25th IVR World Congress
LAW SCIENCE AND TECHNOLOGY
Frankfurt am Main
15–20 August 2011

Paper Series

No. 103 / 2012
Series D
History of Philosophy; Hart, Kelsen, Radbruch, Habermas, Rawls; Luhmann; General Theory of Norms, Positivism

J. Alberto del Real Alcalá

"The Ideal of the Certainty in Law: The Skin and the Heart of Law"

URN: urn:nbn:de:hebis:30:3-249613

Conference Organizers:
Professor Dr. Dr. h.c. Ulfrid Neumann, Goethe University, Frankfurt/Main
Professor Dr. Klaus Günther, Goethe University, Frankfurt/Main; Speaker of the Cluster of Excellence "The Formation of Normative Orders"
Professor Dr. Lorenz Schulz M.A., Goethe University, Frankfurt/Main

Edited by:
Goethe University Frankfurt am Main
Department of Law
Grüneburgplatz 1
60629 Frankfurt am Main
Tel.: [+49] (0)69 - 798 34341
Fax: [+49] (0)69 - 798 34523

J. Alberto del Real Alcalá, Jaen / Spain*

"The Ideal of the Certainty in Law: The Skin and the Heart of Law"

Abstract: The doubt about certainty like an absolute value in law and as an ideal full in legal system (argument about impossibility) is a controversial fact in contemporary legal theory. In this text I examine some contemporary doctrines about the classic understanding (in critical sense) of this ideal. I have selected the most representative doctrines: doctrine about "open texture of Law" (H.L.A. Hart), starting point in this discussion; doctrine about "Il Diritto mite" (G. Zagrebelsky), from the continental European legal tradition at present; and doctrine about "vagueness in Law" (T.A.O. Endicott), this doctrine is the most recent, from the Anglo-Saxon legal tradition. Finally, in Conclusions, I analyze if this doubt (argument about impossibility) contaminates (in some sense) to the concept of law or to the characteristics that describe law in the contemporary Constitutional State.
Keywords: Certainty in Law; Open Texture; Vagueness in Law; Ductility in Law

Summary:

I. Introduction.

The doubt about certainty like an absolute value in law and as an ideal full in legal system (argument about impossibility) is a controversial fact in contemporary legal theory[1]. I examine some contemporary doctrines about the classic understanding (in critical sense) about this ideal. I have selected the most representative doctrines:

- The skin of law in the new constitutionalism: doctrine about "open texture of Law" (H.L.A. Hart, starting point in this discussion; and, doctrine about "vagueness in Law" (T.A.O. Endicott), this doctrine is the most recent, from the Anglo-Saxon legal tradition.

- The heart of law in the new constitutionalism: doctrine about "Il Diritto mite" (G. Zagrebelsky), from the continental European legal tradition at present.

* Prof. Dr. J. Alberto del Real Alcalá, Professor of Philosophy of Law, University of Jaen, Spain. E-mail: adelreal@ujaen.es. Homepage: http://www4.ujaen.es/~adelreal

[1] Cfr. DEL REAL ALCALÁ, J.A.: "¿Certeza del Derecho *vs*. Indeterminación jurídica? El debate entre Positivistas y Antipositivistas", in *Archiv für Rechts-und Sozialphilosophie*, ARSP Beiheft Nr. 106, volume I (*Legal Theory/Legal Positivism and Conceptual Analysis*, Moreso, J.J., ed.), Franz Steiner Verlag, Stuttgart, 1st Edition 2007, pp. 94-106.

Finally, in Conclusions, I analyze if this doubt (argument about impossibility) contaminates (in some sense) to the concept of law or to the characteristics to describe the law in the contemporary Constitutional State.

II. The skind of law in the new constitutionalism: open texture and vagueness in law.

In this epigraph I show the doctrine about "open texture of Law" (1961, Herbert L.A. HART) and relation with the ideal of the certainty in law in the new constitutionalism. In the XXth century, this theoretical of law extended this open texture metaphor. This position is starting point for legal indetermination claim. On the contrary, others theoretical of law affirm that always it is possible to obtain "full" certainty in *all* cases. I will criticize these positions. In my opinion, these positions don't show the legal practice in a correct way. It is necessary to clarify the following thing: the positions that I show don't defend the claim on the uncertain in law in all cases. This claim creates legal insecurity. This claim is not my claim. Really, no lawyer defends this extreme position.[2]

My position defends the argument about impossibility in *some* cases, not in all cases. I defend the argument about impossibility in *borderline* cases. But, I don't defend the argument about impossibility in *clear* cases. My position defends this idea: certainty in law shows limits in borderline cases. Therefore, ideal of certainty in law is not a full ideal. And this affirmation is significant.

This affirmation has some consequences in the comprehension and description of the law. It is necessary to realize a second clarification: to defend an ideal about certainty in law with limits doesn't mean to suggest that it is convenient to introduce more vagueness in legal system. To defend an ideal about certainty in law with limits means to deny the claim that reduces the uncertainty in law to a defect of law, to a dark point of law. Legal Indetermination has more scope. It is not a defect of law, but an empirical characteristic of law.

H.L.A. HART doesn't deny value to certainty in legal norms[3]. However, their doctrine ("open texture of law") questions some aspects about standard vision of certainty in law[4]. HART provides a different description (more sophisticated) about reality in legal system[5]. He

[2] Cfr. SHAPIRO, Scott J.: "On Hart's Way Out", en COLEMAN, J. (ed.): *Hart's Postscript*, Oxford University Press, Oxford, 2001, pp. 149-191.
[3] HART, H.L.A.: *El concepto de Derecho*, traducción de G. R. Carrió, Abeledo-Perrot, Buenos Aires, 1998, p. 255.
[4] HART, H.L.A.: "El positivismo jurídico y la separación entre el Derecho y la moral.", in HART, H.L.A.: *Derecho y Moral. Contribuciones a su análisis*, Depalma, Buenos Aires, 1962, pp. 28-29.
[5] HART, H.L.A.: *El concepto de Derecho*, cit., pp. 155 y ss.; also, HART, H.L.A.: "Postscript", in HART, H.L.A.: *The Concept of Law*, 2.ª edition, Penélope A. Bullock y Joseph Raz, Clarendon Press, Oxford, 1997, pp. 238-276.

rejects a full conception by means of open texture of law[6]. Standard conception is a "mechanics" legal theory. Mechanics legal theory is based in the premise "everything can be known". Always there are previous rules for every case. Work judicial consists on searching for the rule corresponding to every case. Work judicial doesn't have more reach. Therefore, legal rules are not open.[7]

In this perspective, degree of certainty is full and, in consequence, it prejudges the future cases in a blind way, because we ignore the circumstances for those cases in the present time[8]. For HART, legal rules must be intelligible. But, a precision excess in law is not desirable[9].

Open texture of law provides a different description on law in the new constitutionalism. Open texture of law offers a more sophisticated description, next to the legal practice, about how law works in reality. This description allows verifying the following thing: standard vision about legal certainty doesn't provide a satisfactory explanation on legal system. This description doesn't recognize that the law contains *precise* areas, but also *imprecise* areas. In legislation, imprecise areas correspond with legal indetermination. In adjudication, imprecise areas correspond with uncertainty in the juridical operator to solve a case[10].

In law application, precise areas correspond with *clear cases*. And imprecise areas correspond with *borderline cases*. Truly, any legal system has necessity to have clear rules. But, any legal system also has necessity to have imprecise rules. In relation to imprecise rules, they maintain open the solution for a concrete case and in the moment of the application[11]. Therefore, open texture concept ago possible a different description (it doesn't standardize and not homogeneous) about legislation. Because, open texture concept distinguishes two classes of legislated rules: precise and clear rules and imprecise rules and with vagueness[12]. Hart's metaphor distinguishes a *core* and a *penumbra* area in law.

Texture open of law responds to the following cause: human inability to advance the future. Legislator cannot foresee all cases, because the legislators are men, they are not gods[13]. This inability ends in a relative "ignorance in the facts": future facts are impossible to foresee, they will always be ignored. Also, this inability ends in a relative "indetermination of intentions" in the rules. Open texture is open texture in "legal language. And, in John's legal theory, open texture is a characteristic of natural language. Therefore, this characteristic is

[6] HART, H.L.A.: *El concepto de Derecho*, cit., p. 163.
[7] HART, H.L.A.: *El concepto de Derecho*, cit., p. 160.
[8] HART, H.L.A.: *El concepto de Derecho*, cit., p. 162.
[9] HART, H.L.A.: *El concepto de Derecho*, cit., pp. 160-162.
[10] REDONDO, M.C.: "Teorías del Derecho e indeterminación normativa", in *Doxa*, nº 20, Centro de Estudios Políticos y Constitucionales y Universidad de Alicante, Madrid, 1997, pp. 194-195.
[11] HART, H.L.A.: *El concepto de Derecho*, cit., pp. 162-163.
[12] HART, H.L.A.: *El concepto de Derecho*, cit., pp. 157, 168 y 175-176.
[13] HART, H.L.A.: *El concepto de Derecho*, cit., pp. 155, 157, 159-160.

also present in language of law[14]. Hart's precise rules follow the ideal of certainty in a standard sense. And, Hart's imprecise rules don't follow this full ideal. In definitive, contrary to other legal theories, for Hart's legal theory is important those precise areas and imprecise areas, and both types of rules (precise rules and imprecise rules) are located in the same conceptual level[15].

Texture open of law considers homogeneous description of law like unsatisfactory for the new constitutionalism. This affirmation has some consequences in application and interpretation of legal norms. For example, if we accept open texture of law, our observation on judicial cases is *different*. Now, there is not an only type of judicial case. Now, we can distinguish two types of judicial cases: clear cases and uncertain cases. In consequence, there is not an only resolution procedure type for judicial cases. These positions are defended by R. Dworkin with the right answer thesis[16]. And also, these positions are present in the base of Alexy's perspective[17]. However, in Hart's perspective, now, we can distinguish various resolution procedures for judicial cases.

For example, *juridical bivalence* plays in the clear cases. But, this mechanism does not play in the indeterminate cases. On the contrary, *discretion* plays in the uncertain cases. But, this mechanism does not play in the clear cases. Also, principles and rights are *weighted* in uncertain cases[18]. But, principles and rights are not weighted in clear cases. This is related with the following idea: uncertain cases are cases dominated by the uncertainty. Resolution in clear cases is developed by tribunals or by officials. They keep in mind to the circumstances and interests in the conflict. Because, also, then, judges will have to provide a resolution in the borderline cases[19]. They will obtain this resolution from the frame[20] of open alternatives in each case[21]. This resolution will vary in each case.[22]

---

[14] HART, H.L.A.: *El concepto de Derecho*, cit., pp. 155, 157, 159-160, 163 y 173. Cfr., ITURRALDE SESMA, V.: *Lenguaje legal y sistema jurídico. Cuestiones relativas a la aplicación de la ley*, Tecnos, Madrid, 1989, pp. 32 y ss.

[15] HART, H.L.A.: "El positivismo jurídico y la separación entre el Derecho y la moral", *cit.*, p. 29; cfr. HART, H.L.A.: *El concepto de Derecho*, cit., p. 167.

[16] DWORKIN, R. "Thirty Years On", in *Harvard Law Review*, vol. 115, 2002, pp. 1654-1687.

[17] ALEXY, R.: *The argument from injustice. A reply to legal positivism*, Oxford University Press, Oxford, 2002.

[18] DWORKIN, R.: *Law's Empire*, Hart Publishing, Oxford, 2000, pp. 337 y ss.

[19] Vid. DEL REAL ALCALÁ, J.A.: Ámbitos de la 'doctrina de la indeterminación' del Derecho", in *Jueces para la Democracia*, Madrid, n.º 56, julio/2006, Madrid, pp. 48-58.

[20] DEL REAL ALCALÁ. J.A.: "¿'Paradoja' de H. Kelsen sobre la indeterminación jurídica?", in *Cuadernos Electrónicos de Filosofía del Derecho*, Revista de la Sociedad Española de Filosofía Jurídica y Política, n.º 15, Madrid, 2007.

[21] Cfr. DEL REAL ALCALÁ, J.A.: "Desacuerdos en la teoría jurídica sobre el concepto de certeza en el Derecho", in *Boletín Mexicano de Derecho Comparado*, nueva serie, Año XXXIX, n.º 117, Septiembre-Diciembre 2006, Revista del Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México, México D.F., pp. 755–775.

[22] HART, H.L.A.: *El concepto de Derecho*, cit., pp. 158-161.

In this sense, texture open of law recognizes a capacity for the legal creation to the judges[23]. This imperium plays in rules with vagueness and in imprecise and uncertain rules[24]. Because of this function, the judge produces new rules for legal system[25]. In definitive, this area in law is an area dominated by uncertainty[26]. Here, the ideal of certainty in law is not susceptible for full realization[27]. The skin of law is open texture of law.

But, also, another interesting point of view on the skin of law in the new constitutionalism is the thesis about "vagueness in law". This position is the most recent doctrine on the skin of law from Anglo-Saxon legal tradition. This position is defended by T.A.O. Endicott. The purpose of thesis is to provide an opportunity for philosophers of law to discuss problems about vagueness: for example, if, in fact, law is necessarily very vague[28]. In Endicott's position, if vague standards provide no guidance in some cases, how can the life of a community be ruled by law? This problem has to do with the ideal of the rule of law and with the very idea of law[29]. According to Endicott, vagueness in law is an important and unavoidable feature of law[30].

Three arguments base the previous affirmation.

First, precision of law is not necessarily *desirable*[31]. The legislators use vague laws. They not always look for a precise regulation. Law is vague because the precision not always is useful for regulation of the life in the communities. And the legislators know this circumstance.[32]

Second, precise formulations not always produce precise laws. Laws formulated with a precise language don't always produce precise laws in the moment of application and

[23] Vid. ASIS ROIG, R. de: *Jueces y normas. La decisión judicial desde el Ordenamiento*, Marcial Pons, Madrid, 1995, pp. 281 y ss.
[24] HART, H.L.A.: *El concepto de Derecho*, cit., pp. 155-156, 159 y 179-180.
[25] HART, H.L.A.: *El concepto de Derecho*, cit., pp. 159, 161, 169, 179 y 183; vid. PRIETO SANCHÍS, L.: "Neoconstitucionalismo y ponderación judicial", in CARBONELL, Miguel, *Neoconstitucionalismo(s)*, Trotta, Madrid, 2003, pp. 123-158.
[26] Cfr. GARCIA AMADO, J.A.: "¿Ductilidad del Derecho o exaltación del juez? Defensa de la ley frente a (otros) valores y principios", in *Anuario de Filosofía del Derecho*, t. XIII, cit., pp. 65-86.
[27] HART, H.L.A.: *El concepto de Derecho*, cit., pp. 158, 167 y 179-180.
[28] ENDICOTT, E.: "Law and Language", in COLEMAN, J. and SHAIRO, S. (eds.), *The Oxford Handbook of Jurisprudence & Philosophy of Law*, Oxford University Press, Oxford, 2002, pp. 955-960.
[29] Cfr. DEL REAL ALCALÁ, J.A.: "La indeterminación de la 'estructura del deber' de los jueces en el Estado de Derecho", in *Anuario de Filosofía del Derecho*, Ministerio de Justicia, Madrid, 2006, pp. 241-265.
[30] HART, H.L.A.: *El concepto de Derecho*, cit., pp. 158, 167 y 179-180.
[31] ENDICOTT, E.: *Vagueness in Law*, Oxford University Press, Oxford, 2000; Spanish translation: ENDICOTT, T.: *La vaguedad en el Derecho*, translation by Prof. J. Alberto del Real Alcalá and Juan Vega Gómez, Dykinson, Madrid, 2006, p. 21.
[32] ENDICOTT, E.: "Law is Necessarily Vague", en *Legal Theory*, nº 7, Oxford, 2001, p. 379: "In fact, law is necessarily *very* vague"; Spanish translation: ENDICOTT, T.: "El Derecho es necesariamente vago", translation by Prof. J. Alberto del Real Alcalá, in *Derechos y Libertades*, n.º 12, Instituto de Derechos Humanos 'Bartolomé de las Casas' de la Universidad Carlos III de Madrid and Boletín Oficial del Estado, Madrid, Enero-Diciembre 2003, pp. 180-182.

interpretation of the legal norms. The reasons are the interpretive techniques and powers of equity in the judges. These two elements facilitate to give a vague effect to precise legislative formulations.[33]

And *third*, functions in law demand *vague standards*. The reason is: any legal system needs to regulate a great variety of human activity in a general way. This is possible only across abstract standards. And they are necessarily vague. Therefore, law demands necessarily vague and abstract standards to carry out some indispensable functions.[34]

In definitive, we can affirm that the three previous arguments are describing the skin of law in the new constitutionalism. In consequence, the vagueness identifies the skin of law in the contemporary Constitutional State.

III. The heart of law in the new constitutionalism: il diritto mite.

The doctrine about "Il Diritto mite" has been formulated by G. Zagrebelsky, from the continental European legal tradition at present. Mite has been translated (to the Spanish) like "ductil" by Prof.ª Marina Gascón. I will use the expression "ductile law" or ductility.

The contemporary legal practice in the Constitutional State is not identified fully with some habitual characteristics of law. For example, the habitual conception about principle of certainty in law. Doctrine "il Diritto mite" questions the juridical certainty like a full value and a full ideal in law. Because of the new constitutionalism, the contemporary law demands a deep renovation[35].

In the *Diritto mite*, the critique to the rigid conception about certainty in law contains the following premises:

First, the law for principles is the origin in the *Diritto mite*. The europeans legal systems include rules-norms and principles-norms[36]. Besides the rules, this fact means to constitutionalize the values and the principles[37]. Both, rules and principles, have direct application in the new constitutionalism[38]. The application of principles is different to application of rules[39]. In general, principles are not structured according to a hierarchy of

[33] ENDICOTT, T.: "El Derecho es necesariamente vago", *cit.*, pp. 182-184.
[34] ENDICOTT, T.: "El Derecho es necesariamente vago", *cit.*, pp. 184-188 y 189.
[35] ZAGREBELSKY, G.: *Il diritto mitte. Legge, diritti, giustizia*, G. Einaudi, Torino, 1992; Spanish translation, ID., *El derecho dúctil*, Trotta, Madrid, 4ª ed., 2002, pp. 9-10.
[36] Vid. COLEMAN, Jules:*The Practice of Principle: in Defense of a Pragmatist Approach to Legal Theory*, Oxford University Press, Oxford, 2001.
[37] ZAGREBELSKY, G.: *El derecho dúctil*, cit., p. 150.
[38] Vid, GARCÍA DE ENTERRÍA, E.: *La Constitución como norma y el Tribunal Constitucional*, 3.ª ed., Cívitas, Madrid, 1991.
[39] ZAGREBELSKY, G.: *El derecho dúctil*, cit., p. 111.

values[40]. This hierarchy would be incompatible with the pluralistic character of the contemporary society[41]. For this reason, in the new constitutionalism, the rules must agree with the constitutional principles[42].

Second, in the new constitutionalism, the juridical practice generates a contemporary crisis in the principles of generality, abstraction and certainty. If these principles were rigid, they could not describe correctly the juridical practice in the constitutional Democracy. For that reason, the best characteristic to describe to the present law is the "ductility". Law is ductile and the ductility in law is constitutional ductility[43]. Ductility means that the values and constitutional principles cannot have absolute character The ductility shows the essential character of law in the present Constitutional States[44]. In definitive, the ductility is the heart of law en the new constitutionalism.

And *third*, according to the ductility, absolute conception about the certainty of law is not a realistic objective, and is not a desirable objective, in the present legal systems.[45]

In definitive, according to the previous characteristics, if the *skin* of law in the contemporary Constitutional State is open *texture* and *vagueness* in law, the *heart* of law is "il diritto mite". In the contemporary Constitutional State, law has a ductile heart.

IV. Conclusion.

Texture open of law, *vagueness in law* and *Diritto mite* consider homogeneous description of law like unsatisfactory. I relate this unsatisfied situation with argument of the impossibility about the ideal of the certainty in law in the new constitutionalism. My position defends the argument about impossibility in *some* cases (*borderline* cases), not in all cases in the legal system. Because:

-The juridical practice generates a contemporary crisis in the principles of generality, abstraction and certainty.

-In contemporary Constitutional State, law is a law for principles. The plural societies (Constitutional Democracy) are incompatible with a rigid law. They demand a flexible law, a ductile law. Law for principles is a ductile law **(***Diritto mite***)**.

---

[40] Véase MORESO, J.J.: "Conflictos entre principios constitucionales", in CARBONELL, M., *Neoconstitucionalismo(s)*, cit., pp. 99-121.
[41] ZAGREBELSKY, G.: *El derecho dúctil*, cit., p. 124.
[42] ZAGREBELSKY, G.: *El derecho dúctil*, cit., p. 113.
[43] ZAGREBELSKY, G.: *El derecho dúctil*, cit., 2002, p. 14, and pp. 14-15.
[44] Vid. DEL REAL ALCALÁ, J.A.: "Sobre la indeterminación del Derecho y la Ley constitucional. El caso del término 'nacionalidades' como concepto jurídico indeterminado", in *Derechos y Libertades*, n.º 11, Instituto de Derechos Humanos 'Bartolomé de las Casas' de la Universidad Carlos III de Madrid y Boletín Oficial del Estado, Madrid, Enero-Diciembre 2002, pp. 223-250.
[45] ZAGREBELSKY, G.: *El derecho dúctil*, cit., pp. 125 and 146-147.

-According to the ductility, absolute conception about the certainty of law is not a realistic objective, and is not a desirable objective.

-Texture open of law recognizes a capacity for the legal creation to the judges (new rules);

-Precision of law is not necessarily desirable.

-Precise formulations not always produce precise laws.

-Functions in law demand *vague standards*.

These characteristics are significant characteristics. And these characteristics have some consequences: if the ideal of certainty in law is not a full ideal in the contemporary Constitutional State, the skin of law is open texture and vagueness; and the heart of law is a heart ductile.

Address: J. Alberto del Real Alcalá, Jaen / Spain.