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THE RELEVANCE OF COHERENCE: A DEFENSE OF A NORM-ORIENTED PERSPECTIVE OF COHERENCE IN LAW

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ABSTRACT: The present article argues for global coherence in legal argumentation while criticizing ontological and justificatory theories of coherence in law. The article holds the view that the relevance of coherence is contingent upon the validity of a coherence norm in any given jurisdiction. The main thesis defended in this article is that the relevance of coherence to legal argumentation arises from its formal status as a legal norm within the legal system, as provided by the content of positive law in a specific jurisdiction (norm-oriented perspective). The article contends that, from the norm-oriented perspective, the duty of coherence can lead to a requirement for global coherence in law. However, this requirement depends on whether and how a coherence norm is posited in a given jurisdiction.

KEYWORDS: Coherence; global coherence; local coherence; legal argumentation.

A RELEVÂNCIA DA COERÊNCIA: UMA DEFESA DA PERSPECTIVA NORMA-ORIENTADA DA COERÊNCIA NO DIREITO

RESUMO: O presente artigo defende a coerência global na argumentação jurídica ao mesmo tempo em que critica teorias ontológicas e justificatórias de coerência no direito. O artigo argumenta que a relevância da coerência é contingente à validade de uma norma de coerência em qualquer jurisdição examinada. A principal tese deste artigo é a que a relevância da coerência para a argumentação jurídica decorre de sua positivação no ordenamento jurídico, conforme fornecido pelo conteúdo do direito positivo de uma determinada jurisdição (perspectiva normativa). O artigo defende que sob a perspectiva normativa, o dever de coerência pode resultar em uma exigência de coerência global no direito. Contudo, tudo depende de se e como uma norma de coerência encontra-se positivada em uma determinada jurisdição.

PALAVRAS-CHAVE: Coerência; coerência global; coerência local; argumentação jurídica.

1. Introduction

This article defends the relevance of global coherence in judicial legal reasoning while arguing against ontological and justificatory coherence theories in law. It contends that the relevance of coherence is contingent upon the validity of a norm of coherence in any jurisdiction examined. Global coherence is used in contrast to the notion of local coherence. The former relates to the *whole* system of norms drawn from positive sources of law, whereas the latter is limited to *some* norms drawn from positive sources, more specifically, those that compose a particular domain of law. This article supports two theses. The first one shall be called the negative thesis. It corresponds to a rejection of ontological and justificatory theories of coherence in law. The second one shall be called the positive thesis. According to it, the relevance of coherence for judicial legal reasoning comes from its legal standing as provided by the content of the positive law of a particular jurisdiction (norm-oriented perspective). Raz claims that if ontological and coherence theories are rejected, then coherence in law can at best be local (Raz, 1992, p. 311). Contrary to his claim, this article argues that the positive and negative theses combined reveal that the norm-oriented perspective might still sustain a global notion of coherence in law. It all depends on the content of the positive law of a jurisdiction and on whether and how it posited the norm of coherence. Hence, the position held by the article is that it can be the case, although it need not be the case, that there is a norm of global coherence in a given jurisdiction.

To advance these claims, this article is divided into two sections. The first explains the three distinct perspectives from which coherence in law can be examined. These are the ontological, the justificatory, and the norm-oriented standpoints, as already mentioned. As it will be argued, ontological and justificatory coherence theories of law err insofar as they fail to take the law's formal material duly into account. The second section argues that despite the failures of ontological and justificatory coherence theories, coherence is still relevant in law if one adopts a norm-oriented perspective, according to which the validity of coherence is contingent upon the content of the positive law of a jurisdiction. This section further argues that coherence is best understood as a principle norm that guides the interpretation of authoritative texts and the application of legal norms by demanding the realization of an ideal situation of harmony and interdependence among legal norms. The study of the effects of coherence in each

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2024 | v. 18 | n. 3 | p. 1-27 | ISSN 2317-2622. http://dx.doi.org/10.5935/2317-2622/direitomackenzie.v18n317378EN

jurisdiction that recognizes its validity as a positive norm must be undertaken considering the content of the positive law of that same jurisdiction.

2. The negative thesis

The first thesis supported by this article is the negative thesis. According to it, ontological and justificatory coherence theories in law are to be rejected as mistaken. The only proper approach to account for the relevance of coherence in law is the norm-oriented standpoint, which is incompatible with the former perspectives. Before arguing in favour of the positive thesis, however, it is necessary to demonstrate why ontological and justificatory approaches to coherence are incompatible with the norm-oriented perspective and why they are mistaken. Hence, this section adopts the following structure: first, it details what is meant by ontological, justificatory, and norm-oriented approaches to coherence in law, stressing why the former two are incompatible with the last; second, by taking Dworkin's theory of law as integrity as an example that characterizes ontological and justificatory coherence theories, this section tries to present the failures these approaches to coherence in law.

2.1 Three perspectives on coherence in law

The relation between coherence and law can be examined from at least three perspectives. The first one is the *ontological perspective*. To the question "what is law?", one candidate's answer is "law is constituted by a coherent whole of norms" (Hage, 2004, p. 87). Versions of this answer are given by Dworkin and Peczenik, for example. Both authors believe that standards of coherence are constitutive of law. They hold the view that what legal norms exist is determined by coherence considerations.

For Dworkin, the law comprises the set of norms that best fits past legislative and judicial decisions and best justifies the practices adopted within a political community in view of the interpreter's substantive value judgements (Dworkin, 1986, p. 230-231). The requirements of fit and justification are part of his theory of law as integrity and are used to determine the content of law to the extent that only through an act of interpretation can one establish what the law requires. Similarly, Peczenik also holds standards of coherence to be constitutive of law. In his theory, the content of law is determined by recourse to rational argumentation whose purpose is to obtain the most

coherent theory of law possible (Peczenik; Hage, 2000, p. 340). The most coherent theory of law is part of the most coherent theory of everything (Peczenik; Hage, 2000, p. 339). Although he recognizes that the latter is an ideal, he claims that argumentative procedures are the means by which one arrives at the most non-ideal coherent theory (Peczenik; Hage, 2000, p. 340). These argumentative procedures, in their turn, must comply with the criteria of coherence, since this is the only way of ensuring that conclusions are rationally justified and non-arbitrary.

Both authors' positions can be classified as instances of ontological coherence theories. Their common feature is treating coherence as constitutive of law. They proceed in two steps. First, they identify a certain base, formed by legal materials such as legislative, executive, and judicial acts and decisions, as the object to which the coherence test applies (Raz, 1992, p. 284, 286). The base is transitory and is adjusted in consonance with standards of coherence (Raz, 1992, p. 291). Second, they define the law as being the set of principles that makes the base cohere best (Raz, 1992, p. 286). For ontological coherence theories, then, there is a necessary relation between law and coherence. One is able to find out and decide what the law is only by appealing to standards of coherence. This perspective can thus be summarized in the following key thesis:

- The key thesis of the ontological perspective: standards of coherence are necessarily constitutive of law. The legal system comprises all and only the norms that are contained in the most coherent set of norms that can be attributed to the base of a theory.

The second standpoint from which one can examine the relation between coherence and law is the *justificatory perspective*. To the question "how are legal statements justified", one candidate's answer is "by fitting into a coherent theory of law". Coherence appears here as a criterion for justifying the conclusions of legal reasoning, there is a necessary relation between coherence and rational or correct justification. The theories of MacCormick, Dworkin, and Peczenik are examples of theories that hold standards of coherence to govern the justification of legal statements.

When dealing with the role of coherence in justifying normative statements, MacCormick claims that coherence rationalizes them in accordance with principles (MacCormick, 1978, p. 155-157). Rules constitute the means of concretizing the situation prescribed by principles. For this reason, they can be brought together under the

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principle or set of principles that best explain and justify them (MacCormick, 2005, p. 152). In the absence of clear mandatory rules, principles are relevant because they restrict the discretion of judges by forbidding them to decide according to their intuition (MacCormick, 2005, p. 166). In MacCormick's opinion, coherence is never a sufficient criterion for the justification of legal statements (MacCormick, 2005, p. 169). Nevertheless, by restricting the array of possible justified statements, coherence reduces the number of statements that can be deemed to be adequately supported by law (MacCormick, 1978, p. 169).

Alongside his treatment of coherence as a constitutive feature of law, Dworkin likewise values coherence due to its role in the justification of legal statements. For him, integrity demands that the State act with one voice when principles are at stake (Dworkin, 1986, p. 223). Integrity can be expressed by two principles stake (Dworkin, 1986, p. 176). The first one is a legislative principle, in consonance with which lawmakers ought to make law coherent stake (Dworkin, 1986, p. 176). The second one is an adjudicative principle, in conformity with which courts ought to interpret law's formal material, to the greatest degree possible, as the expression of a coherent set of principles stake (Dworkin, 1986, p. 176-177). Dworkin's theory of law as integrity will be explored in greater detail in the following section. The relevant point is that, contrary to MacCormick's perspective, he believes that standards of coherence are by themselves sufficient for justifying legal statements, since, by reference to them, one can determine the right answer to all legal controversies.

Peczenik likewise treats coherence as the ultimate parameter for justifying legal statements. For him, to hold that legal statements are rationally justified is to affirm that conclusions are supported by reasonable premises which satisfy standards of coherence. In his view, one can explain "the very concept of rational thinking as an effort to obtain a balance between (...) criteria of coherence" (Peczenik, 2009, p. 146). Hence, due to their connection with the notion of rationality, standards of coherence govern legal decision-taking by constituting the ultimate grounds for the justification of legal statements.

The theories of MacCormick, Dworkin and Peczenik serve to demonstrate that coherence, in virtue of its relation to practical rationality or correct justification, has often been treated as a criterion for justifying legal statements. Justificatory coherence theories treat coherence as a necessary criterion for justifying legal reasoning, there being a necessary relation between coherence, justification, and rationality. This perspective can thus be summarized in the following key thesis:

- The key thesis of the justificatory perspective: Standards of coherence necessarily guide the justification of legal statements. Legislative and adjudicative decisions are correctly or rationally justified only if they form part of the most coherent theory of law.

Authors who embrace coherence from the ontological perspective often defend it from the justificatory standpoint as well. For instance, both Dworkin and Peczenik believe that coherence is not only constitutive of law, but also governs the justification of legal statements. This happens because, in their theories, the ontological perspective is defended based on an argument of interpretation and justification. In Dworkin's case, legal practice is seen as an interpretive enterprise (Dworkin, 1986, p. 13), insofar as there are deep theoretical disagreements concerning the right criteria for ascertaining what the law is. In Peczenik's case, the law is the combination of rationally justified statements that, in turn, are supported by reasonable premises that fulfil the requirements of coherence. Ergo, some defences of coherence from the ontological perspective lead to a vindication of coherence from the justificatory standpoint as well.

Nevertheless, one can defend coherence in law from the justificatory perspective without committing oneself to ontological coherence theories. In such instances, the content of law is defined by source-based criteria (and not by coherence) and coherence exerts its function only when settled law does not provide one definitive and single solution for the matter at stake (Raz, 1992, p. 286). Coherence comes into play when there seem to be conflicting possible solutions initially supported by distinct materials of law. Standards of coherence are then used to establish which of these solutions is to be preferred in detriment of its rivals. MacCormick's defence of coherence illustrates this point. In his view, standards of coherence are not constitutive of law. Nevertheless, coherence considerations are necessarily relevant for the justification of legal statements even if a certain jurisdiction does not recognize the positive norm of coherence. The importance of coherence resides in the negative constraint it imposes on judges. When faced with a difficult controversy, coherence considerations rule out decisions that are not supported by the norms of the legal system, making it impermissible for judges to choose the morally best decision if it is incompatible with the positive law (MacCormick, 2005, p. 203). Thus, as MacCormick's theory demonstrates, it is possible to embrace a justificatory coherence theory without embracing an ontological one.

REVISTA DIREITO MACKENZIE
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2024 | v. 18 | n. 3 | p. 1-27 | ISSN 2317-2622. http://dx.doi.org/10.5935/2317-2622/direitomackenzie.v18n317378EN

The third standpoint from which one can examine the relation between coherence and law is the *norm-oriented perspective*. This perspective views coherence as a norm of a particular jurisdiction resulting from a process of interpretation of its legal sources. For this perspective, then, the relation between coherence and law is *contingent*, since it depends on the content ascribed by the interpreter to the positive law and, consequently, on the validity of a norm of coherence.

Here, validity is understood as "existence" as a positive norm (Kelsen, 1967, p. 10). The validity of the norm of coherence depends on it being enacted in accordance with the formal and substantive requirements set by higher norms of the legal system in which it is inserted and, ultimately, on it being in conformity with the basic norm of the legal system examined. Although the relation between efficacy and validity cannot be thoroughly elaborated here, the effectiveness of coherence as a norm (whether it is actually applied in the legal domain) is a matter distinct from its validity (whether it ought to be applied in the legal domain) (Kelsen, 1967, p. 10-11). The validity of a norm of coherence is determined solely by reference to the norms that are hierarchically superior to it and can ultimately be traced back to the basic norm of a particular jurisdiction, understood in the Kelsenian sense as "the common source for the validity of all norms that belong to the same order" (Kelsen, 1967, p. 195).

A legal system may posit the norm of coherence by having its positive legal sources either explicitly or implicitly recognize it. Coherence is explicitly recognized when it can be directly attributed to a specific provision as expressing its meaning (Guastini, 2011, p. 69). Here, through an act of interpretation, coherence is directly reconstructed from specific provisions set in legal sources (constitution, statutes, decrees, *e.g.*). This is the case in Brazil, for example. Article 926 of Federal Statute nº 13.105/2015 states that "courts shall render their case law uniform, keeping it stable, whole and coherent". From this provision, the interpreter is able to reconstruct a norm according to which case law must be kept coherent. What the more precise demands and the juridical effects of this norm are cannot be fully addressed here. The relevant point to note is that it is possible for a jurisdiction to recognize coherence directly through its positive legal sources.

There is ample room for jurisdictions to posit norms of coherence that vary in scope. For example, one jurisdiction may establish that coherence must be observed by case law only and that the legislator is free to act in an incoherent manner, while another jurisdiction may recognize that coherence must be preserved in both case law

and legislation. Also, some jurisdictions may strive for greater uniformity in legal definitions by forbidding legislators from one domain of law to alter definitions used in other domains, while others do not impose such limitations. The relevant point is that there is no reason to hold that coherence is a universal principle with the same content in all jurisdictions and whose efficacy is always limited to one aspect or even one domain of law. It all depends on whether and how this norm and its main elements are recognized by positive law. Hence, it is not possible, *ab initio*, to claim that coherence is local whenever it is posited as a norm of a jurisdiction.

According to the norm-oriented perspective, two questions need to be kept apart. The first is whether the law *is* coherent. The second is whether it *ought to be* coherent. The validity of a norm of coherence in a jurisdiction does not mean that its law is coherent. This is yet another distinction between ontological coherence theories, that claim that law *is* necessarily coherent, and a defence of coherence from the norm-oriented perspective. As a positive norm, coherence merely demands that the law be made coherent by its interpreters and appliers. The extent to which a legal system is in fact coherent depends on how well interpreters and appliers have succeeded in effectuating the norm of coherence.

Given the above considerations, what are the precise contours of the norm of coherence in any jurisdiction is a question that must be answered in the light of positive law. Hence, studies undertaken under the norm-oriented perspective are, to a certain extent, doctrinal. They aim (i) at producing information about the law of a particular jurisdiction that recognizes the validity of a norm of coherence, and (ii) at systematizing the legal norms of this jurisdiction by reference to the legal effects of the norm of coherence (Aarnio, 2011, p. 19). The norm-oriented perspective's key thesis can be thus summarized:

- The key thesis of the norm-oriented perspective: it can be the case, though it need not be the case, that coherence is a valid norm in a given jurisdiction. This norm ought to be applied if and only if it is a valid norm in the legal system in which it is inserted.

As it is now evident, a defence of coherence from the norm-oriented perspective is starkly incompatible with ontological and justificatory coherence theories. Whereas them there is a *necessary* connection between coherence and law (either

REVISTA DIREITO MACKENZIE
RDM | São Paulo | SP | 18(3) | e17378EN
2024 | v. 18 | n. 3 | p. 1-27 | ISSN 2317-2622. http://dx.doi.org/10.5935/2317-2622/direitomackenzie.v18n317378EN

because coherence is constitutive of law or due to its relation to rational or correct justification), for the norm-oriented perspective the relation between coherence and law is contingent and it is provided by the positive law of a certain jurisdiction. From the norm-oriented standpoint, then, coherence can never be seen as necessarily constitutive of law (ontological coherence theories) because the content of law is ultimately determined by reference to the basic norm of a jurisdiction. The validity of the norm of coherence itself depends on positive sources of law and, more specifically, on it being in conformity with hierarchically superior norms and with the basic norm. Similarly, from the norm-oriented perspective, coherence is not always necessary for legal justification (justificatory coherence theories). Because the validity of coherence is contingent on the content of the positive law of a jurisdiction, it is not the case that legal statements can and must *always* be justified by appealing to standards of coherence. Coherence is relevant *only if* it is recognized as a valid norm pertaining to the legal system. Conversely, if coherence is not so recognized, then it cannot be invoked to justify legal statements.

The three perspectives from which coherence in law can be examined reveal that there are incompatible ways from which one can account for the role of coherence in law (ontological and/or justificatory, on the one hand, and norm-oriented, on the other). As will be argued in the following sections, the only proper way to account for coherence in law is by adopting the norm-oriented standpoint. The next section will explore why ontological and coherence theories are mistaken and section 2.1 will argue why, despite their failures, coherence might still be global, and not local nor limited to specific domains of the legal system.

2.2 A rejection of ontological and justificatory coherence theories in law

Ontological and justificatory coherence theories err by failing to take the law's formal material duly into account, thus undermining a legal system's ability to guide and coordinate the conduct of its subjects. To support this claim, this section uses Dworkin's theory of law as integrity as a characteristic example of these approaches.[1]

1 Though Raz has argued that Dworkin's theory does not give preference to coherence (Raz, 1992. p. 317), Dworkin's theory has largely been treated as a coherentist approach to law. See Amaya (2017), Kress (1984), and Hurley (1990).

Coherence is a central element in Dworkin's theory of law as integrity. For Dworkin, coherence and law are necessarily related. He argues that law is an interpretative enterprise in which people disagree and argue about the truth of some of its propositions (Dworkin, 1986, p. 13). For him, the most interesting disagreements in law are theoretical. People's divergence resides not in disputes about the correct application of shared factual criteria of legal validity, but in the use of different criteria to ascertain the content of law (Dworkin, 1986, p. 43). People disagree about which social conventions and moral principles govern a particular political community and, therefore, provide the basis for the applicable law (Dworkin, 1986, p. 114, 211). These disagreements are not empirical but are fundamentally moral. They concern the question of which account of the sources of law offers the best moral justification, within constraints of fit, for the use of the state's coercive force (Dworkin, 1986, p. 63).

Law being an interpretative enterprise, Dworkin argues that one cannot provide an account of it without engaging in its practices. Legal statements can make sense only if they are understood by reference to the moral principles that best justify the practices of a particular community (Dworkin, 1986, p. 63). One must necessarily participate in the legal practice of a community to make claims about what it requires, and by deciding which legal statements are justified given the practices of a community, one is also deciding what constitutes that same legal practice. In Dworkin's words, "[...] every actor in the practice understands that what [the legal practice] permits or requires depends on the truth of certain propositions that are given sense only by and within the practice" (Dworkin, 1986, p. 13). Hence, for him, the questions "what is law?" and "which legal statements are justified?" cannot be answered separately. Only by taking part in the legal practice of a community and trying to provide the "[...] best constructive interpretation of the political structure and legal doctrine of [his] community" (Dworkin, 1986, p. 255) from the standpoint of political morality can one satisfactorily account for what the law is. The interpretative attitude influences legal practice and vice-versa (Dworkin, 1986, p. 48); that is, the justificatory and ontological perspectives are intertwined and are indistinguishable.

In this scenario, Dworkin's theory treats standards of coherence as necessary for the justification of legal statements. Legal claims must be morally justified. For legal decision-making, this means that when a judge chooses one decision in detriment of another, he must opt for the one that, from his own moral judgement, puts the legal practice of his community in its most attractive light. In so doing, a judge provides

REVISTA DIREITO MACKENZIE
RDM | São Paulo | SP | 18(3) | e17378EN
2024 | v. 18 | n. 3 | p. 1-27 | ISSN 2317-2622. http://dx.doi.org/10.5935/2317-2622/direitomackenzie.v18n317378EN

a solution that is not merely concerned with ascertaining what is true according to a particular social convention, but what ought to be done considering the principles that best reflect the values that govern his political community (Dworkin, 1986, p. 228). What the law is and what it ought to be are not treated as two different matters (Dworkin, 1986, p. 242, 257).

In this context, coherence is the main test for determining which decision best reflects the values of a political community. It demands the fulfilment of two different requirements. The first one, called "fit", functions as a threshold requirement against which each possible interpretation is to be tested (Dworkin, 1986, p. 255). Courts must choose the decision that best conforms with past decisions and legislation (Dworkin, 1986, p. 242, 257). The second one, called "justification", instructs courts to adopt the interpretation that puts the community's institutions and decisions "[...] in [the best] light from the standpoint of political morality" (Dworkin, 1986, p. 255-256) all things considered (Dworkin, 1986, p. 249). These two tests comprise the adjudicative principle of integrity and aim at ensuring that courts will adopt the decision that leads to the most "[...] coherent theory justifying the network as whole" (Dworkin, 1986, p. 245).

There are two possible ways to understand the requirement of fit. The first shall be called "strong fit", whereas the second shall be called "weak fit". In "strong fit", the requirement of fit is stronger than the requirement of justification. It supports decisions that conform best to past legislation and decisions, even if there are other decisions that exhibit a somewhat lesser degree of fit but are more justified considering the moral principles that underlie the practice of a community. Given two possible decisions, D1 and D2, decision D1 should be automatically discarded if it is not the one that best fits past legislation and decisions, even if one could argue that it would be best justified by the moral principles underlying the practices of the community. In this case, another decision D2 that better conforms to past legislation and decisions, but that is not as well justified by the moral principles underlying the practices of a community, is to be preferred in detriment of D1. In contrast, in "weak fit", the requirement of fit is weaker than the requirement of justification. It functions as a minor threshold that can be put aside if it is demonstrated that one decision, though less compatible with past legal materials, is best justified by the moral principles that underlie the practice of a community. In the example above, D1 is to be preferred in detriment of D2.

At first sight, the "strong fit" requirement may seem to be supported by Dworkin's allegation that the threshold of fit "will eliminate interpretations that some

judges would otherwise prefer, so the brute facts of legal history will in this way limit the role any judge's personal convictions of justice can play in his decisions" (Dworkin, 1986, p. 255). However, interpreting the adjudicative principle of integrity to encompass a "strong fit" requirement seems at odds with Dworkin's main claim that law is an interpretative enterprise.

This happens because the requirements of fit and justification are a manifestation of Dworkin's attitude towards constructive interpretation. His defence of constructive interpretation in law assumes that interpretation comprises three stages: the preinterpretive, interpretive, and postinterpretive ones (Dworkin, 1986, p. 65). In the preinterpretive stage, the interpreter identifies the norms that comprise a particular practice (Dworkin, 1986, p. 65). This stage is reflected in the requirement of fit since such requirement operates as a threshold for establishing which norms can initially be deemed to pertain to a particular legal order. In the interpretive stage, the interpreter tries to find the set of values that best justify the most important elements of that practice (Dworkin, 1986, p. 66). This stage is reflected in the requirement of justification, which instructs judges and courts to look for the value or set of values that best justify the most relevant aspects of the practices of a political community. Finally, in the postinterpretive stage, the interpreter modifies the norms identified in the preinterpretive stage to arrive at the set of norms that is best aligned with the justification accepted at the interpretive stage (Dworkin, 1986, p. 66). This stage is also reflected in the requirement of justification. In Dworkin's view, the interpreter is not only authorized to choose the interpretation that leads to the best reconstruction of the legal practice, but he must necessarily do so. This may lead to an alteration of the initial base, to "make it fit" the theory that provides the best justification of legal practices from the standpoint of morality.

As a manifestation of the posinterpretative stage, the requirement of justification allows the interpreter to alter his initial normative base to render it more compatible with the moral principles that justify a particular practice. The possibility of having the initial base altered by moral considerations leads to the conclusion that the ultimate test for justifying legal statements, in Dworkin's theory, is the justification requirement. The dimension of fit serves merely as the starting point of interpretation but can and must have its elements altered if any one of them is not supported by the fundamental moral principles that underlie the practice of a community. Dworkin's emphasis on the dimension of justification over that of fit is illustrated by his approach

REVISTA DIREITO MACKENZIE
RDM | São Paulo | SP | 18(3) | e17378EN
2024 | v. 18 | n. 3 | p. 1-27 | ISSN 2317-2622. http://dx.doi.org/10.5935/2317-2622/direitomackenzie.v18n317378EN

to conventionalism. In his last lines of his chapter on conventionalism in *Law's Empire*, he claims to have demonstrated that conventionalism does not fit legal practice. Then, he claims to have demonstrated that it also does not justify legal practice. He concludes his remarks by saying that because conventionalism fails the justificatory threshold, there is "no reason to strain to make it fit" our legal practices (Dworkin, 1986, p. 150). In this passage, it is clear that the dimension of fit imposes only a weak constraint on interpreters, since they must alter the base to which the theory applies to make it fit the substantive values that put the legal practice in its best moral light. For this reason, one must agree with Allan that "the requirement of fit is satisfied, in principle, only by the correct [morally best] interpretation of practice" (Allan, 2016, p. 70), because the relevant elements of the base are also determined, as a consequence of the postinterpretative stage, by appealing to moral considerations. Hence, the correct apprehension of Dworkin's requirement of fit is the one that understands it as a weak threshold.

The preference given by Dworkin's theory to the dimension of justification over that of fit leads to a collapse of the realms of morals and law.[2] Dworkin's requirement of justification makes the ascertainment of which legal statements are justified necessarily dependent on moral justification. Legal interpretation is seen as a holistic enterprise that must be justified not by reference to shared criteria of the basic norm, but from the standpoint of political morality. Because of this, every act of legal interpretation becomes an act of moral interpretation in which the interpreter must choose the decision that puts legal practice in its best moral light. The interpreter's task is not restricted to the identification of the norms reconstructed from authoritative texts. Rather his task is *always* one of understanding such authoritative texts in their best light, *imposing* on them meanings (norms) that best promote the moral values that justify the legal practices of a particular community. Though legal texts are the object of interpretation and work as its starting point, they have a limited role in Dworkin's theory. Dworkin downplays the relevance of formal materials in law by allowing them to be set aside so as to satisfy the requirement of justification. That is, in his view, legal materials do not work as serious constraints on the activity of the interpreter because whichever moral theory best justifies legal practice will lead to the adjustment of the base that is supposed to be covered by the theory.

2 On this point, see Hershovitz (2015).

Consequently, Dworkin's theory undermines a legal system's capability to exercise its guidance function. Dworkin overvalues the degree of disagreement among people regarding the proper way to ascertain the content of law while undervaluing the degree of their disagreement over moral questions. There is no reason to suppose that people would disagree on the correct criteria for ascertaining the content of law but agree on which principles of morality provide the best justification for legal practice. As pointed out by Kramer, unless one is thinking about static and homogeneous societies, the least controversial empirical assumption is that widespread disagreements among people over moral questions are much greater than Dworkin takes it to be (Kramer, 2004, p. 53).

Hence, because the justificatory dimension of Dworkin's theory instructs *every* decisionmaker to consult his own value judgement about which principles of morality best justify the legal practice of his community, the invocation of moral considerations is not restricted to a particular type of cases (those in which sources of law are insufficient to provide a final solution, for example). Rather every legal statement must be morally justified. However, given the widespread disagreement over moral questions, it is not possible to affirm that all interpreters will converge in reaching the decision of which moral theory provides the best justification for legal practice. Contrariwise, due to the multiplicity and heterogeneity of interpreters in complex societies, it is safe to assume that there will be a great variety of clashing decisions if each and every interpreter is forced to focus on substantive moral issues when deciding a particular matter. Consequently, Dworkin's theory of coherence will lead to a lack of certainty, uniformity, and regularity in the interpretation and application of law (Kramer, 1999, p. 198), thus undermining a legal system's ability to guide its subjects.

Nevertheless, the fact that ontological and justificatory coherence theories such as Dworkin's are mistaken because they jeopardize the legal system's function of guidance, does not preordain the conclusion that coherence is never global, as Raz (1992, p. 310) argues. Coherence may be relevant beyond limited fields of law, or not merely as a "by-product of the consistent application of a sound moral doctrine" (Raz, 1992, p. 311). To understand why this is so, one must take the norm-oriented perspective into account. The next section will thus defend the positive thesis, according to which the notion of coherence may be global, though it need not be the case. It all depends on whether and how the norm of coherence was posited in a certain jurisdiction.

REVISTA DIREITO MACKENZIE
RDM | São Paulo | SP | 18(3) | e17378EN
2024 | v. 18 | n. 3 | p. 1-27 | ISSN 2317-2622. http://dx.doi.org/10.5935/2317-2622/direitomackenzie.v18n317378EN

3. The positive thesis

Given the failures of ontological and justificatory coherence theories, one could argue that coherence is irrelevant to legal reasoning or that its relevance is limited to some domains of law. The positive thesis defended in this article asserts that coherence is relevant for legal reasoning to the extent that it is recognized as a positive norm, validated by the basic norm of a particular jurisdiction. Whether a legal system is coherent or not is a matter distinct from whether it ought to be made coherent. The validity of the norm of coherence in any jurisdiction does not mean that its law will be automatically coherent by virtue of this norm. It means merely that when interpreting authoritative texts, one ought to strive for coherence. Likewise, whether the norm of coherence is global or local is a question that concerns solely how this norm was posited in a jurisdiction. The purpose of this section is to elaborate further on these points. To do so, this section is divided into two parts. First, it shows why, despite the failures of ontological and justificatory coherence theories, coherence in law might still be global. Second, it explores what is meant by coherence as a norm, attempting to demonstrate the sort of problems that this norm intends to address.

3.1 Global vs. Local Coherence

If a distinctive feature of legal systems is their ability to guide the conduct of their addressees, and if ontological and justificatory coherence theories undermine this function, then, one could argue, the notion of global coherence is incompatible with any system of law. A similar line of reasoning has been offered by Raz. According to him, coherence in law can never be global. Raz supports a notion of coherence that is limited to some domains of law and that relates to the consistent application by legislators and adjudicators of moral doctrine in specific fields of the legal domain (Raz, 1992, p. 311). His argument runs as follows.

Coherence can never be the ultimate criterion for justifying legal statements because of social and moral pluralism. Social pluralism means that people take different views regarding which moral considerations are true or sound. Moral pluralism means that moral values are plural and, therefore, cannot be reduced to a single set of principles (Raz, 1992, p. 311). Raz argues that these two types of pluralism are likely to

be reflected in the content of law, thus leading legislators and courts to what he coins "the dilemma of partial reform" (Raz, 1992, p. 312). In this scenario, interpreters and legislators are forced to choose between coherence of purpose, understood as the consistent application of a moral value in particular fields of law, or an "uncompromising pursuit of the morally correct line" (Raz, 1992, p. 312). For the author, the preference for coherence in detriment of the pursuit of the morally correct decision is a matter of choice, that may vary from situation to situation. Nevertheless, he argues that moral pluralism also supports the conclusion that there is no single way of correctly balancing the multiplicity of values existent in a particular legal field. As a result, when legislators and interpreters choose a mix that is not ruled out as an inferior combination of moral principles, their choice amounts to a discretionary act that is not dictated by reason. Raz concludes that local coherence might be relevant since it reduces conflict and disagreement in law, by providing adherence to the consistent application of principles in a specific legal field (Raz, 1992, p. 313). But in the author's view, coherence is always local and its relevance stems from the need to ensure coordination and regularity in settling disputes that cannot be solved by appealing to moral values alone (Raz, 1992, p. 314).

The problem in Raz's line of reasoning is that it assumes that to be globally relevant, coherence must be regarded as the ultimate criterion for justifying legal statements. Here, he conflates two different matters. The first regards the specific content of coherence (whether it is global or local) and the second regards its relation to the justification of legal statements (whether or not it is necessary). He proceeds in this manner because he ignores the possibility that a norm of coherence may be posited by legal sources in a jurisdiction, thus being part of the content of its positive law. Raz, in other words, ignores that coherence can be examined from the norm-oriented perspective. From this perspective, it can be the case, though it need not be the case, that a certain jurisdiction recognizes the validity of a norm of coherence that is global in character.

A jurisdiction might choose to posit a norm of global coherence to deal with two distinct problems in the legal domain. The first relates to problems of law's indeterminacy, and, more specifically, the indeterminacy of legal texts and not of legal norms. Legal texts are equivocal and this equivocality may be caused by one or a combination of the following problems: (i) *ambiguity* (sometimes it is unclear whether an authoritative text T expresses norm N1 or norm N2); (ii) *complexity* (sometimes it is unclear whether an authoritative text T expresses norm N1 *and also* norm N2); (iii) *entailment*

REVISTA DIREITO MACKENZIE
RDM | São Paulo | SP | 18(3) | e17378EN
2024 | v. 18 | n. 3 | p. 1-27 | ISSN 2317-2622. http://dx.doi.org/10.5935/2317-2622/direitomackenzie.v18n317378EN

(sometimes it is unclear whether an authoritative text T that expresses norm N1 *entails* norm N2); (iv) *defeasibility* (sometimes it is unclear whether norm N1, reconstructed from authoritative text T, is subject to implicit exceptions and, thus, defeasible by another norm N2); (v) *exhaustiveness/exemplification* (sometimes it is unclear whether an authoritative text T with the structure "If A, or B, or C, then Z" refers to a norm that applies solely to the hypothesis of A, B or C, or, alternatively, applies to hypothesis different from A, B and C) (Guastini, 2011, p. 39-44). Given the equivocality of legal texts, global coherence might be relevant for illuminating which meaning is to be assigned to legal provisions. A denial of the equivocality of legal texts would assume that interpretation in the legal domain is always a matter of revelation of the meaning of the words used by legislators. This seems to be Raz's view.

According to Raz, "meaning is revealed" (Raz, 2009, p. 269). Even while he claims that "two incompatible interpretations can be both valid (...) if each succeeds in revealing one of the meanings of the original" (Raz, 2009, p. 271), Raz believes that each interpretation amounts to an act of cognition, of discovering the meaning intended by the legislator. This understanding presupposes a cognitive theory of interpretation. In such an account, the activity of the interpreter is merely one of discovering the meaning of a particular provision of a constitution, statute, or decree. This point is further illustrated by Raz's claim that "an interpretation states or shows (e.g. in performing interpretations) the meaning of the original" (Raz, 2009, p. 268). Implicit in this passage is the assumption that every legal text enables the reconstruction of only one norm that is just awaiting discovery by the interpreter (Mazzarese, 1998, p. 76). However, given the equivocality of legal texts, no act of legal interpretation can be reduced to an act of discovering the "right" meaning of the law or the "true" intention of the legislator (Guastini, 2011, p. 48).

From Raz's standpoint, one could imagine two reasons for defending a cognitive theory of interpretation. On the one hand, if multiple meanings could potentially be attributed to a legal provision and the interpreter had to justify the choice of one in detriment of its rivals, then the interpreter would not be bound by the authority of the legislator, rather he would be involved in the process of legislation. On the other hand, if it were not clear to the addressees which norm they had to follow, since multiple norms could be potentially attributed to a legal provision, then the legal provision issued by the legislator would not be able to function as an exclusionary reason. Both justifications assume that legislators have authority and legal provisions are

authoritative only if interpretation is the revelation of the meaning intended by the legislator. The confusion here pertains to treating interpretation as an all-or-nothing activity: the interpreter either discovers and reveals the meaning of legal provisions, in which case he is interpreting them, or he assigns completely new meanings to legal provisions, in which case he is creating the law. To claim that a legal provision can have *multiple* meanings, however, is quite different from claiming that it can have *any* meaning. The authoritative character of legal provisions does not come from the fact that they lead to the reconstruction of just one clear norm, it comes from the fact that they reduce the number and variety of norms that can be possibly reconstructed by the activity of interpreter.

Global coherence considerations can thus be relevant for solving problems regarding the equivocality of legal texts. Especially in hard cases, in which the activity of interpretation cannot be reduced to an act cognition, coherence considerations may be relevant for ascertaining which meaning is to be preferred in detriment of its rivals. In these cases, the activity of the legislator restricts the scope of discretion of the interpreter, but interpretation is never an exclusively mechanical activity. As explained by Kelsen, the legislator provides the frame of a general norm, and the activity of the interpreter is an act of will be performed within this frame (Kelsen, 1967, p. 353). Thus, considerations of global coherence may be relevant because they may shed some light on how to ascertain which meaning within the frame is to be preferred in detriment of its rivals.

The second reason why a jurisdiction might choose to posit a norm of global coherence relates to problems regarding the pertinence of legal norms, that is, the question of which norm is relevant for dictating the solution of the case at hand. Raz wrongly assumes that there is no discretion regarding the decision of which legal provision governs a particular case. This point is best illustrated by a hypothetical example. Article 421 of the Brazilian Civil Code establishes that contractual freedom must be exercised within the limits of the social function of the contract, whereas article 422 of this code sets the presumption that civil and corporate contracts are equanimous and symmetrical. The norms reconstructed from these provisions enable one to hold the view that two parties who decide to contract on a particular matter are free to do so. The clauses of the contract formed between these two parties are valid and enforceable because they reflect the negotiation of two parties in equal positions. In contrast, the Brazilian Code of Consumer Protection provides certain businesses with special

REVISTA DIREITO MACKENZIE
RDM | São Paulo | SP | 18(3) | e17378EN
2024 | v. 18 | n. 3 | p. 1-27 | ISSN 2317-2622. http://dx.doi.org/10.5935/2317-2622/direitomackenzie.v18n317378EN

protection if they qualify as corporate consumers. The presumption is that certain businesses are worthy of special protection because they are not in the same position as others when contracting. For instance, big corporations that sell ten types of soft drinks may wish to force small businesses to buy all their products instead of only three or four kinds that small businesses would want to buy. To avoid situations such as this, Article 51 of the Brazilian Code of Consumer Protection establishes that the clauses of the contract between two businesses are neither valid nor enforceable if businesses cannot be deemed to have negotiated as equals. Given these two norms, one can easily imagine the following situation.

A small company that produces açaí berries sells part of its production to a local grocery in town A and exports the rest to countries close to Brazil. When contracting with the local grocery, the manager of the small company says that it will no longer sell its açaí production to the local grocery unless the latter also starts buying some of the company's new products that are not exported yet. Because the grocery cannot find other sellers of açaí that meet the same quality standards, it agrees with the terms set by the small producer and a contract is formed. The small company sells part of its açaí production and its new products to the local grocery which, in its turn, buys them. Later, however, the local grocery realized that all new products it had to buy were a failure in the consumer market. It then proceeds to argue that the contract forced it to buy new products just so it could buy açaí. This was made possible solely in virtue of the asymmetry of power between the small company and the local grocery, since the former could have sold its açaí to multiple buyers while the other one could not have found another equally good producer. Consequently, from the standpoint of the local grocery, the clause must be declared null, for the contract was not negotiated between two parties with equal bargaining power. Conversely, the small company argues that the local grocery could have bought açaí from other producers as well, but it exercised its freedom of contract and chose to negotiate with the best producer in town. The contract is valid because there is no reason to suppose that the local grocery had a right to buy the best açaí without following the terms set in the contract.

In deciding this case, first one would have to choose which provision is pertinent. A judge could take the view that the pertinent provisions are Articles 421 and 422 of the Brazilian Civil Code. The norms reconstructed from these provisions would ensure that all clauses of the contract formed between the small company and the local producer are valid. This is would probably lead to a decision in favour of the small producer

of açaí. Conversely, a judge could take the view that the pertinent provision is Article 51 of the Brazilian Code of Consumer Protection and, for this reason, the norm reconstructed from such provision makes the contract null. If adopted, this norm would probably lead to a judgment in favour of the local grocery.

The relevant point here is that the choice between provisions that are potentially relevant for deciding this case is not determined by the provisions themselves nor are they controlled by the legislator in any sense. Raz seems to ignore this point, by taking for granted that there is no discretion in the application of legal rules while arguing that principles give discretion to courts to legislate. Raz assumes that one simply knows which legal provision is to be considered relevant for deciding a particular controversy, thus denying that there is an act of volition or decision-making in this process (Chiassoni, 2019, p. 4).

These considerations allow one to affirm that there may be good reasons for a jurisdiction to posit a norm of global coherence, whose application, contrary to local coherence, is not limited to specific doctrines or areas of law. In such circumstances, coherence considerations would be relevant for addressing problems regarding the equivocality of legal texts and the pertinence of legal norms. The question whether a jurisdiction in fact posited a norm of coherence, be it local or global, is a matter that can be answered only by examining the content of its positive law. The next section will analyse in greatest details what is meant by coherence as a norm.

3.2 Coherence as meta-norm

The previous section argued that a rejection of ontological and justificatory coherence theories in law does not lead to the conclusion that coherence considerations are necessarily limited to a particular legal domain. Whether and how coherence is posited as a norm are questions that can only be answered by examining the positive law of a jurisdiction. This section elaborates further on the notion of coherence as a norm. Because the validity of a norm of coherence was already explored in section 1.1., there only remain two points to be emphasized. First, that the content of the norm of coherence can be ascertained only considering the positive law of a certain jurisdiction. Second, that a defence of coherence from the norm-oriented perspective does not collapse into a defence of coherence from the ontological and justificatory standpoints.

REVISTA DIREITO MACKENZIE
RDM | São Paulo | SP | 18(3) | e17378EN
2024 | v. 18 | n. 3 | p. 1-27 | ISSN 2317-2622. http://dx.doi.org/10.5935/2317-2622/direitomackenzie.v18n317378EN

First, the content of the norm of coherence can be ascertained only considering the positive law of the jurisdiction in which this norm exists. Here, the relevant distinction is between legal texts and legal norms. Legal texts are the object of interpretation and legal norms are the result of the activity of interpretation. For the purposes of this article, a norm can be defined as the meaning assigned by the interpreter to a legal text through the process of interpretation (Guastini, 2011, p. 48). This definition puts into evidence that the reconstruction of the norm of coherence is dependent on the legal texts that serve as its foundation. Because jurisdictions have distinct sources of law (constitution, statutes, case law, decrees, etc) and, consequently, distinct legal texts, the content of the norm of coherence varies from one place to another. Though some common traits may be found among different norms of coherence posited in distinct legal systems, there is no warrant at all for presuming that all norms of coherence will share the same features. Conversely, it is much more likely that there will be great disparities between norms of coherence of different jurisdictions.

The second point to be addressed in this section concerns the reasons why a defence of coherence from the norm-oriented perspective does not collapse into a defence of coherence from the ontological and justificatory standpoints. One could argue that once the norm of coherence is posited in a particular jurisdiction, this norm is merely declaratory, thus incorporating into the law the same coherence considerations provided by ontological and justificatory coherence theories. Or, to put in a slightly different way, one could claim that the positive norm of coherence of a certain jurisdiction simply validates the following theses: (i) standards of coherence are necessarily constitutive of law; (ii) standards of coherence necessarily guide the justification of legal statements; or a combination of (i) and (ii).

The objection is unwarranted. One cannot attribute to the positive norm of coherence a content that renders virtually impossible the maintenance of the legal system into which this norm is inserted. Indeed, it would be strange to assume that legal systems would validate a norm that leads to their extinction. This, however, would be the case if the positive norm of coherence were treated as a declaratory norm. Because this norm would make moral worthiness the ultimate grounds for law-ascertainment, it would lead to a robust incorporationist regime. Here, a robust incorporationist regime is understood as "any given regime [that] render[s] moral worthiness the lone sufficient condition for legal validity" (Kramer, 2004, p. 25). As discussed thoroughly in this article, ontological and justificatory coherence theories take standards of

coherence to be the ultimate grounds for justifying legal statements and ascertain the content of law. Consequently, even if there were other sources of law, these would have to be subject to standards of coherence, given that, as claimed by ontological and justificatory coherence theories, such standards must always and necessarily be employed by interpreters in the legal domain. This means that other sources of law would not serve as touchstones nor provide a regular and certain base for legal judgements, coherence considerations would be able to set them aside. Thus, in practice, coherence considerations would become the sufficient criteria for ascertaining the content of law, rendering every legal judgement a moral judgement. Consequently, the norm of coherence would generate too much uncertainty and too little regularity, making it impossible to consider the putative legal system as a legal system. On the one hand, the multiplicity and heterogeneity of interpreters authorized to make moral judgments would generate incompatible and clashing decisions. On the other hand, such decisions would provide little guidance for law's addressees to regulate their conduct (Kramer, 2004, p. 30). For these reasons, one cannot assume that the content of the positive norm of coherence is the same as that provided by ontological and justificatory coherence theories.

What is left for the positive norm of coherence then? The norm of coherence is concerned solely with relations among positive norms. This means that what ought to be made coherent is one norm (a concrete and individual norm, as those reconstructed from judicial decisions, or a general and abstract norm, as those reconstructed from statutes, for example) with other norms of the legal system. The norm of coherence is not preoccupied with making a norm cohere with moral values if they are not incorporated by the basic norm and are not, for this reason, part of positive law. The norm of coherence requires positive norms to be interpreted in a systematic manner, be it global (the whole system of legal norms) or local (specific legal domains). For this reason, the norm of coherence is a norm of *second degree* or *meta-norm*. It aims at guiding the interpretation of authoritative texts and the application of *other* norms (Ávila, 2007, p. 83). Consequently, it is a methodologically overlying norm, that can never enter into conflict with other norms of the legal system (Ávila, 2007, p. 83).

The positive norm of coherence might be concerned with three kinds of relations among norms. The first relates to the connection of definitions. One norm might fix or alter definitions used by another norm. For example, a civil norm N1 establishes that a property owner is "the person who has the power to use, enjoy and dispose of the thing,

REVISTA DIREITO MACKENZIE
RDM | São Paulo | SP | 18(3) | e17378EN
2024 | v. 18 | n. 3 | p. 1-27 | ISSN 2317-2622. http://dx.doi.org/10.5935/2317-2622/direitomackenzie.v18n317378EN

and the right to recover it from the power of whoever unjustly owns or holds it". A tax norm N2, in its turn, establishes that all property owners must pay a property tax. To know who is subject to taxation, one must necessarily investigate the definition fixed by norm N1. In an ideal state of perfect harmony and interdependence of norms, one definition provided by one norm would cut across all domains of law. However, given the complexity and multiplicity of norms in modern jurisdictions, different norms often establish incompatible definitions. In this case, coherence considerations are relevant because they provide criteria for preferring the adoption of one definition in detriment of its rivals.

The second kind of relation that the norm of coherence is concerned with regards dependence of content. One norm might have its content determined or altered by reference to hierarchically superior or inferior norms. This is the case, so Ávila argues, of the principle of legal certainty in Brazil. Given numerous norms reconstructed from the Brazilian Federal Constitution, Ávila contends that this principle protects only citizens, and not the State (Ávila, 2016, p. 504). This means that, for the author, the principle of legal certainty received a more protective character due to its direct relations with constitutional rules that protect individuals against the State's action. In similar analysis, coherence considerations are relevant because they shed light on how to determine the content of one norm considering other overlying and underlying norms.

The third kind is the relation of dependence of effects. One norm may alter the effects that would usually follow from the application of another norm. One example from the Brazilian jurisdiction illustrates this point (Brazil, CARF, 2000, Acórdão n. 202-12.527). A small manufacturer of sofas once imported four legs for one single sofa it produced. After this, the tax administration excluded the manufacturer from a favourable tax regime under the allegation that it no longer fulfilled the necessary condition for benefiting from it, as encompassed by rule R1, namely that of producing all its merchandise with national materials. The manufacturer challenged this exclusion and obtained a favourable decision. According to the court, it would be unreasonable to exclude the manufacturer from the regime because it had imported *only* four legs for a single sofa and *only* one time. In addition, the court added that the goal of rule R1 was to encourage national production, and this goal was not jeopardized by the importation of four legs for a single sofa. In this case, the tax administration and the manufacturer were in agreement regarding the conditions of application of the rule that

set the conditions for benefiting from the tax regime. However, they disagreed over whether rule R1 should produce its effects in the case. The manufacturer claimed that the principle of reasonableness blocked the effects of rule R1 and this was the position affirmed by the court. In this case, a principle altered the expected effects of a rule. Coherence is relevant in this type of situation because it helps to determine to what extent the juridical effects of one norm might be altered in function of other norms.

The three types of relations aforementioned (dependence of content, dependence of meaning and dependence of effects) might be regulated by a positive norm of coherence. Whether the norm of coherence posited in a certain jurisdiction in fact addressed such matters is a contingent question, which can be answered only considering the positive law.

4. Conclusion

The purpose of this article was to argue that it can be the case, though it need not be the case, that there is a norm of global coherence in a given jurisdiction. To support this claim, two theses were defended. The first was the negative thesis that amounted to a rejection of ontological and justificatory coherence theories in law. The second was a positive thesis that corresponded to a defence of coherence from the norm-oriented perspective. From this standpoint, coherence is both a product of interpretation and a tool that guides the interpretation of authoritative texts and the application of legal norms. The validity of the norm of coherence is contingent on the content of positive law of a certain jurisdiction. If valid, the norm of coherence does not mean that the legal system will be automatically coherent. It merely establishes that the legal system ought to be made coherent by its interpreters. What the precise content of this norm is and what its implications for legal reasoning are can only be ascertained considering the legal system in which this norm is inserted.

REFERENCES

AARNIO, A. *Essays on the doctrinal study of law*. Dordrecht: Springer, 2011.

ALLAN, T. R. S. Interpretation, injustice, and integrity. *Oxford Journal of Legal Studies*, v. 36, n. 1, p. 58-82, 2016.

AMAYA, A. *The tapestry of reason*: an inquiry into the nature of coherence and its role in legal argument. Oxford: Hart Publishing, 2017.

ÁVILA, H. *Certainty in law*. Dordrecht: Springer, 2016.

ÁVILA, H. *Theory of legal principles*. Dordrecht: Springer, 2007.

BRAZIL, CARF, Segundo Conselho de Contribuintes, 18 Oct. 2000, Case n. 13003.000021/99-14, Acórdão n. 202-12.527.

CHIASSONI, P. *Interpretation without truth*: a realistic enquiry. Dordrecht: Springer, 2019.

DWORKIN, R. *Law's Empire*. Cambridge: The belknap press of Harvard University Press, 1986.

GUASTINI, R. *Interpretare e argomentare*. Milano: Dott. A. Giuffrè Editore, 2011.

HERSHOVITZ, S. The End of Jurisprudence. *The Yale Law Journal*, v. 124, n. 4, p. 1160-1205, January-February/2015.

HURLEY, S. L. Coherence, hypothetical cases, and precedent. *Oxford Journal of Legal Studies*, v. 10, n. 2, p. 221-251, Summer/1990.

KELSEN, H. *Pure theory of law*. Translated by Max Knight. Berkeley: University of California Press, 1967.

KRAMER, M. H. *In defense of legal positivism*: law without trimmings. Oxford: Oxford University Press, 1999.

KRAMER, M. *Where law and morality meet*. Oxford: Oxford University Press, 2004.

KRESS, K. J. Legal reasoning and coherence theories: Dworkin's rights thesis, retroactivity, and the linear order of decisions. *California Law Review*, v. 72., issue 3, p. 369-402, May/1984.

MACCORMICK, N. *Legal reasoning and legal theory*. Oxford: Oxford University Press, 1978.

MACCORMICK, N. *Rhetoric and the rule of law*. Oxford: Oxford University Press, 2005.

MAZZARESE, T. La interpretación jurídica como traducción; esclarecimientos provenientes de una analogía común. *Isonomía*, n. 9, p. 73-102, 1998.

PECZENIK, A. *On law and reason*. 2. ed. Dordrecht: Springer, 2009.

PECZENIK, A.; HAGE, J. Legal knowledge about what? *Ratio Juris*, v. 13, n. 3, p. 326-345, September/2000.

RAZ, J. The relevance of coherence. *Boston University Law Review*, v. 72, n. 2, p. 273-321, March/1992.

RAZ, J. *Between authority and interpretation*. Oxford: Oxford University Press, 2009.

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