THE JURISPRUDENCE OF JOHN GARDNER AND THE FUNDAMENTALS OF LAW

edited by Julieta A. Rabanos

Foreword

*Julieta A. Rabanos**

Abstract

On 14 July, 2023, a tribute seminar was held at the University of Genoa for the late John Gardner (1965-2019). The aim was to honour and celebrate his life by discussing some of the many topics he addressed in his extensive, diverse and influential academic works. This section collects the contributions of six of the ten key speakers at the seminar.

Keywords: John Gardner. Legal Positivism. Jurisprudence. Study of Law. Responsibility. Reasons for Action.

On 14 July 2023, a tribute seminar –"The Jurisprudence of John Gardner and the fundamentals of law"– was held at the University of Genoa for the late John Gardner (1965-2019). The aim was to honour and celebrate his life by discussing some of the many topics he addressed in his extensive, diverse and influential academic works.

Gardner's academic career is well known[1]. He attended the University of Oxford for all his high education, undertaking his DPhil studies under the supervision of Joseph Raz and Tony Honoré. After that, he was a fellow of several colleges at the University of Oxford (All Souls College and Brasenose College) and he also held an array of different teaching and researching positions at the University of Oxford, with a brief break where he held a readership at King's College London. In 2000, at the age of 35, he was appointed as Professor of Jurisprudence at University College

* Faculty of Law, University of Belgrade, Bulevar kralja Aleksandra 67, 11000 Belgrade, Serbia, julieta.rabanos@ius.bg.ac.rs.

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[1] For a more in-depth account of it, and also his personal life, see v.gr. Endicott 2019, Acorn 2019, Lacey 2019, and Shute and Acorn 2019, as well as Edwards 2021.

(Oxford), a role previously occupied by H.L.A. Hart and Ronald Dworkin. He held that role until his appointment in 2016 as a Senior Research Fellow of All Souls College, where he remained until his death.

In the same vein, the width and depth of Gardner's academic work is also well known. He wrote four main books on criminal law, jurisprudence, private law, and torts: *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (2007), *Law as a Leap of Faith: Essays on Law in General* (2012), *From Personal Life to Private Law* (2018), and *Torts and other Wrongs* (2020), the latter finished just before this passing. The range of his interests and expertise went even further: among others, it involved problems of torts and contracts, constitutional law, public law, private law, sexual assault law, the rule of law, discrimination, theories of justice, and much more. He indeed defined himself as a "generalist" within the scope of philosophy of law[2].

This seminar was one among other diverse initiatives aiming at honouring and celebrating John Gardner, some of them being very recent books[3]. It had several characteristics that made it special. On the one hand, the main speakers were from both common law and civil law traditions, a specific point that opened the scope of the discussion. On the other hand, it involved both speakers that had directly known Gardner and speakers that only had known Gardner by description, either through his work or through his influence on others' works. Moreover, the contents of the discussion at the seminar revolved mainly around Gardner's substantive ideas on jurisprudence, in particular his proposal on the definition of legal positivism; however, they also touched upon his ideas on reasons for action, practical reasoning, the study of jurisprudence, and responsibility. Finally, the seminar has held within the framework of the residential courses of the *Master in Global Rule of Law and Constitutional Democracy* (University of Genoa & University of Girona), so a great number of audience participants were international graduate students who were able to establish contact with Gardner's work and participate in deepening their understanding and debate of his ideas.

This section of the first 2024 issue of *Analisi e diritto* collects the interventions of six of the ten main speakers of the seminar. The discussion on the following pages will follow this order. The first part will be dedicated to three contributions that propose to discuss John Gardner's stand regarding legal positivism, as it was presented in Gardner's very influential essay "Legal Positivism: 5½ Myths"[4]. In "John Gardner on the Scope of Legal Positivism", Brian Bix critically analyses

[2] Gardner & Flores 2019.

[3] See v.gr. Madden Dempsey & Tanguay-Renaud 2023 (explicitly dedicated as an homage to Gardd ner's academic life), as well as Psarras & Steel 2023 (dedicated to discussing Gardner's ideas related to the philosophy of private law). Also, a very recent special workshop "In Memory of John Gardner", related to Gardner's Underappreciated Words, was held at the beginning of June 2024 at the University of Oxford.

[4] Gardner 2001 (reprinted in Gardner 2012).

Gardner's argument that legal positivism is to be understood only as a thesis about the validity of individual norms, and the problematic consequences that followed from this approach. On the one hand, for Bix, it has contributed to the discount and marginalization of two important questions about the non-/separation of law and morality: the legal status of immoral legal systems, and the role of moral evaluation in the construction of theories about the nature of law. On the other hand, it has contributed to taking attention away from the theoretical question regarding the extent to which a position of non-/separation on one topic within jurisprudence entails or supports a similar view on other topics.

In "(LP*) Revisited. On John Gardner's reductionism of legal positivism", Alejandro Calzetta takes a different path in his critical analysis of Gardner's legal positivism, by concentrating the attention on Gardner's attempt to reduce legal positivism to just only one proposition (the so-called LP*). Calzetta argues that Gardner's reductive attempt fails to account for several features of what it is usually denominated as legal positivism, and that is mainly due to the fact that Gardner approaches the analysis of "legal positivism" as if it were a concept akin to "legal competence", *i.e.* a legal concept, and thus takes a strict conceptual analytical approach to its analysis. However, Calzetta claims, "legal positivism" is in fact a concept of the history of ideas, that needs for a "historical approach" to be analysed, understood and defined. He shows how this issue affects Gardner's approach, also contrasting it with the common law approach of H.L.A. Hart's and the civil law approaches of Norberto Bobbio and Eugenio Bulygin.

Finally, in "5½ Myths of Legal Non-Positivism", Mattias Klatt departs from Gardner's article about the myths about legal positivism to, in turn, propose a discussion regarding several assumptions about legal non-positivism that many authors – including Gardner – seem to hold and argue for. He identifies six assumptions: that legal non-positivism misconstructs legal positivism; that it destroys law's positivity; that it disempowers the legislator; that it accepts a questionable notion of ideal dimension of law; that it does not settle the conflict between real and ideal elements of law; and that it transformed a descriptive-analytical debate about what the law is into a normative-political debate about what the law ought to be. In the same way as Gardner did in his original paper, Klatt discusses and critically analyses these assumptions, and finally unveils them as myths.

The second part will be dedicated to three contributions that explore other facets of Gardner's work. In "'No making responsible, we might say, without holding responsible'", Sebastián Figueroa Rubio proposes to analyse some theses that Gardner advanced on the relations between different concepts of responsibility and to explore their usefulness for the understanding of relationships between agency, reasons, and responsibility practices. Figueroa offers a reconstruction of Gardner's stand in the relation between basic, consequential, and prospective responsibility, and points out two challenges related to Gardner's understanding of

basic responsibility: how it makes more difficult the understanding of other types of responsibility, and how would be possible to make sense of the role of excuses in responsibility practices. Finally, Figueroa offers an argument about how to deal with those challenges using tools provided by Gardner's last works.

In "The Legacy of John Gardner. Legal Justification and the Metaphor of "the Balance of Reasons", María Cristina Redondo proposes to critically analyse Gardner's conception of the so-called "balance of reason" that the addresses of law must undertake in case of conflicts between legal norms. Redondo accepts Gardner's commitments of a positivism approach to analysing law, and that law can be understood as aiming to constitute reasons for action for its addresses. However, she points out that Gardner's conception of "balance of reason" is determined by the thesis of the unity of practical reasoning, as accepting that there is only one kind of reason that can genuine justify decisions, and she advances the claim that there are good reasons to abandon both the idea of the unity of practical reason under the requirements of morality and the standard metaphor that compares practical reasoning to a balance of reasons by which a conflict of reasons must be resolved by judicial authorities.

Finally, in "Jurisprudence as a Side-Quest? A critical appraisal of John Gardner's account of the reasons to study jurisprudence", Bojan Spaić critically engages with Gardner's claim that philosophy of law has a modest and optional role within legal studies. Spaić argues that Gardner's account of reasons for studying jurisprudence falls short because it is based on a very narrow concept of general jurisprudence, one that leaves out a wide array of kinds of jurisprudence and crucial jurisprudential issues. To show this point, Spaić proposes to discuss two types of knowledge that jurisprudence can transfer, and then the ability of various kinds of jurisprudence to develop these types of knowledge in students of law. His main argument is that jurisprudence is best understood not as a side quest in legal studies, but a crucial – albeit additional – content to the study of law that is well positioned to contribute significantly both to the study of law and legal practice.

The contributions of the four remaining key speakers, which are not reproduced in this issue but are set for future publication, discussed Gardner's ideas on responsibility, constitutional law, the functionality of rules of recognition, the legality of law, and the authority of law and its normativity. Annalise Acorn focused on "Responsibility, Self-respect and the Ethics of Self-pathologization". She analysed John Gardner and Timothy Macklem's position in regard to defences which deny responsibility on grounds of mental illness (who maintain that self-respecting persons accused of a crime should ideally want to be able to give a rational account of their actions), and their debate with critics Mitchell and Mackay. Then, Acorn argued that, while she agrees with Gardner and Macklem's view, she nevertheless thinks that Gardner and Macklem's reply to Mitchell and Mackay lacks an acknowledgement and critique of what I will call the therapeutic

persuasion; a cultural phenomenon that has radically altered popular conceptions of responsibility, mental illness and self-respect. She then developed her view on the sensibility of the therapeutic perspective and a critique of that sensibility and its influence on criminal conceptions of responsibility.

José María Sauca Cano focused on honouring Gardner not by offering critical analysis of his work, but by showing how it greatly benefited Sauca's scientific production – in particular, Gardner's essay "Can There Be a Written Constitution?". Some of the ideas contained in that essay, in particular Gardner's distinction between constitution and constitutional law, and his specification of the functionality of the Rules of Recognition, have had a great impact in the development and ultimate formulation of a novel concept that Sauca calls "Constitutional Clauses of Liquidity (CCL)". These clauses are, *grossomodo*, provisions enabling the production of provisions that *prima facie* would have an unconstitutional content. Gardner's distinction between constitution and constitutional law, leaving room for actions that are unconstitutional but neither illegal nor legally invalid, allowed Sauca to find a conceptual space for written constitutional provisions such as the CCLs, as there would be no systemic impossibilities for their existence. In turn, Gardner's specification of functionality of Rules of Recognition (RsoR) allowed for understanding that the characterisation of CCLs as power-conferring rules does not change the RsoR of the constitution.

Natalia Scavuzzo focused on ch. 7 of *Law as a Leap of Faith* (2012), and Gardner's reflections related to the legality of law. Scavuzzo analysed Gardner's attempts to fix the problem of the "insufficient sensitivity" of philosophy of law to ambiguities, and concluded that they still left unattended some ambiguities that would need to be taken into consideration. She argued that, on the one hand, there are some relationships between "law" and "legal" that Gardner's analysis seems to leave aside and unattended. On the other hand, attention to these ambiguities can provide a different explanation of the expressions that Gardner attempts to explain, such as "illegal law" and "all laws are legal". Scavuzzo showed different relationships between "law" and "legality", considering the different meanings that Gardner recognised that "law" can have, and how Gardner's proposed definition for "illegal law", for example, does not fit all of them.

Finally, in "Law as Three Leaps of Faith", Julieta Rabanos discussed Gardner's famous article "Law as a Leap of Faith", identifying several interesting points such as: (1) The Socratic challenge (puzzle between omnipotence and omniscience of God); (2) The comparison between transcendental authority and earthly authority; (3) The search of some "God-equivalent-argument" in legal theory; and (4) The idea of a "leap of faith" regarding law's normativity (in a wide sense). Rabanos then identified several possible challenges and questions associated with each one of those interesting points: (1) Is the Socratic challenge still on if we consider morality as another social normative system, or if we renounce the idea of the unity

of practical reasoning? (2) Is the comparison between transcendental authority and earthly authority really conducive to Gardner's claim that faith in law is different from faith in God? (3) Is really the *Grundnorm* a "juristic God"?; and, finally, (4) Is there only one leap of faith regarding law, or are there three of them? Regarding the last question, she suggested that, where Gardner only explicitly identified one leap, three leaps should be considered: the explicit leap (from Being X to Doing Z because of being X); an implicit leap in Gardner's analysis (Being X and Z at the same time and deciding for X or Z [Leap to Being X]); and missing leap (from belief/desires to reasons).

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