political judgment and co-ordinate social interaction" (Postema, 1999, pp. 79-80), which, in turn, provides the key to understanding the nature of law.

From this standpoint, different contemporary theories look at certain general jurisprudential issues through a common narrative (Postema, 1999, pp. 79-80) of shared methodological assumptions about the nature of law. Postema claims that this "tradition" has applied the so-called autonomy thesis in many ways, and even though he accepts one version of it, his aim is to subject certain aspects of the autonomy thesis to closer examination.

As a thesis regarding the nature of law, the autonomy thesis is a descriptive approach aiming to provide an account of the nature of legal practice as we know it and other structural features of law. The thesis challenges specific aspects shown in some theories that embrace it and are shown as instances of autonomy thesis, but, mainly, the thesis points out potential flaws and conflicting aspects of legal theory that need to be revisited.

The autonomy thesis, as presented, encompasses the notion of a limited domain of practical reasons or norms used in public debate, also known as the limited domain thesis. The practical force of legal reasons has been introduced in the form of the pre-emption thesis, while the sources thesis maintains that the existence and content of member norms can be determined by social facts (Postema, 1999, p. 82).

From this approach, legal norms and reasons can be identified by "content-independent criteria", which means that the existence, content and validity of laws can be established by reference to social facts (sources) without resorting to a moral or evaluative argument (Postema, 1999, p. 81).[5]

In that regard, the autonomy of law strives to show that legal reasoning –though not judicial reasoning– proceeds by itself, regardless of other moral or political justifications, as a thesis about the relationship of legal and moral reasons as they take place in the practical reasoning of both officials and citizens.

One very widely accepted idea in contemporary legal philosophy is that law regulates conduct by issuing legal directives that guide a subject's behavior, providing them with reasons for action. As such, law can make a difference in our practical reasoning. This is particularly evident in judicial reasoning, where ruling on certain issues provides a suitable scenario to test the normative function of law (Bix, 2011, p. 1).

In Razian terms, the pre-emption thesis means that the fact that an action is required by the authority prevents the agent from acting according to his own assessment of the applicable first-order reasons (Raz, 1985, p. 298). At the same time, the agent counts on a second-order reason to comply with the directive issued by the authority (Raz, 1979, pp. 140-141). In that sense, legal reasons are not added to any other reasons the agent might have, but rather replace them. Unlike first-order reasons, these reasons are opaque and do not show a

5 Postema invites us not to equate the authority theory to the separability thesis or to associate it with the positivist legal theory.

direct relationship between the action required by the law and its justification (Postema, 1999, p. 85).

Counting on a legitimate authority[6] enables us to replace our judgment of the balance of reasons with the authority's judgment, which aims to reflect the correct balance of dependent reasons through legal norms. In other words, institutionally accepted second-order reasons, known as exclusionary reasons –whose content is not alien to our deliberation but part of it–, provide a reason not to act on our own judgments of first-order reasons (Vega Gómez, 2014, p. 1185).

Such idea is part of Raz's account of legitimate authority. The *dependence thesis* establishes that directives from legitimate authorities should be based on reasons that apply to its addressees (dependent reasons); the *normal justification thesis* states that authority is justified only insofar as the agent is more likely to act according to the right reason by following the authority's judgment of what they should do, instead of following her own judgment about what she should do; and the pre-emption thesis explains that the fact that an action is required by the authority should replace other relevant reasons (Raz, 1978, p. 140; 1988, pp. 46-55).

On the other hand, the normative thesis, known as the service conception of authority, shows the limited role of legitimate authorities by grounding directives on dependent reasons and selecting the right reasons to abide by the corresponding directives. Authority serves its subjects by doing a better job of specifying what right reason requires. Once the right reason is selected, the pre-emptive quality of authoritative directives shows the proper treatment they should receive to fulfill a mediating service (Raz, 1988, pp. 53-56).

Courts carry out a variety of functions mainly directed at settling disputes and some of them are entitled to provide answers where the law is silent. This activity entails a creative element in interpretation and the possibility to resort to non-sourced principles, given that it is the only way to give a solution that is not yet included in law (MacCormick, 1978, pp. 196-197). Notwithstanding, the very recourse to interpretation offers an opportunity to set a precedent or even overrule a previous one, which, according to Postema, threatens the descriptive adequacy of the pre-emption thesis.

6 The explanation of effective authority presupposes that of legitimate authority. Any authority claims to be legitimate, even though they may fail to meet that criterion, but that is the proper way to understand their role (Raz, 1979, p. 29).

In other words, the authority's mediating service is not properly fulfilled when courts interpret the law, because on such occasions their recourse to non-sourced principles means they are not relying on legal norms or treating them as pre-emptive reasons but opening the balance of reasons. That same court practice threatens the tenets and the proper treatment of legitimate authority.

On the Autonomy Challenge

As explained above, the authority theory presupposes certain sub-theses. However, Postema draws attention to an allegedly descriptive inadequacy of one of these sub-theses –the pre-emption thesis– in judicial practice.

This alleged inadequacy stems from the creative function of judicial interpretation that regularly comes into conflict with the pre-emption thesis whenever courts resort to non-sourced material to decide cases (Raz, 2009, pp. 373-395),[7] for in so doing, courts treat legal rules as first-order reasons. This picture of interpretive judicial practice clashes with the idea that legal rules purport to provide us –courts included– with exclusionary reasons for action.

As a result, the substantive content of the pre-emption thesis does not adequately explain the courts' practice of interpreting, creating and overruling precedents, given that in such instances officials do not have a special domain of legal reasons to be used in public practical reasoning.

Hence, the specific judicial practice of precedent[8] –understood as [authoritative] prior decisions that function as models for later decisions (MacCormick et al. 1997, p. 1)– seems to void the descriptive power of the pre-emption thesis as an instance of the autonomy thesis framework; i.e., that law provides its subjects with reasons for action that can make a difference in their practical reasoning.

Let us keep in mind that interpretation (*sensu stricto)* "occurs where there are doubts in the understanding of a language when it is used, in a particular context, in an act of communication"; that context can be judicial where the

7 Apparently, there is no real disagreement on the fact that legal reasoning is evaluative reasoning according to law. Given that judges resort to interpretation and to moral reasons, judicial reasoning is not autonomous. This autonomy must be distinguished from the autonomy of law, i.e., to identify the content of the law without recourse to moral reasoning, an aspect of the sources thesis.

8 In civil law, there have been efforts to explain precedent by observing how courts have applied it (Camarena, 2022) or considering different characterizations on "following precedents" (Rojas, 2020).

interpretation is performed by a court with the purpose of making a binding legal decision in a particular case (MacCormick et al. 1997, pp. 12-13).

So, what are the underlying components of the autonomy challenge, and what is its scope? Consider the fact that legal rules are special kinds of reasons for action because they purport to function, simultaneously, as dependent reasons for action –because they are based on the reasons the subject already had– and second-order reasons for not acting on the agent's first-order reasons, which would otherwise apply (Waluchow, 2000, p. 47).

This is why it is said that authoritative legal directives intend to provide its subjects with new reasons for action, different from the first-order reasons they had, but still based on some of them (limited domain thesis) (Postema, 1999, p. 79; Raz, 1979, p. 29). The limited domain of laws is identified by content-independent criteria, which means that legal norms can be identified by neutral social facts provided by the rule of recognition[9] (sources thesis) and not by its substantive content.

Following Postema, the pre-emption thesis is added to the challenge scheme as a conceptual statement on the proper way legal rules should function on its addressees' practical reasoning. Therefore, legal rules purport to provide exclusionary reasons for action that preclude an agent from acting on her competing first-order reasons (Postema, 1999, p. 85).

With these elements in mind, let us reformulate the challenge as follows: "Courts often resort to non-sourced based principles to justify interpretations that set aside the established meaning of statutes, to justify, distinguish or even overrule established precedents." This trait of court practice threatens the descriptive adequacy of the pre-emption thesis, given that in those cases legal rules fail to exercise pre-emptive force on the courts' deliberations.

From Postema's perspective, even though the pre-emption thesis might possibly resist the challenge, it would hardly resist the one stating that the pre-emptive treatment citizens give to legal rules depends on the courts' giving legal rules pre-emptive treatment in their practical reasoning (Postema, 1999, p. 99). The fact that, ordinarily, courts interpret legal rules seems to show that they do not treat them as exclusionary reasons for action in their practical reasoning.

9 Understood as the rule of a legal system that set the test of validity which specifies the properties that renders other rules parts of that system (Shapiro, 2009, p. 4).

Therefore, citizens have no reason to believe in the exclusionary status of legal rules (Postema, 1999, p. 100; Raz, 2009, pp. 394-395).[10]

For Margaret Martin (2014, pp. 176-177) the formulated query (in terms of beliefs) means that, since judges are constantly changing the law (i.e., changing citizens' pre-emptive first-order reasons for action), citizens do not believe law has a pre-emptive force, and will therefore not behave accordingly. However, putting the challenge in those terms shifts the approach of the discussion towards the beliefs and attitudes of the participants in legal practice. But, as Rodríguez-Blanco observes, that formulation does not succeed because it turns Postema's argument into an empirical one that does not take on the normative question in Raz's theory, as developed and stated in Raz's reply to Postema (Rodriguez-Blanco, 2016, p. 427).

As a result, the challenge needs to be reformulated to direct it at Raz's theory, given that in his theory judges exercise practical reasoning, meaning "the general human capacity for resolving, through reflection, the question of what one is to do" (Wallace, 2020). Rodríguez-Blanco therefore suggests reformulating Postema's objection not by focusing on behavior or beliefs, but by putting emphasis on the structure of practical reasoning and how it works in order to strengthen the challenge (Rodriguez-Blanco, 2016, p. 427).

By incorporating Rodríguez-Blanco's suggestion and putting emphasis on courts practical reasoning, a different way of analysis is open to explore Postema's criticism structure. In fact, the reformulated challenge reveals a very interesting point of analysis regarding the courts' practical reasoning directly related to the addresses of the law. In the following sections, I will discuss this aspect of the challenge.

Having said that, let us recall that the specific theoretical framework in which courts authoritatively apply[11] and interpret source-based law is called *institutionalized autonomy theory*, which is embedded in the general autonomy

10 Raz addresses this objection by rejecting that the pre-emptive force of directives depends on people's beliefs or attitudes. Even though the legitimacy of much of the law depends on population acceptance, it is not the case that every occasion in which legal directives are applied is an opportunity to modify it. As such, it is improbable that general acceptance can be subverted because of judicial practice.

11 It should be noted that whenever the terms authority or authoritative directives are used in this article, I refer to legitimate authority as defined by Joseph Raz.

thesis. The former shows how judicial reasoning operates, while the latter models legal reasoning (Postema, 1999, pp. 98-99).

Exploring this point is important, because Postema presents us with the opportunity to examine the structure of the court's practical reasoning,[12] in which creative activity takes place. Moreover, the discussion allows to delve into the (usually assumed) authority of precedent from this standpoint, its application, and its relation to the broader theory of law it supports.

The autonomy challenge has implications on different theoretical aspects. The first implication is the potential undermining of the service conception of authority, given that the court practice previously described seriously questions the ability of law to fulfill the mediating service it claims to provide. Since in hard cases courts need to resort to interpretation to offer a solution to the question at hand, it can be inferred that the law does not provide its subjects any service at all.

A second implication has to do with the adequacy of the sources thesis to explain adjudication. Given that in judicial practice it is possible that courts use non-sourced material in some cases, we face the problem of uncertainty about the mutual identification of the practical rules that are supposed to govern social interaction (Postema, 1999, p. 97). This implication threatens the authoritative trait of the precedent as a legal directive.

A third implication is that, if successful, the autonomy challenge would render an explanation of precedential authority inadequate, given the tension arising from one of the foundational sub-theses of the authority theory, namely, the pre-emption thesis. This possibility compels us to look more closely at our precedential practice when discussing its addressees.

The general notion of theory of precedent, as used here, refers to the organized concepts and related doctrine –commonly found in literature– that explain the practice of applying previous authoritative decisions reached by courts to the case at hand. While Raz has not advanced a theory as such, his work has developed and explained a position on the fundamental concepts of the doctrine of precedent in English law (Raz, 1979, pp. 181-182; 2009, p. 320)

12 It is important to note that Raz only replies to Postema's criticism so that it could reveal a weakness in his own account of the nature of law.

which includes the notion of courts applying existing laws, as well as courts making new laws.[13]

In this regard, law-application can be understood in terms of Duarte's inferential law-application (2021, p. 372), whose definition is: "To inferentially apply a provision *p* (on its own) to some object *x* is to reason towards a conclusion *c* about *x* on the grounds that (a) *p* applies to *x*, and (b) if *p* applies to *x*, then *c* is true as a matter of law." This law-application definition is intended to encompass all written legal provisions including statutory provisions and precedents.

Apparently, the authority theory properly explains when we think of citizens as the addressees of authoritative legal provision, because the "authority-subject" relationship in this case is straightforwardly applicable. To illustrate the point, let us think of a homeowner's association meeting. This entity is supposed to supply the right reasons for action on behalf of the homeowners. Under regular circumstances, the homeowner's association is supposed to enforce its internal regulations, but what happens if they need to decide whether to fine an owner for exceeding the time allowed for using the roof garden? Which is a consequence not stipulated in the homeowner association regulations?

This decision-making process would require the association to open the balance of reasons and consider the corresponding first-order reasons to decide if and how to penalize the breach. The simple possibility of re-opening the balance of reasons implies that the association must treat the existing regulations as non-pre-emptive.

However, when it comes to courts, the relationship under discussion does not seem that clear, since courts perform a double role: as addressees and as authorities.[14] This way, the autonomy challenge highlights the possibility of treating courts as one of the addressees of legal directives; a topic that is somewhat overlooked in contemporary legal philosophy.

A fourth Implication comes from the last line the discussion entails: accepting courts as the addressees of legal directives –such as precedents– along with

13 Provided that in Civil Law legal systems courts have the practice to apply authoritative previous decisions reached by other courts in their own decision, I assume the following theoretical discussion is applicable to these systems as well. Even though each system establishes the degree, limits and scope of the practice, the minimal content entailed in the general notion of trusting on judicial previous experience to decide, prevails in both kind of systems. See Gómora-Juárez (2018).

14 In a similar vein, Hershovitz (2003) poses a query on legitimate authority of law in democratic societies.

citizens demands theoretical refinements that potentially modify the original authority theory.

A fifth implication turns out to be the potential inadequacy of the pre-emption thesis to explain the authority of precedent according to the autonomy challenge or, using Martin's (2014, p. 49) words, the inadequacy of the thesis, given that courts, as practical reasoners, are allowed to be released from their duties to apply the law in their interpretive role.

As seen, the autonomy challenge is linked to the authority theory since it questions the pre-emption thesis as advanced by Joseph Raz. In its original formulation, the pre-emption thesis is one of the conditions purportedly to be met by a legitimate authority, because it is the proper way in which an authority can fulfill its functions and serve its subjects by mediating between them and the reasons that apply to them (Raz, 1985, p. 299).

The autonomy challenge is insightful if it explores the tension between ordinary law-application judicial function and the pre-emption thesis when it comes to courts' interpretive function. In other words, the challenge encompasses the underlying question of Raz's authority theory compatibility with an account of officials' reasoning in their use of legal directives such as precedent.

Rescue Strategies for the Pre-emption Thesis

Having clarified the autonomy challenge, Postema claims the only way to maintain the pre-emption thesis as a suitable theoretical framework to explain the practical force of legal directives (including precedent) –in the context of the institutionalized autonomy theory, and as an element of the description of legal practice– is to impose some kind of restriction on it.

Following Postema, we can identify two dimensions of exclusionary reasons. The two dimensions of exclusionary reasons –derived from the pre-emption thesis– are the *subject dimension* and the *substance dimension*. The *subject dimension* refers to the kind of rational agents required to treat legal reasons as exclusionary, and the *substance dimension* refers to the type of other reasons that exclusionary reasons leave out of the practical deliberation of these agents (Postema, 1999, p. 86).

Given that the autonomy thesis holds that legal directives claim to have the exclusionary practical force to exclude all other kinds of reasons outside the domain of the law from being considered, central questions arise. Regarding

the *subject dimension of exclusionary reasons*, who are the agents subject to the legal norms in question? All of them? Only citizens or officials too? And, regarding the *substance dimension of exclusionary reasons*, the question is "Do they exclude all considerations, or only the ones that fall outside the domain of law?" (Postema, 1999, p. 86).

Despite some of the challenges can be overcome by pre-emption thesis defenders –Postema acknowledges–, the above questions encompass fundamental insights for understanding general judicial practice, judicial practical reasoning and applying legal directives, including precedents.

The restriction Postema proposes adopts the form of one of two rescue strategies, if we want to keep the pre-emption thesis as an element of the theoretical explanation of judicial reasoning in general and when working with precedents. We shall call them: rescue strategy 1 and rescue strategy 2.

Rescue strategy 1 focuses on the so-called subject dimension (i.e., exclusionary reasons) and proposes restricting the pre-emption thesis subject dimension scope to citizens, claiming that this thesis applies to citizens using legal norms (even precedents), but does not apply to courts. This way, by restricting the scope of the precedent subject dimension or precedent addressees, we can dispel the objection to the treatment courts give the pre-emption thesis in its interpretive role.

Rescue strategy 2 focuses on the substance dimension of the pre-emption thesis (exclusionary reasons). According to this strategy, we can restrict the pre-emption thesis scope of substance dimension, i.e., admitting that it is possible to limit the content of legal exclusionary reasons. Thus, faced with certain subjects, we could grant that the pre-emption thesis is not applicable to courts, vanishing the objection regarding courts' interpretive role.

Despite the initial appeal of both strategies, I consider neither is satisfactory because of the following reasons. On the one hand, rescue strategy 1 is unsatisfactory because it focuses on only one of the court's functions (interpreting the law) while disregarding another fundamental judicial function (applying the law). Courts do not only interpret the law but also apply it when directly applicable to a case, each of which is a different function.

That is why the courts' exclusionary course of action to explain their performance cannot be discarded. One of the court's ordinary functions is precisely law-application, which is an instance of exclusionary treatment when the legal directive is not subject to a new balance of reasons, so it is purportedly capable of making a difference in judicial practical reasoning.

The last statement implies that there are legal provisions which do not require interpretation and allow us to recognize the courts' regular use of exclusionary reasons. Let us recall that legal directives are intended to serve as an exclusionary reason for action. It then follows that whenever a legal directive provides a solution for the case at hand, courts have an exclusionary reason for deciding accordingly. This law-application description implies an exclusionary courts' treatment of legal directives; hence, the pre-emption thesis applies to them.

We need to move away from the simplistic and misleading picture that shows courts as trapped in an irreconcilable dichotomy which forces them either to apply the law or to create it (Martin, 2014, p. 49). There is no such dichotomy, and there is no reason to think it is the case. Courts, in fact, perform both activities.

Furthermore, rescue strategy 1 avoids examining the problem by asserting a restriction over pre-emption Thesis subjects and avoids the main discussion, as Margaret Martin points out (Martin, 2014, pp. 173-176).[15] Following Postema, she says the restriction seems *ad hoc*, with no justification since it does not explain the fact that in contemporary legal systems courts and judicial operators are subjected to law and have the permanent obligation to apply it (Martin, 2014, pp. 173-176; Postema, 1999, p. 86).

It is important to notice, though, that courts are allowed to depart from precedent when there is compelling reason to do so; it does not discharge them from their obligation to apply the law regularly. The permanent obligation to apply the law is inconsistent with the account of adjudication that Martin ascribes to Raz (Duarte d'Almeida, 2015); instead, Raz does not deny the fact that courts interpret and resort to moral values in adjudication (Raz, 1979, pp. 181-182).

Admitting that courts do not have a real commitment to the pre-emption thesis –with the rescue strategy 1– amounts to asserting that law does not make a difference in judicial operators' practical reasoning in such a way that they are free to decide according to their best balance of first-order reasons. This is an inaccurate explanation of judicial practice.

Rejecting the pre-emption thesis for courts could indirectly have an impact on the normal justification thesis, since citizens comply with precedential rules as authoritative because of the higher probability of success in acting according to the right reasons for action. But if we presume an erratic court

15 This criticism seems to collide with Martin's (2014) previous statement regarding the possibility of courts being released from their duties to apply the Law (p. 49).

performance in its treatment of law and inconsistency in its rulings, then the normal justification thesis is void and citizens are no longer justified for acting according to precedents (Martin, 2014, p. 36).

On the other hand, rescue strategy 2 is unsatisfactory because there is no criterion that determines the substantive contents qualified to exempt courts from applying law pre-emptively (pre-emption thesis) (Postema, 1999, pp. 101-103). Even if there were criteria to decide on the substantive content to exempt courts from performing the pre-emption thesis, such criteria would be arbitrary as we lack information and an objective parameter to define it in advance. It is not viable to establish which substantive contents apply beforehand and, thus, to know which exclusionary reasons can be exempted from court application as the strategy suggests.

It seems to me that the rescue strategy 2 does not really "rescue", but indirectly undermines the pre-emption thesis when it allows subjective criteria to prevail over established law where applicable; the strategy then acts against pre-emption thesis premises, namely, the prevalence of an authoritative legal rule to solve the problem.

The rescue strategy 2 draws from a false assumption: the possibility of artificially dividing cases and classifying them into those that contain substantive content potentially subjected to interpretation and those that do not. Such an assumption is inadequate because any legal case is open to dealing with substantive matters for interpretation when the case arises (Postema, 1999, pp. 101-103).

According to these rescue strategies, we can implement the proposed restrictions to uphold the pre-emption thesis as an element of the theoretical explanation of judicial reasoning. However, even if we accepted the rescue strategies, we would still see courts applying legal directives, including precedents, in an exclusionary way. In fact, we would continue to observe courts applying legal directives as well as interpreting them. Therefore, how can we solve this puzzle?

Raz states that there is no such perplexity because that is the core idea of the pre-emptive force of the law. As such, by attending the query on the subject dimension scope of exclusionary reasons, Raz disagrees with the above position and holds that Postema has overlooked the simple answer, i.e., "those to whom the legal requirement is addressed are those who are bound by it" (Raz, 2009, p. 392).

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Following this argument, the fact that the pre-emption thesis applies to courts simply means that courts are bound by the laws that apply to them, just as I am bound by the laws that apply to me. This assertion is fully understood considering what Raz takes to be instead the relevant question: "What does the law require the courts to do regarding laws which apply not to them but to the litigants in front of them?" (Raz, 2009, p. 392).

The previous answer and the subsequent question imply that courts do not treat the legal directives that apply to the litigants before them pre-emptively. By making such a distinction between the laws that apply to courts and the laws that apply to litigants, it seems clear that the laws that would solve the dispute brought before the court are not reasons considered in the balancing process that takes place in the practical reasoning of courts.

This last one is a crucial point of divergence in the discussion. While Raz denies the possibility that the reasons contained in legal directives that apply to litigants are also considered reasons in courts' practical reasoning, Postema assumes that that is the case if we employ the rescue strategies. Yet, given that the reasons contained in legal provisions directed at litigants still influence the practical reasoning of courts to different degrees, the perplexity persists.

An Alternative Reading (A Way Out)

In the previous sections, we have identified the importance of the *autonomy challenge*, analyzed its content, and reviewed the potential consequences it poses to the pre-emption thesis in judicial practice and precedent. Examining the *autonomy challenge* and the rescue strategies suggested by Postema has allowed us to expose some flaws that need to be overcome.

As we can see, the pre-emption thesis rescue strategies are unsatisfactory.[16] In fact, this way of articulating the discussion seems to put us up against in an apparent dilemma between both. From my perspective, there is no such dilemma since it is inadequate to maintain that we need to restrict the subject or substance dimension of exclusionary reasons to successfully explain judicial reasoning, including the practice of precedent.

It seems to me that accepting the *autonomy challenge* in its original terms implies yielding to the appealing idea that the only possible way to keep the

16 Postema (1999) similarly concludes (although for different reasons) that the rescue strategies do not help to maintain the pre-emption thesis under the circumstances explained here.

pre-emption thesis –as an element of our explanation of precedent and judicial reasoning– is by applying the proposed restrictions referred to as rescue strategies.

As persuasive as either option may be, avoiding the complexities that arise from the challenge or keeping the theory intact and free from criticism is unsatisfactory. Instead, I argue that we should resist using these strategies because both give the semblance of being a solution but do not address the real problem.

Yielding to the rescue strategies implies foregoing an explanation of the underlying theoretical tension, i.e., explaining the role of the authority in judicial practical reasoning, including precedent, and showing whether the pre-emption thesis is compatible with judicial reasoning. Even more, this submission means giving up clarifying whether the authority plays any role at all in practical judicial reasoning and in the use of precedent, and how this occurs. It is necessary, then, to consider the conflicting aspects of the theory and revisit them.

Central as it is for contemporary legal systems, I believe that an adequate account of precedent should provide an explanation of the authority it purports to possess as a fundamental conceptual element exhibited in the practice itself. Vertical precedent –the one established when a hierarchy of courts is in place–, as the central case of that account (Alexander and Sherwin, 2010, pp. 127-129), cannot be properly understood without the concept of authority. Hence, as I have argued elsewhere,[17] Raz's authority theory provides us with the theoretical components to reach that understanding.

Resorting to precedent will serve to untangle the perplexity, because the very practice of precedent embodies the *autonomy challenge*. At any rate, the tension raised between judicial practical reasoning and precedential authority cannot be fully explained if we only focus on one of the dimensions of courts' practical reasoning, as the challenge suggests.

Since the challenge has been framed in very narrow terms, I consider it necessary to broaden it to get the full picture of the practice. Doing so requires taking a step back and re-thinking the terms of the challenge itself.

My claim is that there is an alternative reading of the problem, consistent with the authority theory, that has been overlooked and explains the courts'

17 In contemporary jurisprudence discussions, there is an acknowledgement that the concept of authority plays a central role in the concept of precedent, although how it explains in adjudicative contexts and how it relates to other concepts is a largely neglected topic. This alternative reading offers a solution to this issue as well. See Gómora-Juárez (2018).

practice better than the rescue strategies do. I defend that the pre-emption thesis is applicable to courts[18] through this alternative reading along with other components.

Notice that the authority theory was conceived to explain the relationship between the authority and its subjects when performing a specific role and only as conceived in the original theory. Under these circumstances, the explanation on the relationship established between the authoritative precedent and its addressee flows smoothly; such an approach shows a "typical scenario", i.e., any instance in which a precedent (or any legal directive) operates as an authoritative reason in the practical reasoning of citizens.

Consider now the central distinction between regulated and unregulated cases in the authority theory. Whilst regulated cases can be solved by applying a common law or statutory rule that provides a solution, unregulated cases are faced with a lack of correct legal answers since the law has gaps. That is why cases cannot be solved in the same way because these disputes are only partially regulated. Consequently, courts are required to employ judicial discretion to reach a solution (Raz, 1979, p. 181).

Regulated and unregulated cases provide us with an idea of the different roles that courts perform, either displaying a law-applying role or a law-creating role (Alexander et al, 2008, pp. 27-29). Notice, though, that in the *typical scenario* both roles take for granted that there is only one possible relationship between the subjects involved: the court as the authority and the citizen as the addressee.

On the other hand, an *atypical scenario* occurs with the interaction between the authoritative precedent and its addressee, who –from this perspective– is an official invested with authority. We are talking about any instance in which a precedent (or any legal directive) operates as an authoritative reason in the official's practical reasoning.[19]

Gerald Postema assumes that all agents addressed by the rules, including officials in charge of enforcing and administering them, treat legal norms as exclusionary. However, the autonomy challenge loses its grip when switching from precedent's role in the practical reasoning of citizens to precedent's role in

18 For a critical account of the scope and role of the pre-emptive force of legal directives, see Pulido Ortiz (2018).

19 Note that this possibility is not considered in the framework of the authority theory.

the practical reasoning of courts, because in the last case we give up the *typical scenario* of the authority theory in any of its manifestations.

Hence, Postema's challenge is flawed because it departs from the standard picture of a subjects' relationship deployed by the authority theory, namely, the *typical scenario*. Nevertheless, considering officials as addressees of legal directives (including precedent) entails a great variation in the discussion' terms and thereby we need an alternative reading to explain it. This perspective adds to the complexity of the authority theory that does not explain the *atypical scenario*.

When we apply the proposed shift on the approach of the discussion and consider officials as addressees of exclusionary legal directives –call it, the hermeneutic strategy of courts (hereinafter HeSCo)– the terms in which we usually understand the authority in practical judicial reasoning and precedent are modified.

This shift can be better understood if we draw upon Meir Dan-Cohen's idea –commonly overlooked– to draw a serious distinction in the law between legal directives addressed to the public and those addressed to officials.

Legal directives are commonly understood as actor-specific and act-specific, which means that they are directed to certain subjects and guide them regarding a certain type of action (Raz, 1999, p. 50). So, the legal provision that forbids exceeding the speed limit, seen as a *conduct rule*, is directed at ruling people's actions as the legal provision-subject and identifies the act of speeding as the legal provision-act.

When it is said that courts "apply" the legal provision that forbids exceeding the speed limit, we need to realize that they are not bound by that directive, i.e., courts are not one of the legal provision-subjects nor does its act (that of imposing a penalty) correspond to the legal provision-act (not speeding) specified by the directive. An adequate account of courts' decision-making needs an additional directive whose legal provision-subject are the courts, and whose legal provision-act is the act of judging, called a *decision rule* (Dan-Cohen 2002, p. 39; Raz, 1999, pp. 146-148).

Dan-Cohen's account illustrates the problem raised by Postema's challenge and introduces elements to strengthen the argument.[20] Additionally, the

20 Let us keep in mind that Dan-Cohen's distinction is not purported to solve the tensions arising from precedent and legal interpretation, abstractly considered, but to shed light on what I called the HeSCo and the distinction between legal directives addressed to the public and those addressed to officials.

introduction of these two kinds of directives in our description of the legal system delivers a more precise and satisfactory account of guiding people's behavior through directives presented in the previous example.

Conduct rules and *decision rules* are closely related; their relationship can be explained as follows: courts are enabled by the decision rules to apply the conduct rules of the system directed at citizens (Dan-Cohen, 2002, p. 40). Here, Dan-Cohen highlights that, although possible, it is not a necessary relationship and should not be assumed, because the previous conceptual separation requires an explicit examination of the various normative considerations that guide judicial decision-making.

According to Dan-Cohen, the distinction between conduct rules and decision rules leads to an ambiguity contained in the proposition "the role of judges and other officials is to apply the law", as long as referring to this practice as "law application" obscures the existing complexity in the operation of two different directives in each case of application. Though it is a truism that courts follow the law (decision rules) in deciding cases, their task regarding conduct rules is not similarly obvious (Dan-Cohen, 2002, p. 40).

Unlike the condition of acoustic separation prevailing in an imaginary universe consisting of two groups of people –citizens and officials–, who are in acoustically sealed chambers that only receive the legal directives that apply to them, in the real world, officials and citizens are not in sealed rooms and receive the messages directed at both groups (Dan-Cohen, 2002, pp. 40-41).[21] Hence, any given legal directive may simultaneously guide both conduct and decision whereby we can have legal directives that can be conduct rules, decision rules or both.

As a result, Dan-Cohen calls for an account that preserves the distinction between both kinds of rules while depicting their interrelationship more accurately than the prevailing view does. I think the atypical scenario helps to explain the normative considerations involved as part of judicial decision-making and offer a more accurate explanation of the relationship between conduct rules and decision rules in court's practical reasoning.

21 This heuristic device is called "The Model of Acoustic Separation." Consider that Dan-Cohen applies this model to a different subject matter; however, his explanation of conduct and decision rules is helpful to clarify some elements of the HeSCo, since some theoretical frameworks and concepts are frequently useful and applied in more than one context due to their explanatory scope.

Let us assume that in the real world there is a relative independence between conduct rules and decision rules, which allows us to implement the hermeneutic strategy of courts (HeSCo), i.e., the shift on the approach of the discussion that considers officials as addressees of exclusionary legal directives to explain the court's relationship with the authority in the decision-making process.

It would be excessive to demand that a theoretical framework conceived to explain a typical scenario would succeed in explaining a different scenario since, in it, the legal directive that requires the courts to follow precedents –as a part of the rule of recognition– is the only one with authority over courts.

These remarks are crucial for advancing in the right direction. It is not my intention to dismiss the challenge because it does not cover an atypical scenario. On the contrary, I acknowledge the significant contribution the autonomy challenge has made. First, it has cast attention on our partial theoretical approach when explaining precedential practice which disregards judicial decision-makers as central participants; and second, it has questioned theoretical assumptions that enable us to think from the HeSCo.

To address the autonomy challenge seriously, it is not enough to implement rescue strategies if we keep assuming the typical scenario is the only one possible to fit the explanation, while ignoring the depth of the atypical scenario. It is precisely from the atypical scenario that we can explain the role authority has in the practice of precedent for courts. Besides, this alternative starting point opens the possibility to discuss an aspect commonly overlooked by authority theory defendants and critics alike.

The previous argument reveals the importance of distinguishing between precedent addressee-scenarios to understand practices in their proper dimension. As explained above, courts take on a role as an authority-creator of precedent and, simultaneously, as an addressee of the rule of precedent.

It is my contention that the HeSCo is a fitting approach to describe this interaction and clarify the complexities arising from the conduct and decision rules for courts. According to my proposal, it is possible to resort to the authority theory when applied to precedent. However, a precedential authority account needs to adopt certain features of its own and build upon them to reconcile the complexities involved in an atypical scenario with the HeSCo. This account requires additional theoretical development.

In this respect, Raz distinguishes between legal directives, conferring powers to officials as rules of recognition, and rules that apply to the public, which

officials only need to consider as valid legal directives (Raz, 1999, p. 147). Rules of recognition, like the so-called decision rules, should not be confused with second order reasons to act on a reason. However, it is possible to consider a conduct rule as a second order reason to decide on a reason, and this is the image described by the model of acoustic separation.

The proposition according to which "Courts consider as valid the *conduct rules* they have the obligation to apply following the *decision rules*" implies that courts use conduct rules in their decision-making process. Conduct rules are premises in courts' practical reasoning, given they constitute reasons for a court's decision with pre-emptive force. From this perspective (HeSCo), the action of considering conduct rules as valid implies the courts' using the conduct rule applied to citizens on its own practical reasoning by deciding.

In a recent thorough article, Luís Duarte d'Almeida (2021) discusses what "apply the law" means, its relationships and instances.[22] With an astonishing clarity, Duarte draws a distinction between inferential law-application and pragmatic law-application whereby the former is the decision-makers act of reasoning towards a conclusion supported by any written legal directive, including precedents (Duarte, 2021, pp. 363-364).

On the other hand, pragmatic law-application refers to the actual performance of an external "action such that (a) the agent takes to be an action that either (a1) she legally ought to perform, or at least (a2) she is legally permitted to perform (in the sense that it is not the case that she legally ought not to perform it)." This characterization of pragmatic law-application coincides with Dan-Cohen's decision rules, explained as the legal provision whose subject are the courts and whose object is the act of judging. (Dan-Cohen, 2002, p. 39)

Both schemes are aware of and concerned with the need to explain the two court roles displayed in practical reasoning when deciding. Note, however, that Duarte (2021) accords that "Not all legally justified judicial decisions are law-applying decisions. But what courts legally ought to do turns in part –in large part– on existing law" (p. 374), recognizing somehow the courts' creative role is to be distinguishable from courts applying role.

22 In the same vein, Navarro and Moreso (1997) distinguish between "internal" and "external" applicability of legal norms, where the internal applicability refers to the sphere of validity of legal norms and external applicability refers to institutional duties.

Although the theoretical explanation I suggest takes the internal point of view of "addressees" of precedent as the participants of the practice (hermeneutic turn), we need to bear in mind the centrality of judicial decision-makers at the interpretive occasion as well –whenever unregulated cases arise. This aspect is central for obtaining a complete picture of the practice and is achievable through the HeSCo. I contend, then, it is necessary to make a distinction between the practical reasoning of citizens and that of judicial decision-makers.

The authority theory was thought to explain the typical scenario where it is clear how an authority operates in both legal and non-legal examples. For instance, when I am ill and my doctor prescribes a medical treatment for me to recover, I clearly perform the role of addressee as the subject of a medical authority. Or when my car is towed away by a traffic authority and I must pay a fine to get my car back, my role again is that of addressee and subject of the administrative authority.

Both examples show agents performing identified and defined roles. As seen, the authority theory in its own terms adequately covers and explains that aspect of the practice of precedent regarding citizens and officials, in general. Let us now consider a precedential rule (X) according to which it is unconstitutional for a law to consider procreation and heterosexuality as constitutive elements of marriage.

(X) is the precedential rule that decision-makers have an obligation to apply.[23] According to (X), Amanda and Sofia –as the addressees of the rule of precedent– can get married because a court already weighed the reasons and decided (X) as the reason for action in that situation.

Applying the HeSCo, if Amanda and Sofia brought their case before a court, the court –performing as an addressee of (X)– would have an exclusionary reason for action, which in this instance is to decide according to (X). In this example, we can identify two important points. On one hand, the participants in this example perform the roles of citizen-addressee and judicial official-addressee of the precedential rule, respectively. On the other hand, because of the relative independence between conduct rules and decision rules, the referred precedential rule operates as an exclusionary reason for action in the court decision-making.

23 In some jurisdictions, the reach of precedents is restricted to the judicial branch, but that distinction does not affect the structure of the argument.

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From the HeSCo, by applying rules of precedent in the atypical scenario, courts play the role of addressees of precedent –which as an existing legal directive– they are subject to apply in an exclusionary way. While in the typical scenario, by creating rules of precedent, overruling or distinguishing, courts perform as an authority whose decision is directed to others. This is the act the regular model of authority dictates. The crucial point to bear in mind here is that courts constantly perform both roles.

At the same time, the autonomy challenge and the rescue strategies advance their explanation based only on one of the roles that courts perform which has, in turn, led to partial explanations of precedential and judicial practice. Then, it is important to identify the role that courts perform (applying or creating law) and the scenario or perspective used in each case to explain how its practical reasoning take place.

Both roles can be exemplified as follows. When a judicial decision-maker settles a case by applying an authoritative precedent (performing as a legal directive-addressee), he is using an exclusionary reason to solve the case, i.e., he has a first-order reason to decide according to the rule content and a second-order reason not to re-open the balance of reasons. The balance of reasons has been done before by another court, which is why there is an applicable rule of precedent in first place.

Meanwhile, when courts face unregulated cases, they are presented with an occasion to exercise interpretation and to provide an answer to settle the case at hand. In this instance, the court is performing its role of creative authority whose obligation is to weigh reasons through a new reasoning process to provide a solution to the problem at hand. In this situation –and even in overruling or distinguishing practices– the judicial decision-maker does not have a first-order reason to decide (because the problem is not settled or not covered by the precedent, there is a more suitable answer than the precedent or the case at hand has a characteristic not considered by the precedent). Consequently, the second-order reason not to re-open the balance of reasons no longer exists, which means that the judicial decision-maker necessarily will re-open the balance of reasons.

These examples reveal the interpretive occasion that comes up whenever unregulated cases appear, as these require a completely different reasoning process from the one a court requires for regulated cases. In unregulated cases, coherence and creativity have a role to play to reach a solution, even though

existing law broadly guides that decision. Conversely, when faced with regulated cases, courts rely on the reasons for action provided by legal provisions which offer a solution to the case at hand.

Notice that if we use the HeSCo as suggested, we would broaden the scope of authority application which goes beyond the typical scenario it was conceived for. On the other hand, awareness of the roles and possible scenarios in judicial decision-making makes this a tenable explanation of the existing relationship between the authority and the courts in their practical reasoning to decide.

Since regulated and unregulated cases coexist, we need to be able to explain not only the typical but the atypical scenario, as well as to provide a complete account of judicial practice and precedent. This last point leads to the need of further theoretical developments to explain the latter in terms of the interaction between precedent and courts reasoning in its different roles; the authority theory provides the elements to do the job.

Final Remarks

Though the authority theory is not meant to cover the complexity discussed herein, it is still a valuable theoretical framework to explain our concept of precedent, with the peculiarity that, in the case of precedent, it deploys its own features derived, for instance, from the dual role of courts as applying-addressees and creating-addressees.

Among other lessons, the autonomy challenge pointed out at a theoretical gap in the authority theory regarding courts practical reasoning and precedent; a gap that legal philosophers need to fill. The observation of considering courts as legal directives-addressees and subjects of the authority of law stresses an important aspect of that other dimension commonly neglected.

Additionally, Postema's reformulated autonomy challenge reveals the tension between the authority theory and the practice of precedent. However, the shift of approach applied through the HeSCo preserves the notion of authority from the authority theory, as originally conceived, since any authority claims to provide reasons for action as the result of a balancing-reasons service.

Discussing only one of the roles performed by courts would render the sources thesis inadequate. However, by considering the dual role courts perform, it is possible to grasp how the sources thesis still explains the practice of precedent. Law can be identified by social facts, but a gap is nonexistent law. Then, the

court's law-making process creates law where there was none, and this practice is also a social fact.

As the article showed, to disentangle the puzzle, it is necessary to further the discussion regarding courts as practical reasoners, as well as to pursue a more complete account of precedent, to be able to explain how the authority functions and how interpretation takes place in the court's practical reasoning according to the roles described. The HeSCo is a useful tool to that end. The suggested theoretical distinction on court roles and the relative separation of legal directives is a necessary step towards properly explaining how practical court reasoning occurs.

References

Alexander, L. & Sherwin, E. (2008). *Demystifying Legal Reasoning*. Cambridge University Press.

Alexander, L. & Sherwin, E. (2010). Los jueces como creadores de reglas. *Problema. Anuario de Filosofía y Teoría del Derecho*, *4*, 127-167.

Bernal Pulido, C., Bustamante, T. (Eds.). (2015). *Fundamentos filosóficos de la teoría del precedente judicial* (R. Camarena, Trans.). Universidad Externado de Colombia (Original work published 2009).

Bix, B. (2011). The Nature of Law and Reasons for Action. *Problema. Anuario de Filosofía y Teoría del Derecho*, *5*, 399–415.

Camarena González, R. (2022). La ratio decidendi a través de ojos mexicanos. *Problema. Anuario de Filosofía y Teoría del Derecho*, *16*.

Cross, R. & Harris, J. W. (1961). *Precedent in English Law*. Clarendon Press.

Dan-Cohen, M. (2002). *Harmful Thoughts: Essays on Law, Self, and Morality*. Princeton University Press.

Da Rosa de Bustamante, T. (2016). *Teoría del precedente judicial. La justificación y la aplicación de las reglas jurisprudenciales* (Juan Carlos Panez Solórzano & Brian L. Ragas Solórzano, Trans.). Ediciones Legales.

Duarte d'Almeida, L. (2015). Review of *Judging Positivism*, by Margaret Martin. *The Modern Law Review*, *78*(4), 699-707. https://doi.org/10.1111/1468-2230.12136

Duarte d'Almeida, L. (2021). What is it to Apply the Law? *Law and Philosophy*, (40), 361-386.

Duxbury, N. (2008). *The Nature and Authority of Precedent*. Cambridge University Press.

Gascón Abellán, M. & Núñez-Vaquero, Á. (Eds.). (2020). *La construcción del precedente en el Civil Law*. Atelier.

Goldstein, L. (1984). Some Problems about Precedent. *The Cambridge Law Journal*, *43*(1), 88-107.

Gómora-Juárez, S. (2017). La posibilidad conceptual y el argumento histórico en torno al estudio del precedente. *Precedente*, *11*, 137-185. https://doi.org/10.18046/prec.v11.2448

Gómora-Juárez, S. (2018). *Un análisis conceptual del precedente judicial*. Universidad Nacional Autónoma de México-Instituto de Investigaciones Jurídicas.

Goodhart, A. L. (1930). Determining the Ratio Decidendi of a Case. *The Yale Law Journal*, *40*(2), 161-183.

Hershovitz, S. (2003). Legitimacy, Democracy, and Razian Authority. *Legal Theory*, *9*(3), 201-220. https://doi.org/10.1017/S1352325203000090

MacCormick, N. (1978). *Legal Reasoning and Legal Theory*. Clarendon Press.

MacCormick, N. & Summers, R. S. (1991). *Interpreting Statutes*. Ashgate.

Martin, M. (2014). *Judging Positivism*. Hart Publishing.

Moral Soriano, L. (2002). *El precedente judicial*. Marcial Pons.

Navarro, P. E. & Moreso, J. (1997). Applicability and Effectiveness of Legal Norms. *Law and Philosophy*m, (16), 201-219.

Núñez-Vaquero, Á., Arriagada Cáceres, M. B. & Hunter Ampuero, I. (Eds.). (2021). *Teoría y práctica del precedente*. Tirant lo Blanch.

Núñez-Vaquero, Á. (Forthcoming). *Precedentes: una aproximación analítica*. Marcial Pons.

Postema, G. J. (1999). Law's Autonomy and Public Practical Reason. In Robert P. George (ed.), *The Autonomy of Law Essays on Legal Positivism* (pp. 79-118). Oxford University Press. https://doi.org/10.1093/acprof:oso/9780198267904.003.0004

Pulido Ortiz, F. (2018). *Jueces y reglas. La autoridad del precedente judicial*. Editorial Universidad de la Sabana.

Raz, J. (1979). *The Authority of Law: Essays on Law and Morality*. Clarendon Press.

Raz, J. (1985). Authority, Law and Morality. *Monist*, *68*(3), 295-324. https://doi.org/10.5840/monist198568335

Raz, J. (1988). *The Morality of Freedom*. Clarendon Press. https://doi.org/10.1093/0198248075.001.0001

Raz, J. (1999). *Practical Reason and Norms*. Oxford University Press. https://doi.org/10.1093/acprof:oso/9780198268345.001.0001

Raz, J. (2009). *Between Authority and Interpretation: On the Theory of Law and Practical Reason*. Oxford University Press. https://doi.org/10.1093/acprof:oso/9780199562688.001.0001

Raz, J. (ed). (2011). Practical Reasoning. *From Normativity to Responsibility* (pp. 130-141). Oxford University Press. https://doi.org/10.1093/acprof:oso/9780199693818.003.0007

Rodriguez-Blanco, V. (2016). Review of *Judging Positivism*, by Margaret Martin. *Law and Philosophy, 35*(4), 425-433. https://doi.org/10.1007/s10982-016-9262-4

Rojas Marroquín, A. M. (2021). Precedente, analogía y razones para actuar. Comentarios sobre la propuesta de Frederick Schauer. *Problema. Anuario de Filosofía y Teoría del Derecho*, *15*, 307–342. https://doi.org/10.22201/iij.24487937e.2021.15.16125

Schauer, F. (1991). *Playing by the Rules. A Philosophical Examination of Rule-Based Decision-Making in Law and in Life*. Oxford University Press.

Shapiro, S. (2009). What is the Rule of Recognition (and Does it Exist)? In Matthew Adler and Kenneth Einar Himma (eds.), *The Rule of Recognition and the U.S. Constitution* (pp. 235-268). Oxford University Press. https://doi.org/10.1093/acprof:oso/9780195343298.001.0001

Simpson, A. W. B. (1957). The Ratio Decidendi of a Case. *The Modern Law Review*, *20*(4), 413-415.

Stone, J. (1959). The Ratio of the Ratio Decidendi. *The Modern Law Review*, *22*(6), 597-620.

Vega Gómez, J. (2014). Autoridad. In Jorge L. Fabra and Verónica Rodríguez-Blanco (eds.), *Enciclopedia de teoría del derecho y teoría jurídica* (Vol. 2.) (pp. 1177-1192). Universidad Nacional Autónoma de México-Instituto de Investigaciones Jurídicas. http://ru.juridicas.unam.mx/xmlui/handle/123456789/12688

Wallace, R. J. (2020). Practical Reason. In Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Spring 2020 Edition). https://plato.stanford.edu/archives/spr2020/entries/practical-reason/

Waluchow, W. J. (2000). Authority and the Practical Difference Thesis: A Defense of Inclusive Legal Positivism. *Legal Theory*, 6(1), 45-81.

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