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VSEBINA

V tokratni številki je objavljenih nekaj izbranih prispevkov s 1. Genovsko-slovanskega seminarja za teorijo prava, ki je potekal v Genovi decembra 2014. Prispevki so objavljeni v angleščini, slovenščini, hrvaščini in španščini.

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This issue is composed of papers in English, Slovenian, Croatian, and Spanish. For English synopses and keywords, see pages 147–151. Some of the papers were presented first at the Genoa-Slavic seminar in legal theory, which took place in Genoa in December 2014.

PISMO UREDNIKOMA

O *tû-tûju*

V tem prispevku sem se namenil pokazati, da t. i. posredniški pojmi igrajo eno bistvenih vlog pri urejanju in tvorbi pravnega znanja. V izhodišču bom povzel Rossovo razmišljanje o takšnih pojmih, nato pa ga bom kritiziral. Njegov cilj je bil pokazati, da imamo v pravu tudi takšne pojme, ki nimajo nobenega pomenskega ozira, a jih je vseeno razumno uporabljati, saj pri predstavitvi pravnih pravil igrajo koristno vlogo. Sam menim, da imata oba Rossova poudarka napako: zmoten je njegov sklep, da posredniški pojmi nimajo nobenega pomenskega ozira, Rossova predstavitev njihove vloge v pravu pa je preveč omejujoča.

1 ROSSOVO RAZMIŠLJANJE

Alf Ross nas v svojem znanem članku iz leta 1951 popelje na umišljene otoke Ajîzuli v Južnem Pacifiku, da bi nam predstavil pleme Ajîc-kif.[1] V jeziku tega plemena obstaja pojem »tû-tû«. Kdorkoli občuje s svojo taščo ali ubije totemsko žival ali jé za poglavarja pripravljeno hrano, postane tû-tû. Kdorkoli je tû-tû, je podvržen posebnemu obredu očiščenja. Ross nato ugotovi, da so v jeziku plemena Ajîc-kif resnične naslednje izjave:

(1) *Če je neka oseba občevala s svojo taščo, je tû-tû.*

(2) *Če je neka oseba ubila totemsko žival, je tû-tû.*

(3) *Če je neka oseba jedla za poglavarja pripravljeno hrano, je tû-tû.*

(4) *Če je neka oseba tû-tû, se mora podvreči obredu očiščenja.*

Ross se zato vpraša, kaj je tû-tû. Njegov odgovor je, da to »seveda [ni] prav nič; je beseda brez vsakršnega pomena. /.../ Govorjenje o tû-tûju je popoln nesmisel.«[2] Beseda nima nobenega pomenskega ozira, čeprav so izreki, ki jo vključujejo, pomenljivi. Da bi to dokazal, Ross nadaljuje takole:[3]

> Izjava »[neka oseba] je tû-tû« se očitno pojavlja v prav posebni pomenski povezavi z zapletenim sklopom okoliščin, v katerem je mogoče razločiti dvoje:

1 Članek je bil prvič objavljen v danščini. Tu bomo navajali njegovo angleško objavo (Ross 1957) in slovenski prevod (Ross 2008).

2 Ross 2008: 89. Za angleško besedilo glej Ross 1957: 812.

3 Ross 2008: 90. Za angleško besedilo glej Ross 1957: 814.

1. Stanje stvari, v katerem je nekdo bodisi jedel za poglavarja pripravljeno hrano, ubil totemsko žival ali občeval s taščo itd. (Odslej imenovano: *stanje stvari 1.*)
2. Stanje stvari, v katerem je zanj uporabljivo veljavno pravilo, ki nalaga obredno očiščenje; z drugimi besedami je to mogoče natančneje opisati kot stanje stvari, v katerem bo obravnavana oseba po vsej verjetnosti izpostavljena določenemu odzivu skupnosti (lahko da bo na primer usmrčena), če se temu obredu ne podvrže. (Odslej imenovano: *stanje stvari 2.*)

Da bi dokazal odsotnost pomenskega ozira besede »tû-tû«, Ross obravnava izjavi (3) in (4):

(3) *Če je neka oseba jedla za poglavarja pripravljeno hrano, je tû-tû.*

(4) *Če je neka oseba tû-tû, potem se mora podvreči obredu očiščenja.*

Pomenski ozir besede »tû-tû« je mogoče prepoznati tako v *stanju stvari 1* kot v *stanju stvari 2*. Povsem razumno bi bilo nadomestiti »tû-tû« v izjavi (3) s *stanjem stvari 2*, v izjavi (4) pa s *stanjem stvari 1*. A ta rešitev ni zadovoljiva, saj bi imel »tû-tû« v tem primeru dva različna pomena, razlogovanje, ki bi iz premis (3) in (4) sklenilo, da se mora tisti, ki je jedel za poglavarja pripravljeno hrano, podvreči obredu očiščenja, pa bi bilo zaradi napake, imenovane *quattuor terminorum*, logično neveljavno. Druga možnost je, da »tû-tû« v obeh primerih nadomestimo s *stanjem stvari 1*. A tudi to ne bi delovalo, saj bi bila ob tem izjava (3) za sklepanje neuporabna:

(3)* *Če je neka oseba jedla za poglavarja pripravljeno hrano, obstaja stanje stvari, v katerem je obravnavana oseba bodisi jedla za poglavarja pripravljeno hrano, ubila totemsko žival ali občevala s svojo taščo itd.*

Podobno bi bila za sklepanje neuporabna izjava (4), če bi trdili, da »tû-tû« pomeni *stanje stvari 2.* Ross zato sklene, da »tû-tû« nima nobenega pomenskega ozira.

Obenem Ross trdi, da je lahko raba takšnih pomensko praznih pojmov koristna, kadar želimo (pravna) pravila predstaviti na učinkovit način. Predpostavimo, na primer, da mora biti v kulturi Ajîc-kif tisti, ki je »tû-tû«, podvržen obredu očiščenja, poleg tega pa se šteje še kot neprimeren za boj ali za lov. Tako imamo ob pravilih (1) – (4) še dve veljavni pravili:

(5) *Če je neka oseba tû-tû, se šteje, da ni primerna za boj.*

(6) *Če je neka oseba tû-tû, se šteje, da ni primerna za lov.*

Ob odsotnosti pojma tû-tû v kulturi Ajîc-kif bi bil en del njihovega pravnega reda bolj zapleten, saj bi bila pravila (1)–(6) ubesedena takole:

(1)^{a} *Če je neka oseba občevala s svojo taščo, se mora podvreči obredu očiščenja.*

(1)^{b} *Če je neka oseba občevala s svojo taščo, se šteje kot neprimerna za boj.*

(1)^{c} *Če je neka oseba občevala s svojo taščo, se šteje kot neprimerna za lov.*

(2)[a] *Če je neka oseba ubila totemsko žival, se mora podvreči obredu očiščenja.*

(2)[b] *Če je neka oseba ubila totemsko žival, se šteje kot neprimerna za boj.*

(2)[c] *Če je neka oseba ubila totemsko žival, se šteje kot neprimerna za lov.*

(3)[a] *Če je neka oseba jedla za poglavarja pripravljeno hrano, se mora podvreči obredu očiščenja.*

(3)[b] *Če je neka oseba jedla za poglavarja pripravljeno hrano, se šteje kot neprimerna za boj.*

(3)[c] *Če je neka oseba jedla za poglavarja pripravljeno hrano, se šteje kot neprimerna za lov.*

Namesto šestih pravil bi jih imeli torej devet. V današnjih, bolj zapletenih pravnih redih pa je lahko raba takšnih »pomensko praznih« pojmov, kot je tû-tû, še bolj opazna. Ross primeroma obravnava pojem lastništva. V vsakem pravnem redu obstaja več načinov pridobitve lastništva (nakup, dedovanje, priposestvovanje, izvršba, dobljena stava, menjava, prihodek itd.) in več posledic lastništva (pravica rabe, prodaje, uživanja, spremembe, najema, menjave, uničenja itd.). Pojem lastništva – ali katerakoli druga posredniška zveza med različnimi stanji stvari – je preprosto učinkovit način oblikovanja in predstavljanja pravnih pravil. To pa ne vpliva kaj dosti na pomenski ozir izraza »lastništvo« – gre za besedo »brez vsakršnega pomena« prav tako kot »tû-tû«, »pravica«, »dolžnost« ali »zahtevek«.

2 VSI POJMI SO *TÛ-TÛISTIČNI*

V tem, drugem razledku bom zatrjeval, da ima Rossov argument o pomenski praznosti tû-tûja napako. Vzemimo enega od pojmov, ki po Rossu niso brez pomenskega ozira, npr. *totemska žival*. Predpostavimo, da so – v kulturi Ajîc-kif – resnične naslednje izjave:

(7) *Če je nekaj lev, je totemska žival.*

(8) *Če je nekaj tiger, je totemska žival.*

(9) *Če je nekaj albino žival, je totemska žival.*

(10) *Če je nekaj totemska žival, jo je treba počastiti z žrtvovanjem.*

Z Rossovim razlogovanjem, da je »tû-tû« brez pomenskega ozira, je mogoče utemeljevati, da je brez pomenskega ozira tudi izraz »totemska žival«. Dovolj je predpostavka, da *stanje stvari 3* pomeni stanje stvari, v katerem je kaj bodisi lev ali tiger ali albino žival, *stanje stvari 4* pa stanje stvari, v katerem obstaja dolžnost počastitve tega z žrtvovanjem. Če bi trdili, da je izraz »totemska žival« treba razumeti, kot da se v izjavah (7)–(9) nanaša na *stanje stvari 4*, v izjavi (10) pa na *stanje stvari 3*, potem nikdar ne bi bilo mogoče priti do sklepa, da je

določenega leva, tigra ali albino žival treba počastiti z žrtvovanjem (tak sklep bi bil neveljaven zaradi napake, imenovane *quattuor terminorum*); če bi trdili drugače, da se »totemska žival« vsakokrat nanaša na *stanje stvari 3*, potem bi bile izjave (7)–(9) »za sklepanje neuporabne«; in če bi, končno, trdili, da pomenski ozir izraza »totemska žival« tvori *stanje stvari 4*, potem bi bila »za sklepanje neuporabna« izjava (10).

Uporabo tovrstnega razlogovanja bi bilo mogoče razširiti na *katerikoli* povedkovni izraz (pa tudi na lastna imena, če sprejemamo Quinov postopek prevoda lastnih imen v povedkovne izraze).[4] Rossov dokaz, po katerem je določen pojem brez pomenskega ozira, je namreč odvisen od sočasnega sprejemanja dveh postavk:

(a) (delne) opredelitve pomena, kot je »Če je neka oseba jedla za poglavarja pripravljeno hrano, je tû-tû«;

(b) pravilo, v katerem se obravnavani izraz pojavi v opisu stanja stvari, ki ima za posledico uporabo pravila, npr. »Če je neka oseba tû-tû, se mora podvreči obredu očiščenja«.

Glede na to, da je vedno za katerikoli izraz mogoče najti neko (delno) opredelitev pomena, je možnost uporabe Rossovega argumenta, da je neki izraz brez pomenskega ozira, odvisna od obstoja kakšnega pravila, v katerem se obravnavani izraz pojavi v opisu stanja stvari, ki ima za posledico uporabo pravila. To velja tudi za pojme, ki se – drugače kakor tû-tû ali totemska žival – ne uporabljajo v pravnih, moralnih ali religioznih okvirih. Vzemimo izraz »hrana«; delna opredelitev njegovega pomena je npr. tole: »Če je nekaj mango, je hrana«. Ob tem je dovolj že obstoj družbenega pravila, kakršno je »Če je nekaj hrana, je to treba razdeliti med člane skupnosti«, da pridemo do sklepa, da »hrana« nima nobenega pomenskega ozira.

(Obrobna opomba: zmešnjavo v Rossovem razlogovanju je lahko opaziti, če se osredotočimo na spoznavnostno vlogo dveh vrst izjav, ki jih je uporabil v svojem primeru. Pomenske opredelitve, kakršna je »Če je neka oseba jedla za poglavarja pripravljeno hrano, je tû-tû«, so analitične izjave in torej resnične v vseh možnih svetovih. Pravila, kakršno je »Če je neka oseba tû-tû, se mora podvreči obredu očiščenja«, pa niso nujno resnične, tj. držijo le v nekaterih možnih svetovih. Zaradi prostorske omejitve ne bom nadalje razvil kritike v tej smeri; zdi pa se, da Rossova napaka izhaja iz mešanja intenzije oz. pomenske vsebine nekega izraza z njegovo ekstenzijo, tj. z njegovim pomenskim obsegom.)

S povedanim do tu smo ugotovili, da ni nobene *logične* razlike med »tû-tû« in, vsaj potencialno, katerimkoli drugim povedkovnim izrazom. Zato bi lahko Rossov sklep, da so »tû-tû«, »obveznost«, »lastništvo« ali »pravica« brez pomen-

4 Glej Quine 1948: 21–38.

skega ozira, razširili na *katerikoli izraz*. To pa je, seveda, precej nesmiselno. Ross nikjer ne namigne, da njegov prikaz spodkopava pojem pomenskega ozira na splošno. Nasprotno, pokazati skuša, da medtem ko imajo nekateri pojmi (kot so poglavar, hrana ali obred očiščenja) povsem dobro opredeljeni ozir, drugi pojmi – tû-tû, lastništvo itd. – služijo le kot tehnika ponazarjanja: poenostavljajo strukturo pravnega reda, ne da bi s seboj nosili neko ontološko breme.

To je, končno, Rossov cilj: utemeljiti skuša metafizično trditev, da se nekateri pravni pojmi (lastništvo, pravica in obveznost) ne nanašajo na nobeno obstoječo danost. A kot smo videli, tega ni mogoče doseči zgolj z logičnim sklepanjem, saj je – po istem postopku – mogoče pokazati, da se tudi drugi pojmi, ki izpolnjujejo določene pogoje (tj. ki se pojavijo v opisu stanja stvari, ki ima za posledico uporabo nekega pravnega pravila), ne nanašajo na nobeno obstoječo danost. Z drugimi besedami, trditev, da nekateri pojmi nimajo nobenega pomenskega ozira, medtem ko ga drugi imajo, je *predhodna logiki*: odvisna je od ontoloških izbir. Na primer: kot se zdi, Ross predpostavlja, da se takšni pojmi, kot so poglavar, hrana, totemska žival ali obred očiščenja, na nekaj nanašajo, medtem ko naj to ne bi veljalo za tû-tû in obveznost. To me navaja k zaključku, da se Rossovo razlogovanje najbolje ponazori, če rečemo, da hoče *braniti* naslednje ontološko stališče: če sprejmemo povsem ponaravoslovljeni pogled na pravo, potem se moramo soočiti s težavami obravnavanja pravnih pojmov, kot so lastništvo, obveznost ali pravica, saj iz načina njihove rabe v pravnem govoru izhaja, da se nanašajo na obstoječe pojave. Rossovo razlogovanje pa pokaže, da se temu nedobrodošlemu sklepu lahko izognemo; brez logične nedoslednosti lahko namreč obravnavamo omenjene pojme kot takšne, ki nimajo pomenskega ozira, obenem pa vztrajamo, da so koristni gradniki kateregakoli pravnega reda. Gledano s tega zornega kota je Rossovo razlogovanje *obramba* določenega metafizičnega pogleda na pravo. Pokazati skuša, da je takšen metafizični pogled na pravne pojave mogoč, ne pa da je nujen.

3 KAJ NAPRAVI *TÛ-TÛ*?

Ross trdi, da posredniški pojmi – kot sta tû-tû ali lastništvo – v vsakem pravnem redu igrajo pozitivno vlogo, ker omogočajo učinkovito ponazarjanje pravnih pravil. Osebno mislim, da je vloga takšnih pojmov veliko večja. V nadaljevanju bi rad pokazal, da Ross podcenjuje tû-tûjevo koristnost; rekel bi celo, da si je težko predstavljati učinkujoč pravni red, ki ne bi imel nobenega posredniškega pojma.

Prva naloga posredniških pojmov je krepitev notranje skladnosti pravnega reda. A kaj je skladnost množice izjav? Omenjeno merilo določajo odgovori na naslednja vprašanja: a) Ali je množica izjav stanovitna? b) Kakšna je stopnja medsebojne povezanosti članov množice? c) Kakšna je stopnja enotnosti

množice?[5] Nestanovitna množica izjav je notranje neskladna. Za vsako stanovitno množico izjav pa velja, da stopnja njene notranje skladnosti raste z medsebojno povezanostjo izjav, ki jih množica vsebuje, in s stopnjo njihove enotnosti. Izjave neke množice so medsebojno povezane, če lahko skupaj služijo kot premise v logično veljavnih sklepih, enotne pa so, če jih ni mogoče razdeliti v dve podmnožici, ne da bi se pri tem bistveno izgubila sporočilnost. Pomembno je poudariti, da pojem logične skladnosti ni binaren pojem; množica je lahko skladna tudi v večji ali manjši meri.

Zdaj pa se vrnimo k izhodiščnemu primeru. Množica naslednjih izjav:

(1) *Če je neka oseba občevala s svojo taščo, je tû-tû.*

(2) *Če je neka oseba ubila totemsko žival, je tû-tû.*

(3) *Če je neka oseba jedla za poglavarja pripravljeno hrano, je tû-tû.*

(4) *Če je neka oseba tû-tû, se mora podvreči obredu očiščenja.*

je notranje skladna, saj je stanovitna. Stopnjo notranje skladnosti določa dejstvo, da med člani množice obstaja več medsebojnih povezav. (1) in (4), (2) in (4) pa tudi (3) in (4) je mogoče uporabiti pri izpeljavi treh novih izjav: »Če je neka oseba občevala s svojo taščo, se mora podvreči obredu očiščenja«, »Če je neka oseba ubila totemsko žival, se mora podvreči obredu očiščenja« in »Če je neka oseba jedla za poglavarja pripravljeno hrano, se mora podvreči obredu očiščenja«. Prav tako je množica enotna: če bi jo na kakršenkoli način razdelili (npr. na dve podmnožici – {(1), (2)} in {(3),(4)}), bi izgubili enega bistvenih delov sporočila (mdr. ne bi bilo več mogoče izpeljati izjav »Če je neka oseba ubila totemsko žival, se mora podvreči obredu očiščenja« in »Če je neka oseba jedla za poglavarja pripravljeno hrano, se mora podvreči obredu očiščenja«).

Našo izhodiščno množico zdaj primerjajmo z naslednjo, iz katere je bil odstranjen pojem tû-tû:

(1)[a] *Če je neka oseba občevala s svojo taščo, se mora podvreči obredu očiščenja.*

(2)[a] *Če je neka oseba ubila totemsko žival, se mora podvreči obredu očiščenja.*

(3)[a] *Če je neka oseba jedla za poglavarja pripravljeno hrano, se mora podvreči obredu očiščenja.*

Ta množica izjav ima, čeprav je manjša od izhodiščne, nižjo stopnjo notranje skladnosti. Res je stanovitna, vendar med člani množice ni nobene medsebojne povezave, odsotna pa je tudi enotnost, saj je množico prav mogoče razdeliti na več načinov, ne da bi izgubili kak bistveni del sporočila.

Seveda je na mestu vprašanje, zakaj je skladnost pomembna. Poglobljena obravnava tega vprašanja presega okvire pričujočega zapisa. Naj kljub temu do-

5 Glej Bonjour 1985, Brožek 2013.

dam, da je stopnja notranje skladnosti tesno povezana z več spoznavnimi dejavniki. Mogoče je trditi, da nam visoka stopnja notranje skladnosti omogoča bolje razumeti, naučiti se in pomniti dano množico pravil, prav tako pa tudi njihovo učinkovitejšo uporabo. Pravni red, ki bi imel le nizko stopnjo notranje skladnosti, bi bil neuporaben, kot to izhaja iz primera tistih zgodovinskih pravnih redov, ki so bili zelo kazuistični.

Druga vloga, ki jo imajo posredniški pojmi, je hevristična in vpliva na celovitost pravnega reda.[6] Zamislimo si, da je svet starešin plemena Ajîc-kif sprejel odločitev o usodi nekega posameznika, ki je ubil neko žival. Ni šlo za totemsko žival, ampak za zverino, ki jo lovijo le enkrat na leto med posebnim obredom in je edini vir mesa za poglavarjevo dieto. Če primitivni pravni red plemena Ajîc-kif ne bi vseboval posredniškega pojma tû-tû, potem bi svet plemenskih starešin moral iznajti povsem novo pravno pravilo za obravnavani primer; glede na ključno vlogo pojma tû-tû v primerih uboja totemske živali in uživanja za poglavarja pripravljene hrane pa bodo imeli starešine vendarle določeno vodilo za odločitev in prav mogoče je, da bodo posameznika, ki je zagrešil uboj, podvrgli obredu očiščenja.

Poglejmo še en primer. Po Rossu je lastništvo zgolj posredniški pojem, tj. povezava med raznimi stanji stvari in njihovimi pravnimi posledicami. Zamislimo si, da obstajajo v nekem pravnem redu zgolj pravila o lastništvu premičnin in nepremičnin, zakonodajalec pa mora razmisliti o uvedbi novega sklopa pravil, ki naj urejajo intelektualno lastnino. Jasno je, da mu obstoječi pojem lastništva pri tej nalogi koristi. Zakonodajalcu ni treba iznajti povsem nove množice pravil o intelektualni lastnini. Namesto tega lahko uporabi obstoječi okvir pravil o lastništvu, le da ga priredi posebnostim intelektualne lastnine. Z drugimi besedami, uvedba intelektualne lastnine v obstoječi okvir pravil, ki urejajo lastništvo, je nekaj drugega kot iznajdba povsem novega pravnega instituta. V prvem primeru lahko govorimo o priredbi – izrabijo se prednosti obstoječih rešitev, utemeljitev in celotnega okvira pravnega znanja, ki obkroža pojem lastništva; v drugem primeru pa bi bil institut intelektualne lastnine zgrajen iz nič, sestavljal bi v samem bistvu novo množico pravil, brez zalednega okvira, ki zakonodajalca vodi pri izpolnitvi naloge.

Iz teh primerov jasno izhaja, da so posredniški pojmi lahko več kot le učinkovita »tehnika ponazarjanja« pravnih pravil – opravljajo pomembno hevristično nalogo. Kadar odločamo o težkih primerih ali se namenimo urediti dotlej neurejeni prostor družbenih odnosov, smo s *tû-tûističnimi* pojmi v rokah v precej boljšem položaju kot brez njih.[7]

Osebno menim, da zgornja razmišljanja podpirajo sklep, da je Rossova slika tû-tûja in drugih posredniških pojmov slaba karikatura. Takšni pojmi so bolj

6 Glej Lindahl 2003: 185–200 in Ashley & Brüninghaus 2003: 153–162.

7 Glej tudi pronicljive komentarje v Sartor 2008.

koristni, kot si je to predstavljal Ross. Ob tem da krepijo notranjo skladnost pravnega reda, v težkih primerih in v poprej neurejenih okoliščinah pravnikom služijo tudi kot hevristično orodje. Tû-tû in podobni pojmi so pomembna orodja, ki oblikujejo pravni red.

—***Zahvala.***— Ta prispevek je plod raziskovalnega projekta *Naturalizacja prawa*, ki ga je denarno podprl poljski Naradowe Centrum Nauki. V angleščini je bil prispevek najprej objavljen v *Revista Utopía y Praxis Latinoamericana* 20 (2015) 71.

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On *tû-tû*

My goal in this short paper is to argue that so-called intermediary concepts play an essential role in organizing and generating legal knowledge. My point of departure is a reconstruction and a critique of Alf Ross's analysis of such concepts. His goal was to argue that there exist concepts in the law which have no semantic reference, yet it is reasonable to use them as they perform some useful function regarding the presentation of legal rules. I believe that Ross is wrong on both counts: his argument to the effect that intermediary concepts have no reference is flawed, and his characterization of the functions such concepts play in the law is too limiting.

1 ROSS'S ARGUMENT

In his famous paper of 1951 Alf Ross takes us to the imaginary Noîsulli Islands in the South Pacific to meet the Noît-cif tribe.[1] In the language of Noît-cif there exits the concept of '*tû-tû*'. Whoever encounters his mother-in-law, or kills a totem animal or has eaten the food prepared for the chief, becomes *tû-tû*. Whoever is *tû-tû*, is subject to a ceremony of purification. Thus, Ross observes that the following statements are true in the language of Noît-cif:

(1) If a person *x* has encountered their mother in law, *x* is *tû-tû*.

(2) If a person *x* has killed a totem animal, *x* is *tû-tû*.

(3) If a person *x* has eaten the food prepared for the chief, *x* is *tû-tû*.

(4) If a person *x* is *tû-tû*, *x* is subject to the ceremony of purification.

Ross further asks, what is *tû-tû*. And he replies that, it is "of course nothing at all, a word devoid of any meaning whatever. (…) The talk about *tû-tû* is pure nonsense."[2] The word has no semantic reference, although the expressions in which it appears are meaningful. In order to show that it is so, Ross observes that[3]

> the pronouncement of the assertion '*x* is *tû-tû*' clearly occurs in definite semantic connection with a complex situation of which two parts can be distinguished:

1 The paper appeared first in Danish. Below, I quote the English version, Ross 1957.

2 Ross 1957: 812.

3 Ross 1957: 814.

(i) The state of affairs in which *x* has either eaten of the chief's food or has killed a totem animal or has encountered his mother-in-law, etc. This state of affairs will hereinafter be referred to as *affairs*$_1$.

(ii) The state of affairs in which the valid norm which requires ceremonial purification is applicable to *x*, more precisely stated as the state of affairs in which if *x* does not submit himself to the ceremony he will in all probability be exposed to a given reaction on the part of the community. This state of affairs will hereinafter be referred to as *affairs*$_2$.

In order to show that '*tû-tû*' has no semantic reference, Ross considers the propositions (3) and (4):

(3) If a person *x* has eaten the food prepared for the chief, *x* is *tû-tû*.

(4) If a person *x* is *tû-tû*, *x* is subject to the ceremony of purification.

There are two ways of pinpointing the semantic reference of '*tû-tû*' – it may either be identified with *affairs*$_1$ or *affairs*$_2$. The natural move would be to substitute '*tû-tû*' with *affairs*$_2$ in the proposition (3), and with *affairs*$_1$ in the proposition (4). But this solution is unsatisfactory, since in such a case '*tû-tû*' would have two different meanings, and the argument based on (3) and (4) to the effect that a person who has eaten the food prepared for the chief is subject to the ceremony of purification would not be logically valid due to the fallacy of *quattuor terminorum*. The second option is to understand '*tû-tû*' as referring uniquely to *affairs*$_1$; this, however, will not do, since it would make the proposition (3) analytically void:

(3)* If a person *x* has eaten the food prepared for the chief, the state of affairs exists where *x* has either eaten of the chief's food or has killed a totem animal or has encountered his mother-in-law, etc.

Similarly, if one claimed that the meaning of '*tû-tû*' is *affairs*$_2$, the proposition (4) would become analytically void. Therefore, Ross concludes, '*tû-tû*' has no semantic reference.

At the same time, Ross claims that the use of such semantically empty concepts may be useful as an efficient method of the presentation of (legal) rules. Let us assume that in the culture of Noît-cif being '*tû-tû*' not only requires to undergo the process of purification, but also makes the person unfit for combat as well as for hunting. Thus, in addition to the proposition (1) – (4), the following two rules are valid:

(5) If a person *x* is *tû-tû*, *x* is unfit for combat.

(6) If a person *x* is *tû-tû*, *x* is unfit for hunting.

Now, the absence of the concept of '*tû-tû*' would make (the relevant part of) the Noît-cif legal system more complex, since the contents of the propositions (1)–(6) would become:

(1)[a] If a person *x* has encountered their mother in law, *x* is s subject to the ceremony of purification.

(1)[b] If a person *x* has encountered their mother in law, *x* is unfit for combat.

(1)[c] If a person *x* has encountered their mother in law, *x* is unfit for hunting.

(2)[a] If a person *x* has killed a totem animal, *x* is s subject to the ceremony of purification.

(2)[b] If a person *x* has killed a totem animal, *x* is unfit for combat.

(2)[c] If a person *x* has killed a totem animal, *x* is unfit for hunting.

(3)[a] If a person *x* has eaten the food prepared for the chief, *x* is s subject to the ceremony of purification.

(3)[b] If a person *x* has eaten the food prepared for the chief, *x* is unfit for combat.

(3)[c] If a person *x* has eaten the food prepared for the chief, *x* is unfit for hunting.

In this way, six proposition become nine different propositions. In the actual, more complex legal systems, the utilization of such 'semantically empty' concepts as '*tû-tû*' may be even more advantageous. For example, Ross considers the concept of ownership. In any legal system there are many ways of acquiring ownership (purchase, inheritance, prescription, execution, winning a bet, exchange, earning, etc.) as well as many consequences of being an owner (the right to use, sell, consume, alter, share, exchange, transfer, give away, destroy, etc.). The concept of ownership – or any other such intermediate link between different states of affairs – is simply an efficient way of structuring and presenting legal norms. However, it changes little when it comes to identifying the semantic reference of the term 'ownership' – it is "a word devoid of any meaning whatever" just like '*tû-tû*', 'right', 'duty' or 'claim'.

2 EVERY CONCEPT IS *TÛ-TÛESQUE*

I would like to argue in this section that Ross's argument to the effect that '*tû-tû*' is semantically void, is flawed. Let us consider one of the concepts Ross thinks to have semantic reference, e.g. 'totem animal'. Let us further assume that – in the culture of Noît-cif – the following propositions are true:

(7) If *x* is a lion, then *x* is a totem animal.

(8) If *x* is a tiger, then *x* is a totem animal.

(9) If *x* is an albino animal, then *x* is a totem animal.

(10) If *x* is a totem animal, then *x* should be worshiped by sacrifice.

Now, Ross's strategy for establishing the 'semantic emptiness' of '*tû-tû*' may be used to argue for the lack of semantic reference of the term 'totem animal'. It is enough to assume that $affairs_3$ stands for the state of affairs in which *x* is a lion, or a tiger, or an albino animal, and $affairs_4$ for the state of affairs in which worship by sacrifice is required towards *x*. Now, if one claims that the term 'totem animal' should be understood as referring to $affairs_4$ in the propositions (7)–(9), and as referring to $affairs_3$ in the proposition (10), one would never be able to arrive at a conclusion that a particular lion, tiger, or an albino animal should be worshiped by sacrifice (due, of course, to the fallacy of *quattuor terminorum*); if, on the other hand, the semantic reference of 'totem animal' would be fixed as $affairs_3$, the propositions (7)–(9) would become 'analytically void'; and if the reference was $affairs_4$, the proposition (10) would be 'analytically void'.

This line of argument can be extended so as to include *any* predicate (and also a proper name, if one applies Quine's procedure of translating proper names into predicates).[4] Let us observe that Ross's demonstration that a given concept has no semantic reference is made possible by simultaneously accepting two claims:

(a) a (partial) meaning postulate, such as "If a person *x* has eaten the food prepared for the chief, *x* is *tû-tû*";

(b) a norm in which the term under consideration appears in the description of a state of affairs that triggers the application of the norm, as in "If a person *x* is *tû-tû*, *x* is subject to the ceremony of purification."

Assuming that one can always identify a (partial) meaning postulate for any term, the possibility of carrying out Ross's argument to the effect that the term has no semantic reference hangs together with there being a norm in which the term appears in the description of a state of affairs that triggers the application of the norm. This is true also for the concepts, which – unlike '*tû-tû*' or 'totem animal' – are used also in extra-legal, extra-moral and extra-religious contexts. Let us consider the term 'food'; a partial meaning postulate for the term is, for example, "If *x* is a mango, then *x* is food". Now, it suffices that there exists a social nom such as "If *x* is food, then *x* should be shared among the members of the community", to arrive at a conclusion that 'food' has no semantic reference.

(A note at the margin: the confusion inherent in Ross's argument is clearly visible when one considers the epistemic status of the two kinds of propositions he contemplates in the '*tû-tû*' example. Meaning postulates, such as "If a person *x* has eaten the food prepared for the chief, *x* is *tû-tû*", are analytic statements in the sense that they are true in all possible worlds. Norms, on the other hand, such as "If a person *x* is *tû-tû*, *x* is subject to the ceremony of purification", are

4 Cf. Quine 1948: 21–38.

contingent, i.e. they hold only in some possible worlds. Due to space limitations I will not follow this line of critique; it seems, however, that Ross's mistake lies in confusing the intension of a term with its extension).

Our considerations so far reveal that there is no *logical* difference between '*tû-tû*' and, potentially at least, any other predicate. Thus, Ross's conclusion that such concepts as '*tû-tû*', 'obligation', 'ownership' or 'right' lack semantic reference can easily be applied to *any term*. This is, of course, highly paradoxical. Ross nowhere suggests that his analysis undermines the concept of semantic reference altogether. To the contrary – he tries to show that while some terms (such as 'chief', 'food' or 'ceremony of purification') have perfectly well defined referents, other concepts – '*tû-tû*', 'ownership', etc. – are mere presentation devices: they simplify the structure of the legal system, but carry no ontological baggage.

This, ultimately, is Ross's goal: he tries to establish a metaphysical claim to the effect that some legal concepts ('ownership', 'right' or 'obligation') do not refer to any existing entities. However, as we have seen, this cannot be done through mere logical means, since it is possible to show – in the same way – that any concept, which fulfills certain criteria (i.e., features in the description of a state of affairs which triggers the application of a legal norm), refers to no existing entity. In other words, the claim that some concepts have no semantic reference while others do, is *pre-logical*: it is determined by the chosen ontology. For example, Ross seems to assume that such concepts as 'chief', 'food', 'totem animal' or 'the ceremony of purification' refer to something, while '*tû-tû*' or 'obligation' do not. In light of this I believe that the best way to reconstruct Ross's argument is to say that it aims at *defending* a certain ontological stance and runs roughly as follows: if you are an adherent of a purely naturalistic view of the law, you face a difficulty when considering some legal concepts such as 'ownership', 'obligation' or 'right', since the way they are used in the legal discourse suggests that they refer to some existing phenomena. Ross's analysis shows that one can avoid this unwanted conclusion – it is logically consistent to treat the aforementioned concepts as devoid of semantic reference, while insisting on their usefulness in the structure of any legal system. Viewed from this angle, Ross's argument is a *defense* of a certain metaphysical view of the law; it aims to show that such a metaphysics is possible, and not that it is the necessary way of looking at legal phenomena.

3 WHAT *TÛ-TÛ* CAN DO?

Ross admits that intermediate concepts – such as '*tû-tû*' or 'ownership' – play a positive role in any legal system, since they enable a more efficient technique of the presentation of legal rules. I believe it is an understatement. Below,

I would like to show that Ross underestimates what *tû-tû* can do; I would even go as far as saying that it would be difficult to imagine a functional legal system without any intermediate concepts.

The first function of intermediate concepts is to *increase coherence* in the legal system. But what is coherence of a set of propositions? The measure in question is determined by taking into account: (a) whether the set is consistent; (b) what is the level of inferential connections between the members of the set; and (c) what is the degree of the unification of the set.[5] A set of proposition which is inconsistent is also incoherent. For any consistent set of propositions, its degree of coherence increases with the increase of the inferential connections between the propositions it contains and its level of unification. There exist inferential connections between propositions belonging to a given set if they can serve together as premises in logically valid schemes of inference. In turn, a given set of propositions is unified if it cannot be divided into two subsets without a substantial loss of information. It is important to stress that the concept of logical coherence is not a binary one; coherence is rather a matter of degree.

Let us come back now to our initial example. The set of propositions:

(1) If a person *x* has encountered their mother in law, *x* is *tû-tû*.

(2) If a person *x* has killed a totem animal, *x* is *tû-tû*.

(3) If a person *x* has eaten the food prepared for the chief, *x* is *tû-tû*.

(4) If a person *x* is *tû-tû*, *x* is subject to the ceremony of purification.

is coherent, since it is consistent. The degree of its coherence is determined by the fact that there exist inferential connections between its elements. (1) and (4), (2) and (4), as well as (3) and (4) may be used to derive three new propositions: "If a person *x* has encountered their mother in law, *x* is subject to the ceremony of purification", "If a person *x* has killed a totem animal, *x* is subject to the ceremony of purification", and "If a person *x* has eaten the food prepared for the chief, *x* is subject to the ceremony of purification". The set is also unified: if one divided it in any way (say, into two sets – {(1), (2)} and {(3), (4)}), one would lose some substantial information (i.e., it would no longer be possible to derive "If a person *x* has killed a totem animal, *x* is subject to the ceremony of purification", and "If a person *x* has eaten the food prepared for the chief, *x* is subject to the ceremony of purification").

Let us now compare our initial set with the following alternative, where the concept '*tû-tû*' is eliminated:

(1)[a] If a person *x* has encountered their mother in law, *x* is s subject to the ceremony of purification.

5 Cf. Bonjour 1985, Brożek 2013.

(2)[a] If a person *x* has killed a totem animal, *x* is s subject to the ceremony of purification.

(3)[a] If a person *x* has eaten the food prepared for the chief, *x* is s subject to the ceremony of purification.

The resulting set of propositions, even if smaller than the original one, is much less coherent. It is consistent, but there exist no inferential connections between its elements, and it is not unified – one can divide the set in a number of ways way without any loss of information.

But why coherence matters? An in-depth analysis of this problem exceeds the scope of this short note. However, it seems that the degree of coherence is closely correlated with a number of cognitive factors. Arguably, high degree of coherence enables us to better comprehend, learn and remember the given set of rules, and apply them in a more efficient way. A legal system which would be coherent only to a small degree would be dysfunctional, as illustrated by those historical legal systems which were highly casuistic.

The second role played by intermediate concepts is *heuristic*, and it may help increase the completeness of a legal system.[6] Let us imagine that the council of elders of the Noît-cif tribe has to decide the fate of an individual who has killed an animal. It was not a totem animal, but a beast killed only once a year during a special ceremony and the only source of meat for the chief's diet. If the Noît-cif primitive legal system did not contain the intermediary concept of '*tû-tû*', the council of elders would have to devise a completely new legal rule governing the case at hand; however, given the pivotal role of the concept of '*tû-tû*' in the cases of killing a totem animal and eating the food prepared for the chief, the council would have some guidance in deciding the novel case and would probably arrive at the conclusion that the individual who committed the killing should be subject to the ceremony of purification.

Let us consider another example. According to Ross, ownership is only an intermediary concept, a link between some states of affairs and their legal consequences. Let us assume that in some legal system there exist only rules pertaining to the ownership of movable and immovable things, and the legislator must consider the introduction of a new set of rules regulating intellectual property. It is clear that the existing concept of ownership is useful in such an endeavor. The legislator does not have to devise a completely new system of norms for intellectual property, but instead works within the framework of the existing model of ownership, only adapting it to the peculiar character of the problem under consideration. In other words, introducing intellectual property into the existing framework of rules governing ownership is different than designing a completely new legal institution. In the former case, the process may

6 Cf. Lindahl 2003: 185–200, Ashley & Brüninghaus 2003: 153–162.

be called adaptation – one takes advantage of existing solutions, justifications, and the entire body of legal knowledge that surrounds the concept of ownership; in the latter case, however, intellectual property would be an institution built from scratch, an essentially novel set of rules with no background knowledge to guide the legislator in their endeavor.

It should be clear from the above examples that intermediate legal concepts have more to offer than a helpful 'form of presentation' of legal rules – they perform an important heuristic function. Whenever one decides a hard case or considers regulating an as-yet unregulated sphere of social interactions, one is better off with '*tû-tû*'-like concepts than without them.[7]

* * *

I believe that the above considerations support the conclusion that the picture of '*tû-tû*' and other intermediary legal concepts as painted by Ross is a bad caricature. Such concepts are more useful than Ross imagines – they not only generate much coherence in a legal system, but can also serve as a heuristic tool whenever one faces a novel situation or a hard case. '*Tû-tû*' and similar concepts are powerful tools which shape our legal systems.

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7 See also insightful comments in Sartor 2008.

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Sobre *tû-tû*

Mi propósito en este breve artículo es argumentar que los llamados conceptos intermediarios juegan un rol esencial en la organización y generación del conocimiento jurídico. Mi punto de partida es una reconstrucción y crítica del análisis de Alf Ross sobre dichos conceptos. Su objetivo era argumentar que existen conceptos en el derecho que no tienen referencia semántica, pero que aun así es razonable usarlos dado que cumplen con algunas funciones útiles relacionadas con la presentación de las reglas jurídicas. Creo que Ross está equivocado en ambos casos: su argumento al efecto de que los conceptos intermediarios no tienen referencia es defectuoso, y su caracterización de las funciones que dichos conceptos cumplen en el derecho es muy limitante.

1 EL ARGUMENTO DE ROSS

En su famoso artículo de 1951, Alf Ross nos lleva a las imaginarias Islas Noîsulli en el Pacífico Sur, para conocer a la tribu Noît-cif.[1] En el lenguaje de los Noît-cif existe el concepto de "*tû-tû*". Quien se encuentra con su suegra, o mata un animal tótem o ha ingerido la comida preparada para el cacique, se vuelve *tû-tû*.

Quien está *tû-tû*, es sometido a una ceremonia de purificación. En consecuencia, Ross señala que las siguientes afirmaciones son verdaderas en el lenguaje de los Noît-cif:

(1) Si una persona *x* ha encontrado a su suegra, *x* está *tû-tû*.

(2) Si una persona *x* ha matado a un animal tótem, *x* está *tû-tû*.

(3) Si una persona *x* ha ingerido la comida preparada para el cacique, *x* está *tû-tû*.

(4) Si una persona *x* está *tû-tû*, *x* deberá ser sometida a la ceremonia de purificación.

Ross luego plantea la pregunta sobre qué es *tû-tû*. Y contesta que esto es: "por supuesto /…/ nada, una palabra desprovista de todo significado /…/ La

1 El artículo apareció primero en danés. Aquí se citan la versión inglesa (Ross 1957) y su trad. castellana (Ross 1976).

conversación acerca de *tû-tû* es un puro sin sentido."[2] La palabra no tiene referencia semántica, aunque las expresiones en las cuales aparece son significativas. Para demostrar que esto es así, Ross señala que[3]

> el enunciado afirmativo "N.N. está *tû-tû*" se da claramente en conexión semántica con una situación compleja en la que pueden distinguirse dos partes:
>
> 1. El estado de cosas consistente en que N.N. ha ingerido comida del jefe, o ha matado a un animal tótem o se ha encontrado con su suegra, etc. En adelante, llamaremos a este estado de cosas '$hechos_1$'.
> 2. El estado de cosas consistente en que la norma válida que obliga a la ceremonia de purificación es aplicable a N.N.; o expresado con más precisión: el estado de cosas consistente en que si N.N. no se somete a la ceremonia, con toda probabilidad estará expuesto a una reacción dada por parte de la comunidad. En adelante llamaremos a este estado de cosas '$hechos_2$'.

A fin de *mostrar* que "*tû-tû*" no tiene referencia semántica, Ross considera las proposiciones (3) y (4):

(3) Si una persona *x* ha ingerido la comida preparada para el cacique, *x* está *tû-tû*.

(4) Si una persona *x* está *tû-tû*, *x* deberá ser sometida a la ceremonia de purificación.

Hay dos formas de determinar con precisión la referencia semántica de "*tû-tû*" – esta puede ser identificada tanto con $hechos_1$ como con $hechos_2$. Lo natural sería sustituir "*tû-tû*" con $hechos_2$ en la proposición (3), y con $hechos_1$ en la proposición (4). Pero esta solución no es satisfactoria, dado que en ese caso "*tû-tû*" tendría dos significados diferentes, y el argumento basado en (3) y (4) –al efecto de que una persona que ha ingerido la comida preparada para el cacique debe ser sometida a la ceremonia de purificación– no sería lógicamente válido en virtud de la falacia de *quattuor terminorum*. La segunda opción es entender "*tû-tû*" como referido únicamente a $hechos_1$; esto, sin embargo, no sirve, dado que haría que la proposición (3) fuese analíticamente vacía:

(3)* Si una persona *x* ha ingerido la comida preparada para el cacique, existe el estado de cosas donde *x* ha o bien ingerido la comida del cacique, o bien ha matado un animal tótem, o ha encontrado a su suegra, etc.

Similarmente, si uno afirma que el significado de "*tû-tû*" es $hechos_2$, la proposición (4) se volvería analíticamente vacía. Por lo tanto, Ross concluye, "*tû-tû*" no tiene referencia semántica.

Al mismo tiempo, Ross afirma que el uso de tales conceptos semánticamente vacíos puede ser útil como un método eficiente de presentación de reglas (jurídicas). Asumamos que en la cultura de los Noît-cif, estar "*tû-tû*" no sólo

2 Ross 1976: 8–9. Para la versión inglesa, véase Ross 1957: 812.

3 Ross 1976: 13–14. Parala versión inglésa, véase Ross 1957: 814.

requiere someterse al proceso de purificación, sino también vuelve no apta a la persona para el combate así como para la caza. En consecuencia, además de las proposiciones (1)–(4), las siguientes dos reglas son válidas:

(5) Si una persona *x* está *tû-tû*, *x* no está apta para el combate.

(6) Si una persona *x* está *tû-tû*, *x* no está apta para la caza.

Ahora bien, la ausencia del concepto de "*tû-tû*" haría más complejo al (la parte relevante de) sistema jurídico Noît-cif, dado que los contenidos de las proposiciones (1)–(6) serían:

(1)^a Si una persona *x* ha encontrado a su suegra, *x* deberá ser sometida a la ceremonia de purificación.

(1)^b Si una persona *x* ha encontrado a su suegra, *x* no está apta para el combate.

(1)^c Si una persona *x* ha encontrado a su suegra, *x* no está apta para la caza.

(2)^a Si una persona *x* ha matado a un animal tótem, *x* deberá ser sometida a la ceremonia de purificación.

(2)^b Si una persona *x* ha matado a un animal tótem, *x* no está apta para el combate.

(2)^c Si una persona *x* ha matado a un animal tótem, *x* no está apta para la caza.

(3)^a Si una persona *x* ha ingerido la comida preparada para el cacique, *x* deberá ser sometida a la ceremonia de purificación.

(3)^b Si una persona *x* ha ingerido la comida preparada para el cacique, *x* no está apta para el combate.

(3)^c Si una persona *x* ha ingerido la comida preparada para el cacique, *x* no está apta para la caza.

De esta forma, seis proposiciones se vuelven nueve proposiciones diferentes. En los sistemas jurídicos actuales más complejos, la utilización de dichos conceptos "semánticamente vacíos" como "*tû-tû*" puede incluso ser más ventajosa. Por ejemplo, Ross examina el concepto de propiedad. En cualquier sistema jurídico, hay muchas maneras de adquirir propiedad (compra, herencia, prescripción adquisitiva, ejecución, ganar una apuesta, trueque, ganarla, etc.), así como muchas consecuencias de ser propietario (el derecho de usar, vender, consumir, alterar, compartir, permutar, transferir, regalar, destruir, etc.). El concepto de propiedad –o cualquier otro vínculo que intermedia entre diferentes estados de cosas– es simplemente una forma eficiente de estructurar y presentar normas jurídicas. Sin embargo, esto cambia poco cuando se trata de identificar la referencia semántica del término "propiedad" – esta es "una palabra desprovista de cualquier significado" del mismo modo que "*tû-tû*", "derecho", "deber" o "pretensión".

2 TODO CONCEPTO ES *TÛ-TÛESCO*

En esta sección, es mi intención argumentar que el argumento de Ross, relativo a que "*tû-tû*" es semánticamente vacío, es defectuoso. Consideremos uno de los conceptos que Ross cree que tiene referencia semántica, por ejemplo "animal tótem". Asumamos además que –en la cultura de los Noît-cif– las siguientes proposiciones son verdaderas:

(7) Si *x* es un león, entonces *x* es un animal tótem.

(8) Si *x* es un tigre, entonces *x* es un animal tótem.

(9) Si *x* es un animal albino, entonces *x* es un animal tótem.

(10) Si *x* es un animal tótem, entonces *x* debe ser adorado a través de sacrificios.

Ahora bien, la estrategia de Ross para establecer la "vacuidad semántica" de "*tû-tû*" podría ser usado para argumentar la falta de referencia semántica del término "animal tótem". Es suficiente asumir que $hechos_3$ representa el estado de cosas en el cual *x* es un león, o un tigre, o un animal albino, y $hechos_4$ representa el estado de cosas en el cual es requerido adorar a través de sacrificios a *x*. Ahora bien, si uno afirma que el término "animal tótem" debe ser entendido como una referencia a $hechos_4$ en las proposiciones (7) – (9), y como una referencia a $hechos_3$ en la proposición (10), uno no podría llegar nunca a la conclusión de que un león, tigre o animal albino en particular deba ser adorado a través de sacrificios (debido, por supuesto, a la falacia de *quattuor terminorum*); si, por otra parte, la referencia semántica de "animal tótem" fuese fijada como $hechos_3$, las proposiciones (7) – (9) se volverían "analíticamente vacías"; y si la referencia fuera $hechos_4$, la proposición (10) sería "analíticamente vacía".

Esta línea de argumentación puede ampliarse hasta incluir *cualquier* predicado (e incluso un nombre propio, si uno aplica el procedimiento de Quine de traducir nombres propios a predicados).[4] Observemos que la demostración de Ross de que un concepto determinado no tiene referencia semántica se hace posible vía aceptar simultáneamente dos afirmaciones:

(a) un (parcial) postulado de significado, como "Si una persona *x* ha ingerido la comida preparada para el cacique, *x* está *tû-tû*";

(b) una norma en la cual el término bajo consideración aparece en la descripción de un estado de cosas que provoca la aplicación de la norma, como en "Si una persona *x* está *tû-tû*, *x* debe ser sometida a la ceremonia de purificación".

Suponiendo que uno siempre puede identificar un postulado de significado (parcial) para cada término, la posibilidad de llevar a cabo el argumento de Ross – referido a que el término no tiene referencia semántica– depende de la

4 Cf. Quine 1948: 21–38.

existencia de una norma en la cual el término aparezca en la descripción de un estado de cosas que provoca la aplicación de la norma. Esto es verdad también para los conceptos que –a diferencia de "*tû-tû*" o "animal tótem"– son asimismo utilizados en contextos extra-jurídicos, extra-morales y extra-religiosos. Consideremos el término "comida"; un postulado de significado parcial para el término es, por ejemplo, "Si *x* es un mango, entonces *x* es comida". Ahora bien, basta con que exista una norma social tal como "Si *x* es comida, entonces *x* debe ser compartida entre los miembros de la comunidad", para llegar a la conclusión de que "comida" no tiene referencia semántica.

(Una nota al margen: la confusión inherente al argumento de Ross es claramente visible cuando uno considera el estatus epistémico de los dos tipos de proposiciones que él considera en el ejemplo de "*tû-tû*". Los postulados de significado, tales como "Si una persona *x* ha ingerido la comida preparada para el cacique, *x* está *tû-tû*", son enunciados analíticos en el sentido de que son verdaderos en todos los mundos posibles. Las normas, por otra parte, como "Si una persona *x* está *tû-tû*, *x* deberá ser sometida a la ceremonia de purificación", son contingentes, esto es, sólo se sostienen en algunos mundos posibles. Debido a las limitaciones de espacio, no seguiré esta línea de crítica; parece, sin embargo, que el error de Ross yace en confundir la intensión de un término con su extensión).

Nuestras consideraciones hasta ahora revelan que no existe diferencia *lógica* entre "*tû-tû*" y, potencialmente al menos, cualquier otro predicado. Así, la conclusión de Ross de que conceptos como "*tû-tû*", "obligación", "propiedad" o "derecho" carecen de referencia semántica puede ser fácilmente aplicada a *cualquier término*. Esto es, por supuesto, altamente paradójico. Ross en ningún lugar sugiere que su análisis debilita completamente el concepto de referencia semántica. Por el contrario: trata de mostrar que mientras algunos términos (como "cacique", "comida" o "ceremonia de purificación") tienen referentes perfectamente bien definidos, otros conceptos –"*tû-tû*", "propiedad", etc.– son meramente dispositivos de presentación: simplifican la estructura del sistema jurídico, pero no llevan bagaje ontológico.

Este, a la larga, es el objetivo de Ross: trata de establecer una pretensión metafísica al efecto de que algunos conceptos jurídicos ("propiedad", "derecho" u "obligación") no refieren a ninguna entidad existente. Sin embargo, como hemos visto, esto no puede ser alcanzado a través de meros medios lógicos, desde que es posible mostrar –de la misma forma– que cualquier concepto, que cumple ciertos criterios (por ejemplo, aparece en la descripción de un estado de cosas que provoca la aplicación de una norma jurídica), no refiere a una entidad existente. En otras palabras, la pretensión de que algunos conceptos no tienen referencia semántica mientras que otros sí la tienen, es *pre-lógica*: está determinada por la ontología elegida. Por ejemplo, Ross parece asumir que conceptos

como "cacique", "comida", "animal tótem" o "la ceremonia de purificación" refieren a algo, mientras que "*tû-tû*" u "obligación" no lo hacen. A la luz de esto, creo que la mejor forma de reconstruir el argumento de Ross es decir que este intenta *defender* un cierta postura ontológica y que funciona más o menos de la siguiente manera: si uno es un adherente a una postura puramente naturalística del derecho, debe enfrentarse a una dificultad al momento de considerar algunos conceptos jurídicos como "propiedad", "obligación" o "derecho", dado que la forma en la que son usados en el discurso jurídico sugiere que refieren a algún fenómeno existente. El análisis de Ross muestra que uno puede evitar esta conclusión indeseada – es lógicamente consistente tratar los conceptos anteriormente mencionados como desprovistos de referencia semántica, y al mismo tiempo insistir en su utilidad en la estructura de cualquier sistema jurídico. Visto desde este ángulo, el argumento de Ross es una *defensa* de una cierta mirada metafísica del derecho; intenta mostrar que una metafísica tal es posible, y no que es el modo necesario de considerar fenómenos jurídicos.

3 ¿QUÉ PUEDE HACER *TÛ-TÛ*?

Ross admite que los conceptos intermediarios –como "*tû-tû*" o "propiedad"– desempeñan un papel positivo en cualquier sistema jurídico, ya que permiten una técnica más eficiente de presentación de las reglas jurídicas. Creo, personalmente, que estos conceptos hacen mucho más.

Debajo, pretendo mostrar que Ross subestima lo que *tû-tû* puede hacer; pretendo incluso atreverme a decir que sería difícil imaginar un sistema jurídico funcional sin conceptos intermediarios.

La primera función de los conceptos intermediarios es la de *aumentar la coherencia* en el sistema jurídico. Pero, ¿qué es la coherencia de un conjunto de proposiciones? La medida en cuestión se determina tomando en cuenta: (a) si el conjunto es consistente; (b) cuál es el nivel de conexiones inferenciales entre los miembros del conjunto; y (c) cuál es el grado de unificación del conjunto.[5] Un conjunto de proposiciones que es inconsistente es asimismo incoherente. Para cada conjunto consistente de proposiciones, su grado de coherencia aumenta con el aumento de las conexiones inferenciales entre las proposiciones que este contiene y su nivel de unificación. Existen conexiones inferenciales entre posiciones pertenecientes a un conjunto dado si estas pueden servir conjuntamente como premisas en esquemas de inferencia lógicamente válidos. Sucesivamente, un conjunto dado de proposiciones está unificado si no puede ser dividido en dos subconjuntos sin una pérdida sustancial de información. Es importante su-

5 Cf. Bonjour 1985, Brożek 2013.

brayar que el concepto de coherencia lógica no es un concepto binario; la coherencia es más bien una cuestión de grado.

Volvamos ahora a nuestro ejemplo inicial. El conjunto de proposiciones:

(1) Si una persona *x* ha encontrado a su suegra, *x* está *tû-tû*.

(2) Si una persona *x* ha matado a un animal tótem, *x* está *tû-tû*.

(3) Si una persona *x* ha ingerido la comida preparada para el cacique, *x* está *tû-tû*.

(4) Si una persona *x* está *tû-tû*, *x* deberá ser sometida a la ceremonia de purificación.

es coherente, ya que es consistente. El grado de su coherencia está determinado por el hecho de que existen conexiones inferenciales entre sus elementos. (1) y (4), (2) y (4), así como (3) y (4) pueden ser usadas para derivar tres nuevas proposiciones: "Si una persona *x* ha encontrado a su suegra, *x* deberá ser sometida a la ceremonia de purificación", "Si una persona *x* ha matado a un animal tótem, *x* deberá ser sometida a la ceremonia de purificación" y "Si una persona *x* ha ingerido la comida preparada para el cacique, *x* deberá ser sometida a la ceremonia de purificación". Este conjunto está asimismo unificado: si uno lo dividiera de cualquier forma (digamos, en dos conjuntos – {(1), (2)} y {(3), (4)}), uno perdería alguna información sustancial (por ejemplo, no sería ya posible derivar "Si una persona *x* ha matado a un animal tótem, *x* deberá ser sometida a la ceremonia de purificación" y "Si una persona *x* ha ingerido la comida preparada para el cacique, *x* deberá ser sometida a la ceremonia de purificación").

Comparemos ahora nuestro conjunto inicial con la siguiente alternativa, donde el concepto de "*tû-tû*" es eliminado:

(1)ª Si una persona *x* ha encontrado a su suegra, *x* deberá ser sometida a la ceremonia de purificación.

(2)ª Si una persona *x* ha matado a un animal tótem, *x* deberá ser sometida a la ceremonia de purificación.

(3)ª Si una persona *x* ha ingerido la comida preparada para el cacique, *x* deberá ser sometida a la ceremonia de purificación.

El resultante conjunto de proposiciones, incluso siendo más pequeño que el original, es mucho menos coherente. Es consistente, pero no existen conexiones inferenciales entre sus elementos, y no está unificado – uno podría dividir el conjunto de varias maneras sin ninguna pérdida de información.

Pero, ¿por qué importa la coherencia? Un análisis en profundidad de este problema excede el alcance de este breve apunte. Sin embargo, pareciera que el grado de coherencia se encuentra estrechamente correlacionado con un número de factores cognitivos. Podría decirse que un alto grado de coherencia nos permite comprender, aprender y recordar mejor el conjunto de reglas dado, y

aplicarlas de una forma más eficiente. Un sistema jurídico que fuese coherente sólo en un grado pequeño sería disfuncional, tal como ha sido ilustrado por aquellos sistemas jurídicos históricos que eran altamente casuísticos.

El segundo rol que desempeñan los conceptos intermediarios es *heurístico*, y puede ayudar a incrementar la completitud de un sistema jurídico.[6] Imaginemos que el consejo de ancianos de la tribu Noît-cif debe decidir el destino de un individuo que ha matado a un animal. Este no es un animal tótem, sino una bestia matada sólo una vez por año durante una ceremonia especial y la única fuente de carne de la dieta del cacique. Si el primitivo sistema jurídico Noît-cif no contuviese el concepto intermediario de "*tû-tû*", el consejo de ancianos debería crear una regla jurídica completamente nueva que rija para el caso en consideración; sin embargo, dado el rol esencial del concepto de "*tû-tû*" en los casos de matanza de un animal tótem y de consumo de la comida preparada para el cacique, el consejo habría tenido alguna guía para decidir el caso novel y podría haber arribado a la conclusión de que el individuo que ha cometido la matanza debe ser sometido a la ceremonia de purificación.

Consideremos otro ejemplo. De acuerdo con Ross, propiedad es sólo un concepto intermediario, un vínculo entre algunos estados de cosas y sus consecuencias jurídicas. Asumamos que en algún sistema jurídico sólo existen reglas relativas a la propiedad de cosas móviles e inmóviles, y el legislador debe considerar la introducción de un nuevo conjunto de reglas que regulen la propiedad intelectual. Es claro que el concepto existente de propiedad es útil para dicha tarea. El legislador no tiene que crear un sistema de normas completamente nuevo para la propiedad intelectual, sino trabajar dentro del marco del modelo ya existente de propiedad, sólo adaptándolo al carácter peculiar del problema bajo análisis. En otras palabras, introducir la propiedad intelectual dentro del marco existente de reglas que regulan la propiedad es diferente que diseñar una institución jurídica completamente nueva. En el primer caso, el proceso puede ser llamado adaptación – uno aprovecha las ya existentes soluciones, justificaciones y el conjunto entero de conocimiento jurídico que rodea al concepto de propiedad; en el segundo caso, sin embargo, la propiedad intelectual sería una institución construida desde cero, un conjunto de reglas esencialmente novel sin conocimiento de fondo que guíe al legislador en su esfuerzo.

De los ejemplos anteriores, debería surgir claramente que los conceptos jurídicos intermediarios tienen más que ofrecer que ser meramente una "forma de presentación" útil de las reglas jurídicas – estos desempeñan una función heurística importante. Cada vez que uno decide un caso difícil o considera regular una esfera todavía no regulada de interacciones sociales, a uno le irá mejor con conceptos similares a "*tû-tû*" que sin estos.[7]

6 Cf. Lindahl 2003: 185–200, Ashley & Brüninghaus 2003: 153–162.

7 Véase también los agudos comentarios en Sartor 2008.

* * *

Creo que las consideraciones anteriores apoyan la conclusión de que la imagen de "*tû-tû*" y otros conceptos jurídicos intermediarios, tal como ha sido delineada por Ross, es una mala caricatura. Estos conceptos son más útiles de lo que Ross imagina – no sólo generan mayor coherencia en un sistema jurídico, sino que también sirven como una herramienta heurística cuando uno se enfrenta a una situación novel o a un caso difícil. "*Tû-tû*" y conceptos similares son herramientas poderosas que le dan forma a nuestros sistemas jurídicos.

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Realistični pogled na pravo in na (s)poznavanje prava

Avtor oriše eno od oblik analitičnega pravnega realizma kot stičišče treh osnovnih tez. Po prvi tezi so razlagalne izjave v pravnem govoru pripisovalne izjave brez spoznavne vloge. Po drugi tezi je pravo skupek vplivnih norm, tj. tistih norm, ki so bile dejansko uporabljene (pri razreševanju zadev) v preteklosti in jih bodo v prihodnosti verjetno uporabila pristojna telesa. Po tretji tezi se pravne znanosti kot spoznavne dejavnosti ne sme zamenjevati s pravno stroko. Čeprav se pravna stroka udejstvuje tudi v spoznavnih dejavnostih, njeno delo sestavljajo predvsem nespoznavne dejavnosti, kakršni sta pravno razlaganje in pravotvorje. | Starejša različica tega članka je bila objavljena v *Revusu* (2013) 19 v italijanščini, francoščini in hrvaščini.

Ključne besede: pravni realizem, razlagalni skepticizem, pravna ontologija, pravna stroka, pravna znanost

Pravni realizem – ali, pravilneje, eno od oblik analitičnega pravnega realizma[1] – lahko opredelimo s priredjem treh tesno povezanih tez: ontološko tezo, razlagalno tezo in spoznavoslovno tezo.

Ontološka teza opredeljuje samo pravo; odgovarja na vprašanje, kakšna vrsta (ali skupek) danosti je pravo.

Razlagalna teza se nanaša, kot pove že ime samo, na pravno razlaganje; odgovarja na vprašanje, kakšna dejavnost je razlaganje pravnih besedil.

Spoznavoslovna teza se nanaša na pravno znanje (ali »pravno znanost«, kot se temu reče v pravoslovnem izročilu celinske Evrope); odgovarja na vprašanje, kaj tvori znanstveno védenje o pravu.

Začel bom z obravnavo razlagalne teze, saj ima ta po logiki stvari prednost pred preostalima.

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1 Tu orisana oblika pravnega realizma ima nekaj skupnih značilnosti z drugimi oblikami realizma (posebej z ameriškim in skandinavskim), a nobeni od njih ni enaka.

1 RAZLAGALNI REALIZEM

V izhodišču je treba vzpostaviti naslednje razlikovanje.[2] V pravnih okvirih imenujemo z razlaganjem (vsaj) dve različni dejavnosti, in sicer:

a) *spoznavno* razlaganje, ki z obravnavo besedila razkriva njegove mogoče (smiselne) pomene,[3] in

b) *razsodbeno* razlaganje, s katerim pravnim besedilom pripišemo določene pomene (izključujoč preostale).

Razlagalni realizem je skeptični, tj. dvomeči nauk o razsodbenem razlaganju. Po tem nauku je dejavnost pripisovanja pomena normativnim besedilom nespoznavna dejavnost – saj z razsodbenim razlaganjem ne tvorimo spoznanja, ampak tvorimo odločitev.[4]

Povedano velja tako za sodno razlaganje (to je običajna, ožja tema obstoječih naukov o razlaganju)[5] kot za dogmatično razlaganje, ki ga izvaja pravna stroka.

Ob tem je treba razločiti še razlaganje v pravem pomenu besede in pravotvorje.

1.1 Razlaganje v pravem pomenu besede

Na razlaganje pravnih besedil vplivata dve obliki nedoločnosti.

Po eni strani so normativne ubeseditve pogosto večpomenske. Z razlaganjem *in abstracto* – tj. z razlaganjem, osredinjenim na besedila – je tem mogoče pripisati več izključujočih se pomenov: normativni stavek S je mogoče razlagati tako, da izraža normo N1 ali pa normo N2.

Po drugi strani je vsaka norma ohlapna in dopušča različno razlaganje *in concreto* – tj. na dejstva osredinjeno razlaganje: glede na vsako normo se je mogoče vprašati, ali je posamični primer P znotraj ali zunaj njenega polja uporabe.[6]

Zato so razlagalne izjave – tako tiste *in abstracto* (»Normativni stavek S izraža normo N1«) kot takšne *in concreto* (»Primer P spada v polje uporabe norme

2 To je podobno Kelsnovemu razlikovanju med razlago kot a) spoznavnim dejanjem na eni strani in b) voljnim dejanjem na drugi. Glej Kelsen 1992: 82 in nasl. Ter Kelsen 1950 : Uvod.

3 »Smiselni« so tisti pomeni, ki jih je mogoče pripisati s prepričljivimi argumenti in ki jih je v dani pravni kulturi in v okvirih družbene dejanskosti mogoče sprejeti.

4 Guastini 2011b. Ta pogled dolgujem Tarellovemu nauku o razlaganju. Glej Tarello 1974 in 1980.

5 Pomembni izjemi sta Kelsnov in Tarellov nauk.

6 Moralo bi biti jasno, da so druge (in morda celo pomembnejše) oblike nedoločnosti povezane s pravnimi prazninami in z normativnimi nasprotji. Vendar se praznine in nasprotja ne porajajo pred razlaganjem, ampak iz njega šele izhajajo. V večini primerov se praznine in/ali nasprotja pokažejo z določeno razlago pravnih besedil, pri čemer lahko ob drugačni razlagi taisti praznine in/ali nasprotja izginejo.

N1«) – *pripisovalne* izjave, in ne spoznavne ali opisne izjave.[7] Tako kot stipulativna opredelitev tudi razlagalna izjava ni opis enega in edinega že obstoječega pomena. Nasprotno, razlagalna izjava tvori odločitev o izbiri enega izmed izključujočih se pomenov,[8] zato pa tudi ni resničnostno zaznamovana.

Naj mimogrede dodam, da so razlagalne odločitve pravnikov, med njimi pa odvetnikov in sodnikov, seveda odvisne od njihovih praktičnih (tj. političnih, ekonomskih, poklicnih itd.) zanimanj, predstav o pravičnem in, ne nazadnje, pojmovnih pravnodogmatičnih tvorb.

Poleg tega so pravniki, med njimi pa seveda odvetniki in sodniki, pogosto sami vir nedoločnosti pravnih besedil – kadar nedoločnost »porodijo« v besedilih, ki v običajnem sporočanju ne bi povzročala nobenih razlagalnih težav.

1.2 Pravotvorje

V splošnem pravnem jeziku navadno uporabljano izraz »razlaga« za vsa miselna opravila razlagalcev (sodnikov, odvetnikov, pravnikov na splošno itd.).

Kljub temu je mogoče hitro ugotoviti, da se pravni razlagalci – med njimi pa še posebej pravna stroka – ne ustavijo pri odločitvah o izbiri enega od izključujočih se pomenov normativnih besedil. Pomembnejše je njihovo udejstvovanje v tem, kar predlagam, da z izrazom, izposojenim pri Rudolfu von Jheringu, poimenujemo pravotvorje. S tem se nanašam na množico miselnih opravil, ki med drugimi vključuje naslednja opravila:

a) ustvarjanje normativnih in vrednostnih praznin,[9]
b) ustvarjanje vrednostnih hierarhij med normami,
c) specificiranje načel,
č) vzpostavljanje ravnovesja med nasprotnimi načeli, predvsem pa
d) tvorjenje neizraženih (tako imenovanih implicitnih) norm.[10]

7 Tu ne govorim o razlagalnih izjavah, s katerimi se zgolj poroča ali obvešča o nedoločnosti danega pravnega besedila (»Pravno besedilo B je mogoče razumeti v smislih S1 ali S2«), ampak o takšnih razlagalnih izjavah, ki problem nedoločnosti razrešijo (»Pravno besedilo B vsekakor pomeni S1«). Takšne izjave so podobni Austinovim performativom, ki ničesar ne »opisujejo«, o ničemer ne »poročajo« in niso »resnične ali neresnične« (J. L. Austin 1962: 5); te izjave opravljajo razlago kot govorno dejanje pripisovanja pomena.

8 Guastini 1997.

9 Na neki način vse praznine ustvarijo razlagalci, saj prepoznava praznine predpostavlja razlaganje: npr. po razlagi A neka pravna določila *urejajo* predmetni primer, medtem ko ga po razlagi B *ne urejajo*. Razlaga B torej ustvarja praznino, medtem ko jo razlaga A preprečuje. Ob tem je treba dodati, da so vrednostne praznine še posebej odvisne od razlagalčevih vrednostnih sodb.

10 Vsi takšni pojmi so celovito obravnavani v Guastini 2011a. Njihove značilnosti pa so, na kratko, te: a) normativna praznina pomeni odsotnost pravne ureditve nekega primera; b) vrednostna praznina pomeni odsotnost zadovoljive (in obstoj nezadovoljive) ureditve; c) vrednostna hierarhija med dvema normama je vrednostno razmerje, ki ga razlagalec ustvari s primerjalno

Ta opravila so na več načinov povezana med seboj. Tvorjenje neizraženih norm je na primer namenjeno zapolnitvi praznin in specificiranju načel. Vrednostne hierarhije so namenjene vzpostavljanju ravnovesja med nasprotnimi načeli. In tako dalje.

Če torej že razlaganje v pravem pomenu besede samo ni spoznavna dejavnost, potem še toliko bolj velja za pravotvorje, da to ni stvar spoznanja, ampak je stvar odločitve. Pravzaprav je pravotvorje pristno pravniško in/ali sodno ustvarjanje prava.[11]

2 ONTOLOŠKI REALIZEM

Pravni realizem privzema empiristično ontologijo prava. Pravo po njej ni skupek abstraktnih danosti (kakršne so norme, vrednote, pravice ali obveznosti ipd.).[12] Pravo je, nasprotno, le skupek dejstev. A kakšnih dejstev? To vprašanje zahteva razčlenjen odgovor.

2.1 Pravo kot skupek normativnih besedil

Na prvi pogled (ob površni obravnavi) se beseda pravo preprosto nanaša na normativna besedila (zakone, zakonike, ustave, podzakonske predpise), ki jih sprejmejo pravodajna telesa: tj. normativne oblasti v obliki zakonodajnih teles, ustavodajnih skupščin itd. Z drugimi besedami, pravo je skupek normativnih (predpisovalnih, usmerjevalnih) ubeseditev ali stavkov in torej neka vrsta dejstev ali, natančneje, jezikovnih danosti.

Tak pojem prava – jasno je prisoten v številnih sodobnih izrazih, npr. v izrazu razlaganje prava – je lahko, četudi se zdi nekoliko neizpopolnjen, koristen pri razjasnitvi osnovne pravne ontologije in same tvorbe pravnih norm, in sicer iz dveh razlogov:

a) prvič, ker so norme jezikovne tvorbe, in
b) drugič, ker se norme lahko porodijo le z »zakonodajnim« dejanjem (razumljenim v splošnem, vsebinskem smislu »zakona«); »Ni velelnika brez poveljevalca, ni ukaza brez ukazovalca«.[13]

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vrednostno sodbo; č) specificiranje načela pomeni, da se iz njega izvede neizraženo pravilo; d) vzpostavljanje ravnovesja med nasprotnimi načeli pomeni vzpostavitev vrednostne hierarhije med njimi; e) neizražena norma je norma, ki nima nobene uradne ubeseditve v pravnih virih, tj. norma, ki ni smiselni pomen nobenega posamičnega normativnega določila.

11 Glej Guastini 2013.

12 Mimogrede je treba dodati, da so po značilno realistični tezi deontični pojmi (kot sta obveznost, prepoved itd.) in tudi tako imenovani temeljni pravni pojmi (kot sta pravica, oblast itd.) brez vsakršnega pomenskega ozira. Glej npr. Ross (2008 in 1958a) in Olivecrona (1971).

13 Glej Kelsen 1973: 237 in 1991: 3 (kjer odzvanjajo stališča Walterja Dubislava).

Kljub temu pa normativna besedila potrebujejo razlaganje. Normativnih ubeseditev ne smemo zamenjevati z normami v pravem pomenu besede, tj. ne smemo jih zamenjevati z njihovo pomensko vsebino.[14] A kako odgovoriti na vprašanje, kaj je pravo, kadar se normativni stavek S lahko razlaga tako, da izraža bodisi normo N1 ali pa normo N2? Je pravo N1 ali N2?

Ob povedanem moramo zaključiti, da pravo niso pravna besedila; ta so, ne nazadnje, samo pravni vir.[15] Pravo ni skupek normativnih stavkov, ampak je skupek normativnih pomenov (tj. norm v ožjem pomenu besede), ki jih razlagalci dejansko pripišejo pravnim besedilom, bodisi z razlaganjem v pravem pomenu besede ali pa pri pravotvorju.[16]

2.2 Pravo kot skupek norm

Besede pravo ob globlji obravnavi ne smemo uporabljati za normativna besedila, ampak za normativne pomene: tj. skupek norm, ki jih razlagalci dejansko »izpeljejo« ali »ustvarijo« iz normativnih ubeseditev.

Tak skupek vključuje izražene norme (tj. pomene, ki jih lahko smiselno pripišemo obstoječim normativnim ubeseditvam) in neizražene norme (tj. tiste, ki jih ustvarijo razlagalci).

V tem je pravo odvisno od prepleta dveh različnih dejavnosti: a) oblikovanja normativnih besedil in b) pravnega razlaganja in pravotvorja. Pravo ne obstaja brez besedil, ki potrebujejo razlago (prva ontološka teza), poleg tega pa pravo ne obstaja niti brez razlaganja (druga ontološka teza). V nekem smislu je torej pravo skupek razlagalnih praks.

Ob tem izražajo pravna stroka in sodniki vsaj skozi čas nasprotna stališča: številne normativne ubeseditve so predmet izključujočih se razlag; že sam po sebi je sporen obstoj vsake neizražene norme (v danem pravnem sistemu), saj takšne norme nimajo nobene uradne ubeseditve. Različne razlage in tvorbe

14 Prav zaradi tega smo rekli, da ima po logiki stvari razlagalni realizem prednost pred ontološkim realizmom.

15 Glej Gray (1948: 124 in nasl. in 170): »Konec koncev zakonodajalec izgovarja le besede; sodiščem pa pritiče, da povejo, kaj te besede pomenijo; tj. ona morajo razlagati zakonske akte. […] In to je razlog, da zakonske akte, zakone, obravnavamo kot vir Prava, ne pa kot del Prava samega. […] Sodišča mrtvim besedam zakona dajejo življenje.«; »Lahko bi pozivali, da če je Pravo neke družbe skupek zakonov, ki jih sodišča uporabljajo, potem bi zakone morali razumeti kot del prava samega in ne zgolj kot Pravni vir; da jih morajo sodišča uporabljati neposredno, ne pa da jih obravnavajo kot vodnjak, iz katerega sodišča sama pridobivajo svoja pravila. […] In če bi se zakoni razlagali sami, bi to držalo; vendar se zakoni ne razlagajo sami; njihov pomen razglašajo sodišča in *ravno s tistim pomenom, ki ga razglasijo sodišča, ne pa s katerim drugim pomenom, se jih družbi naloži kot Pravo.*«

16 Glede ontologije pomenov bom rekel le, da je pomen nekega stavka drugi, domnevno sopomenski stavek. V tem pogledu so tudi pomeni jezikovne danosti.

privedejo do različnih skupkov norm, s tem pa do (deloma) različnih pravnih sistemov.

Ena od usmeritev v sodni praksi na primer kaže, da pravni sistem vključuje izražene norme N1, N2, N3 in neizražene norme N4 in N5. Druga usmeritev v sodni praksi medtem kaže, da pravni sistem vključuje izražene norme N1 in N2 (ne pa N3), neizražene norme N4 in N5, dodatno pa še neizraženo normo N6. V takem primeru imamo pred sabo dva različna pravna sistema: {N1, N2, N3, N4, N5} in {N1, N2, N4, N5, N6}.

Na mestu sta torej naslednji vprašanji: Kaj je v teh okoliščinah pravo? Kateri od teh dveh sistemov je pravo? Da bi dobili odgovor, se moramo spustiti na najglobljo raven obravnave, ki sovpada s tretjim pojmom prava.

Preden se mu posvetimo, naj poudarim, da je drugi pojem prava – čeprav nas ne zadovoljuje – zaslužen za prikaz, da prava ne ustvarja le zakonodajalec. V pravni praksi najdemo ob pravodajnih oblasteh tudi razlagalce, pravo pa se v nekem smislu torej porodi kot plod zakonodaje in razlaganja. Prava si ni mogoče predstavljati brez razlagalcev (tj. pravnikov), tako kot si religije ni mogoče predstavljati brez duhovnikov ali teologov.

2.3 Pravo kot skupek vplivnih norm

Na tretji, najgloblji ravni obravnave se beseda pravo nanaša na skupek vplivnih norm, tj. norm, ki so bile dejansko uporabljene (pri razreševanju zadev) v preteklosti in jih bodo v prihodnosti verjetno uporabila pristojna telesa – sodniki, upravni uradi, pa tudi najvišji ustavni organi (vsaj kar zadeva ustavne norme).[17]

Z drugimi besedami: kljub temu, da obstajajo različne pravne razlage in tvorbe, je mogoče (skoraj) vedno najti nekaj sočasnih vodilnih razlag oz. tvorb, ki so kot splošno sprejete udejanjano pravo (angl. *law in action*).

Tu se lahko vrnemo k prejšnjemu (abstraktnemu) primeru. Po prvi usmeritvi v sodni praksi je pravni sistem sestavljen takole: {N1, N2, N3, N4, N5}; po drugi usmeritvi v sodni praksi pa je tak: {N1, N2, N4, N5, N6}. Da bi ugotovili, katere norme so dejansko pravo, moramo preveriti, katere od teh norm imajo resnično vpliv. Precej mogoče je, da se ob empirični obravnavi vodilnih usmeritev v sodni praksi izkaže, da imajo vpliv npr. norme N1, N2, N4, N5 in N7, normi N3 in N6 pa ne.

Skratka, besedo pravo je mogoče razumeti na tri različne načine:

(i) kot skupek normativnih *besedil*, ki so jih sprejele pravodajne oblasti,

(ii) kot skupek (izraženih in neizraženih) *norm*, ki jih oblikujejo razlagalci,

(iii) kot skupek (izraženih in neizraženih) *norm z dejanskim vplivom*.

To nas vodi k spoznavoslovni tezi.

17 Očitni sklic je Ross 1958a. Glej pa tudi Bulygin 1991.

3 SPOZNAVOSLOVNI REALIZEM

Na mestu je še eno uvodno razlikovanje. V pravoslovju celinske Evrope se navadno delo pravnikov imenuje pravna znanost, pravna doktrina ali pravna dogmatika. Vendar je vse te izraze mogoče razumeti, kot da se nanašajo na (vsaj) dve vrsti miselnega udejstvovanja, ki ju je treba razlikovati:

(i) na eni strani je to *pravna znanost* v pravem pomenu besede – tj. »pravoslovna znanost« (J. Austin),[18] »znanost o pravu« (Kelsen)[19] – kot znanstveni (nepristranski, nevrednotenjski) opis tistega prava, ki ima dejansko vpliv;

(ii) na drugi strani imamo *pravno stroko* (doktrino oz. dogmatiko), tj. običajno učeno obravnavo prava, še posebej tistih normativnih besedil, ki jih štejemo za uradne pravne vire.

Zaradi tega vključuje spoznavoslovni realizem dve različni tezi – prva je opisna teza o dejanski pravni stroki, druga pa predpisovalna teza o znanstvenem (s)poznavanju prava.

3.1 Pravna stroka

Glede na vse povedano dejanske prakse pravnikov ne moremo šteti za pristno znanstveno udejstvovanje, saj njihove izjave (povečini) niso spoznavne izjave in niso resničnostno zaznamovane. Razlagalne izjave namreč niso opisne izjave, ampak so pripisovalne izjave; tiste izjave, ki ubesedujejo neizražene norme, pa so skrivoma predpisovalne.[20] Pravna stroka torej prava ne opisuje, ampak sodeluje pri njegovem ustvarjanju.

Po klasičnem pogledu analitične filozofije prava je pravna stroka plod metajezikovnega udejstvovanja, katerega predmet je jezik pravodajalcev.[21] Čeprav privlačna, je takšna slika o pravni stroki nekoliko zavajajoča. Jezik pravodajalcev in jezik razlagalcev sta dejansko v stalnem osmotskem procesu. Ni mogoče reči, da se jezik pravnikov zgolj »nanaša« na jezik pravodajalcev. Pravniki, nasprotno, oblikujejo in bogatijo predmet svojega raziskovanja, tako kot kak violinist, ki v skladbo, ki jo izvaja, vključuje apokrifne note.

Razlaganje in pravotvorje nista enaka pravnemu (s)poznavanju, ampak sta del pravne politike.[22] Dejansko tvorita enega od (bistvenih) delov samega predmeta pravnega (s)poznavanja v pravem pomenu te besede.

18 Austin 1995: 14, 112 in nasl.

19 Kelsen 1992: 7 in 1966: 3. pogl.

20 Pravim »skrivoma«, ker se take izjave navadno predstavljajo kot izjave o obstoju norm – »Neizražena norma N pripada pravnemu sistemu S (oz. v njem obstaja)« –, čeprav gre za pristne *normativne* ubeseditve, tj. ubeseditve povsem »novih« norm.

21 Bobbio 2011.

22 Glej Kelsen 1992: 82 in Ross 1958: 46.

Kot bomo videli v nadaljevanju pa pravniki kljub temu prispevajo tudi k (s)poznavanju prava.

3.2 Pravna znanost

V skladu s tukaj orisano obliko analitičnega pravnega pozitivizma pri pravni znanosti ne gre za opisovanje abstraktnih danosti, kakršne so obveznosti, pravice in/ali deontične zaznamovanosti ravnanj (»Obvezno je *p*«, »Prepovedano je *q*«) in podobno. Zato tudi izjave pravne znanosti ne morejo biti deontične izjave, ki – kakor odmev[23] – ponavljajo norme, na katere se nanašajo.[24]

Pravna znanost v pravem pomenu besede lahko privzame tri različne oblike, ustrezne trem pojmom prava, ki smo jih predstavili v enem od prejšnjih razdelkov.

(i) *Spoznavno razlaganje*. Ko sem prej govoril o razlaganju, sem obravnaval razsodbeno razlaganje – pripisovanje izbranega pomena določenemu pravnemu besedilu. Seveda je razsodbeno razlaganje običajno in najpomembnejše opravilo pravne stroke. Vseeno pa ta opravlja tudi druga opravila, med katerimi je predvsem spoznavno razlaganje, s katerim prepoznavamo vse mogoče pomene nekega normativnega besedila – tj. pomene, ki jih je temu dopustno pripisati v skladu z deljenimi jezikovnimi (sintaktičnimi, semantičnimi in pragmatičnimi) pravili, sprejetimi metodami pravnega razlaganja in obstoječimi pravnimi pogledi – ne da bi pri tem izbrali katerega koli od mogočih pomenov (»Besedilo B je mogoče razlagati v smislu S1 ali S2«).

Spoznavno razlaganje prispeva k poznavanju prava kot skupka normativnih besedil, saj razkriva večpomenskost normativnih ubeseditev in ohlapnost norm.[25]

(ii) *Poustvarjanje usmeritev v sodni praksi.* Če pravo razumemo (ne kot skupek normativnih besedil, ampak) kot skupek izraženih in neizraženih norm, potem obravnava, poustvarjanje in opis razlagalnih in pravotvornih usmeritev med sodniki in pravniki očitno prispevajo k poznavanju prava.

Tudi to je v pravni stroki običajna praksa, ki prispeva k poznavanju prava, saj gre za neizogiben prvi korak pri prepoznavanju vodilnih usmeritev v sodni praksi, kar pa je hkrati neizogiben prvi korak pri prepoznavanju tistega prava, ki ima dejansko vpliv.

(iii) *Opisovanje vplivnih norm*. Če pravo razumemo kot skupek norm z resničnim vplivom, potem spoznavanje in opisovanje prava zahtevata prepoznavo

23 Scarpelli 1967.

24 To je v nasprotju s Kelsnovim pogledom. Glej npr. Bulygin 1982.

25 Spoznavne razlagalne izjave je, mimogrede, mogoče razumeti bodisi kot napovedi prihodnjih razlagalnih odločitev pristojnih teles ali pa kot razlagalne usmeritve, ki naj takšne prihodnje odločitve vodijo z oženjem kroga dopustnih pomenov predmetnega besedila.

tistih norm, ki jih sodniki in druga telesa dejansko uporabljajo.[26] (Jasno je, da lahko pravna znanost ob odsotnosti vplivne norme za predmetni primer zgolj opozori na obstoj nasprotij v sodni praksi.)

Mogoče se je strinjati s prevladujočim mnenjem, da pravna znanost podaja izjave o normah, tj. resnične ali neresnične izjave, katerih predmet so norme.[27] Ob tem pa je vendarle treba dodati dve pojasnili: prvo se nanaša na logično obliko takšnih izjav, drugo pa na njihove pogoje resničnosti.

(a) Kot sem že trdil drugje, izjave o normah niso deontične izjave, ki normativno zaznamujejo ravnanja.[28] Gre za izjave o obstoju (vplivnih) norm. »Pravni« obstoj neke norme pomeni, da ta pripada določenemu pravnemu sistemu. Zato so izjave o normah ne glede na njihovo dejansko skladenjsko obliko izjave, ki zatrjujejo pripadnost (vplivnih) norm določenemu pravnemu sistemu: »Norma N pripada pravnemu sistemu S«.

(b) Izjava o normi je resnična, če in samo če bo ta norma verjetno uporabljena v prihodnjih odločitvah. Zato je izjave o normah mogoče razumeti kot izjave o bodočih negotovih dejstvih, tj. kot napovedi prihodnje uporabe norm, na katere se izjave nanašajo.

—***Zahvala.***— Zelo sem hvaležen Miku Karlssonu in Stanleyju Paulsonu za komentarje na prvi osnutek tega članka. Zahvaljujem se tudi anonimnima ocenjevalcema.

Iz angleščine prevedla
Tilen Čuk in Andrej Kristan.

26 Glej še enkrat Ross 1958a: 2. pogl. In Bulygin 1991.

27 Glej npr. Bulygin 1982.

28 Guastini 2000.

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Riccardo Guastini*

A Realistic View on Law and Legal Cognition

The author outlines one form of analytical legal realism as the junction of three main theses. According to its first main thesis, interpretive sentences in legal discourse are ascriptive sentences with no cognitive function. According to the second thesis, the law is the set of norms in force, i.e. the norms actually applied (that is, used in deciding cases) in the past and predictably applied in the future by law-applying agencies. The third thesis is that legal science as a cognitive activity must not be confused with legal scholarship. Although legal scholars do engage in cognitive activities, their work mainly consists in non-cognitive activities such as interpretation and legal construction. | An earlier version of this statement was published in *Revus* (2013) 19 in Italian, French, and Croatian.

Key words: legal realism, interpretive scepticism, ontology of law, legal scholarship, legal science

Legal realism – or, better, one form of analytical legal realism[1] – can be characterized as the conjunction of three strictly connected theses: ontological, interpretive, and epistemological.

The ontological thesis is about the law itself – it answers the question "What kind of entity (or set of entities) is the law?".

The interpretive thesis, as the name suggests, is about legal interpretation – it answers the question "What kind of activity is interpreting legal texts?".

The epistemological thesis is about legal knowledge (or "legal science", as it is usually labelled in continental jurisprudence) – it answers the question "In what does the scientific knowledge of law consist?".

I shall begin by discussing the interpretive thesis since it is logically prior to the others.

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1 The form of legal realism I am going to sketch shares some tenets with other forms of realism (the American and the Scandinavian, in particular), but does not coincide with any of them.

1 INTERPRETIVE REALISM

A preliminary distinction is necessary.[2] In the legal domain, "interpretation" is the name of (at least) two different activities, that is:

(a) "cognitive" interpretation, which amounts to the analysis of a text in view of clarifying its possible (plausible) meanings,[3] and

(b) "adjudicative" interpretation which consists in ascribing a definite meaning to a text (rejecting the others).

Interpretive realism is a sceptical theory of adjudicative interpretation. It asserts that ascribing meaning to normative texts is a non-cognitive activity – not a matter of cognition, but rather a matter of decision[4]

This holds for judicial interpretation (which is the usual, limited, subject of current theories of interpretation[5]) as well as for "dogmatic" interpretation, that is, the interpretation put forward by legal scholars.

Moreover, a further distinction between interpretation strictly so called and legal construction is in order.

1.1 Interpretation strictly so called

Legal texts are affected by a double form of indeterminacy.

On the one hand, normative formulations are often ambiguous. Therefore they admit different competing interpretations "in abstracto" (or text-oriented): the normative sentence S can be interpreted as expressing either a norm N1 or a norm N2.

On the other hand, each norm is vague, admitting of different competing interpretations "in concreto" (or fact-oriented): given any norm, we may ask whether the individual case C is included or excluded from its scope.[6]

This is why interpretive sentences – "in abstracto" ("The normative sentence S expresses the norm N1") as well as "in concreto" ("The case C falls within the

2 The following distinction echoes Kelsen's distinction between interpretation understood as (a) an act of cognition and (b) an act of will, respectively. See Kelsen 1992: 82 f. & Kelsen 1950: Preface.

3 A "plausible" meaning is a meaning that can be maintained with persuasive arguments and, as a matter of sociological fact, can be accepted within a given legal culture.

4 Guastini 2011b. This view is indebted to Tarello's theory of interpretation. See Tarello 1974 & 1980.

5 Kelsen's and Tarello's theories are two remarkable exceptions.

6 There should be no need to say that further (and maybe even more important) forms of indeterminacy depend on legal gaps and normative conflicts. Gaps and conflicts, however, do not forerun interpretation – they follow it. In most cases legal texts disclose gaps and/or conflicts in the light of certain interpretations, while a different interpretation might make the gaps and/or the conflicts disappear.

scope of the norm N1") – are not cognitive or descriptive, but *ascriptive* sentences.[7] Just like stipulative definitions, they are not descriptions of the one and only preexisting meaning, but decisions about competing meanings.[8] Therefore, they have no truth-value.

By the way, it is a matter of course that interpretive decisions of jurists, lawyers, and judges are conditioned by their practical (for instance, political, economic, professional, etc.) interests and ideas of justice, as well as – last not least – the conceptual constructions of legal dogmatics.

Moreover, jurists, lawyers, and judges often are the very source of the indeterminacy of legal texts, in the sense that they "put" indeterminacy in texts that would not raise any interpretive problems at all in ordinary conversation.

1.2 Legal construction

In juristic common parlance the term "interpretation" usually applies to the bulk of the intellectual operations accomplished by interpreters (judges, lawyers, jurists, etc.).

Nevertheless, it is quite easy to realize that interpreters – and above all legal scholars – do not confine themselves to deciding the meanings of normative texts. Most importantly, they engage in what, borrowing an expression from Rudolf von Jhering, I propose to call "legal construction". By this phrase I mean a set of intellectual operations which include (*inter alia*):

(a) the creation of normative and axiological gaps;[9]

(b) the creation of axiological hierarchies among norms;

(c) the specification of principles;

(d) the balancing of conflicting principles; and

(e) most of all, the construction of unexpressed (so-called "implicit") norms.[10]

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7 I refer to those interpretive sentences that do not simply report or take notice of the indeterminacy of a given legal text ("The legal text T may be understood in the senses S1 or S2"), but resolve it ("The legal text T definitely means S1"). Such sentences resemble J. L. Austin's performatives, that 'do not "describe" or "report" or constate anything at all, are not "true or false"' (J. L. Austin 1962: 5) – they perform the linguistic act of meaning-ascription, i.e., interpretation.

8 Guastini 1997.

9 All gaps, in a sense, are "created" by interpreters since the identification of a gap presupposes interpretation: e.g., according to interpretation A the case at hand *is* regulated by some legal provision, while according to interpretation B the same case *is not*. So, interpretation B "creates" a gap, while interpretation A prevents it. By the way, axiological gaps, in particular, entirely depend on interpreters' value-judgments.

10 All such concepts are fully analyzed in Guastini 2011a. But a short characterization runs as follows: (a) a normative gap is the lack of any legal regulation of a case; (b) an axiological gap

Various connections exist among such different operations. For instance, the construction of unexpressed norms is aimed at filling gaps and specifying principles. Axiological hierarchies are aimed at balancing conflicting principles. And so forth.

Now, if interpretation properly understood is not a cognitive activity, legal construction is *a fortiori* the output not of cognition, but of decision. In fact, legal construction amounts to genuine juristic and/or judicial law-creation.[11]

2 ONTOLOGICAL REALISM

Legal realism endorses an empiricist ontology of law. Law is not a set of abstract entities (such as norms, values, rights and obligations, or the like).[12] Rather, it is merely a set of facts. What kind of facts, however? This question requires an articulate answer.

2.1 Law as a set of normative texts

At a first glance (at a surface level of analysis) the word "law" simply refers to the normative texts (statutes, codes, constitutions, regulations) enacted by law-giving agencies: such normative authorities as the legislators, the framers of the constitution, and so on. In other words, "law" denotes a set of normative (prescriptive, directive) formulations or sentences, hence facts of a certain kind – namely, language-entities.

Such a concept of law – well reflected in many current expressions, such as "interpreting the law" – although somewhat unsophisticated may be useful in view of clarifying both the basic ontology and the very genesis of legal norms, since:

(a) in the first place, norms are but language-entities; and

(b) in the second place, norms can only come into the world by means of acts of "legislation" (in the generic, material, sense of "legislating") – 'No imperative without an imperator, no command without a commander'.[13]

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is the lack of a satisfactory regulation (and the presence of an unsatisfactory one); (c) an axiological hierarchy between two norms is a value-relationship created by interpreters by means of a comparative value-judgement; (d) specifying a principle amounts to deriving from it an unexpressed rule; (e) balancing conflicting principles consists in establishing an axiological hierarchy between them; (f) an unexpressed norm is a norm which lacks any official formulation in the sources of law, not being a plausible meaning of any particular normative sentence.

11 See Guastini 2013.

12 By the way, according to a distinctive realistic thesis, deontic concepts (such as obligation, prohibition, etc.) as well as so-called "fundamental legal concepts" (such as right, power, etc.) are deprived of any semantic reference. See, e.g., Ross 1957 & 1958b and Olivecrona 1971.

13 See Kelsen 1973, 237 & 1991: 3 (echoing a thesis of Walter Dubislav).

Nonetheless, normative texts obviously require interpretation. Normative formulations must not be confused with norms properly understood, that is, their meaning contents.[14] If the normative sentence S can be interpreted as expressing either the norm N1 or the norm N2, what is the law? N1 or N2?

Thus we are obliged to say that legal texts are not "the law": after all, they are but sources of law.[15] Law is not a set of normative sentences, but the set of normative meanings (that is, norms strictly understood) which are actually ascribed to legal texts by interpreters, either by means of interpretation in the strict sense or by means of legal construction.[16]

2.2 Law as a set of norms

This is why, at a deeper level of analysis, we have to use the term "law" to denote not normative texts, but rather normative meanings: the set of norms which interpreters actually "extract" or "construe" from normative formulations.

Such a set includes both the class of expressed norms (that is, the norms which are meanings plausibly assignable to the existing normative formulations) and the class of unexpressed norms (that is, the norms construed by interpreters).

From this standpoint, law depends on the combination of two different activities: (a) the formulation of normative texts, and (b) the interpretation and construction of such texts. There is no law without texts to be interpreted (first ontological thesis), but moreover there is no law without interpretation (second ontological thesis). In a sense, law is a set of interpretive practices.

However, legal scholars and judges – at least diachronically – often disagree: many normative formulations are subject to competing interpretations; the existence (in the legal system) of any unexpressed norm is intrinsically controversial, since such a norm lacks any official formulation. Different interpretations

14 This is the reason why interpretive realism is logically prior to ontological realism.

15 See Gray (1948: 124 s & 170): 'After all, it is only words that the legislature utters; it is for the courts to say what these words mean; that is it is for them to interpret legislative acts. /.../ And this is the reason why legislative acts, statutes, are to be dealt with as sources of Law, and not as a part of the Law itself. /.../ The courts put life into the dead words of the statute»; «It may be urged that if the Law of a society be the body of rules applied by its courts, then statutes should be considered as being part of the Law itself, and not merely as being a source of the Law; that they are rules to be applied by the courts directly, and should not be regarded as fountains from which the courts derive their own rules. /.../ And if statutes interpreted themselves, this would be true; but statutes do not interpret themselves; their meaning is declared by the courts, and *it is with the meaning declared by the courts, and with no other meaning, that they are imposed upon the community as Law*'.

16 As to the ontology of meanings, I shall confine myself to say that the meaning of a sentence is nothing but another sentence assumed to be synonymous with the first one. From this point of view, meanings too are linguistic entities.

and constructions bring forward different sets of norms, hence (partially) different legal systems.

For example, according to a certain jurisprudential trend, the legal system includes, say, the expressed norms N1, N2, N3, and the unexpressed norms N4 and N5. Whereas, according to a different jurisprudential trend, the same system includes the expressed norms N1, N2 (not N3), and the unexpressed norms N4, N5, but also N6. Thus, we are facing to two distinct legal systems: {N1, N2, N3, N4, N5}, {N1, N2, N4, N5, N6}.

Therefore we should ask: what is the law in such circumstances? Which of these two systems is the law? To answer such a question one must climb down to the deepest level of analysis, corresponding to a third concept of law.

Nonetheless, this second concept of law – although still unsatisfactory – has the merit of accounting for the fact that the law is not produced by "legislators" only. In legal practice, side by side with law-giving authorities, one finds interpreters too, and the law in a sense arises from the interaction of legislators and interpreters. One cannot even imagine the law without interpreters (namely, jurists) as well as one cannot imagine a religion without priests or theologians.

2.3 Law as a set of norms in force

At the third, deepest, level of analysis, the term "law" refers to the set of norms in force, that is, the norms actually applied (that is, used in deciding cases) in the past and predictably applied in the future by law-applying agencies – judges, administrative agencies, as well as supreme constitutional organs (as far as constitutional norms are concerned).[17]

In other words, notwithstanding the existing different interpretations and constructions, one can (almost) always find a number of synchronically leading interpretations and constructions generally accepted – the "law in action", as we may call it.

Let us go back to the preceding (abstract) example. According to the first jurisprudential trend the content of the legal system is {N1, N2, N3, N4, N5}; according to the second it is {N1, N2, N4, N5, N6}. To identify what the law is in fact, we have to ascertain which of the norms in question is in force. And it is quite possible that the empirical analysis of the leading jurisprudential trends shows, for example, that N1, N2, N4, N5 as well as N7 are in force, while N3 and N6 are not.

Summing up, by the word "law" one can understand three different things:

(i) the set of the normative *texts* enacted by the lawgiving authorities;

17 The obvious reference is to Ross 1958a. See however Bulygin 1991.

(ii) the set of (expressed and unexpressed) *norms* formulated by interpreters;

(iii) the set of (expressed and unexpressed) norms actually *in force*.

This leads us to the epistemological thesis.

3 EPISTEMOLOGICAL REALISM

A preliminary distinction is in order.

In the common usage of continental jurisprudence, the ordinary juristic work is frequently labelled as "legal science", "legal doctrine", or "legal dogmatics". But all such phrases can be understood as pointing to (at least) two quite different intellectual enterprises which ought to be distinguished:

(i) on the one hand, *legal science* properly so called – the "science of jurisprudence" (J. Austin[18]), the "science of law" (Kelsen[19]) – that is, the scientific (neutral, value-free) description of the law in force;

(ii) on the other hand, what I shall call *legal scholarship*, that is, the usual academic investigation into the law, namely into those normative texts which are regarded as the official sources of law.

For this reason epistemological realism includes two distinct theses – the first one being a descriptive thesis concerning actual legal scholarship, and the second one being a prescriptive thesis bearing upon the scientific knowledge of the law.

3.1 Legal scholarship

Given what we have said, the actual practice of jurists cannot be considered as a genuine scientific enterprise, since juristic sentences (or the greater part of them) are neither true nor false, and hence non-cognitive. Interpretive sentences are not descriptive, but ascriptive, and the sentences which formulate unexpressed norms are secretly prescriptive.[20] Legal scholars do not describe the law – they contribute to making it.

According to a classical view of analytical legal philosophy, legal scholarship is a meta-linguistic enterprise that takes the language of the lawgivers as its object-language.[21] Unfortunately, that picture of legal scholarship is, although seductive, somehow misleading. The language of lawgivers and the language of

18 J. Austin 1995: 14, 112 s.

19 Kelsen 1992: 7 & 1966: ch. III.

20 "Secretly", since such sentences usually claim to be existential propositions about norms – "The unexpressed norm N belongs to (exists in) the legal system S" – although they are genuine *normative* formulations, i.e., formulations of brand "new" norms.

21 Bobbio 2011.

interpreters are actually subject to a continuous osmotic process. Juristic language does not simply "bear upon" lawgivers' language. Rather, jurists shape and enrich the object of their study, like a violinist interpolating apocryphal notes in the composition he or she is executing.

Interpretation and construction are not legal cognition – rather, they are pieces of legal policy[22] In fact, they are part (an essential part) of the very object of legal cognition properly understood.

Nevertheless, jurists do contribute to the cognition of law, too, in the ways we are going to see.

3.2 Legal science

From the standpoint of the form of legal realism outlined in this paper, legal science cannot consist in describing such abstract entities as obligations or rights and/or the deontic properties of behaviour ("It is obligatory that *p*", "It is prohibited that *q*"), and the like. And, as a consequence, its sentences cannot be deontic sentences repeating – iterating, like an echo[23] – the norms they refer to.[24]

Legal science properly understood can assume three different forms, corresponding to the three concepts of law developed in the previous section.

(i) *Cognitive interpretation*. Talking about interpretation, I dealt with "adjudicative" interpretation – the ascription of a definite meaning to a given legal text. And adjudicative interpretation is the usual and most important job of legal scholars. Nonetheless, they also accomplish a different task, namely, "cognitive" interpretation which consists in identifying the various possible meanings of a normative text – the meanings admissible on the basis of shared linguistic (syntactic, semantic, and pragmatic) rules, accepted methods of legal interpretation, and existing juristic theories – without choosing anyone of them ("The text T can be interpreted in the senses S1 or S2").

Cognitive interpretation contributes to the knowledge of law understood as a set of normative texts, since it reveals the ambiguity of normative formulations and the vagueness of norms.[25]

(ii) *Reconstruction of jurisprudential trends*. Understanding the law (not as a set of normative formulations, but) as a set of expressed and unexpressed

22 See Kelsen 1992: 82; Ross 1958: 46.

23 Scarpelli 1967.

24 Contrary to Kelsen's view. See e.g. Bulygin 1982.

25 By the way, cognitive interpretive sentences can be understood: either as predictions of future interpretive decisions of law-applying agencies; or as interpretive directives aiming at guiding such future decisions, namely, by circumscribing the range of admissible meanings of the text concerned.

norms, the analysis, reconstruction, and description of the interpretive and constructive trends of judges and jurists constitute obvious contributions to the knowledge of law.

And this, too, is a common practice among legal scholars, which contributes to legal knowledge, since it is a necessary preliminary to ascertaining the prevailing jurisprudential trends, which, in turn, is a necessary preliminary to identifying the law in force.

(iii) *Description of the law in force*. Understanding the law as a set of norms in force, the cognition and description of the law requires the identification of the norms actually applied by judges and other law-applying agencies.[26] (No need to say that, where no definite norm regarding a certain matter is in force, legal science can only take note of the existing jurisprudential conflicts.)

One may agree with the prevailing view according to which legal science consists in a set of "normative propositions", that is, true or false sentences concerning norms.[27] However, two clarifications are in order: the first one pertains to the logical form of normative propositions, and the second to their conditions of truth.

(a) As I already said, normative propositions are not deontic sentences about the normative qualification of behaviour.[28] Rather, they are existential sentences about norms (in force). The "legal" existence of a norm is simply its membership in a definite legal system. Hence, normative propositions, whatever their actual syntactic form may be, are sentences which state the membership of norms (in force) within a definite legal system: "The norm N belongs to the legal system S".

(b) A normative proposition is true if, and only if, the norm which it refers to will be predictably applied in future decisions. Therefore, normative propositions can be understood as propositions on contingent futures: predictions concerning the future application of the norms they refer to.

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26 See once more Ross 1958a: ch. 2 and Bulygin 1991.

27 See, e.g., Bulygin 1982.

28 Guastini 2000.

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Riccardo Guastini*

Un enfoque realista acerca del derecho y el conocimiento jurídico

El autor esboza una forma del iusrealismo analítico como una conjunción de tres tesis principales. Según su primera tesis principal, los enunciados interpretativos en el discurso jurídico son enunciados adscriptivos sin ninguna función cognitiva. De acuerdo con la segunda tesis, el derecho es un conjunto de normas vigentes, eso es, las normas efectivamente aplicadas (en la motivación de las decisiones) en el pasado y previsiblemente aplicadas en el futuro. La tercera tesis constata que la ciencia jurídica como actividad cognitiva no debe confundirse con la dogmática. Aunque los juristas dogmáticos realizan actividades cognitivas, su trabajo consiste mayormente en actividades no cognitivas como la interpretación y la construcción jurídica. | Una versión previa de esta posición fue publicada en *Revus* (2013) 19 en italiano, francés y croata.

Palabras clave: realismo jurídico, escepticismo interpretativo, ontología del derecho, dogmatica jurídica, ciencia del derecho

Se puede caracterizar al realismo jurídico – o, mejor, a una forma del iusrealismo analítico[1] – como la conjunción de tres tesis estrechamente relacionadas entre sí: una tesis ontológica, una tesis interpretativa y una tesis epistemológica.

La tesis ontológica versa sobre el derecho, y responde a la siguiente pregunta: "¿Qué tipo de entidad (o conjunto de entidades) es el derecho?".

La tesis interpretativa tiene por objeto, como lo dice su nombre, la interpretación jurídica, y responde a la siguiente pregunta: "¿Qué tipo de actividad es la interpretación de textos jurídicos?".

La tesis epistemológica, por último, tiene por objeto el conocimiento del derecho (o la "ciencia del derecho", como se suele decir en la filosofía jurídica continental), y responde a la siguiente pregunta: "¿En qué consiste el conocimiento científico del derecho?".

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1 La forma del realismo jurídico que voy a esbozar comparte algunas de sus carácteristicas con otras formas de realismo (en concreto, el americano y el escandinavo), pero no coincide con ninguna de ellas.

Empezaré aquí con la tesis interpretativa, en cuanto tiene una prioridad lógica sobre las otras dos.

1 REALISMO INTERPRETATIVO

En primer lugar hay que introducir una distinción preliminar.[2] En el ámbito jurídico, "interpretación" denota (al menos) dos actividades distintas:

(a) interpretación "cognitiva", que consiste en el análisis de un texto con el objetivo de aclarar sus posibles significados (plausibles),[3] y

(b) interpretación "decisoria" que consiste en atribuir a un texto un determinado significado (rechazando los demás).

El realismo interpretativo es una teoría escéptica sobre la interpretación decisoria. El mismo sostiene que la atribución de significado a los textos normativos no es una actividad cognitiva sino volitiva.[4]

Esto vale tanto para la interpretación judicial (la cual es el sujeto usual, delimitado de las corrientes teorías de la interpretación)[5] como para la interpretación "dogmática" realizada por los juristas académicos.

Dicho esto, es necesario distinguir ulteriormente entre la interpretación en sentido estricto y la construcción jurídica.

1.1 Interpretación en sentido estricto

Los textos del derecho padecen de dos formas de indeterminación.

Por un lado, los enunciados normativos frecuentemente son ambiguos, admitiendo diferentes interpretaciones "en abstracto" (u orientadas a los textos): no se sabe si el enunciado E expresa la norma N1 o la norma N2.

Por otro lado, todas y cada una de las normas son vagas, de modo que admiten varias interpretaciones "en concreto" (u orientadas a los hechos): dada una norma no se sabe si el caso C entra o no en su ámbito de aplicación.[6]

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2 La siguiente distinción hace eco a la que Kelsen realizó entre interpretación entendida como (a) un acto de conocimiento y (b) un acto de voluntad. Véase Kelsen 1992: 82 s y Kelsen 1950: Prefacio.

3 Es "plausible" un significado que puede defenderse con argumentos persuasivos y, dependiendo de la realidad social, puede aceptarse por la cultúra jurídica en cuestión.

4 Guastini 2011b. Esta opinión es propria de la teoria de la interpretación de Giovanni Tarello (1974 y 1980).

5 Las teorias de Kelsen y Tarello son dos excepcipon destacables.

6 Otras (y quizás aún más importantes) formas de indeterminación dependen, obviamente, de lagunas y antinomias. No obstante, las lagunas y las antinomias no preceden a la interpretación sino que son posteriores a ella. En la mayoría de los casos, los textos jurídicos presentan

Así parece obvio que los enunciados interpretativos – en abstracto ("El enunciado normativo E expresa la norma N1") y en concreto ("El caso C recae en el ámbito de aplicación de la norma N1") – no tienen carácter descriptivo (o cognitivo) sino *adscriptivo*.[7] Tal como las definiciones estipulativas, los mismos no son descripciones de un único significado preexistente, sino decisiones acerca de los significados en competición.[8] En consecuencia, los enunciados interpretativos carecen de valor de verdad.

Añadimos, además, que las decisiones interpretativas de los operadores jurídicos (juristas, abogados y jueces), están condicionadas, evidentemente, por sus intereses prácticos (políticos, económicos, profesionales, etc.), sus ideas de justicia y por último, aunque no por ello menos importante, por las elaboradas construcciones conceptuales de la dogmática jurídica.

Los operadores jurídicos en el sentido que ellos introducen son también frecuentemente ellos mismos la fuente de la indeterminación de los textos jurídicos, en el sentido que ellos introducen indeterminación en textos que en el discurso ordinario no presentarían problema interpretativo alguno.

1.2 Construcción jurídica

En el lenguaje común de los juristas el término "interpretación" es habitualmente utilizado para denotar la totalidad de las operaciones intelectuales llevadas a cabo por los intérpretes (jueces, abogados, otros juristas, etc.).

No obstante, no es difícil darse cuenta que los intérpretes – y, sobre todo, entre ellos, los dogmáticos – no se limitan a decidir el significado de los textos normativos. La parte más importante de su trabajo es lo que, tomando una expresión de Rudolf von Jhering, propongo llamar "construcción jurídica". Con esta expresión me refiero a un conjunto de operaciones intelectuales entre las que destacan las siguientes:

(a) la creación de lagunas normativas y axiológicas;[9]

(b) la creación de jerarquías axiológicas entre normas;

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una laguna y/o una antinomia bajo una determinada interpretación; pero, bajo una interpretación diferente, las mismas lagunas y/o antinomias pueden desaparecer.

7 Aquí me refiero a los enunciados interpretativos que no son meras descripciones de la indeterminación de un texto jurídico ("El texto jurídico T puede entenderse en el sentido S1 o S2"), sino que la resuelven ("El texto jurídico T significa S1"). Tales enunciados se parecen a los performativos de J. L. Austin, que no "describen" o "constatan" nada – no son verdaderos ni falsos (J. L. Austin 1962: 5) – sino que realizan un acto de habla adscriptivo de significado, o sea, una interpretación.

8 Guastini 1997.

9 Todas las lagunas son, en un sentido, "creadas" por los interpretes puesto que la identificación de una laguna presupone interpretación: por ejemplo, segun la interpretación A, el caso en cuestión sí *está* regulado por una determinada disposición normativa, mientras que según la interpretación B aquel caso *no está* regulado por la misma disposición. La interpretación B

(c) la concreción de principios;
(d) la ponderación de principios en conflicto; y
(e) sobre todo, la elaboración de normas no explícitas (o sea, así llamadas normas "implícitas").[10]

Estas operaciones están mutuamente conectadas entre sí de diferentes maneras. La elaboración de normas implícitas, por ejemplo, sirve para colmar lagunas y concretar principios. Las jerarquías axiológicas son instrumentos útiles para resolver los conflictos entre principios. Etc.

Ahora bien, si la interpretación en sentido estricto no es una actividad cognitiva, entonces a mayor razón tampoco lo es la construcción jurídica. La construcción jurídica es una actividad decisoria. De hecho, ella consiste en una genuina creación del derecho doctrinal y/o judicial.[11]

2 REALISMO ONTOLÓGICO

El realismo jurídico adopta una ontología empirista del derecho. Según esta, el derecho no es un conjunto de entidades abstractas (como normas, valores, obligaciones, derechos o cosas parecidas).[12] Más bien, se trata meramente de un conjunto de hechos. Pero, ¿qué tipo de hechos? La pregunta planteada requiere una respuesta articulada.

2.1 El derecho como conjunto de textos normativos

En un primer nivel (superficial) de análisis, la palabra "derecho" denota nada más que los textos normativos (leyes, códigos, constituciones, reglamentos) promulgados por los órganos creadores del derecho, o sea, las autoridades nor-

"crea" entonces una laguna, mientras que la interpretacón A la evita. Dicho tan sólo de paso, las lagunas axiológicas dependen totalmente de los juicios de valor de los interpretes.

10 Todos estos conceptos están plenamente analizados en Guastini 2011a. Su breve caracterización es la siguiente: (a) una laguna normativa es la ausencia de disciplina jurídica para un determinado supuesto de hecho; (b) una laguna axiológica es la ausencia de una disciplina satisfactoria (y la presencia, por el contrario, de una disciplina insatisfactoria); (c) una jerarquía axiológica es una relación de valor entre normas instituida por los intérpretes mediante un juicio de valor comparativo; (d) concretizar un principio significa obtener de aquél una norma implícita mediante argumentación; (e) la ponderación de principios en conflicto consiste en establecer entre ellos una jerarquía axiológica; (f) una norma implícita es una norma que no está oficialmente formulada en las fuentes del derecho, o sea que no constituye el significado plausible de ninguna concreta disposición normativa.

11 Véase Guastini 2013.

12 Según una tesis característica del realismo, los conceptos deónticos (obligación, prohibición, etc.) y los así llamados "conceptos jurídicos básicos" (como derecho subjetivo, poder, etc.) carecen de referencia semantica. Véase, por ejemplo Ross (1957 y 1958a) y Olivecrona (1971).

mativas tales como los legisladores, los constituyentes, etc. En otras palabras, "derecho" denota un conjunto de formulaciones normativas (prescriptivas o directivas), y por ende hechos de un tipo especial: entidades lingüísticas.

Este concepto de derecho, aunque es bastante ingenuo, se manifiesta en numerosas expresiones corrientes tales como "interpretar el derecho", y sirve para aclarar la ontología fundamental y la génesis de las normas jurídicas, ya que:

(a) en primer lugar, las normas no son otra cosa que entidades lingüísticas; y

(b) en segundo lugar, ellas nacen de actos de "legislación" (en el sentido genérico, material de esta palabra) – "No hay imperativo sin un *imperator.*"[13]

No obstante, los textos normativos requieren evidentemente de interpretación. Las formulaciones normativas no deben confundirse con las normas en sentido estricto, eso es, con sus contenidos de significado.[14] Si una determinada formulación normativa F puede ser entendida, por ejemplo, tanto en el sentido N1 como en el sentido N2, ¿cuál es entonces el derecho: N1 o N2?

Diremos por tanto que el derecho no es propiamente un conjunto de textos normativos; estos no son nada más que las fuentes del derecho.[15] El derecho no es un conjunto de formulaciones normativas, sino el conjunto de los significados normativos – es decir, de las normas en sentido estricto – que los intérpretes atribuyen a los textos jurídicos mediante interpretación (en sentido estricto) o mediante construcción jurídica.[16]

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13 Véase Kelsen 1973: 237 y 1991: 3 (haciendo eco de una tesis de Walter Dubislav).

14 Esta es la razón por la cual el realismo interpretativo tiene una prioridad lógica sobre el realismo ontológico.

15 Véase Gray (1948: 124 s y 170): "Después de todo, son solo palabras las que pronuncia el legislador; son los tribunales los que tienen que decir qué significan esas palabras; es decir, son ellos quienes interpretan los actos legislativos […] Esta es la razón por la que los actos legislativos, las leyes, deben ser consideradas fuentes del derecho, y no partes del derecho mismo […] Los tribunales dan vida a las palabras muertas de la ley"; "Debería ser evidente que si el derecho de una sociedad es el conjunto de normas aplicadas por sus tribunales, entonces las leyes no deberían ser consideradas meras fuentes del derecho, sino parte del propio derecho; que las leyes son normas que deben ser directamente aplicadas por los tribunales, y que no deberían ser consideradas como recursos a partir de los cuales los tribunales derivan sus propias normas […] Si las leyes se interpretaran a sí mismas, esto sería verdad. Pero las leyes no se interpretan a sí mismas. Su significado es establecido por los tribunales. Y *es con este significado establecido por los tribunales, y con ningún otro significado, que las leyes son impuestas a la comunidad como Derecho*".

16 En cuanto a la ontología de los significados, diría tan sólo que el significado de un enunciado es otro enunciado que se considera sinónimo al primero. Desde este punto de vista, los significados también son entidades lingüísticas.

2.2 El derecho como conjunto de normas

Por esta razón, pasando a un nivel de análisis más profundo, conviene utilizar la palabra "derecho" para denotar no un conjunto de disposiciones normativas, sino más bien un conjunto de significados normativos: eso es, el conjunto de normas que los intérpretes "extraen de" o "construyen con" las disposiciones normativas.

Tal conjunto incluye tanto la clase de normas expresas (eso es, las que constituyen significados plausibles de formulaciones normativas preexistentes) como la clase de normas implícitas (normas construidas por los intérpretes).

Desde este punto de vista, el derecho depende de la combinación de dos actividades distintas: (a) la formulación de los textos normativos y (b) su interpretación y manipulación constructiva. No hay derecho sin textos que interpretar (primera tesis ontológica), pero tampoco hay derecho sin interpretación (segunda tesis ontológica). Por lo tanto, el derecho es, en un sentido, un conjunto de prácticas interpretativas.

Dicho esto, los dogmáticos y los jueces frecuentemente discrepan (visto al menos diacrónicamente): muchas formulaciones normativas son objeto de interpretaciones distintas en competición entre sí. La existencia (dentro del sistema jurídico) de una norma implícita es una cuestión intrínsecamente discutible debido, precisamente, a que se trata de una norma "producen" que no encuentra formulación oficial alguna. Interpretaciones y construcciones jurídicas distintas conjuntos de normas diferentes y, por lo tanto, sistemas jurídicos (parcialmente) diferentes.

Según una corriente jurisprudencial, por ejemplo, el sistema incluye las normas expresas N1, N2, N3 y las normas implícitas N4 y N5; según otra corriente jurisprudencial, el sistema incluye las normas expresas N1 y N2 (pero no N3), y las normas implícitas N4 y N5, pero también la norma implícita N6. Estamos, por tanto, frente a dos sistemas diferentes: {N1, N2, N3, N4, N5} y {N1, N2, N4, N5, N6}.

En tal caso debemos preguntarnos: ¿cuál es el derecho en estas circunstancias? ¿cuál de los dos sistemas es el derecho? Para responder a esta pregunta es necesario proseguir hasta un tercer nivel de análisis, más profundo, que se corresponde con un tercer concepto del derecho.

Antes de darle paso, podemos observar que el segundo concepto – aunque resulta todavía insatisfactorio – tiene el mérito de llamar la atención sobre el hecho de que el derecho no es el producto unilateral de los "legisladores". En la práctica jurídica, los legisladores se encuentran acompañados también por los intérpretes, y el derecho, al menos en un sentido, nace precisamente de las interacciones entre legisladores e intérpretes. No es posible imaginarse un derecho

sin intérpretes (en concreto, los juristas), como tampoco una religión sin curas o teólogos.

2.3 El derecho como conjunto de normas vigentes

En un tercer nivel de análisis (más profundo), la palabra "derecho" denota el conjunto de las normas vigentes. Es decir, el conjunto de normas efectivamente aplicadas (usadas para motivar las decisiones) en el pasado, y previsiblemente aplicables en el futuro, por los órganos aplicadores de formulaciones normativas: los jueces, la administración pública y los supremos órganos constitucionales (en cuanto concierne las normas constitucionales).[17]

Dicho con otras palabras: aunque existan diferentes interpretaciones y diferentes construcciones, uno (casi) siempre encuentra sincrónicamente varias interpretaciones y construcciones jurídicas generalmente aceptadas y dominantes – el "derecho en acción" como suele decirse.

Retomemos el ejemplo anterior: según una primera corriente jurisprudencial, el contenido del sistema jurídico consiste en {N1, N2, N3, N4, N5}; según la otra corriente, ese consiste en {N1, N2, N4, N5, N6}. Para identificar lo que de hecho dispone el derecho, debemos saber cuáles de esas normas están vigentes. Es perfectamente posible, por ejemplo, que del análisis empírico de las corrientes jurisprudenciales dominantes resulten vigentes las normas N1, N2, N4, N5, y quizás también una ulterior norma N7, pero no las normas N3 ni N6.

Resumiendo, por derecho se pueden entender al menos tres cosas diferentes:

(i) un conjunto de *textos* normativos promulgados por los órganos legislativos;

(ii) un conjunto de *normas* (expresas e implícitas) formuladas por los intérpretes;

(iii) un conjunto de normas (expresas e implícitas) efectivamente *vigentes*.

3 REALISMO EPISTEMOLÓGICO

Aquí es necesario introducir otra distinción preliminar. En el lenguaje común de los juristas continentales, el trabajo habitual de los proprios juristas suele llamarse "ciencia jurídica, "doctrina" o "dogmática". Sin embargo, estas expresiones pueden denotar (al menos) dos empresas intelectuales diferentes que uno debería distinguir:

17 Me refiero por supuesto a Ross 1958a. Véase, sin embargo, Bulygin 1991.

(i) por un lado, la *ciencia jurídica* en sentido estricto – la "science of jurisprudence" (J. Austin[18]), la "ciencia del derecho" (Kelsen[19]) – eso es, la descripción científica (neutral, avalorativa) del derecho vigente;

(ii) por otro lado, la *doctrina o dogmática*, o sea, la investigación académica del derecho y, en concreto, de aquellos textos normativos que se consideran como fuentes oficiales del derecho.

Por esta razón, el realismo epistemológico consiste en dos tesis diferentes. La primera es una tesis descriptiva relativa a la doctrina o dogmática tal y como ésta de hecho se desarrolla. La segunda es una tesis prescriptiva relativa al conocimiento científico del derecho.

3.1 Dogmática jurídica

Por las razones que ya hemos visto, la práctica efectiva de los juristas no puede ser considerada como una empresa genuinamente científica, dado que sus enunciados (o la mayor parte de ellos) no son verdaderos ni falsos, o sea, no tienen carácter cognitivo. Los enunciados interpretativos no son descriptivos, sino adscriptivos, y los enunciados que formulan normas implícitas, por su parte, son (subrepticiamente) prescriptivos.[20] Los dogmáticos no describen el derecho – ellos participan en su creación.

Según un punto de vista característico de la filosofía analítica del derecho, la dogmática es un metalenguaje que tiene por objeto el lenguaje del "legislador".[21] Esta configuración de la dogmática es muy atractiva pero, por desgracia, es engañosa. El lenguaje del legislador y el lenguaje de los intérpretes son ambos objeto de un continuo proceso osmótico. El discurso de los juristas no "tiene por objeto" meramente el discurso de las autoridades normativas. Por el contrario, los juristas más bien modelan y enriquecen continuamente su objeto de estudio, como un violinista que intercala anotaciones apócrifas en la partitura que está ejecutando.

La interpretación y la construcción jurídica no son actividades jurídicas cognitivas – por lo contrario, ellas forman parte de la política del derecho[22] y son, por tanto, parte (una parte esencial) del objeto mismo de estudio de la ciencia jurídica entendida en sentido estricto.

18 J. Austin 1995: 14, 112 s.

19 Kelsen 1992: 7 y 1966: cap. III.

20 Digo "subrepticiamente" porque se presentan normalmente como enunciados existenciales que versan sobre normas – "La norma implícita N pertenece al (o existe en el) sistema jurídico S" – aunque sean genuinos enunciados que formulan normas, eso es, formulaciones de normas perfectamente "nuevas".

21 Bobbio 2011.

22 Véase Kelsen 1992: 82. Ross 1958: 46.

Sin embargo, los juristas también contribuyen al conocimiento del derecho como veremos a continuación.

3.2 Ciencia jurídica

Desde el punto de vista de la forma del realismo jurídico esbozada en este articulo, la ciencia jurídica no puede consistir en la descripción de entidades abstractas tales como obligaciones o derechos y/o calificaciones deónticas de la conducta ("Es obligatorio que *p*", "Está prohibido que *q*"), etc. Por lo tanto, sus enunciados no pueden ser enunciados deónticos que repiten (reiteran, como un eco[23]) las normas a las que se refieren.[24]

La ciencia jurídica entendida en sentido estricto puede asumir tres formas diferentes, conectiadas con los tres conceptos de derecho presentados anteriormente.

(i) *Interpretación cognitiva*. Antes me refería a la interpretación "decisoria" (la adscripción de un determinado significado a un texto jurídico). En la práctica común de los dogmáticos, la interpretación decisoria es la tarea más importante. Sin embargo, ellos también realizan otras tareas, como la de la interpretación "cognitiva" que consiste en identificar varios significados posibles de un texto normativo sin privilegiar ninguno ("El texto T puede interpretarse en los sentidos S1 y S2"); se trata de identificar los significados admisibles de acuerdo con las reglas lingüísticas – sintácticas, semánticas, y pragmáticas – compartidas, los métodos de interpretación jurídica aceptados, y las teorías jurídicas existentes.

La interpretación cognitiva constituye una contribución al conocimiento del derecho entendido como conjunto de textos normativos, ya que pone en evidencia la ambigüedad de las formulaciones normativas y la vaguedad de las normas.[25]

(ii) *Reconstrucción de corrientes jurisprudenciales*. Entendiendo el derecho como un conjunto – no de formulaciones normativas sino – de normas (expresas e implícitas), el análisis, la reconstrucción y la descripción de las corrientes (interpretativas y constructivas respectivamente) presentes en la cultura jurídica (en la dogmática y en la jurisprudencia) constituye una obvia contribución al conocimiento del derecho.

23 Scarpelli 1967.

24 Contrariamente a lo que piensa Kelsen. Véase por ejemplo Bulygin 1982.

25 Obsérvese como, además, los enunciados de la interpretación cognitiva pueden entenderse o bien como previsiones sobre las futuras decisiones interpretativas de los órganos de aplicación o bien como directivas interpretativas orientadas a guiar tales decisiones mediante la circunscripción del área de los significados admisibles del texto en cuestión.

Esto también forma parte de la práctica habitual de los dogmáticos y contribuye al conocimiento del derecho en cuanto paso preliminar necesario a la identificación de las corrientes dominantes. Y el conocimiento de las corrientes dominantes es, a su vez, preliminar a la identificación del derecho vigente.

(iii) *Descripción del derecho vigente.* Entendiendo el derecho como un conjunto de normas vigentes, el conocimiento y la descripción del derecho exige la identificación de las normas efectivamente aplicadas por los jueces y por otros órganos de aplicación.[26] (Es inútil añadir que donde no hay una norma vigente relativa al caso en cuestión, la ciencia jurídica solamente puede hacerse eco de los desacuerdos que existen en la jurisprudencia.)

Es posible afirmar, en consonancia con la opinión más difundida sobre el tema, que la ciencia jurídica consiste en un conjunto de "proposiciones normativas".[27] No obstante, es necesario introducir dos ulteriores precisiones: la primera relativa a la forma lógica de las proposiciones normativas; la segunda a sus condiciones de verdad.

(a) Las proposiciones normativas, como ya se ha dicho, no son enunciados deónticos relativos a la calificación normativa del comportamiento.[28] Son, más bien, enunciados existenciales acerca de normas (vigentes). La existencia "jurídica" de una norma no es nada distinto de su pertenencia a un sistema jurídico. Las proposiciones normativas son por tanto enunciados que (independientemente de su forma sintáctica) afirman la pertenencia de normas (vigentes) a un sistema jurídico: "La norma N pertenece al sistema S".

(b) Una proposición normativa es verdadera si y sólo si es previsible que la norma a la que se refiere será aplicada en el futuro. Por lo tanto, las proposiciones normativas pueden ser entendidas como proposiciones sobre contingentes futuros: esto es, como previsiones sobre la futura aplicación de las normas a las que se refieren.

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26 Véase nuevamente Ross 1958a: cap. 2, y Bulyigin 1991.

27 Véase, por ejemplo, Bulygin 1982.

28 Guastini 2000.

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Andrzej Grabowski*

Clara non sunt interpretanda vs. omnia sunt interpretanda

A Never-Ending Controversy in Polish Legal Theory?

The paper addresses a contemporary Polish debate on the limits and functions of juristic interpretation of law. After presenting the main theses and features of Jerzy Wróblewski's clarificative theory of juristic interpretation and Maciej Zieliński's derivational theory of juristic interpretation, the author critically discusses various arguments (epistemological, ethical, empirical, historical, and practical) used in the debate. Finally, a tentative solution of the controversy, based on the criticism of Zieliński's conception of legal norm, is proposed. It is argued that his conception is utopian and not recommendable, due to unacceptable conceptual and practical consequences.

Key words: legal interpretation, clara non sunt interpretanda, isomorphy, omnia sunt interpretanda, legal norm

1 INTRODUCTION

In the 1950s, a new theory of legal interpretation was created by Jerzy Wróblewski – the so-called clarificative (*klaryfikacyjna*) theory of juristic interpretation.[1] This descriptive theory was based on the analysis of Polish legal practice, in particular on the methods and techniques of legal interpretation applied by judges of the Polish Supreme Court. From the 1950s until his early death in 1990, Wróblewski elaborated on his theory and proposed some minor changes.[2] The clarificative theory of juristic interpretation has predominated Polish legal culture for a long time and is still frequently used by Polish lawyers.

The second most important Polish theory of legal interpretation was introduced by Maciej Zieliński in the 1970s.[3] It is called the derivational (*derywa-*

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1 Wróblewski 1956, 1957, 1959.

2 See e.g. Wróblewski 1960, 1961, 1967: 378–379, 1972: 109ff., 1972a, 1985, 1987, 1988: 112ff., 1990: 52ff., 1992: 87ff.; Dascal & Wróblewski 1988; Opałek & Wróblewski 1969: 230ff., 1991: 249ff.

3 Zieliński 1972.

cyjna) theory of juristic interpretation.[4] Zieliński's normative theory is mainly based on the linguistic and logical analysis of the characteristic features of Polish legislative texts, and (additionally) on the examination of the judicial decisions of Polish courts and the accomplishments of Polish legal doctrine.[5] After Wróblewski's death, the derivational theory of juristic interpretation gained momentum and today it is increasingly used by the Polish judiciary.

Despite the fact that both theories of interpretation are based on the very same paradigm of legal positivism and refer to the juristic interpretation of legal texts, they are contradictory in many regards. Undoubtedly, the choice between two fundamental meta-principles of legal interpretation is at the centre of the controversy. In Wróblewski's clarificative theory, one of the main directives of juristic interpretation is the *clara non sunt interpretanda* principle.[6] In short, the basic function of this principle is to express the idea of the direct understanding of legal texts, which takes place when the so-called operative interpretation of positive law is not necessary because the law-applying authority has no doubts regarding the meaning and the scope of application of a given legal norm that is to be applied in a legal case. Moreover, in Wróblewski's clarificative theory, the related principle of *interpretatio cessat in claris* indicates the precise moment that marks the end of juristic interpretation. By contrast, in Zieliński's derivational theory of juristic interpretation, the *omnia sunt interpretanda* principle comes to the fore.[7] In short, the basic idea is to exclude the possibility of the direct understanding of legal texts by claiming that the interpretation of legal provisions (legal text) is always necessary (against the principle of *clara non sunt interpretanda*) and it has to be brought to an end by applying all the acceptable methods and techniques of juristic interpretation (against the principle of *interpretatio cessat in claris*).

The controversy over the adequacy of the two opposite meta-principles of legal interpretation began in the last decade of the 20th century and is very intense in Poland today.[8] In the debate, many specific arguments (epistemological, ethical, pragmatic, historical, empirical etc.) were formulated and it is argu-

4 This name was proposed by Franciszek Studnicki in Studnicki 1978: 41.

5 Zieliński 1972: 3, 2002: 80, 2012: 85.

6 It has to be noted that, as far as I know, Wróblewski for the first time directly pointed out this principle in Dascal & Wróblewski 1988: 204ff. and (as regards his works in the Polish language), in Wróblewski 1990: 59. In his earlier works, he mainly referred to the principle of *interpretatio cessat in claris* or to the doctrine of *claritas* (*lex clara*) and, but very rarely, to the rule *in claris non fit interpretatio*.

7 This principle was formulated for the first time in Zieliński 2005: 120.

8 See e.g. Zieliński 1990: 179ff., 2005: 118ff., 2010: 138–143, 2012: 53ff.; Sarkowicz 1995: 23–26; Morawski 2002: 63ff., 2006: 15–18, 49ff.; Lang 2005: 169ff.; Zieliński & Radwański 2006: 17–20; Zirk-Sadowski 2006, 2012: 140ff.; Radwański 2009: 9ff.; Płeszka 2010: 187–235, 2010a: 96ff.; Rozwadowski 2010; Grzybowski 2012, Tobor 2013: 20–36.

ably an open question as to which principle will be victorious and will influence Polish legal practice in the future.[9]

Even though the aforementioned controversy is parochial, I assume that the underlying problem is universal and worthy of discussion. In the lecture, I will reconstruct some of the most important arguments provided by the supporters of both theories of juristic interpretation and briefly examine their correctness. Finally, I will also propose a tentative solution to the controversy, based, on the one hand, on some methodological considerations, and, on the other hand, on the juristic concept of the legal norm. However, first we have to take a closer look at both interpretive principles and their roles in the theories of Wróblewski and Zieliński.

2 THE *CLARA NON SUNT INTERPRETANDA* PRINCIPLE IN WRÓBLEWSKI'S CLARIFICATIVE THEORY OF JURISTIC INTERPRETATION

Due to the well-known ambiguity of the concept of legal (juristic) interpretation, in his theory, Wróblewski made a distinction between three principal meanings of the term "interpretation" (*interpretacja* in Polish). He distinguished interpretation *sensu largissimo* (SL-interpretation), interpretation *sensu largo* (L-interpretation) and interpretation *sensu stricto* (S-interpretation).[10] The principal criterion of distinction has an extensional character: when we speak about interpretation *sensu largissimo,* we refer to the interpretation of any cultural object;[11] in the case of interpretation *sensu largo,* we are dealing with the interpretation of texts (i.e. linguistic objects);[12] and interpretation *sensu stricto* is also connected with the interpretation of texts, but only those whose meaning raises some doubts in the context of law application.[13] Moreover, Wróblewski

9 See e.g. Kondratko 2007; Kotowski 2014.

10 See e.g. Wróblewski 1972a: 53ff., 1979: 75–76, 1988: 112–114, 1990: 55–59; Dascal & Wróblewski 1988: 203–205; Opałek & Wróblewski 1991: 250–251. It is worth noting that Wróblewski's tripartite distinction was supplemented by Zieliński with the category of interpretation *strictissimo sensu*, i.e. legal interpretation based on extra-linguistic (e.g. systemic or functional) directives of legal interpretation – see Zieliński 1990: 185, 2002: 58. However, this amendment is only indirectly grounded on an extensional criterion.

11 In his words, the SL-interpretation "means any understanding of any object as an object of culture, through the ascription to its material substratum of a meaning, a sense, or a value" – Dascal & Wróblewski 1988: 203.

12 The L-interpretation "means an ascription of meaning to a sign treated as belonging to a certain language …". Dascal & Wróblewski 1988: 204.

13 The S-interpretation "means an ascription of meaning to a linguistic sign in cases where its meaning is doubtful in a communicative situation, i.e., in cases where its 'direct understanding' is not sufficient for the communicative purpose at hand". Dascal & Wróblewski 1988: 204.

claims that the juristic (legal) operative interpretation of law is an instance of interpretation *sensu stricto*. If an interpreter has no doubts concerning the meaning of legal norms (rules, norm formulations, legal provisions), then she understands them directly and the operative interpretation of the legal text is not necessary.

At this point, a linguistic remark is perhaps appropriate. In Polish juristic language, as in the German language, two terms exist that are used in the discourse of legal interpretation: "interpretacja" and "wykładnia". The former need not be translated and the latter is the equivalent of "Auslegung" in German. Due to such a linguistic distinction, it has to be noted that in Polish juristic language, the equivalent of the term the "operative interpretation of law" is "wykładnia operatywna". Therefore, the abovementioned thesis of Wróblewski states that "wykładnia operatywna" (i.e. the operative interpretation of the law/legal texts, as opposed to "wykładnia doktrynalna", i.e. a doctrinal/dogmatic interpretation of the law)[14] belongs to the category of "interpretacja *sensu stricto*" (S-interpretation). As he claims:

> [t]he operative interpretation takes place if there is a doubt concerning the meaning of a legal norm which has to be applied in a concrete case of decision-making by a law-applying agency. This interpretation is thus a case-bound interpretation. Operative interpretation has to fix a doubtful meaning in a way sufficiently precise to lead to a decision in a concrete case.[15]

In order to explain this claim, in his later works, Wróblewski introduced a distinction between the "situation of interpretation" (*sytuacja wykładni*) and the "situation of isomorphy".[16] The concept of isomorphy was borrowed from Kaarle Makkonen.[17] According to the Finnish author, in the course of the judicial application of law, we are dealing with an isomorphic situation (*Isomorphiesituation*) if no act of legal interpretation is required from the judge due to the "clear and self-evident" character of the norm to be applied to the facts of a given legal case.[18] As Makkonen claims, a judicial decision, in which:

> zwischen den gegebenen Tatsachen und den in einer bestimmten Vorschrift geschilderten Tatsachen Isomorphie herrscht, konzentriert sich die eigentliche Entscheidungsproblematik auf die Festsetzung der Rechtsfolge. Es ist wichtig zu beachten, dass es sich dann nicht um Auslegung der Bestimmung handelt, hinsichtlich deren Isomorphie herrscht. Da Isomorphie gerade das bedeutet, dass die Bedeutung

14 Of course, the category of operative interpretation (*wykładnia operatywna*) is also well known outside Poland – for example, in his works, Wróblewski often refers to Ferrajoli 1966.

15 Wróblewski 1985: 244.

16 See e.g. Wróblewski 1967: 378, 1972:53, 1988: 121ff., 1990: 58, 1992: 33, 92ff.; Dascal & Wróblewski 1988: 215.

17 See Makkonen 1965: 78ff. On the contemporary criticism of Makkonen's theory see Siltala 2011: 29ff.

18 Siltala 2011: 7.

> des Rechtsnormsatzes, der diese Bestimmung enthält, völlig klar ist, kann natürlich über diese Bedeutung keine Unklarheit entstehen.[19]

Therefore, for Makkonen, isomorphy is the relation of correspondence between the facts depicted in a given legal norm, which is to be applied in a case, and the facts in the real world. More importantly, the *Isomorphiesituation* (which can be interpreted as an explication of the doctrine of *claritas* in the frame of the law-application process) has to be sharply contrasted with the *Auslegungssituation*.

Generally speaking, for Wróblewski, the understanding of a legal norm is based on the concept of the fulfilment of the norm. The meaning of a legal norm is grasped as a pattern of the ought behaviour.[20] The understanding of a norm is equivalent to the subject's knowledge on whether a norm is fulfilled or not. If a person knows when a given norm is fulfilled, then she understands it. Thus, it is hardly surprising that Wróblewski also asserts that the situation of isomorphy, in which:

> the text fits the case under consideration directly and unproblematically, as a glove to a hand,[21]

is possible; moreover, according to him, two *bona fide* relevant facts justify the use of the concepts of interpretation *sensu stricto* and pragmatic clarity in the description and explanation of legal interpretive practice:

> (a) not all applied legal texts are S-interpreted; and (b) sometimes the alleged clarity of the text is used as an argument for its direct understanding and against the need of S-interpretation.[22]

Finally, the pragmatic character of the concept of clarity has to be emphasised. In his analysis, Wróblewski distinguished between three types of "pragmatic clarity of law": the clarity of (legal) qualification (which is the only type that is relevant to the *clara non sunt interpretanda* principle), the clarity of the subject's orientation in the law and the clarity of the systematisation of the law.[23] When explaining the "pragmatically oriented" character of his theory of legal interpretation,[24] Wróblewski stressed that the same legal norm (or norm formulation) in some contexts of law application calls for S-interpretation, but for others, it does not require interpretation because the "direct understanding" (a.k.a. "immediately given meaning")[25] is sufficient *in concreto*, i.e. in a given

19 Makkonen 1965: 108.

20 See Wróblewski 1959: 74ff.; Woleński 1972: 26ff.; Płeszka & Gizbert-Studnicki 1984: 26.

21 Dascal & Wróblewski 1988: 215.

22 Dascal & Wróblewski 1988: 215.

23 See e.g. Wróblewski 1988a; Opałek & Wróblewski 1991: 253–254.

24 See e.g. Wróblewski 1985: 243; Dascal & Wróblewski 1988: 215ff.

25 Wróblewski 1979: 76.

case of law application,[26] notwithstanding the fact that legal language (in which legal texts are formulated) is fuzzy.[27]

To conclude, the *clara non sunt interpretanda* principle is, for Wróblewski, a concise formulation of the basic idea of the juristic (legal) interpretation of legal texts, stemming from his comprehension of the operative S-interpretation (*wykładnia operatywna*) of the law, which takes place if and only if a law-applying agent has reasonable doubts[28] concerning the meaning of a given legal norm to be applied in a case.

3 THE *OMNIA SUNT INTERPRETANDA* PRINCIPLE IN ZIELIŃSKI'S DERIVATIONAL THEORY OF JURISTIC INTERPRETATION

Maciej Zieliński is the author of the derivational theory of legal interpretation (*derywacyjna teoria wykładni*). In his Ph.D. thesis from 1969, published in an abbreviated form in 1972,[29] he proposed a reconstructionist-type normative theory of juristic interpretation. The final version of derivational theory was presented in the works published by Zieliński in the last decade.[30] Since Zieliński and his co-workers from the Poznań-Szczecin school of legal theory[31] mainly publish their works in Polish,[32] a short description of the derivational theory of interpretation is perhaps in order.

The basis of the derivational theory of juristic interpretation is a conceptual distinction between a legal provision (legal disposition) and a legal norm, proposed by Zieliński's mentor Zygmunt Ziembiński in 1960.[33] Whilst a legal provision is defined as the (simplest) unit of legal texts, being a sentence from a grammatical point of view, a legal norm belongs to a broader category of the norms of conduct (comportment). In Zieliński's words:

> The term "norm of conduct" is to be understood as an expression which on the ground of the meaning rules of a given national language (independently of the occasional el-

26 Wróblewski 1985: 243.

27 See e.g. Wróblewski 1983, 1985: 241–243; Dascal & Wróblewski 1988: 217ff.

28 Dascal & Wróblewski 1988: 221–222.

29 Zieliński 1972.

30 Zieliński 2002, 2005, 2012; Zieliński & Radwański 2006.

31 For more on this important school in Polish legal theory see Czepita, Wronkowska & Zieliński 2013.

32 Probably the only, yet very short and fragmentary presentation of Zieliński's derivational theory of legal interpretation in English is given in Zieliński 1987.

33 Ziembiński 1960.

ements of situation) formulates in a *direct* way an order or a prohibition for the *directly* appointed subjects [of – *A. G.*] *directly* appointed conduct in a given situation.[34]

Moreover, the norms of conduct (comportment) and, consequently, all the legal norms, are "strictly univocal expressions",[35] because they are formulated in the "extra-contextually univocal (unambiguous) language".[36] Such an idealising assumption[37] of the derivational theory of legal interpretation has many far-reaching consequences; e.g. it means that the results of the "translation" of the legal provisions into legal norms are extremely complicated.

Let us examine an "easy" interpretive case. In the last chapter of his book from 1972,[38] Zieliński provides an example of the derivative interpretation of Article 148 § 1 of the Polish Penal Code from 1969[39] (which was valid from January 1970 until September 1998). This provision established the legal consequences of a basic type for the crime of intentional killing (murder), by (simply) stating that:

> Who kills a man is penalised by no less than 8 years of imprisonment or by capital punishment.

However, a partial result of the derivational interpretation of this legal provision provided by Zieliński in the form of a "norm-shaped expression" is almost unreadable – in my opinion, even for some lawyers:

> A man, who is not a mother, acting under influence of the labour and during it, in relation to the child, and who is not a person, which in necessary defence is repelling any direct and illegal attack against any social good or any personal good, and who is not an authorised person executing a legally valid death penalty, and who is not a soldier acting against the enemy during the war hostilities not in a way inconsistent with the laws of war, is ordered that, in any circumstances from the 1st of January 1970, she does not kill, and even does not attempt to kill neither under the influence of the strong emotion, nor on demand of the other man and under the influence of a compassion for her, a man.[40]

34 Zieliński 1987: 165. Italics in original.

35 Zieliński 1987: 166.

36 This idealizing assumption, often criticised for being too rigid in relation to legal interpretation (see e.g. Wróblewski 1973: 124–125, 1990: 57; Płeszka & Studnicki 1984: 22ff.; Brożek 2006: 84), was later softened by Zieliński. For example, in Zieliński 1996: 5–6, he defines a legal norm as "an utterance which sufficiently univocally orders (or prohibits) someone (the addressee) certain behaviour in certain circumstances". However, a "sufficient univocity" looks very suspicious in comparison with the initial assumption of the "strict univocity" of legal norms. And, unfortunately, Zieliński's position is very inconsistent, because in his later basic monograph on legal interpretation, he defines the norm of conduct (and, consequently, also the legal norm) again as a "univocal expression". See Zieliński 2002: 16, 2012: 14.

37 Zieliński 1972: 17, 1987: 166.

38 See Zieliński 1972: 71–81.

39 *Kodeks karny. Ustawa z dnia 19 czerwca 1969 r.* [Penal Code. Statute of 19 June 1969]. Published in *Dziennik Ustaw* [Journal of Statutes] of 1969, No. 13, Item 94.

40 Zieliński 1972: 80. The emphasis (by enhanced letter spacing) is in the original.

This result is partial[41] because the derivational theory proposes a sequential model of juristic interpretation,[42] which consists of three phases (stages) of interpretation.[43]

First, the arranging phase (also called the validating phase),[44] in which an interpreter has to identify the set of valid legal provisions, i.e. the content of the current legal texts at a moment of interpretation (or at a moment in the past). In this phase, the main problems can stem from changes in legislative acts (statutes, governmental regulations etc.): their derogations or amendments. Naturally, the preparatory activities of an interpreter do not necessarily take place prior to the activities belonging to the next phase of interpretation.[45]

Second, the phase of reconstruction, in which legal norms encoded by the legislator in legal texts are decoded in the form of "norm-shaped expressions". As can be seen, in this stage, the interpreter of the legal texts has to take into account not only the so-called central legal provision (in the abovementioned case – Article 148 § 1 of the Polish Penal Code), but also the other relevant legal provisions (in the abovementioned case – Articles 11 § 1, 22 §1, 148 § 2, 149 and 150 of the Polish Penal Code, Article I of the Introductory Provisions to the Penal Code,[46] and the rules of the public international law of war and humanitarian law), which modify the meaning and the scope of application of the interpreted norm. This is the case because legal norms are encoded by the lawmaker, who frequently uses legislative techniques of condensation (one legal provision – more than one legal norm) and dismemberment (many legal provisions – one legal norm)[47] in legal texts. According to Zieliński, a "norm-shaped expression" must include four elements that are crucial for the subsequent formulation of a legal norm: the addressee, the circumstances (situation), the normative operator (of ordering or forbidding) and the determination of conduct (compartment).[48]

41 It is also partial in yet another sense: from Article 148 § 1 we can decode not only a sanctioned norm (addressed to the "ordinary" people), but also a sanctioning norm and a norm of competence, both addressed to the judges of penal courts. See Zieliński 1972: 81.

42 See Zieliński & Radwański 2006: 31; Gizbert-Studnicki 2010: 50, 64ff.

43 Zieliński 2002: 273, 298ff., 2012: 289, 319ff.; Zieliński & Radwański 2006: 18.

44 See Kanarek & Zieliński 2001; Zieliński 2002: 298–303, 2012: 319–324; Zieliński & Radwański 2006: 16–17.

45 Zieliński 2002: 298, 2012: 319.

46 *Przepisy wprowadzające kodeks karny. Ustawa z dnia 6 czerwca 1997 r.* [Introductory Provisions to the Penal Code. Statute of 19 April 1969]. Published in *Dziennik Ustaw* [Journal of Statutes] 1969, No. 13, Item 95.

47 For more on these common legislative techniques see Zieliński 1972: 15–16, 54ff., 2002: 103ff., 2012: 108ff.; Zieliński & Radwański 2006: 15–16.

48 See Zieliński 2002: 103ff., 2012: 108ff.

Thus, we arrive at the third and final phase of perception, in which the (univocal) meaning of the "norm-shaped expressions" is being established and, therefore, we finally obtain a legal norm as the result of the derivational interpretation of legal provisions. Zieliński admits that the formulation of a legal norm can be much extended.[49] What is more important, however, is that especially within the phase of perception, the principle of *omnia sunt interpretanda* governs the process of interpretation, at least in accordance with the derivational theory.

As already noted, the *omnia sunt interpretanda* principle was introduced by Zieliński in 2005. It states that:

> every legal provision (legal text) has to undergo the process of interpretation in order to establish its content (to understand it), irrespective of the degree of its understanding *prima facie*.[50]

Moreover, in 2011, this principle was supplemented by a new and more detailed principle of *interpretatio cessat post applicationem trium typorum directionae*,[51] which means that juristic interpretation can be concluded if and only if the directives of linguistic, systemic and functional interpretation have been thoroughly applied by an interpreter.[52] It has to be added that in Polish legal culture, such a tripartite division of the first-level directives of legal interpretation, introduced by Jerzy Wróblewski in 1959,[53] is universally taken for granted, even by Zieliński and the supporters of the derivational theory of legal interpretation.[54]

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49 As he observes, the reconstruction of the complete legal norm from Article 148 § 1 of the Penal Code will comprise "no less than 8 typewritten pages". Ziembiński & Zieliński 1992: 119.

50 Zieliński 2005: 118. It is worth adding that in his basic monograph on legal interpretation, this principle is listed as the first of eleven universal principles of juristic interpretation – see Zieliński 2002: 294, 2012: 315. It implies that the *omnia sunt interpretanda* principle can also be applied in the arranging and in the reconstructive phase of derivational interpretation. However, it has to be noted that only in the phase of perception do we deal with the problems of meaning; therefore, only in this very phase of interpretation does the *omnia sunt interpretanda* principle contradict the *clara non sunt interpretanda* principle – compare a similar argument in Płeszka 2010: 191–192.

51 Peno & Zieliński 2011: 126.

52 According to the derivational theory, however, five exceptions exist where the univocal linguistic meaning may not be overruled by means of the systemic and, especially, the functional interpretation of legal texts. For instance, we have to accept a linguistically univocal meaning of legal definitions, the norms of legislative competence (as far as they directly and unambiguously indicate the law-making authorities) and legal provisions that confer legal rights to the citizens etc. See Zieliński & Radwański 2006: 30–31; Zieliński 2012: 344.

53 Wróblewski 1959: 211ff.

54 In fact, Zieliński incorporates the main elements of the clarificative theory of interpretation into the phase of perception. See e.g. Zieliński 2002: 243, 310ff., 2012: 253–254, 330ff.; Zieliński & Radwański 2006: 20–26.

It is worth adding that in recent works, Zieliński and his co-workers have attempted to elaborate (on the basis of the derivational theory) on the "integrated Polish theory of legal interpretation" by including all the valuable achievements of the other conceptions of legal interpretation created in Poland in the 20th century, which constitute the "common good" of Polish jurisprudence.[55] Such an integrative effort can indeed be welcomed; however – as Zieliński overtly acknowledges[56] – the *omnia sunt interpretanda* principle has nothing to do with the integration, as it was introduced by him in order to replace two of Wróblewski's meta-principles of legal interpretation: *clara non sunt interpretanda* and *interpretatio cessat in claris*. In effect, both principles, as well as Wróblewski's concept of the direct understanding of legal texts, are treated by Zieliński as myths of juristic thinking concerning legal interpretation.[57]

4 THE POLISH DEBATE

The above presentation of the opposing standpoints of Wróblewski and Zieliński can be synthetically summarised by the following scheme:

The theory of interpretation:	**clarificative (J. Wróblewski)**	**derivational (M. Zieliński)**
starting point of interpretation	*clara non sunt interpretanda* i.e. the interpretation takes place iff *lex non clara est*	*omnia sunt interpretanda* i.e. every legal provision must be interpreted
ending point of interpretation	*interpretatio cessat in claris* i.e. the lack of reasonable and relevant doubts	*interpretatio cessat post applicationem trium typorum directionae*[58]

At this point, before beginning the discussion on the Polish debate, a brief comment on the main assumption of the paper seems to be in order. I have assumed that the basic problem that underlies the Polish controversy is not parochial, but universal. As there is no time to justify this assumption in a more detailed way, let me put forward only a couple of examples that seem to support this hypothesis.

55 See Zieliński 2006, 2012: 310–313; Zieliński, Bogucki, Choduń, Czepita, Kanarek & Municzewski 2009; Zieliński & Zirk-Sadowski 2011.

56 See Zieliński 2005: 120, 2012: 60–61; Radwański & Zieliński 2006: 20.

57 Zieliński 2010: 138–143, 147.

58 With five exceptions – see above (footnote no. 52).

The first example, which is quite evident, is taken from recent jurisprudential literature. When we consider the following quotation:

> The commonsense view that the content of the law is often clear enough – and at other times, it is not – is the correct one. Mostly, just like in an ordinary conversation, we hear (or read, actually) what the legal directive says and thereby understand what it requires. In some cases, it is unclear what the law says, and interpretation is called for. /…/ The law requires interpretation when its content is indeterminate in a particular case of its application,

we realise that it looks quite familiar and could be, arguably, attributed *in toto* to Wróblewski. Yet, this quotation is taken from Andrei Marmor,[59] who in his well-known theory of legal interpretation sharply differs between understanding and interpretation[60] in a way that is similar in many regards (however, it is not identical) to Wróblewski's distinction between the direct understanding and the S-interpretation of legal texts. As Marmor's conception is the subject matter of an ongoing jurisprudential discussion – one that is also taking place in Italy[61] – it implies that the underlying problem can hardly be classified as parochially Polish.

The second evident example is related to the contemporary critique of the jurisprudential doctrine of *claritas*. Of course, it is impossible to even list all of the relevant authors who claim that every legal text must be interpreted; therefore, let us just point out that when analysing the criticism of the traditional doctrine of clarity, Wróblewski directly refers to the works on legal interpretation by Michel van de Kerchove, Giovanni Tarello and Riccardo Guastini.[62] In addition, as regards the contemporary Polish discussion, it can be added that many scholars examine (usually with positive conclusions) the correctness of the *clara non sunt interpretanda* principle (and Wróblewski's clarificative theory of interpretation in general) in the context of the doctrine of *acte clair*, adopted in the jurisdiction of the (European) Court of Justice.[63]

After this digression, we will now address the main issue by reconstructing the most important objections against the principles of *clara non sunt interpretanda* and *interpretatio cessat in claris* put forth by Zieliński in his numerous works[64] and the basic, mainly defensive arguments formulated by the supporters of the clarificative theory of interpretation. In order to make the presen-

59 Marmor 2011: 144–145.

60 See Marmor 2005: 15ff., 2011: 137ff.

61 See e.g. Chiassoni 2007: 149ff.; Poggi 2007.

62 See Dascal & Wróblewski 1988: 209ff.; Wróblewski 1990: 57.

63 See e.g. Skrzydło 1998; Płeszka 2010a.

64 As the majority of the arguments was repeatedly used by Zieliński, I only generally indicate the relevant text sources: Zieliński 1990: 179ff., 2002: 52ff., 2005: 118ff., 2006: 100, 2010: 139ff., 2012: 53ff.; Zieliński & Radwański 2006: 18–20; Zieliński & Zirk-Sadowski 2011: 102ff.

tation more readable, in what follows, the arguments presented in the Polish debate will be generally labelled.[65]

4.1 Epistemological arguments

Zieliński maintains that Wróblewski did not specify whose doubts are relevant when we are dealing with the direct understanding of a legal text – the doubts of a person (judge) who has to decide, of the litigants or of the "ordinary" citizens? By arguing *ad absurdum*, he refers to the case of an uneducated person who has no linguistic knowledge and is so unreflective that she does not understand the legal text at all. As such, a person surely has no doubts – he argues – so, according to the *clara non sunt interpretanda* principle, she is not in the "situation of interpretation" and has no chance of establishing, by the means of interpretation, the meaning of the legal provisions. Thus, according to Zieliński, Wróblewski did not specify the criteria for distinguishing the situation of direct understanding from the situation of interpretation well enough, because the author of the clarificative theory of interpretation did not provide any applicable relativisation of the concepts of doubt and clarity, which play such an important role in his theory. And, if he did provide such a relativisation, for instance, by claiming that the clarity of a legal text is relativised to a given language, then it would be tantamount to the self-destruction of Wróblewski's theory, since in such a case, we must always determine whether a given legal provision is clear or not; that is, we must always embark on interpretation.

Furthermore, in his argumentation in favour of the *omnia sunt interpretanda* principle, Zieliński, somewhat paradoxically,[66] claims that we always have to carry out the systemic and the functional interpretation of a legal text, because only by doing so can we reveal the doubts concerning the meaning of the legal provisions, and in consequence prove that such doubts are present. In effect, Zieliński explicitly admits that exceptionally, in one type of situation, legal interpretation is usually unnecessary; namely, if we have already completely (i.e. in accordance with the principles of *omnia sunt interpretanda* and *interpretatio cessat post applicationem trium typorum directionae*) interpreted a given legal provision and we are dealing with a similar case at law, then the reinterpretation of this provision can be omitted, providing that its meaning has not changed in the meantime.

65 The names of the arguments analysed in Sections 4.1, 4.2 and 4.5 are borrowed from Płeszka 2010: 197ff.

66 See Płeszka 2010: 195–196. It looks paradoxical because the principal objective of legal interpretation is to get rid of interpretive doubts and not to discover or invent them; however, it is *prima facie* true that before carrying out the systemic and the functional interpretation we can only have linguistic doubts, if there are any – see a similar opinion in Morawski 2006: 51–52.

To conclude: Zieliński's standpoint is that the understanding of legal texts is always preceded by legal interpretation; therefore, a "direct and unreflective understanding of a legal text" is an obvious juristic myth. Hence, legal interpretation is always necessary – *omnia sunt interpretanda*!

The response to Zieliński's arguments is very restricted, probably because for some of the supporters of Wróblewski's clarificative theory of interpretation (and the *clara non sunt interpretanda* principle), these arguments are self-evidently pointless, and for others, they are convincing. In fact, only one of them – Lech Morawski – directly responds to Zieliński's criticism by indicating that the concept of doubts is indeed relativised: only the objective doubts, related to the problem of legal qualification, which have not yet been unambiguously explained in jurisdiction or by the legal doctrine (dogmatics), are to be taken into account as far the applicability of the *clara non sunt interpretanda* principle is concerned.[67] On the other hand, Marek Zirk-Sadowski (a successor of Jerzy Wróblewski at the Department of Legal Philosophy and Legal Theory in the University of Łódź), concedes that from the linguistic (analytical) point of view, the *clara non sunt interpretanda* principle is contemporarily difficult to sustain.[68] However, he also maintains that we can try to reinterpret the concept of direct understanding extra-linguistically by claiming that the clarity of a legal text is to be understood institutionally, i.e. in terms of the institutional clarification (explanation) of the meaning of legal provisions in the jurisdiction (e.g. when the constant and stable line of jurisdiction can be observed and/or the interpretive decision in the form of a valid Resolution of the Supreme Court is adopted).[69]

In my opinion, although the epistemological arguments of Zieliński are not convincing, they bring about the necessity of some modifications to the contemporary reading of the *clara non sunt interpretanda* principle and to the clarificative theory of legal interpretation in general.

First, the clarificative theory of Wróblewski is a theory of the operative legal interpretation, i.e. the interpretation that constitutes a part of the judicial application of law[70]. Therefore, it is hardly surprising that Wróblewski states that:

> The standard subject of the understanding and of the operative interpretation of the law is the court. /…/ The court uses legal provisions in the direct understanding when

67 See Morawski 2006: 50ff. He also claims, in reference to Stanley Fish's well-known analysis of Hart's theory of interpretation, that the clarity of a legal rule can depend on its "interpretive history". Morawski 2002: 64, 2006: 52. It is worth noting that for Zieliński, the relativisation proposed by Morawski is – quite surprisingly – a "free modification" of Wróblewski's basic idea. Zieliński & Radwański 2006: 19.

68 See Zirk-Sadowski 2012: 156–159; Zieliński & Zirk-Sadowski 2011: 103–104, 107.

69 See Zirk-Sadowski 2012: 156–159; Zieliński & Zirk-Sadowski 2011: 103.

70 See e.g. Wróblewski 1959: 125ff., 1972: 50ff., 109ff., 1988: 42ff., 117ff., 1990: 76ff., 1992: 30ff., 87ff.

> it recognises that in a concrete situation they are sufficiently clear for the purposes of deciding. /…/ The clarity of a text is a pragmatic feature and depends on the application of the provision to a concrete situation.[71]

Thus, we see – without any doubt – that for Wróblewski, it is the judge who *in concreto* directly understands the law or has reasonable doubts regarding the meaning of the applicable legal provisions (legal norms). Thus, the first epistemological argument of Zieliński is missing the point.

Secondly, the objection stating that in Wróblewski's theory of interpretation we do not find any sound criterion for the distinction between the situation of the direct understanding of a legal text and the situation of interpretation is also rather easy to rebut. It is, obviously, the concept of isomorphy that fulfils this function: if the judge recognises isomorphy, then *clara non sunt interpretanda* (i.e. a judge is not embarking on legal interpretation) or *interpretatio cessat in claris* (i.e. a judge is terminating the interpretive activity). Of course, taking into account that for Wróblewski, the legal language is fuzzy (and legal rules are defeasible and open textured), it is an open question as to whether such a criterion is not too subjective, imprecise or vague. Yet, in the contemporary legal systems, we have many institutions that guarantee the intra-systemic relative objectivity and uniformity of judicial interpretive decisions. And, I think that we should also remember a particular realistic appeal from Wróblewski for tolerance within legal discourse:

> Neither as a starting point nor as an ending point of the understanding of a text is clarity an absolute given. Consequently, legal language has to tolerate the existence of interpretive doubt, even concerning the question of whether a text must or must not be interpreted.[72]

Finally, surely the most important epistemological objection: Is the direct understanding of a legal text possible at all? Without entering into a deep philosophical debate, first let us remember that Zieliński, in effect, admits that it is possible to understand a legal text without interpreting it, providing that we are dealing with – as he calls them – the "post-interpretive understanding"[73] or the "decisional cases",[74] which are different from "interpretational cases". I suppose that at this point we do not have any controversy: Wróblewski, Morawski, Płeszka, Tobor or Zirk-Sadowski could accept this thesis without hesitation. Thus the real controversy seems to be limited to the case of the judge who has to apply a new (in a subjective, or also in an objective sense) legal provision, which she has never interpreted before.

71 Wróblewski 1990: 71.

72 Dascal & Wróblewski 1988: 222.

73 Zieliński 2002: 219, 2012: 229.

74 Zieliński 2002: 246, 2012: 257.

For Wróblewski, the concept of direct understanding is intuitive and it has a "pre-theoretical" and a "pre-analytical" character.[75] However, it does not mean that this concept may not be explained on an extra-legal basis. Recently, a proposal regarding such an explanation from the perspective of contemporary empirical psycholinguistics was elaborated by Marcin Romanowicz.[76] His analysis confirms that the direct understanding of a text is possible (as such), but its factors are significantly different from those that have been included in Wróblewski's theory of interpretation.

For Wróblewski, the direct understanding is founded on a subject's general linguistic knowledge and is governed by the linguistic directives of direct understanding[77]. As he stated in his monograph from 1959:

> The "direct understanding" is difficult to be precisely specified for the reason that it is an elementary fact, which we also encounter outside the normative sphere. /…/ If someone, who knows Polish language well, reads some phrase in this language connected with the domain that she knows well, and if this phrase need not to consider any context apart from that, which is directly and presently available to her, then unquestionably at once, without any consideration and launching an investigation, she "directly understands" what a given phrase means. /…/ Similarly, we can accept that in some cases the law-applying body "directly understands" a norm, providing that the established state of facts obviously fits the hypothesis of a given norm, which in a concrete case of its application is completely univocal (that does not exclude the ambiguity or meaning indeterminacy in the other applications).[78]

We see that initially, for Wróblewski, the direct understanding was based not only on linguistic competence, but also on the good knowledge of a domain to which a given expression refers. However, in his later work, he restricted the cognitive background of the direct understanding by connecting it exclusively with the linguistic rules of sense:

> The knowledge of the rules of sense /…/ is the foundation of a linguistic competence of a language user. These rules constitute the basis for the direct understanding of a text in any natural language.[79]

And precisely such a change in his original insights was mistaken, because the analysis of Romanowicz shows that in any act of direct understanding, the cognising subject is activating not only its linguistic knowledge, i.e. the "knowledge about language", but – simultaneously – also general knowledge, i.e. the

75 Wróblewski 1990: 58.

76 See Romanowicz 2011: 65ff. It is worth adding that his analyses are also relevant to the purely philosophical hermeneutic category of *Vorverständnis*, which is quite mysterious as well – see Gizbert-Studnicki 1987.

77 Wróblewski 1972: 114, 1988: 117, 1992: 90.

78 Wróblewski 1959: 115.

79 Wróblewski 1990: 58.

"knowledge about the world".[80] Therefore, during the act of understanding, the cognising subject is using not only its operative short-term memory, but also its long-term memory.[81]

What is more important, however, is the conclusion by Romanowicz, stating that from the psycholinguistic perspective, the conception of the direct understanding is fully acceptable:

> For the cognising subject the mere process of processing linguistic information, which is a legal provision, remains unconscientious. Only the outcome of such a process, that is, a certain understanding of the legal provision, is given to the consciousness, and hence the impression of the "directness" of cognition (understanding).[82]

This conclusion is crucial in the context of our discussion. We can take for granted that the direct understanding of legal provisions is empirically possible. Can Zieliński be satisfied with such a conclusion? Surely not, since he can still maintain that even if the direct understanding of legal texts is possible, it is never sufficient to arrive at the *Isomorphiesituation*, because – as he indeed argues[83] – it is hardly possible to identify any example of the *lex clara* in the texts of positive law. Yet, in my opinion, this line of argumentation is also misleading, for Wróblewski's concept of clarity is of a pragmatic nature. Therefore, to argue that the understanding of every legal provision can be doubtful would be an exact instance of the *ignoratio elenchi* fallacy: even the demonstration that every legal provision is semantically indeterminate, unclear or vague is not sufficient to falsify the statement that in some ("easy") cases, the direct meaning of a legal norm (provision) is pragmatically clear enough for the judge to decide the case at law.

4.2 Ethical argumentation

Moral arguments are less sophisticated and easier to discuss. Firstly, Zieliński claims that the use of the *clara non sunt interpretanda* principle by the public authorities can deteriorate the situation of a citizen because it can justify the limitation of human rights caused by the absence of legal interpretation. Secondly, providing that it is a public agent (authority) whose doubts are decisive for the assessment as to whether *lex clara est*, it also implies the possibility of meaning manipulation by granting enormous discretionary power to the public agents. Moreover, it can be the source of a specific "interpretive opportunism" – the law-applying organ can take advantage of the *clara non sunt interpretanda* principle in order to refuse to carry out legal interpretation, whereas

80 Romanowicz 2011: 68.

81 Romanowicz 2011: 69.

82 Romanowicz 2011: 70.

83 See Zieliński 2010: 141, 2012: 58; Zieliński & Radwański 2006: 19. This argument is borrowed by Zieliński from Łętowska 2002: 54ff.

the actual reasons may be totally different; for example, convenience, laziness or a reluctance to provide adequate interpretive arguments. Therefore, the appeal to the *clara non sunt interpretanda* principle can allow the law-applying authority to prevent the interpretive dispute in the courtroom and to justify its legal interpretive decision by *ratione imperii*, instead of by *imperio rationis*.[84] Finally, the *clara non sunt interpretanda* principle only apparently strengthens legal certainty, since a citizen can be surprised both by the absence of a judge's doubts (in the case in which the clear meaning of an ambiguous legal text has already been established in the jurisdiction or by legal doctrine) and by the presence of such doubts (whilst – yet only for the citizen – the legal text is linguistically clear and univocal). In both cases, the conviction that the rule of law has been broken can easily arise on the side of the citizen.

The counter-arguments from the supporters of the *clara non sunt interpretanda* principle are less numerous. Marek Zirk-Sadowski[85] and Krzysztof Płeszka[86] claim that this principle, in effect, defends the citizens against the "linguistic violence" of the judges (law-applying organs). The *omnia sunt interpretanda* principle expands the power of the judges by increasing the possibility of the application of various interpretive techniques (especially extra-linguistic ones), which the citizens simply do not know. On the other hand, the principle of *clara non sunt interpretanda* obligates the judge to provide a direct justification for any deviation from the ethnical linguistic meaning of legal terms. In addition, Zirk-Sadowski proposes a history-laden indirect explanation of Wróblewski's intentions connected with the introduction of the *clara non sunt interpretanda* principle. As he states (in the paper recently written together with Zieliński):

> Independently from the controversies over the linguistic sense of the *clara non sunt interpretanda* principle, it has to be noted that formerly (in particular in the 1950s) it was able to play a positive role in limiting the temptations of the totalitarian system, by emphasising the role of the certainty of legal text. The minimising of the role of interpretation in the process of law application – as it seems – can be an element of the protection of citizens against the excessive role of political and ideological factors in the understanding and application of the law.[87]

84 This argument is also borrowed by Zieliński from Łętowska 2002: 54–55.

85 See Zirk-Sadowski 2006: 70ff.

86 See Płeszka 2010: 233ff.

87 Zieliński & Zirk-Sadowski 2011: 105. Of course, it is only a very defeasible hypothesis of mine that this passage was introduced by Zirk-Sadowski. This hypothesis is based on the fact that Zieliński has overtly argued that the principle of *clara non sunt interpretanda* in effect "would exclude the possibility of the defence from the part of the Weaker". Zieliński & Radwański 2006: 19. In Wróblewski's texts, for obvious political reasons (Poland remained a totalitarian state until 1989 and Wróblewski died in 1990), any moral intention of such a nature might not have been explicitly expressed by him.

Finally, according to Wiesław Lang, the principle of *clara non sunt interpretanda* can be regarded as the necessary precondition for the legitimisation of the *ignorantia iuris nocet* principle.[88] As he claims:

> [t]he absolute rejection of the principle of *clara non sunt interpretanda* and the stringent realization of the principle of *ignorantia iuris nocet* could be exclusively possible in the society of lawyers,[89]

because only the lawyers (and, in particular, the judges on account of the principle of *iura novit curia*) can be (morally) obligated to know whether *lex clara est*, or – on the contrary – whether the legal interpretation is necessary.

In my opinion, in order to evaluate the moral value of both principles, we have to distinguish between two historical contexts. In the *Unrechtsstaat*, no matter whether it is a totalitarian or an authoritarian state, these principles can be equally used for the iniquitous manipulation of the results of legal interpretation for political or ideological reasons. And, arguably, it would be highly naive to presume that the selection of one of them would bring about some progress in the administration of justice. However, the situation changes if we consider the role of these principles in the law-governed state (*Rechtsstaat*). In such a context, it can be presumed that the *clara non sunt interpretanda* principle is more favourable for the doctrine of judicial passivism, whereas the *omnia sunt interpretanda* principle mutually reinforces the doctrine of judicial activism. Thus, it seems that the moral evaluation of these principles depends on whether we prefer the active or the passive role of judges in the application of law. Generally speaking, I suppose therefore that our moral evaluation of both principles can be based on the most general assessment of the degree of people's confidence in public authorities. If we have more trust in the lawmaker (legislator), then we should prefer the *clara non sunt interpretanda* principle because it will limit judicial activism.[90] And if we trust more in the judiciary, the principle of *omnia sunt interpretanda* appears to be morally better since it promotes judicial activism.

4.3 Empirical arguments

Zieliński claims that the principles of *clara non sunt interpretanda* and *interpretatio cessat in claris* are very seldom referred to in the jurisdiction of the Supreme Court and the other higher Polish courts. He highlights some

88 See Lang 2005: 169ff.

89 Lang 2005: 177.

90 Unfortunately, however, this reasoning reveals a certain antinomy. For it is also true that the acceptance of the *clara non sunt interpretanda* principle implies that we do trust in judges – we trust them because they will decide whether "reasonable doubts" exist or *lex clara est*. Thus, it seems that if a judge wants to be active, the principle of *clara non sunt interpretanda* may not be sufficient to prevent her from embarking on a creative interpretation of the law.

empirical data, stating that from 1971–2000, these principles were explicitly mentioned only 29 times in the judicial decisions of the Supreme Court, the Constitutional Tribunal and the Supreme Administrative Court (with the referential basis of about 35,000 rulings). On the other hand, in an unspecified – yet, in his opinion, a significant and constantly increasing – number of cases, these courts have interpreted the law despite the fact that the linguistic meaning of the given legal provisions was clear and unambiguous. These empirical observations are supported by the empirical research and analyses of Zieliński's co-workers.[91]

Moreover, Zieliński insists that, except for the clarificative theory of Wróblewski, all of the Polish theories of legal interpretation elaborated in the 20th century[92] have unanimously rejected the doctrine of clarity. Therefore, the principles of *clara non sunt interpretanda* and *interpretatio cessat in claris* must be abandoned altogether. He even maintains that we have already witnessed the change of the interpretational paradigm in Poland and cites some new rulings in which the principle of *omnia sunt interpretanda* is explicitly applied by the courts.[93]

For the chief opponents of Zieliński's *omnia sunt interpretanda* principle, these theses are only an instance of wishful thinking. They also cite many rulings (Morawski – 12[94]; Płeszka – 34[95]) from the last two decades in which the Polish higher rank courts directly refer (mainly positively) to the principles of *clara non sunt interpretanda* and/or *interpretatio cessat in claris*. The adherents of these two principles maintain that they not only defined the paradigm of legal interpretation in Poland, but are still the important elements of the Polish legal culture[96] and are commonly accepted by Polish judges.[97]

It is impossible to argue against the facts. In my opinion, however, the above evaluations and empirical argumentation are based on interpreted facts, and – more importantly – the samples of judicial decisions, to which the opponents refer, are not representative at all. Firstly, the discussed interpretive meta-principles are applied in the vast majority of cases without being explicitly mentioned by the judges. Secondly, the analysis of the justifications for

91 See e.g. Municzewski 2004; Radwański 2009; Bogucki 2012.

92 In particular, he refers to the theories of Eugeniusz Waśkowski, Sawa Frydman (Czesław Nowiński), Jan Woleński, Leszek Nowak, Franciszek Studnicki, Ryszard Sarkowicz and Leszek Leszczyński. See Zieliński 2002: 68ff., 2012: 72ff.

93 The first judicial decision, in which the principle of *omnia sunt interpretanda* was explicitly mentioned, was the *Ruling of the Constitutional Tribunal from 13 January 2005*, Sign. P 15/02, published in *Dziennik Ustaw* [Journal of Statutes] 2005, No. 13, Item 111.

94 Morawski 2002: 65–69.

95 Płeszka 2010: 217–230.

96 Płeszka 2010: 231.

97 Morawski 2002: 66, 2006: 54; Płeszka 2010: 216–217.

the judicial decisions of the higher courts is not representative, since we can assume that the rate of "hard" interpretive cases (in which we do not deal with *lex clara*) is considerably higher than in the lower rank (first instance) courts. Thirdly, the inferred conclusions of the empirical research are well beyond the obvious methodological standards. For example, from the official data on the judicial decisions of the Polish Constitutional Tribunal,[98] we can easily obtain the information that after the first decision from 2005, the principle of *omnia sunt interpretanda* was explicitly mentioned twice (in 2008 and 2012), whereas (in the same period) the principle of *clara non sunt interpretanda* was positively referred to four times (in 2006, 2007, 2008 and 2014). Due to the fact that in the period 2005–2014, the Constitutional Tribunal had passed about 6100 rulings and decisions, it is hardly possible to reasonably infer anything from these data. Presumably, we will obtain analogous non-conclusive data by examining the judgments of the Polish Supreme Court or the Supreme Administrative Court.

Moreover, the empirical argumentation is arguably pointless as far as the substantiation of the conflicting interpretive principles is concerned. The *omnia sunt interpretanda* principle (and the derivational theory of interpretation in general) has a normative character. The *clara non sunt interpretanda* and *interpretatio cessat in claris* principles were introduced by Wróblewski as descriptive statements; however, at present, the change in the methodological status of these principles in the Polish legal discourse and judicial practice, and the fact that they are usually interpreted normatively, are not questioned.[99] Therefore, the well-known argument from Hume's guillotine seems to be fully applicable: any direct empirical justification of these principles, belonging to the category of directives, is excluded.[100]

Thus, I suppose that the empirical data, and the arguments founded on them, are useless for the purposes of our discussion. They could be relevant only if we grasp the discussed interpretive principles as the customary rules of the judges' interpretive reasoning. I think that such a legal-sociological approach to the principles of *clara non sunt interpretanda* and *interpretatio cessat in claris* is indeed possible, but it is impossible in reference to the principles proposed by

98 Http://otk.trybunal.gov.pl/orzeczenia/ (accessed November 5th, 2014).

99 See e.g. Gizbert-Studnicki 2010: 51ff.; Romanowicz 2011: 62ff.; Zieliński & Zirk-Sadowski 2011: 105–106; Kotowski 2014: 62. Even Wróblewski has explicitly accepted the possibility of the change in the methodological status of these directives. See Wróblewski 1990: 76; Opałek & Wróblewski 1991: 259–261.

100 This argument is directly accepted by Zieliński, who criticises the use of empirical arguments by Płeszka as the *ignoratio elenchi* error, for there is no "transition" from facts to directives. See Zieliński 2010: 141. However, this argument shows that Zieliński's argumentation is inconsistent, since he also adduces empirical arguments against the *clara non sunt interpretanda* principle and in favour of the *omnia sunt interpretanda* principle. See e.g. Zieliński 2002: 56, 2006: 100, 2012: 57.

Zieliński, for it is conceptually self-contradictory to "invent" and "introduce" the "new" customary rules of judicial reasoning. And it makes empirical argumentation irrelevant.

4.4 The argument from Roman law and the "argument from architecture"

Zieliński presents two historical arguments. Firstly, the argument from the Roman law, according to which the principle of *clara non sunt interpretanda*, notwithstanding its Latin formulation, is not grounded in Roman tradition. On the contrary, as Zieliński's co-worker and expert in Roman law, Władysław Rozwadowski, argues on the basis of the analysis of Roman legal tradition, we may rather formulate the ancient version of the *omnia sunt interpretanda* principle: *Etiam clarum ius exigit interpretationem*.[101] Secondly, a specific argument against the Roman pedigree of the *clara non sunt interpretanda* principle, according to which the fact that this paroemia was not included in the set of 86 paroemias, which have been placed on the pillars situated at the entrance to the building of the Polish Supreme Court (constructed in Warsaw from 1996–1999), also supports the negative evaluation of the Roman roots of the *clara non sunt interpretanda* principle. For Zieliński, if this paroemia were really of Roman origin, it could not be ignored by the experts in Roman law and Polish medieval law who made up the list.[102]

In the current Polish debate, nobody has answered these arguments. It is worth noting, however, that Wróblewski himself has provided some information concerning the historical antecedents of his main ideas. In the basic monograph from 1959, he indicated a German scholar, Valentin Wilhelm Foster, who, in the book *Interpres sive de interpretatione juris libri duo*, published in Wittenberg in 1613, mentioned the maxim *interpretatio cessat in claris*.[103] Later, in collaboration with Marcelo Dascal, Wróblewski explained the philosophical foundations of the modern interpretive doctrine of *claritas* by relating it to the Cartesian epistemological principle of clear and distinct ideas, and to the Port Royal Logic of Antoine Arnauld and Pierre Nicole.[104]

Of course, it does not mean that the questions related to the historical origins of the *clara non sunt interpretanda* and *interpretatio cessat in claris* principles are definitively resolved. For instance, Clausdieter Schott maintains that the maxim

101 Rozwadowski 2010.

102 Let us note, however, that at least one paroemia from that list is expressing a mode of reasoning that is directly related to the principle of *clara non sunt interpretanda*: *Cum in verbis nulla ambiguitas est, non debet admitti voluntatis quaestio* (D.32.25.1). According to Masuelli, this maxim of Paulus "ha rappresentato sicuramente il punto di partenza del brocardo '*in claris non fit interpretatio*'". Masuelli 2002: 415.

103 Wróblewski 1959: 129.

104 Dascal & Wróblewski 1988: 206ff.

interpretatio cessat in claris was invented by the lawyers of the Renaissance: Guido de la Pape, Aloisius de Albertis, Philippus Decius and Petrus Paulus Parisius – who, in the first half of the 16th century, formulated this maxim for the first time.[105] And Saverio Masuelli convincingly demonstrates that the origin of the equivalent brocard *in claris non fit interpretatio* can be traced back to Cicero and Quintilian.[106] Hence, the ancient pedigree of the interpretive principles belonging to Wróblewski's clarificative theory of interpretation is, in my opinion, indisputable. In particular, the long history of the formulation of the *interpretatio cessat in claris* principle provides a good counter-argument against Zieliński's first historical argument from the Roman law.

And, as regards the second peculiar "pillar argument" by Zieliński, I think that it does not deserve any elaborated comment, but simply this: *Argumenta non numeranda, sed ponderanda sunt*!

4.5 Pragmatic (praxeological) arguments

Jerzy Wróblewski had already raised his most fundamental and powerful objection against the derivational theory of legal interpretation in the review[107] of Zieliński's basic monograph *Interpretation as a Process of Decoding Legal Text*. He stated that the operations of decoding a legal text, which – according to Zieliński – are "factually indispensable" for legal interpretation, extend well beyond the frames of the "traditional models of juristic interpretation". Wróblewski also expressed serious doubt as to whether anybody would in fact undertake the task of decoding a complete "norm" that had been so rigorously defined by Zieliński ("univocity"). In his later works, Wróblewski slightly weakened his criticism, conceding that the derivational theory of interpretation, which conceptualises legal interpretation as belonging to the category of the interpretation *sensu largo* (L-interpretation), can be "convenient" for some jurisprudential considerations or linguistic studies.[108] Nevertheless, he still insisted that due to the peculiarities of legal language (in which legal provisions are formulated), it is "practically impossible" to construct the norms in a way that would satisfy the strict requirements established by the derivational theory of interpretation.[109]

In a similar pragmatic line of argumentation, Lech Morawski formulated his principal pragmatic (praxeological) objections against the *omnia sunt inter-*

105 Schott 2001: 158, 166–167.
106 Masuelli 2002: 402ff.
107 See Wróblewski 1973: 125.
108 See Opałek & Wróblewski 1991: 252.
109 Wróblewski 1990: 57.

pretanda principle and the derivational theory of interpretation in general.[110] As he claims:

> The principle that clear legal provisions do not require any interpretation is first and foremost pragmatically justified. The assumption that in every situation the court is obligated to carry out the interpretation of a provision, even the one which sense does not provoke any reasonable doubts neither in jurisdiction, nor in legal doctrine, would in practice lead to the paralysis of the law-applying institutional bodies, which will be forced to waste time and to provide the ordinary interpretive clichés in the justifications of their decisions.[111]

Moreover, Morawski insists that the application of the derivational theory of interpretation is hardly possible in legal practice, since the result of such an application would be:

> the construction, completed with much pain and toil, of the rules which nobody knows and which are utterly needless.[112]

In his direct answer to Morawski's argumentation, Zieliński emphasises that his criticism is superficial and unconvincing.[113] The application of the *omnia sunt interpretanda* principle only apparently slows down the judicial proceedings. In fact, if the court of appeal does not approve the decision of the first instance court, which was based on the *clara non sunt interpretanda* principle, the process of the application of law will be much longer. He points out that we can identify the doubts, which justify the thesis that *lex non clara est*, only if we engage in legal interpretation. Thus, according to Zieliński, the application of the *omnia sunt interpretanda* principle in every legal case by the first instance courts will minimise the duration of judicial proceedings. Moreover, the process of judicial law application can be speeded up by other means that are morally less risky.

In my opinion, it is symptomatic that Zieliński did not respond to the charge that it is practically impossible to decode legal norms in conformity with the conditions stipulated by the derivational theory of legal interpretation.[114] And even though the thesis that we sometimes need to carry out legal interpretation in order to identify the (reasonable) interpretive doubts seems justified, it does not imply that the principle of *omnia sunt interpretanda* is practicable. Indeed, this principle determines not only the manner of interpreting legal provisions, but also the ultimate end of legal interpretation, which cannot be successfully

110 See Morawski 2002: 63ff., 2006: 16ff., 50ff.

111 Morawski 2002: 64, repeated in Morawski 2006: 51.

112 Morawski 2006: 17–18.

113 See Zieliński & Radwański 2006: 18–19; Zieliński 2010: 142–143, 2012: 59–60.

114 A partial reply from the point of view of the derivational theory of legal interpretation was proposed by Radwański, who claims that the legal norm – as a result of the derivational interpretation of legal texts – must not be the "all-embracing" one – Radwański 2009: 10.

achieved in legal practice, since – as Zygmunt Tobor plausibly argues – the result of the derivational legal interpretation (i.e. the "univocal" legal norm) will always be open for further interpretation.[115] Arguably, any interpretation based on the *omnia sunt interpretanda* principle is a never-ending intellectual activity. Therefore, the interpretive meta-principle proposed by Zieliński as the remedy for the alleged severe shortcomings of the *clara non sunt interpretanda* principle calls to mind the famous Virgil dictum from Aeneid (12.46): *Aegrescit medendo*. In effect, in the practical context, it seems to me that Zielinski's remedy is worse than the disease, despite the fact that the correctness of Wróblewski's clarificative theory of legal interpretation, based on the doctrine of (pragmatic) clarity, is controversial as well.

5 A TENTATIVE SOLUTION

Before I present a tentative solution to the discussed controversy, several methodological remarks would appear to be in order, as it is not easy to establish a common methodological ground for the discussion and evaluation of the correctness of the conflicting interpretive meta-principles proposed by Wróblewski and Zieliński. The methodological aspects of the clarificative and the derivational theory of juristic interpretation are different in many regards and the careful identification of these differences is crucial for the elaboration of any reasonable proposal for the solution to the controversy between the *clara non sunt interpretanda* (and *interpretatio cessat in claris*) and the *omnia sunt interpretanda* (and *interpretatio cessat post applicationem trium typorum directionae*) interpretive principles.

Due to the typologies of the modern theories of legal interpretation proposed by Riccardo Guastini, first of all, it should be noted that the clarificative theory of Wróblewski belongs to the category of the mixed ("vigil") theories, whilst the derivational theory of Zieliński is presumably a specific example of the cognitive (formalist, "noble dream") theory of legal interpretation.[116] Secondly, as already noted, the theory of Wróblewski was elaborated and introduced as a descriptive theory, whilst Zieliński's derivational theory is a purely normative one.[117] Thirdly, the clarificative theory is primarily focussed on the operative

115 See Tobor 2013: 24. His argument from the interpretive *regressus ad infinitum* is based on Wittgenstein's observation from the *Philosophical Investigations* (§ 201). However, I suppose that we may reach the very same conclusion if we take into account the jurisprudential doctrines of the open texture and the defeasibility of legal rules.

116 See Guastini 1997: 279–283, 2011: 149–151. One reservation must be made: Zieliński is not a cognitivist.

117 See e.g. Zieliński 2002: 80, 2012: 85, 285ff.; Brożek 2006: 83ff.; Gizbert-Studnicki 2010: 51; Zieliński & Zirk-Sadowski 2011: 106.

interpretation that takes place in the frames of judicial law application, whilst the derivational theory is universal, i.e. it is supposed to be applicable to all kinds of juristic interpretations of law (operative, doctrinal etc.).[118] Therefore, fourthly, the theory of Wróblewski primarily refers to the case-oriented (facts-oriented) legal interpretation (i.e. interpretation *in concreto*), whilst the referent of Zieliński's theory is the text-oriented (i.e. *in abstracto*) interpretation of law. Fifthly, according to the current view,[119] the clarificative theory is related to the context of justification of interpretive decisions, whilst the derivational theory is surely primarily focussed on the context of discovery.[120]

Thus, we can observe that it is not an easy task to establish a common methodological perspective (basis) for these two Polish theories of legal interpretation. However, in order to propose a solution to the controversy, it is indeed indispensable to anyone interested in finding such a solution. Therefore, in what follows, I assume (somehow arbitrarily) that the appropriate methodological basis consists of:

(1) the adoption of the normative understanding[121] of both theories in general, and the interpretive meta-principles in particular;

(2) the acceptance of the common reference of them; namely, the operative, case-oriented (*in concreto*) judicial interpretation of law; and

(3) the assumption that we are dealing with the heuristically interpreted context of discovery of the courts' interpretive decisions.

Moreover, in order to make the proposed tentative solution more readable, the following scheme will be very useful:

118 Płeszka and Gizbert-Studnicki have proposed that the derivational theory of legal interpretation should be used in reference to the dogmatic (doctrinal) interpretation, whereas the clarificative theory of interpretation is more adequate for the operative interpretation of law. Płeszka & Gizbert-Studnicki 1984: 24ff. However, the former thesis was explicitly rejected by Zieliński, who stresses the universal character of his theory. See Zieliński 2002: 80, 243ff., 2012: 85, 254ff.; Płeszka 2010: 163ff.

119 See e.g. Romanowicz 2011: 63ff., 72ff.; Grzybowski 2012: 52ff.

120 Zieliński emphasises this feature of his theory many times. See e.g. Zieliński 2002: 249ff., 2012: 260ff.; Zieliński & Radwański 2006: 35; Zieliński & Zirk-Sadowski 2011: 104–105.

121 Let us remember that nowadays, the clarificative theory of Wróblewski is usually interpreted as a normative theory of interpretation, especially within the Polish judiciary and even Wróblewski himself has explicitly accepted the possibility of the normative interpretation of his theory of legal interpretation. See Wróblewski 1990: 76; Opałek & Wróblewski 1991: 259–261.

The theory of interpretation:	clarificative (J. Wróblewski)	derivational (M. Zieliński)
the object of interpretation	legal norm (norm formulation, legal provision/text or rule)[122]	legal provisions, i.e. legal text
the purpose of interpretation	pragmatic clarity (isomorphy)	semantic univocity
the result of interpretation	the meaning of a norm (a pattern of the ought behaviour) sufficiently determined for deciding a given legal case	the legal norm, i.e. the (sufficiently) univocal and "all-embracing"[123] expression (a norm of conduct)

Certainly, the solution to the Polish controversy could be based on various considerations: axiological, sociological, methodological, argumentative etc. Yet, I am going to propose an analytical solution of a conceptual kind, mainly based on the analysis related to the juristic concept of a legal norm that is used in the legal discourse.

First, let us consider the second row of the scheme: the purposes of legal interpretation. It is obvious that the pragmatic clarity of the law (which takes place in the situation of isomorphy) is not equivalent to the semantic univocity of legal norms. In the clarificative theory of Wróblewski, the former concept is connected with a referential theory of meaning, whilst in the theory of Zieliński, the latter concept is a category of non-referential semantics.[124] What is more important, however, is that the pragmatic clarity of legal norms can be (and, in fact, is) successfully achieved by the judges in a huge number of legal cases. But the semantic univocity can probably be treated only as a regulative idea of juristic interpretive reasoning, mainly because of practical and epistemological reasons (open texture, defeasibility, interpretive *regressus ad infinitum*). What is

122 Jerzy Wróblewski was very inconsistent on this point; however, in his most important monographs, he referred legal interpretation to the legal norms or legal rules. See Wróblewski 1959, 1972, 1992. This inconsistency is excusable, because for him, the most important aspect of legal interpretation was always to establish the meaning of a given normative utterance (or legal text) in the form of "a pattern of the ought behaviour".

123 It means that a legal norm has to be the result of the derivational interpretation of all of the relevant legal provisions of a given domestic legal system, the European and the international law etc. By the way, many commentators point out that such an "all-embracing", normatively complete legal norm can never actually be formulated. See e.g. Płeszka & Studnicki 1984: 24; Brożek 2006: 84.

124 See Płeszka & Gizbert-Studnicki 1984: 21. This characteristic has never been questioned in Polish jurisprudence and was recently explicitly accepted in Zieliński, Bogucki, Choduń, Czepita, Kanarek & Municzewski 2009: 26.

still more important is that the semantic univocity of a given legal norm does not imply its pragmatic clarity: in my opinion, a judge can have no semantic doubts over the intension of legal terms used in a given legal norm, but she can still have some doubts as far as the extension of those terms is concerned. This is the case because when we apply non-referential semantics to the issues of legal interpretation, we always have to make a next final step that enables us to relate language (legal norms) to reality (facts of a case).

Now, let us turn our attention to the two remaining rows of the scheme (the first and the third ones) in order to make the final point. As we can easily observe, there is a crucial difference between Wróblewski and Zieliński: for the first scholar, the legal norm is the object of legal interpretation, and for the second, the result of it. And we can also see, this time maybe not so easily, that for Wróblewski, the meaning of a legal norm can be (however, it need not be, because sometimes the direct understanding of a norm is sufficient) the result of legal interpretation. What is essential here is that the legal norms and their meanings are ontologically distinct: in Wróblewski's conceptual network, we deal separately with the legal norm and with its meaning, i.e. a pattern of the ought behaviour. But within the derivational theory of Zieliński, the legal norm and its meaning are even linguistically indistinguishable – the same linguistic expression, called a "legal norm", is the legal norm and the self-referential expression of its complete meaning (i.e. a legal norm "XYZ" means "XYZ" and nothing else or more). Therefore, in the case of "legal norms" in Zieliński's sense, it will be redundant or even absurd[125] to speak about the meaning of any legal norm (or we can speak about the meaning indeed, but exclusively about the literal one).[126] I think that such consequences of the conceptual apparatus of the derivational theory of legal interpretation are not acceptable for lawyers, because in the legal discourse, no matter whether it is practical or theoretical, we are used to speaking (and need to be able to speak) separately about legal norms and about their various, potential or actual meanings (literal, systemic, functional etc.).

The above reasoning also explains why, in my opinion, Zieliński needs the interpretive meta-principles of *omnia sunt interpretanda* and *interpretatio cessat post applicationem trium typorum directionae* for his theory of legal interpretation. And why for him the pragmatic clarity of law is without any relevant value. As a legal positivist, he wants the legal system to consist of legal norms, that is, the univocal and "all-embracing" semantically complete expressions of the legal ought, which indeed can be formulated if and only if *omnia sunt interpretanda*. Maybe his aspiration is axiologically justifiable, yet I think that it is

125 Because the only available answer to the question, "What is the meaning of legal norm XYZ?" will simply be "XYZ".

126 Since legal norms are formulated in the "extra-contextually univocal language".

utopian.[127] Therefore, my vote is for Wróblewski's *clara non sunt interpretanda* and *interpretatio cessat in claris* meta-principles of legal interpretation, the use of which in the (judicial) interpretive discourse does not have such strange conceptual consequences.[128]

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127 Stefan Kisielewski (1911–1991), a famous Polish publicist, writer and composer, once said (in reference to the nonsensical reality of the regime of a real-socialist People's Republic of Poland, which happily died in 1989) that "Socialism is the regime in which the difficulties unknown in any other system are being heroically overcome!". It is a pity, but I think that this dictum, *mutatis mutandis*, can be referred to the derivational theory of legal interpretation. A similar argument was formulated in Morawski 2006: 18. He claims that the derivational theory of legal interpretation "is rather creating imaginary problems, instead of resolving the actual problems".

128 I am fully aware that this solution of the parochial Polish controversy is parochial as well. And, for me, it is possible that the solution to the underlying universal controversy as to whether we should distinguish, on the basis of the doctrine of *claritas*, the phenomena of the direct (pre-interpretive) and the indirect (interpretive) understanding of legal norms, perhaps can be just the opposite, i.e. the negative one. Yet, that is quite another story.

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Pravilo priznanja i nastanak pravnog sustava

U radu se tvrdi da pravilo priznanja, s obzirom na to kako ga je predstavio Hart, ne može biti konstitutivno pravilo nijednog pravnog sustava kao takvog, nego prije konstitutivno pravilo (primarnih) pravnih pravila kao elemenata pravnog sustava. Budući da uzimam da je pravni sustav institucionalna artefaktna vrsta, tvrdim da su za objašnjenje pravnog sustava kao cjeline, uz pravilo priznanja kao token-elementarno konstitutivno pravilo, potrebna još dva konstitutivna pravila – jedno konstituirajuće u pogledu nositelja pravne vlasti i drugo konstituirajuće u pogledu pravnog sustava kao tokena. Međutim, s obzirom na središnju ulogu prakse nositelja pravne vlasti u uspostavljanju konkretnog primjerka ili tokena pravnog sustava, također tvrdim da se pravilo priznanja ne može razumjeti 'samo' kao token-elementarno konstitutivno pravilo nego i implementacijsko ili konkretizacijsko pravilo pojedinog pravnog sustava.

Ključne riječi: pravilo priznanja, konstitutivna pravila, artefaktna teorija prava, institucionalni artefakti, pravni sustav

1 UVOD

Prema Hartu, pravilo priznanja predstavlja temelje pravnog sustava. Sva ostala pravila u pravnom sustavu utvrdljiva su kao članovi pravnog sustava samo na temelju postojanja takvog pravila priznanja. S obzirom na to da se ostala pravila može prepoznati kao pripadajuća sustavu pravila samo kroz leće pravila priznanja, kaže se da se pravilom priznanja stvara jedinstvo među različitim pravilima.

Važnost koju Hart pridaje pravilu priznanja, kao i neke njegove karakterizacije u *The Concept of Law*, ukazuju na to da je pravilo priznanja prije svega pravilo na temelju kojega ostala pravila *jesu* pravna pravila. Njime se objašnjava *postojanje* pravno valjanih normi kao takvih. Pojmovna je isitina da zadovoljenje pravila priznanja konstituira normu kao pravo. Prema tomu, može se reći da pravilo priznanja ima važnu ontološku ulogu[1] te da je po svojoj naravi konstitutivno pravilo. Pod 'konstitutivnim pravilom' ovdje podrazumijevam

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1 Unatoč činjenici da se ponekad tvrdi da pravilo priznanja ima i važnu epistemičku ulogu, K. Himma uvjerljivo argumentira da je ta uloga, u najboljem slučaju, znatno skromnija. Vidi Himma (1999: 48).

pravilo kojim se određuju određeni uvjeti koji trebaju biti ispunjeni u okviru određenog konteksta kako bi nešto imalo (smatralo se da ima) odnosnu statusnu funkciju ili da bi postojalo (smatralo se da postoji) nešto s odnosnom statusnom funkcijom. Da bi statusna funkcija bila nametnuta, odnosna zajednica treba kolektivno prihvatiti konstitutivna pravila. Ali u pogledu čega je pravilo priznanja konstitutivno? Konstituiraju li se njime samo pojedina pravna pravila kao članovi sustava ili pojedini pravni sustav kao cjelina? Iz onoga što o pravilu priznanja kaže Hart, može se zaključiti da ono sasvim sigurno služi barem prvoj funkciji. Ono je nedvojbeno konstitutivno pravilo pojedinih pravnih pravila kao elemenata sustava. Međutim, iako Hart to ne tvrdi (barem ne izrijekom), moguće je doći u iskušenje da se pravilo priznanja shvati kao konstitutivno pravilo pravnog sustava kao takvog.

Ono što u radu tvrdim jest da pravilo priznanja, s obzirom na to kako ga je prikazao Hart, ne može biti konstitutivno pravilo nijednog pravnog sustava kao takvog, nego prije konstitutivno pravilo (primarnih) pravnih pravila kao elemenata pravnog sustava. Naime, tvrdim da se pravilom priznanja ne određuju uvjeti koji trebaju biti ispunjeni u okviru određenog konteksta kako bi postojao (smatralo se da postoji) pravni sustav, nego samo uvjeti koji trebaju biti ispunjeni u okviru određenog konteksta kako bi se nešto smatralo '(primarnim) pravnim pravilom'. Budući da polazim od toga da je pravni sustav institucionalna artefaktna vrsta, tvrdim i da su za objašnjenje pravnog sustava kao cjeline, uz pravilo priznanja kao token-elementarno konstitutivno pravilo, potrebna još dva konstitutivna pravila – jedno konstituirajuće u pogledu nositelja pravne vlasti i drugo konstituirajuće u pogledu pravnog sustava kao tokena.[2] Međutim, s obzirom na središnju ulogu prakse nositelja pravne vlasti u uspostavljanju konkretnog primjerka ili tokena pravnog sustava, također tvrdim da se pravilo priznanja ne može razumjeti 'samo' kao token-elementarno konstitutivno pravilo nego i implementacijsko ili konkretizacijsko pravilo pojedinog pravnog sustava. Pod 'implementacijskim pravilom' ovdje podrazumijevam pravilo zadovoljenjem kojega autor tokena x_i čini da uvjeti U iz tipskog konstitutivnog pravila Tx postoje.

2 Dakako, dio onoga što tvrdim jest da je pravilo priznanja nedostatno da objasni empirijski (iskustveni) nastanak pravnog sustava. Međutim, iako bi se moglo tvrditi da je, prema jednom shvaćanju skupa, skup ukupnost konstituirana svojim elementima tako da se svaki sustavni skup pravnih pravila pojmovno (kao apstrakcija) može smatrati pravnim sustavom, tvrdim također da je pojmovna istina da pravilo priznanja sâmo ne može biti konstitutivno pravilo pravnog sustava jer je ono konstitutivno pravilo samo dijela elemenata ukupnog skupa (naime, samo primarnih pravnih pravila). Nadalje, što je zapravo pitanje različito od onoga je li pravilo priznanja konstitutivno pravilo pravnog sustava, treba imati na umu da pravni sustav nije konstituiran sâmim postojanjem pravila priznanja; osim toga, moraju biti učinkovita pravila valjana na temelju pravila priznanja. Time se otvara veza između empirijskih i pojmovnih shvaćanja pravnoga sustava. Zahvaljujem anonimnom recenzentu i K. Himmi što su ukazali na ova razlikovanja.

U radu prvo prikazujem (2. poglavlje) Hartovo objašnjenje pravila priznanja, zagovarajući interpretaciju pravila priznanja kao po svojoj naravi konstitutivnog pravila. Pri tome ukazujem na neke prigovore (glede načina na koji nositelji pravne vlasti stječu svoj pravni ili službeni status, članstva sâmoga pravila priznanja u pravnom sustavu, dostatnosti prihvaćanja od nositelja pravne vlasti za uspostavu pravila priznanja i temelja dužnosti običnih građana da se pokoravaju pravu) iz kojih proizlazi pitanje u pogledu čega je pravilo priznanja konstitutivno. Hartovo objašnjenje pravila priznanja potom (3. poglavlje) analiziram u odnosu na artefaktnu teoriju prava, izlažući tvrdnju o pravilu priznanja kao istodobno token-elementarnom konstitutivnom pravilu i implementacijskom pravilu pravnog sustava. Konačno (4. poglavlje), iznova razmatram neke od prigovora upućenih Hartovu objašnjenju pravila priznanja i nastojim pokazati da se interpretacija pravila priznanja dana u okviru artefaktne teorije prava s njima nosi mnogo bolje.

2 PRAVILO PRIZNANJA KAO KONSTITUTIVNO PRAVILO

Prema Hartovu objašnjenju, pravilo priznanja je posebna vrsta društvenog pravila koje tvori temelje pravnog sustava. Njegovo se postojanje očituje u načinu na koji nositelji pravne vlasti utvrđuju pravila svoga sustava, tj. pravo. Tako utvrđeno pravo je ono što Hart naziva primarnim pravilima o obvezama. S obzirom na to da je svako primarno pravilo valjano ako ga se može utvrditi ili priznati kao člana pravnog sustava sukladno kriterijima postavljenima pravilom priznanja, Hart te kriterije smatra konačnim kriterijima valjanosti. Činjenica da valjanost i članstvo svih primarnih pravila nekog sustava ima izvor u jednom pravilu daje pravilu priznanja posebnu sposobnost, naime sposobnost ujedinjavanja do tada nepovezanog skupa pravila u sustav pravila. Osiguravajući jedinstvo, što je razlikovno obilježje svakoga sustava, pravilo priznanja, kaže Hart, »uvodi /.../ ideju pravnog sustava«.[3]

Kako je već rečeno, pravilo priznanja ima i važnu konstitutivnu ulogu. Pitanje je samo što se to točno njime konstituira. Pravna pravila su najupadljiviji kandidati. Da pravilo priznanja konstituira pravna pravila može se zaključiti iz Hartova objašnjenja testa utvrđivanja i njegova stajališta o tome kako primarna pravila stječu svoj pravni status. Prvo, kriteriji (valjanosti) izloženi u pravilu priznanja nisu samo neko korisno sredstvo koje nam pomaže prepoznati da nešto negdje već postoji, nešto što prethodi tim kriterijima. Prema Hartu, kriteriji izloženi u pravilu priznanja dio su »testa za utvrđivanje što *treba*

3 Hart (1994: 95).

smatrati pravom« (isticanje dodano).[4] A taj se test najbolje očituje u načinu na koji nositelji pravne vlasti, npr. sudovi, »utvrđuju što *treba smatrati* pravom« (isticanje dodano).[5] Dakle, nije da pravna pravila samo *bivaju* utvrđivana tim kriterijima. Što je važnije, kriteriji kažu koja pravila *trebaju biti* pravna pravila. Unatoč načinu na koji se obično upućuje na kriterije valjanosti, njihov položaj u odnosu na pravna pravila čini ih više skupom obvezujućih zahtjeva nego pukim testom utvrđivanja. Drugi argument u prilog određivanju pravila priznanja kao konstitutivnog pravila temelji se na Hartovu stajalištu o načinu na koji primarna pravila stječu svoj pravni status.[6] Prema Hartu, pravilo može steći svoj status pravnog pravila, pravila koje je član pravnog sustava, samo ispunjenjem kriterija predviđenih pravilom priznanja.[7] Dakle, pravilo priznanja je ono na temelju čega svako pojedino (primarno) pravilo postaje *pravno* pravilo. Pravila nemaju pravni status prije nego im se takav status prizna sukladno kriterijima valjanosti postavljenima pravilom priznanja. Pravilom priznanja se, dakle, »pravilima dodjeljuje njihov *status* pravnih pravila«.[8]

Osim njegove konstitutivne uloge u odnosu na pravila sustava, moguće je možda zamisliti i njegovu konstitutivnu ulogu u odnosu na pravni sustav kao takav. U potonjem slučaju, pravilo priznanja bilo bi pravilo na temelju kojega ne samo da pojedina pravila jesu pravila, nego i sustav tih pravila *jest* pravni sustav. Kada bi u pravilu priznanja postavljeni uvjeti postojali, postojao bi pravni sustav. Pravilo priznanja na taj bi način sustavu dodijelilo njegov *status* pravnog sustava. A ta slika, čini se, iako izrijekom neiskazana, zapravo prati pravilo priznanja. Budući da pravilo priznanja ima temeljnu ulogu u Hartovu objašnjenju postojanja pravnog sustava, to ne bi trebalo predstavljati iznenađenje. Hart, naravno, ne tvrdi da je pravilo priznanja konstitutivno pravilo pravnog sustava kao cjeline. Upravo suprotno, Hart tvrdi da uvođenje svakog od sekundarnih pravila (pravila priznanja, pravila mijenjanja i pravila presuđivanja) predstavlja samo korak iz predpravnog u pravni svijet, ili iz skupa običaja (primarnih pravila) u pravni sustav te da su samo sva sekundarna pravila uzeta zajedno dostatna da uređenje primarnih pravila pretvore u pravni sustav.[9] Međutim, iako, za Harta, spoj primarnih pravila o obvezama i sekundarnih pravila priznanja, mijenjanja i presuđivanja predstavlja srce pravnog sustava, zajednica primarnih i sekundarnih pravila nije cjelina pravnog sustava.[10]

4 Hart (1994: 105).
5 Hart (1994: 108).
6 Ovaj je argument iznio Lamond. Vidi Lamond (2013: 114–115).
7 Hart (1994: 109, 110 i 111).
8 Lamond (2013: 115).
9 Hart (1994: 94).
10 Hart (1994: 98 i 99).

Međutim, tvrdnja da pravilo priznanja ima konstitutivnu ulogu u odnosu na pravni sustav kao cjelinu mogla bi naći neku neuhvatljivu potporu u Hartovoj teoriji. Tako, primjerice, prema Hartu, pravilo priznanja, čak i kada se svodi samo na upućivanje na autoritativni tekst, »uvodi /.../ *ideju pravnog sustava*: jer pravila sada nisu samo zaseban nepovezani skup, nego su, na jednostavan način ujedinjena« (isticanje dodano).[11] Budući da je nužno obilježje pravnog sustava da je sustav a ne skup pravila, i budući da je pravilo priznanja ono koje može osigurati tu zajednicu pravila, može se reći da pravilo priznanja konstituira ne samo svako pojedino pravilo pravnog sustava nego i sustav kao takav. Drugu potporu za takovrsnu tvrdnju moguće je pronaći u Hartovu stajalištu da ako išta zaslužuje »biti nazivano *temeljima pravnog sustava*« (isticanje dodano), to je onda »društvena situacija u kojoj je pravilo priznanja prihvaćeno i upotrebljava se za utvrđivanje primarnih pravila o obvezama«.[12] Još se jednu potporu može naći u sljedećoj tvrdnji: »pravilo koje pruža kriterije za utvrđivanje ostalih pravila sustava doista se može smatrati *određujućim obilježjem pravnoga sustava*« (isticanje dodano).[13]

Bilo kako bilo, interpretacija Hartova pravila priznanja kao jedinog konstitutivnog pravila sustava kao cjeline nedvojbeno bi kršila načelo milosrđa (*the principle of charity*). Međutim, čini se da neki od prigovora koji se redovito upućuju Hartovu objašnjenju pravila priznanja prešutno zahtijevaju neko takvo pravilo, bilo da je riječ o pravilu priznanja samom (u reinterpretiranom obliku) ili nekoj drugoj vrsti pravila, koje bi bilo konstitutivno ne samo u pogledu primarnih pravnih pravila nego i sekundarnih pravnih pravila kao elemenata pravnog sustava ili pravnog sustava kao cjeline. Izraz »primarna pravila« ovdje upotrebljavam za upućivanje na sve vrste pravila »prvoga reda« u pravnom sustavu (bilo da je riječ o onima kojima se nameću dužnosti ili onima kojima se dodjeljuju prava), izuzev tri sekundarna pravila (pravila priznanja, mijenjanja i presuđivanja) kao pravila »drugoga reda«.

Uzmimo, primjerice, prigovor da pravilo priznanja ne može objasniti zašto je ono (kao i druga dva sekundarna pravila) član pravnog sustava. Ako je pravni sustav zajednica primarnih i sekundarnih pravila i ako pravilo priznanja služi konstituiranju samo primarnih pravila sustava, onda mora postojati još neko pravilo koje bi bilo konstitutivno u pogledu sekundarnih pravila sustava. U tom je kontekstu čudno i to kako pravilo priznanja može osigurati zajednicu primarnih i sekundarnih pravila. Izlažući kriterije članstva za primarna pravila, ono nedvojbeno osigurava jedinstvo između različitih primarnih pravila sustava, ali ne može objasniti jedinstvo između primarnih pravila i, npr., sekundarnog pravila mijenjanja ili presuđivanja.

11 Hart (1994: 95).
12 Hart (1994: 100).
13 Hart (1994: 111).

Ili, da uzmemo drugi primjer – poznata dvojba glede toga što dolazi prvo, pravilo priznanja ili nositelji pravne vlasti. Ako pravna praksa nositelja pravne vlasti utemeljuje pravilo priznanja, onda nositelji pravne vlasti *kao* nositelji pravne vlasti trebaju postojati prije nastanka pravila priznanja. Njihova uloga nositelja pravne vlasti ne može biti konstituirana onim istim pravilom koje oni sâmi konstituiraju. A, prema Hartu, nositelji pravne vlasti (npr. zakonodavci ili suci) mogu steći svoju službenu ulogu samo na temelju nekog pravila.[14] Možda bi se moglo ustrajati na tvrdnji da zakonodavci i suci stječu svoja službena svojstva na temelju pravila mijenjanja ili presuđivanja. To bi, međutim, podrazumijevalo da ta pravila prethode pravilu priznanja. Ipak, Hart uopće nije spomenuo kronološki red prema kojem je bilo koje od tih pravila uvedeno u sustav. Također, bilo bi i pojmovno pogrešno pretpostaviti njihovo prvenstvo u odnosu na pravilo priznanja jer je ono što zakonodavci i suci čine u skladu s pravilima mijenjanja i presuđivanja uvođenje promjena u odnosu na pravila utvrđena pravilima sustava i presuđivanje glede tih pravila, a što se ne može činiti ako pravilo priznanja koje izlaže kriterije valjanosti već ne postoji. Dakle, ako nositelji pravne vlasti ne stječu svoju službenu ulogu na temelju nekog od Hartovih sekundarnih pravila, onda opet postoji potreba za nekim drugim pravilom kojim se konstituira njihov službeni status i koje prethodi pravilu (priznanja) koje je konstituirano njihovom službenom praksom.

Još jedan problem koji se često povezuje s pravilom priznanja odnosi se na pitanje zašto je prihvaćanje od nositelja pravne vlasti dostatno za utemeljenje pravila priznanja. Da je prihvaćanje pravila priznanja od nositeja pravne vlasti dostatno za njegov nastanak ne čini se problematičnim ako pravilo priznanja shvatimo kao konstitutivno samo u pogledu primarnih pravila sustava (tj. pravila 'prvoga reda'). Budući da su primarna pravna pravila elementi pravnog sustava kao cjeline, pravilo priznanja je konstitutivno samo u pogledu elemenata sustava. To pretpostavlja da je pravni sustav već konstituiran, što opet pretpostavlja da je određena skupina ljudi, na temelju nekog drugog konstitutivnog pravila, već stekla svoj status nositelja pravne vlasti. Stekavši status nositelja pravne vlasti, ta je skupina stekla službenu sposobnost da prakticira pravilo priznanja i tako postavi kriterije članstva za primarna pravna pravila njihova pravnog sustava.

Konačno, postoji prigovor da pravilo priznanja ne može utemeljiti (pravnu) obvezu običnih građana da se pokoravaju pravu jer je to pravilo samo nositelja pravne vlasti. Ako je pravilo priznanja utemeljeno konvergentnom praksom ponašanja i kritičkim stavom prihvaćanja jedne skupine ljudi (nositelja pravne vlasti), ono ne može stvoriti dužnost pokoravanja pravu ni za jednu drugu skupinu ljudi osim te. Međutim, ta moguća skupina nositelja pravne vlasti ne bi mogla steći svoj službeni status da drugi ljudi, i mogući nositelji pravne vla-

14 Hart (1994: 80 i 97).

sti i oni koji to nisu (obični građani), nisu prihvatili to da se moguće nositelje pravne vlasti smatra nositeljima pravne vlasti, s ovlašću da stvaraju pravo kojemu se mora pokoravati. Dakle, opet, u cilju objašnjenja normativnosti prava u pogledu svih članova odgovarajuće zajednice, mora postojati pravilo koje prethodi pravilu priznanja. Naravno, tomu je tako samo ako ne prihvatimo gledište prema kojem postoji neka moralna dužnost pokoravanja pravu ili da je pravo normativno na temelju različitih elemenata prava koji ljudima pružaju razloge za pokoravanje (poput ovlašćivanja na upotrebu prisilnih mehanizama izvršenja).

Ti primjeri upućuju na dva važna zaključka. Prvo, Hartovo se pravilo priznanja ne može uspješno razumjeti kao (jedino) konstitutivno pravilo pravnog sustava kao cjeline. Drugo, ti primjeri izazivaju pojmovni problem. Ako je Hartovo objašnjenje pravila priznanja ispravno, onda trebaju postojati još barem dva konstitutivna pravila. Naime, jedno koje utemeljuje nositelje pravne vlasti i drugo koje uvodi početni pojam nekog pravnog sustava. Potonji ću zaključak razmatrati u idućem poglavlju, unutar teorijskog okvira artefaktne teorije prava.

3 PRAVNI SUSTAV KAO APSTRAKTAN INSTITUCIONALNI ARTEFAKT I NJEGOVA KONSTITUTIVNA PRAVILA

Prema artefaktnoj teoriji prava, pravni sustav je apstraktan institucionalni artefakt.[15] Pravni sustav je artefakt jer ga stvara autor (u pravilu skupni) koji ima odgovarajuću intenciju (koja proizlazi iz autorove skupne intencionalnosti) da stvori institucionalni artefakt »pravni sustav«, na temelju autorovog supstancijalnog i supstancijalno ispravnog pojma o tome što pravni sustav jest, pod uvjetom da ta intencija bude uglavnom uspješno ostvarena.[16] Bivajući institucionalnim po svojoj prirodi, pravni sustav se razlikuje od 'običnih' artefakata (poput stolica, čekića ili satova) po tome što se temelji na pravilu i zahtijeva skupno priznanje (prihvaćanje) od odgovarajuće zajednice. To znači da inicijalno može biti stvoren samo ako postoji skupno priznanje odgovarajućih konstitutivnih pravila i da može postojati samo dok se to priznanje održava.[17] Konačno, pravni je sustav apstraktan u smislu što nije stvoren nametanjem statusne funkcije 'pravni sustav' nijednom postojećem fizičkom objektu ili osobi, nego činjenjem činjenicom da pravni sustav postoji pod uvjetom da su ispunjeni određeni uvje-

15 Dio ovoga poglavlja temelji se na Burazin 2016: 5. pogl.

16 O intencionalno-pojmovnoj teoriji artefakata, na kojoj temeljim svoju artefaktnu teoriju prava, vidi, npr., Thomasson (2007: 52–73) i Thomasson (2003: 580–609).

17 Za ovaj aspekt vidi Searle (1995: 44–45).

ti.[18] Naravno, činjenje činjenicom da pravni sustav postoji ostvaruje se putem skupnog priznanja (egzistencijalnog) konstitutivnog pravila kojim je postavljen skup uvjeta za postojanje pravnog sustava. Pravilo čijim skupnim priznanjem odgovarajuća zajednica čini činjenicom da pravni sustav postoji stvara kontekst u kojem može nastati primjerak pravnog sustava.

Skup uvjeta postavljen konstitutivnim pravilom pravnog sustava predstavlja dostatne uvjete postojanja pravnog sustava. S obzirom na to da je pravni sustav artefaktna vrsta, čini se da taj skup uvjeta postojanja uključuje barem skup uvjeta za bivanje artefaktom. On stoga uključuje i uvjet autorstva i uvjet intencije. Uvjet autorstva zahtijeva da postoji autor, skupno priznat kao takav od odgovarajuće zajednice, koji stvara pravni sustav.[19] Uvjet intencije zahtijeva da taj autor ima određenu intenciju da stvori institucionalnu artefaktnu vrstu 'pravni sustav', da je ta intencija utemeljena na autorovom supstancijalnom pojmu pravnog sustava[20] te da je u konačnici ta intencija uglavnom uspješno ostvarena.[21] Budući da ti uvjeti određuju artefaktni značaj pravnog sustava, može se reći da se oni zapravo svode na inicijalni pojam pravnog sustava. To, nadalje, znači da pojam pravnog sustava koji dijeli odgovarajuća zajednica, putem skupnog priznanja konstitutivnog pravila pravnog sustava, ima stipulativnu ulogu kod utemeljenja 'naravi' pravnog sustava.[22]

Međutim, (skupni) pojam pravnog sustava koji zajednica dijeli ono je što određuje 'narav' pravnog sustava samo na prvoj razini. Odgovarajuća zajednica skupno priznaje da je nešto pravni sustav ako je stvoreno s intencijom da

18 O razlici između konkretnih i apstraktnih institucionalnih objekata vidi Thomasson (2003: 587–588).

19 S obzirom na to da, u načelu, nijedna osoba ne stvara pravni sustav počinjući od ničega, da pravni sustav obično nema točno utvrdljive autore te da se čini kako mnogi ljudi s različitim ulogama tijekom dugoga razdoblja doprinose nastanku i postojanju pravnog sustava, artefaktna teorija prava postavlja i upotrebljava vrlo širok pojam autorstva. Artefaktna teorija prava ne isključuje mogućnost skupnog autorstva te prihvaća kao autore široki raspon osoba, uključujući i one koji održavaju dotični artefakt i njegove djelatne korisnike. Međutim, prema artefaktnoj teoriji prava, pojmovna je istina da pravni sustavi, s obzirom na to da su entiteti koje stvaraju ljudi, imaju autore.

20 Autorov pojam pravnog sustava je, dakako, 'neteorijski' ili 'praktični' pojam prava, konstitutivan u pogledu pravnog sustava.

21 Možda bi se moglo učiniti previše ograničavajućim za teoriju prava kada bi se apriorno ograničila samo na one primjerke pravnog sustava koji su stvoreni na intencionalan način. Međutim, s obzirom na to da su pravni sustavi vrlo složeni institucionalni artefakti, čini se neobičnim tvrditi da su tako složeni entiteti mogli nastati (potpuno) neintencionalno. Nije da je netko nešto prtljao, pa proizveo entitet *x*, a tek potom shvatio da je to što je proizveo primjerak pravnog sustava. Nadalje, uvjet intencionalnosti ne isključuje mogućnost da dio (ili čak veći dio) procesa nastajanja institucionalnog artefakta uključuje njegovo postupno nastajanje iz ustaljene prakse. Osim toga, ako je točno da su nositelji pravne vlasti autori pravnog sustava, onda se čini prihvatljivim pretpostaviti da oni djeluju s intencijom da ono što proizvedu pripada vrsti 'pravni sustav', a ne nekom drugom sustavu pravila.

22 Usporedi Thomasson (2003: 591–592).

bude pravi član institucionalne artefaktne vrste 'pravni sustav'. To nedvojbeno zahtijeva da odgovarajuća zajednica ima barem neki (ma kako opći) pojam o tome što pravni sustav jest.[23] Međutim, s obzirom na to da je pravni sustav, na kraju krajeva, artefakt, mora imati autora. Autor mora imati određene intencije. On također mora imati supstancijalni (i supstancijalno ispravan) pojam o tome što pravni sustav jest. Ispravnost njegova pojma prosuđuje se na temelju podudaranja skupnog pojma pravnog sustava koji dijeli zajednica i autorovog pojma pravnog sustava. Da bi autorov pojam bio ispravan, treba se barem supstancijalno poklapati s odgovarajućim pojmom pravnog sustava koji dijeli zajednica. Međutim, s obzirom na to da autor treba imati samo supstancijalan (i supstancijalno ispravan) pojam i s obzirom na to da taj pojam treba biti ostvaren samo uglavnom uspješno, može se reći da se konačna zbiljska 'narav' (značaj) proizvedenog pravnog sustava, na drugoj razini, ipak oblikuje intencijama njegova autora (i onih koji pravni sustav održavaju). Dakako, osim što je važan za stvaranje pravnog sustava, (skupni) pojam koji dijeli odgovarajuća zajednica važan je i za njegovo postojanje. Pravni sustav postoji samo dok ga odgovarajuća zajednica skupno priznaje kao pravni sustav ili samo dok se autorove intencije barem uglavno poklapaju sa (skupnim) pojmom pravnog sustava koji dijeli zajednica. To je u skladu s Hartovom tvrdnjom da u slučaju općeg nepoštovanja pravila sustava treba reći »da se sustav, kad je riječ o novom sustavu, nikada nije ni utemeljio kao pravni sustav određene skupine, ili, kad je riječ o već utemeljenom sustavu, da je on prestao biti pravni sustav dotične skupine«.[24] Iz toga proizlazi da bi neka osoba ili skupina osoba mogla stvoriti novi sustav pravila koji bi imao svoje pravilo priznanja, ali koji zapravo ne bi bio pravni sustav određene skupine jer bi na djelu bilo opće nepoštovanje njegovih pravila. Prema artefaktnoj teoriji prava, autori i njihove intencije nedvojbeno bi postojali, ali ne bi postojao i institucionalni artefakt jer bi izostalo skupno priznanje od odgovarajuće skupine.

Pa kako se dakle u ovo objašnjenje uklapa Hartovo pravilo priznanja? Funkcija je pravila priznanja da omogući postojanje primarnih pravnih pravila (tj. pravila 'prvoga reda') pravnog sustava. Međutim, unatoč činjenici da je navedeno pravilo konstitutivno u pogledu svih pravnih pravila sustava, ono je konstitutivno u pogledu svakog pojedinog pravnog pravila, a ne u pogledu pravnog sustava kao takvog. Ako uzmemo da je pravni sustav sustav pravila, pravilo priznanja bi se najbolje moglo shvatiti kao konstitutivno pravilo elemenata pravnog sustava. Ono bi se moglo formulirati na sljedeći način:

> Za svako pravilo *x*, mi (nositelji pravne vlasti) skupno prihvaćamo da se *x*, ako ispuni određene uvjete U, smatra pravnim pravilom našeg pravnog sustava.

23 Odgovarajući pojam pravnog sustava koji dijeli zajednica je, kao i autorov pojam, 'neteorijski' ili 'praktični' pojam prava, konstitutivan u pogledu pravnog sustava.

24 Hart (1994: 103).

Uvjeti U koje *x* treba ispuniti kako bi ga se smatralo pravnim pravilom mogu uključivati, npr., činjenicu da je određeno pravilo dio nekog autoritativnog teksta pravila, da ga je donijelo točno određeno tijelo, da se dugo običajno praktcira ili da je povezano sa sudskom odlukom.[25] Ti uvjeti, dakako, pretpostavljaju pojam pravnog pravila koji dijele nositelji pravne vlasti jer se njima točno određuje, kako kaže Hart, »neko obilježje ili obilježja koja se, ako ih dotično pravilo posjeduje, uzimaju kao presudan znak to da je riječ o pravilu skupine koje treba biti podržano društvenim pritiskom koji ona vrši«,[26] tj. da je ono 'pravno' pravilo. Međutim, uvjeti određeni pravilom priznanja pretpostavljaju i pojam pravnog sustava koji dijele nositelji pravne vlasti. Jer, prema Hartu, pravilo priznanja, čak i svom najjednostavnijem obliku (onome koji se svodi isključivo na upućivanje na autoritativan tekst) uvodi »ideju pravnog sustava« te može biti shvaćeno kao »određujuće obilježje pravnog sustava«.[27] Ako ostanemo u okviru Hartove teorije, razumno je pretpostaviti da pojam pravnog sustava koji dijele nositelji pravne vlasti uključuje barem sljedeća dva obilježja: da je pravni sustav sustav valjanih pravnih pravila, tj. pravila koja su članovi jednog te istog sustava pravila, te da je pravni sustav strukturiran kao zajednica primarnih i sekundarnih pravnih pravila. Međutim, budući da je, za Harta, pravilo priznanja konačno pravilo u pravnom sustavu, neodgovorenim ostaje pitanje kako nositelji pravne vlasti (npr. suci ili zakonodavci), u čijoj se praksi sastoji zbiljsko postojanje pravila priznanja, stječu svoj status nositelja 'pravne' vlasti. Čini se da je, u cilju objašnjenja nastanka nositelja pravne vlasti i izbjegavanja problema kružnosti (dvojbe glede toga kako pravilo priznanja može objasniti nositelje pravne vlasti kada je upravo praksa nositelja pravne vlasti ta koja konstituira navedeno pravilo), potrebno konstitutivno pravilo sljedećeg oblika:

> U pogledu te skupine ljudi *z*, skupno priznajemo da se *z* smatra nositeljima pravne vlasti.

Prema Searleovoj teoriji izgradnje društvene zbilje, 'nositelji pravne vlasti' kao institucija u nekom kontekstu K mogu biti stvoreni jedino ako postoji skupna intencionalnost kojom se nekoj skupini ljudi nameće poseban status, onaj 'nositelja pravne vlasti', (te, posljedično, funkcija s određenim »deontičkim vlastima«, tj. pravima, ovlaštenjima, dužnostima, obvezama, itd.).[28] I to vrijedi bez obzira na to kako se skupinu početno razabralo – je li se skupina sama odijelila kao nositelji pravne vlasti na temelju sile ili su je takvom priznali drugi.[29] Skupna intencionalnost potrebna za nametanje statusa nositelja pravne vlasti

25 Hart (1994: 95).

26 Hart (1994: 94).

27 Hart (1994: 95 i 111).

28 Searle (1995: 114) i Searle (2010: 6-11). Primijetimo da Searleove »deontičke vlasti« uključuju i vlasti i obveze, čme se izbjegava problem pripisivanja sucima isključivo vlasti.

29 Naravno, moguće je tvrditi da druga situacija pravo čini legitimnim (ili legitimnijim) sustavom pravila. Vidi Taekema (2008: 171). Međutim, čak i u prvoj situaciji skupina mora biti

iskazuje se putem skupnog priznanja određene skupine kao one koja ima taj poseban status. Oni koji tu skupinu skupno priznaju kao nositelje pravne vlasti su obični građani (adresati pravila koja proizvode nositelji pravne vlasti) kao i sami potencijalni nositelji pravne vlasti. Nametanjem statusa nositelja pravne vlasti određenoj skupini, članovi odgovarajuće zajednice dodjeljuju toj skupini posebne funkcije s odgovarajućim »deontičkim vlastima«: funkcije utvrđivanja, stvaranja, mijenjanja i primjenjivanja prava.

Međutim, kako bi nametnula statusnu funkciju nositelja 'pravne' vlasti nekoj skupini osoba te joj pripisala određene 'deontičke vlasti', nužno je da odgovarajuća zajednica već dijeli barem neki opći pojam ili ideju o tome što 'pravo' ili 'pravni sustav' i 'pravno' jest. Nadalje, s obzirom na to da su pravni sustavi institucionalni artefakti, prethodno treba postojati prikladno konstitutivno pravilo koje određuje skup uvjeta koji trebaju biti ispunjeni kako bi pravni sustav postojao. Takvo je, dakako, pravilo čijim skupnim priznanjem odgovarajuća zajednica čini činjenicom da nešto ima statusnu funkciju 'pravni sustav', stvarajući tako kontekst u kojem može nastati primjerak pravnog sustava. To konstitutivno pravilo možemo formulirati na sljedeći način:

Mi (skupno) priznajemo da, ako uvjeti U postoje, onda postoji pravni sustav.

Kako je već rečeno, uvjeti određeni konstitutivnim pravilom pravnog sustava (koji se zapravo svode na pojam pravnog sustava) uključuju barem uvjete koji trebaju biti ispunjeni kako bi postojao institucionalni artefakt 'pravni sustav', ali mogu uključivati i druge uvjete. Tako uvjeti U iz konstitutivnog pravila pravnog sustava mogu varirati od jednostavnog zahtjeva da bilo što što skupina ljudi koju zajednica (skupno) prizna svojim nositeljima pravne vlasti smatra pravnim sustavom jest pravni sustav do podrobnijih i informiranijih uvjeta postojanja pravnog sustava (npr., da je ukupnost pravila koja nositelji pravne vlasti smatraju pripadajućima pravnom sustavu pravni sustav ili da je pravni sustav bilo što što nositelji pravne vlasti smatraju pravnim sustavom, dok god su oni sami njime pravno ograničeni ili pod uvjetom da pravni sustav podržava ljudska prava, izražava načelo vladavine prava, itd.). Pojam prava je, napokon, pojam artefakta, a s obzirom na to da su artefakti podložni mijenjanju (ovisno o ljudskim interesima), i njihovi se pojmovi mogu mijenjati.

Na taj način, skupno priznajući konstitutivno pravilo pravnog sustava, odgovarajuća zajednica određuje 'narav' svoga pravnog sustava. To je, međutim, određivanje samo na prvoj razini. Odgovarajuća zajednica tako izlaže opću ideju svoga pravnog sustava, ali ga još uvijek ne oprimjeruje. Da bi nastao primjerak pravnog sustava netko mora konkretizirati ili implementirati opću ideju (tj. netko mora dovesti do toga da uvjeti U iz konstitutivnog pravila pravnog sustava postoje). Budući da odgovarajuća zajednica ovlašćuje nosite-

skupno priznata kao skupina nositelja pravne vlasti kako bi imala statusnu funkciju 'nositelja pravne vlasti'. Kao što i banda nije banda ako nije skupno priznata kao takva.

lje pravne vlasti da utvrđuju, stvaraju, mijenjaju i primjenjuju pravo, može se reći da su nositelji pravne vlasti pravi autori određenog primjerka ili tokena pravnog sustava. A ako su nositelji pravne vlasti doista autori pravnog sustava, skupno priznati od odgovarajuće zajednice kao imatelji statusne funkcije 'nositelji pravne vlasti' (funkcije koja podrazumijeva odgovarajuće »deontičke vlasti« utvrđivanja, stvaranja, mijenjanja i primjenjivanja prava), ne bi trebalo biti pogrešno pretpostaviti da oni svoje prakse hoće kao prakse koje izvršavaju s obzirom na ispunjavanje njihove službene uloge. Iskaz njihove intencije da postupaju na taj način najviše se može razabrati u njihovom smatranju svojih obrazaca ponašanja pravilom – pravilom (priznanja) koje, prema Hartu, čini temelje pravnog sustava.[30] Stoga se može reći da je njihova intencija intencija stvaranja pravnog sustava. Dakle, konstitutivno pravilo pravnog sustava, priznato od odgovarajuće zajednice, stvara kontekst u kojem se praksa nositelja pravne vlasti kao autora pravnog sustava, koja za posljedicu ima nastanak pravila priznanja i ostalih sekundarnih pravila, može razumjeti kao konkretiziranje ili implementiranje općeg pojma pravnog sustava koji zajednica dijeli i određivanje 'naravi' pravnog sustava na drugoj razini. Jer, kako kaže Finnis, »osnovna ideja (recimo klijentova narudžba) kontrolira stvaranje artefakta, ali ga ne određuje potpuno, a dok on nije potpuno određen artefakt ne postoji ili je nepotpun«.[31]

Pravni sustav stječe svoje glavno obilježje (naime, da je sustav pravila) putem pravila priznanja. Jer pravilo priznanja ujedinjuje do tada nepovezani skup pravila u sustav pravnih pravila. I to je kontekst s obzirom na koji treba tumačiti Hartovu tvrdnju da pravilo priznanja uvodi »ideju pravnog sustava« te da ga se može shvatiti kao »određujuće obilježje pravnog sustava«.[32] Budući da su pravni sustavi institucionalni artefakti, koji za svoje postojanje trebaju skupno priznanje, pravilo priznanja samo, naravno, nije dostatno da stvori pravni sustav. Kako bi ispunilo svoju ulogu konstituiranja pravnih pravila kao elemenata (članova) sustava pravila, dajući tako oblik postojećem pravnom sustavu, pravilu priznanja potreban je kontekst poput onoga koji se uspostavlja praksom priznavanja toga što se smatra pravnim sustavom i tko se smatra nositeljem pravne vlasti, a što je praksa odgovarajuće zajednice. Stoga, uz pravilo priznanja kao token-elementarno konstitutivno pravilo, koje prakticiraju nositelji pravne vlasti, potrebna su još barem dva konstitutivna pravila – konstitutivno pravilo određenog pravnog sustava i konstitutivno pravilo nositelja pravne vlasti u tom pravnom sustavu, koja prakticira odgovarajuća zajednica, tj. zajednica čiji su članovi adresati pravnih pravila njezina pravnog sustava. Međutim, budući da su nositelji pravne vlasti autori pravnog sustava te da oni

30 Hart (1994: 100).

31 Finnis (1984: 284).

32 Hart (1994: 95 i 111).

konkretiziraju pojam pravnog sustava koji dijeli zajednica uglavnom putem pravila priznanja, može se reći da pravilo priznanja nije 'samo' token-elementarno konstitutivno pravilo, nego i implementacijsko ili konkretizacijsko pravilo pravnog sustava.

4 PREISPITIVANJE NEKIH PRIGOVORA GLEDE HARTOVA OBJAŠNJENJA PRAVILA PRIZNANJA

U 2. poglavlju ukazao sam na četiri prigovora koji se često upućuju Hartovu objašnjenju pravila priznanja. Analiza svakog od njih pokazala je da pravilo priznanja samo nije dostatno da u cijelosti objasni ono za što bi se moglo pretpostaviti da bi trebalo objasniti. Tako je, primjerice, pokazano da pravilo priznanja, onako kako ga je zamislio Hart, nije sposobno objasniti zašto je ono, ili ostala sekundarna pravila, član pravnog sustava, ili objasniti status nositelja pravne vlasti, ili objasniti zašto je prihvaćanje od nositelja pravne vlasti dostatno za njegov nastanak, ili zašto obični građani imaju dužnost pokoravati se pravu. Međutim, nakon uvođenja nekoliko osnovnih teorijskih alata artefaktne teorije prava u 3. poglavlju, sada je moguće preispitati spomenute prigovore. Budući da je pitanje objašnjenja statusa nositelja pravne vlasti već bilo razmotreno u prethodnom poglavlju, ovdje ću se pozabaviti preostalim trima prigovorima i pokušati pokazati kako dodatna konstitutivna pravila, utvrđena kao nužni uvjeti za nastanak pravila priznanja i određenog primjerka (tokena) pravnog sustava, zajedno s ukupnim okvirom artefaktne teorije prava, mogu pružiti uvjerljivije odgovore.

Započnimo s problemom objašnjenja činjenice da su sekundarna pravila (tj. pravila drugoga reda), uključujući pravilo priznanja, članovi sustava pravnih pravila. Sukladno konstitutivnom pravilu određenog pravnog sustava, odgovarajuća zajednica skupno priznaje da, ako se ispune određeni uvjeti, 'pravni sustav' postoji. Kako je već rečeno, ti uveti, u svom najjednostavnijem obliku, mogu odrediti da je pravni sustav što god nositelji pravne vlasti smatraju pravnim sustavom, ili mogu biti razrađeniji, određujući, npr., da je ukupnost pravila koja nositelji pravne vlasti smatraju pripadajućima pravnom sustavu pravni sustav. Skup pravila koja nositelji pravne vlasti nedvojbeno smatraju onima koja oblikuju pravni sustav jesu primarna pravila (tj. pravila prvoga reda). Izvršavajući svoju temeljnu funkciju prema pravilu priznanja, nositelji pravne vlasti utvrđuju određena pravila kao primarna pravna pravila sustava. Međutim, primarna pravna pravila ne iscrpljuju popis pravila koja pripadaju pravnom sustavu i koja ga, stoga, oblikuju. Popis uključuje i sekundarna pravila. Dakle, ono što treba dokazati jest da nositelji pravne vlasti, osim primarnih pravila, i sekundarna pravila smatraju pravnim pravilima koja pripadaju sustavu pravila. Zbog gore objašnjenih razloga, to je nemoguće dokazati poziva-

njem na pravilo priznanja. Prema Hartu, sekundarna pravila ne nastaju isključivo iz određenog obrasca ponašanja koji slijede nositelji pravne vlasti. Osim toga, nositelji pravne vlasti trebaju imati specifičan kritički stav prihvaćanja u pogledu tog obrasca ponašanja, koji podiže navedeni obrazac na razinu javnog standarda kojega bi se oni trebali pridržavati. Dakle, ono što nositelji pravne vlasti zapravo čine jest da *smatraju* svoj obrazac ponašanja pravilom. No smatraju li oni takvo pravilo pravnim pravilom i pravilom koje pripada njihovom pravnom sustavu? Budući da se sekundarna pravila sastoje od *pravnih* vlasti i dužnosti (utvrđivanja, stvaranja, mijenjanja i primjenjivanja prava) pripisanih skupini ljudi na temelju skupnog priznanja konstitutivnog pravila od strane odgovarajuće zajednice, na temelju kojega ta skupina stječe svoju statusnu funkciju 'nositelja *pravne* vlasti', onda dotična pravila ne mogu biti ništa drugo nego *pravna* pravila. Dakle, ono što tim pravilima daje status pravnih pravila jest narav deontičkog sadržaja sekundarnih pravila sustava, pripisanog putem pravila konstitutivnog u pogledu nositelja pravne vlasti. Nadalje, kako je već rečeno, pravilo priznanja pretpostavlja neki pojam pravnog sustava koji dijele nositelji pravne vlasti (kao autori pravnog sustava), koji pojam vjerojatno uključuje razumijevanje posebne strukture pravnog sustava, u smislu zajednice primarnih i sekundarnih pravnih pravila, od strane nositelja pravne vlasti. Konačno, ako obični građani pravila koja određuju izvore prava ili ovlašćuju nekoga da donosi nova pravna pravila ili autoritativne odluke u pravnim sporovima redovito smatraju pravnim pravilima, teško je poreći da nositelji pravne vlasti postupaju na isti način, tj. da i oni ta pravila smatraju pravnim pravilima i članovima svoga pravnog sustava.

Drugo se pitanje tiče toga zašto je prihvaćanje od strane nositelja pravne vlasti dostatno za nastanak pravila priznanja. Ono što iznosi Hart jest da je, iako u jednostavnom društvu pravilo priznanja može biti prihvaćeno i od građana i od nositelja pravne vlasti, u složenoj modernoj državi »stvarno stanje takvo da velik dio običnih građana – možda i većina – nemaju nikakvo opće shvaćanje pravne strukture ili njegovih kriterija valjanosti«.[33] Budući da moderna država nužno ima pravni sustav, dostatno je da pravilo priznanja prihvate samo nositelji pravne vlasti. Taj se argument, međutim, svodi na intuitivnu tvrdnju nepodržanu empirijskim dokazima. Nadalje, iako može biti točno da velika većina običnih građana nema nikakvo opće shvaćanje strukture pravnog sustava ili njegovih kriterija valjanosti, iz toga ne proizlazi da nije nužno nikakvo ili, primjerice, neko minimalno prihvaćanje od strane običnih građana. G. Lamond nudi dva argumenta u prilog tvrdnji da je prihvaćanje od strane nositelja pravne vlasti dostatno za nastanak pravila priznanja. U modernim pravnim sustavima, prvi je njegov argument, pravilo priznanja »se čini pravilom konstituiranim praksom nositelja pravne vlasti, s obzirom na to da su pravna

33 Hart (1994: 114).

pravila ona utvrđena praksom nositelja pravne vlasti«.[34] Prema njegovom drugom argumentu, s obzirom na to da se čini da se »u suvremenim pravnim sustavima gledišta onih koji nisu nositelji pravne vlasti od strane nositelja pravne vlasti obično ne smatraju djelomično određujućima u pogledu kriterija valjanosti u tim sustavima /.../, pravilo priznanja konstituirano je isključivo praksama i vjerovanjima nositelja pravne vlasti u tim sustavima, i društveno je pravilo nositelja pravne vlasti«.[35] Dok prvi argument predstavlja logičku pogrešku *petitio principii*, drugi argument je opet intuitivna tvrdnja nepodržana empirijskim dokazima. Štoviše, čak i kada bi bilo točno da gledišta onih koji nisu nositelji pravne vlasti nisu određujuća u pogledu kriterija valjanosti, činjenica da se gledišta onih koji nisu nositelji prave vlasti *obično* od strane nositelja pravne vlasti ne smatraju djelomično određujućima u pogledu tih kriterija ne može dovesti do zaključka da je pravilo priznanja konstituirano *isključivo* praksama i vjerovanjima nositelja pravne vlasti. S druge strane, argument koji proizlazi iz artefaktne teorije prava je pojmovni argument. Skupnim prihvaćanjem pravila konstitutivnih u pogledu pravnog sustava i nositelja pravne vlasti, odgovarajuća zajednica nameće određenoj skupini statusnu funkciju 'nositelji pravne vlasti' i čini tu skupinu autorima svoga pravnog sustava. Budući da su nositelji pravne vlasti autori pravnog sustava i budući da njihova funkcija uključuje funkciju utvrđivanja pravila kao pravnih pravila i pravila pripadajućih sustavu pravila, ono što je dostatno za utemeljenje pravila priznanja jest praksa i specifični normativni stav onih kojima je odgovarajuća zajednica pripisala statusnu funkciju nositelja pravne vlasti.

Konačno, postavlja se pitanje kako pravilo priznanja može objasniti dužnost običnih građana da se pokoravaju prmarnim pravilima kada je ono samo pravilo nositelja pravne vlasti. Iako je točno da pravilo priznanja, kako ga je zamislio Hart, ne može objasniti dužnost pokoravanja pravu onih koji nisu nositelji pravne vlasti, objašnjenje pravila priznanja kao dijela skupa viših konstitutivnih pravila (jednog konstitutivnog u odnosu na pravni sustav i jednog konstitutivnog u odnosu na nositelje pravne vlasti) u tom pogledu prolazi mnogo bolje. Budući da odgovarajuća zajednica (i obični građani i potencijalni nositelji pravne vlasti) skupno priznaje da je pravo što god skupina na koju je nametnula statusnu funkciju 'nositelja pravne vlasti' smatra pravom i budući da ona nositeljima pravne vlasti dodjeljuje odgovarajuće »deontičke vlasti«, uključujući vlast proizvođenja obvezujućih izjava, ona također obvezuje samu sebe na pokoravanje takvim izjavama kada su one stvorene kao valjana pravna pravila. Dakle, ono što objašnjava kako primarna pravna pravila sustava mogu stvoriti pravne obveze na strani građana nije sâmo pravilo priznanja, nego činjenica da članovi

34 Lamond (2013: 109).

35 Lamond (2013: 110).

odgovarajuće zajednice (uključujući obične građane) uspostavljaju gore opisan kontekst u kojem pravilo priznanja može nastati.

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Luka Burazin*

The Rule of Recognition and the Emergence of a Legal System

The paper claims that the rule of recognition, given the way it is presented by Hart, cannot be a constitutive rule of any legal system as a whole, but rather a constitutive rule of (primary) legal rules as elements of a legal system. Since I take the legal system to be an institutional artifact kind, I claim that, in order to account for a legal system as a whole, at least two further constitutive rules, in addition to the rule of recognition as a token-element constitutive rule, are needed – one constitutive of legal officials and the other constitutive of a legal system as a token. However, given the central role the legal officials' practice occupies in establishing a particular instantiation or token of a legal system, I also claim that the rule of recognition cannot be understood as 'merely' a token-element constitutive rule but also as a legal system's implementation or concretisation rule.

Key words: rule of recognition, constitutive rules, artifact theory of law, institutional artifacts, legal systems

1 INTRODUCTION

According to Hart, the rule of recognition represents the foundations of a legal system. All other rules in the legal system are identifiable as members of a system only in virtue of the existence of such a rule of recognition. Since other rules can be seen as belonging to a system of rules only through the lens of the rule of recognition, it is said that the rule of recognition creates unity among different rules.

The relevance Hart attaches to the rule of recognition, as well as some of its characterisations in *The Concept of Law*, indicate that the rule of recognition is first and foremost a rule in virtue of which other rules *are* legal rules. It explains the *existence* of legally valid norms as such. As a matter of conceptual truth, the satisfaction of the rule of recognition constitutes a norm as law. It can thus be said that the rule of recognition plays an important ontological role[1] and thus

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1 Despite the fact that it has sometimes been argued that the rule of recognition also plays an important epistemic role, K. Himma convincingly argues that this role is, at most, considerably more modest. See Himma (1999: 48).

has the character of a constitutive rule. By 'constitutive rules' I here mean the rules which lay out certain conditions that have to be met within a particular context in order for something to have (count as having) the relevant status function or for there to be (count as being) something of the relevant status function. For the status function to be imposed, constitutive rules have to be collectivelly accepted by the relevant community. But what is the rule of recognition constitutive of? Does it constitute merely particular legal rules as members of a system or a particular legal system as a whole? From what Hart says about the rule of recognition, it can be inferred that it certainly serves at least the first function. It is no doubt the constitutive rule of particular legal rules as elements of a system. However, even though this is not what Hart claims (at least not explicitly), one might also be tempted to see it as a constitutive rule of a legal system as such.

What I claim in this paper is that the rule of recognition, given the way it is presented by Hart, cannot be a constitutive rule of any legal system as a whole, but rather a constitutive rule of (primary) legal rules as elements of a legal system. That is, I claim that the rule of recognition does not lay out the conditions that have to be met within a particular context in order for there to be (count as being) a legal system but only the conditions that have to be met within a particular context in order for something to count as a '(primary) legal rule'. Since I take the legal system to be an institutional artifact kind, I further claim that, in order to account for a legal system as a whole, at least two further constitutive rules, in addition to the rule of recognition as a token-element constitutive rule, are needed – one constitutive of legal officials and the other constitutive of a legal system as a token.[2] However, given the central role the legal officials' practice occupies in establishing a particular instantiation or token of a legal system, I also claim that the rule of recognition cannot be understood as 'merely' a token-element constitutive rule but also as a legal system's implementation or concretisation rule. By 'implementation rule' I here mean the rule through the satisfaction of which the author of a token x_i makes conditions C from the type constitutive rule Tx obtain.

2 Of course, a part of my claim is that the rule of recognition is insufficient to explain the empirical emergence of a legal system. However, even though one might argue that, according to one conception of a set, a set is a totality constituted by its elements so that any systematic set of legal rules can be considered a legal system conceptually (as an abstraction), I also claim that the rule of recognition alone cannot be a constitutive rule of a legal system as a matter of conceptual truth since it is a constitutive rule of only a part of the elements of a total set (i.e., of only primary legal rules). Furthermore, which is indeed a question different from the question of whether the rule of recognition is a constitutive rule of a legal system, one should bear in mind that the existence of a rule of recognition alone does not constitute a legal system; in addition, the rules valid under the rule of recognition must be efficacious. And that opens the relationship between empirical and conceptual conceptions of a legal system. Thanks to the anonymous reviewer and K. Himma for pressing this point.

In this paper I first present (Section 2) Hart's account of the rule of recognition, advocating an interpretation of the rule of recognition as a constitutive rule by its nature. I also point to some objections (as to the way officials acquire their legal or official status, as to why the rule of recognition is itself a member of a legal system, as to why acceptance by officials is sufficient for establishing the rule of recognition, and as to what grounds the ordinary citizens' duty to obey the law) that raise questions concerning what the rule of recognition is constitutive of. Then (Section 3) I analyse Hart's account of the rule of recognition against the background of the artifact theory of law, expounding the claim about the rule of recognition being both a token-element constitutive rule and the legal system's implementation rule. Finally (Section 4), I reconsider some of the objections levelled at Hart's account of the rule of recognition and try to show that the interpretation of the rule of recognition given within the framework of the artifact theory of law fares far better in overcoming such objections.

2 RULE OF RECOGNITION AS A CONSTITUTIVE RULE

On Hart's account, the rule of recognition is a special kind of social rule forming the foundations of a legal system. Its existence is manifested by the way officials identify the rules of their system, i.e. the law. The thus identified law is what Hart calls primary rules of obligation. Since any primary rule is valid only if it can be identified or recognised as a member of a legal system according to the criteria laid down in the rule of recognition, Hart takes these criteria to be the system's ultimate criteria of validity. The fact that the validity or membership of all primary rules of a system can be traced back to a single rule confers on the rule of recognition a special capacity, i.e. the capacity of unifying the thus far unconnected set of rules into a system of rules. By providing unity, which is a distinctive feature of every system, the rule of recognition, as Hart says, "introduces /.../ the idea of a legal system".[3]

As has already been said, the rule of recognition also plays an important constitutive role. The question is only what precisely does it constitute. Legal rules are the most notable candidate. That the rule of recognition constitutes legal rules may be inferred from Hart's account of the identification test and his view of the way in which primary rules acquire their legal status. First, the criteria (of validity) set out in the rule of recognition are not just some useful tool which helps us recognize that something is already there, prior to these criteria. According to Hart, the criteria set out in the rule of recognition are part of "the test for identifying what *is to count as* law" (emphasis added).[4] And

3 Hart (1994: 95).

4 Hart (1994: 105).

this test is manifested in the way in which officials, e.g. courts, "identify what *is to count as* law" (emphasis added).[5] So, it is not that legal rules only *are* identified by these criteria. More importantly, the criteria say which rules *are to be* legal rules. Despite the way in which criteria of validity are often referred to, their position with regard to legal rules makes them more of a set of obligatory requirements than a mere identification test. The second argument speaking in favour of characterising the rule of recognition as a constitutive rule is based on Hart's view of the way primary rules acquire their legal status.[6] According to Hart, a rule can acquire its status of a legal rule, a rule that is a member of a legal system, only upon satisfying the criteria provided by the rule of recognition.[7] Thus, it is the rule of recognition in virtue of which particular (primary) rules come to be *legal* rules. Rules do not have legal status prior to being recognised as having such status according to the criteria of validity laid down in the rule of recognition. The rule of recognition thus "confers on the rules their *status* as legal rules".[8]

Besides its constitutive role with respect to the rules of a system, one might perhaps try to imagine its constitutive role with respect to a legal system as such. In the latter case the rule of recognition would be a rule in virtue of which not only particular rules are legal rules, but also a system of these rules *is* a legal system. If the conditions laid out in the rule of recognition were to obtain, there would be a legal system. The rule of recognition would thus confer on the system its *status* as a legal system. And this image in fact, though not explicitly expressed, seems to accompany the rule of recognition. Since the rule of recognition plays a vital role in Hart's account of the existence of a legal system, this should not present a surprise. Hart, of course, does not claim that the rule of recognition is a constitutive rule of a legal system as a whole. Quite to the contrary, Hart maintains that an introduction of each of the secondary rules (rules of recognition, change and adjudication) represents only a step from the pre-legal into the legal world, or from a set of customs (primary rules) to a legal system and that only all secondary rules taken together are sufficient to convert the regime of primary rules into a legal system.[9] And even though, for Hart, the combination of primary rules of obligation with the secondary rules of recognition, change and adjudication represents the heart of a legal system, the union of primary and secondary rules is not the whole of a legal system.[10]

5 Hart (1994: 108).
6 This point was made by Lamond. See Lamond (2013: 114–115).
7 Hart (1994: 109, 110 and 111).
8 Lamond (2013: 115).
9 Hart (1994: 94).
10 Hart (1994: 98 and 99).

However, the claim that the rule of recognition has a constitutive role with respect to a legal system as a whole might find some elusive support in Hart's theory. Thus, for example, according to Hart, the rule of recognition, even when amounting to only a reference to an authoritative text, "introduces /.../ *the idea of a legal system*: for the rules are now not just a discrete unconnected set but are, in a simple way, unified" (emphasis added).[11] Since the necessary feature of a legal system is that it is a system rather than a set of rules, and since it is the rule of recognition that can provide for this unity of rules, one might say that the rule of recognition constitutes not only each of the rules of a legal system but also the system as such. Another support for this kind of claim may be found in Hart's view that if anything deserves "to be called *the foundations of a legal system*" (emphasis added), it is the "social situation where a secondary rule of recognition is accepted and used for the identification of primary rules of obligations".[12] Yet additional support is found in the following claim: "the rule providing criteria for the identification of other rules of the system may well be thought *a defining feature of a legal system*" (emphasis added).[13]

Be that as it may, an interpretation of Hart's rule of recognition as being the sole constitutive rule of a system as a whole would undoubtedly violate the principle of charity. However, it seems that some of the objections that are regularly levelled at Hart's explanation of the rule of recognition implicitly call for some such rule, be it the rule of recognition itself (in a reinterpreted form) or some other kind of rule, that would be constitutive not only of primary legal rules but also of secondary legal rules as elements of a legal system or of a legal system as a whole. I here use the term 'primary rules' to refer to all types of 'first-order' rules in a legal system (be they duty-imposing or power-conferring), with the exception of the three secondary rules (rules of recognition, change and adjudication) as 'second-order' rules.

Take, for example, the objection that the rule of recognition is not able to explain why it itself (as well as the other two secondary rules) is a member of a legal system. If a legal system is a union of primary and secondary rules and if the rule of recognition serves only to constitute the primary rules of a system, then there has to be some other rule that would be constitutive of the secondary rules of the system. In this context it is also curious how the rule of recognition can provide for the union of primary and secondary rules. By stating the membership criteria for primary rules, it certainly does provide for unity among the different primary rules of a system but it cannot account for unity between primary rules and, e.g., the secondary rule of change or adjudication.

11 Hart (1994: 95).
12 Hart (1994: 100).
13 Hart (1994: 111).

Or to take another example – the famous dilemma about what comes first, the rule of recognition or officials. If it is the practice of officials that grounds the rule of recognition, then officials *qua* officials have to exist prior to the emergence of the rule of recognition. Their role as officials cannot be constituted by this same rule which they themselves constitute. And according to Hart, officials (e.g. legislators or judges) can acquire their official role only in virtue of some rule.[14] One might perhaps insist on claiming that legislators and judges acquire their official capacity in virtue of the rules of change and adjudication. This, however, would imply that these rules precede the rule of recognition. Yet Hart made no mention of the chronological order in which any of the secondary rules are introduced into the system. It would also be conceptually wrong to presuppose their precedence in respect of the rule of recognition since what according to the rules of change and adjudication legislators and judges do is introduce changes to and adjudicate upon the rules identified as the rules of a system, which cannot be done unless a rule of recognition setting out the criteria of validity already exists. Hence, if officials do not acquire their official role in virtue of any of Hart's secondary rules, one again requires some other rule that constitutes their official status and precedes the rule (of recognition) which is constituted by their own official practice.

Another problem often linked with the rule of recognition relates to why acceptance by officials is sufficient for establishing the rule of recognition. That acceptance of the rule of recognition by officials is sufficient for its emergence does not seem troublesome if we conceive the rule of recognition as constitutive of only primary (i.e. 'first-order') rules of a system. As primary legal rules are elements of a legal system as a whole, the rule of recognition is only constitutive of the elements of a system. This presupposes that a legal system has already been constituted, which again presupposes that a particular group of people, in virtue of some other constitutive rule, has already acquired its status of legal officials. By acquiring the status of legal officials, this group has acquired the official capacity to practice the rule of recognition and thus lay down membership criteria for the primary legal rules of their legal system.

Finally, there is the objection that the rule of recognition is incapable of grounding the ordinary citizens' (legal) duty to obey the law since it is a rule of officials alone. If the rule of recognition is established by the convergent practice of behaviour and critical attitude of acceptance of one group of people (officials), it can create a duty to obey the law for no other group but this. However, this potential group of officials could not have acquired its official status if other people, both potential officials and non-officials (ordinary citizens), had not accepted that potential officials be counted as officials with the capacity to make law that must be obeyed. So, again, in order to account for the normativity of

14 Hart (1994: 80 and 97).

law in respect of all the members of a particular community there has to be a rule which precedes the rule of recognition. Of course, this is only so if we do not accept the view according to which there exists some moral duty to obey law or that law is normative in virtue of the various elements of a legal institution giving people a reason to obey (such as the authorisation of coercive enforcement mechanisms).

These examples point to two important conclusions. First, Hart's rule of recognition cannot be fruitfully conceived as a (sole) constitutive rule of a legal system as a whole. Second, these examples raise a conceptual problem. If Hart's account of the rule of recognition holds, then there need to be at least two other constitutives rules, i.e. one establishing officials and the other introducing the initial concept of a particular legal system. I shall consider the latter within the theoretical framework of the artifact theory of law in the next section.

3 LEGAL SYSTEM AS AN ABSTRACT INSTITUTIONAL ARTIFACT AND ITS CONSTITUTIVE RULES

According to the artifact theory of law, legal system is an abstract institutional artifact.[15] It is an artifact since it is created by an author (as a rule a collective one) who has a particular intention (resulting from the author's collective intentionality) to create the institutional artifact 'legal system', based on the author's substantive and substantively correct concept of what a legal system is, under the condition that this intention be largely successfully realized.[16] By being institutional by nature, it differs from 'ordinary' artifacts (such as chairs, hammers or clocks) in that it is rule-based and requires collective recognition (acceptance) by the relevant community. This means that it can initially be created only if there is collective recognition of the relevant constitutive rules and can continue to exist only for as long as this recognition is maintained.[17] Finally, it is abstract in the sense that it is not created by imposing the status function 'legal system' to any existing physical object or person but by making it the case that it exists provided certain conditions are fulfilled.[18] Making it the case that a legal system exists is, of course, realised through the collective recognition of the (existential) constitutive rule laying out a set of conditions for there to be a legal system. The rule through the collective recognition of which the relevant

15 A part of this Section is based on Burazin 2016: Sec. 5.

16 For an intentional-conceptual theory of artifacts on which I base my artifact theory of law see, e.g., Thomasson (2007: 52–73) and Thomasson (2003: 580–609).

17 For this aspect see Searle (1995: 44–45).

18 For the difference between concrete and abstract institutional objects see Thomasson (2003: 587–588).

community makes it the case that there is a legal system creates the context in which an instance of the legal system can emerge.

The set of conditions laid out in a legal system's constitutive rule represents sufficient existence-conditions for there to be a legal system. Since a legal system is an artifact kind, this set of existence-conditions seems to include at least the set of conditions for being an artifact. It thus includes the conditions of both authorship and intention. The authorship condition requires that there be an author, collectively recognised as such by the relevant community, who creates a legal system.[19] The intention condition requires that this author have a particular intention to create the institutional artifact kind 'legal system', that this intention be based on the author's substantive concept of the legal system,[20] and that eventually this intention be at least largely successfully realised.[21] Since these conditions define the artifactual character of the legal system, one can say that they, in fact, amount to the initial concept of the legal system. This, further, means that through collective recognition of a legal system's constitutive rule the relevant community's concept of the legal system plays a stipulative role in establishing the 'nature' of the legal system.[22]

However, the community's (collective) concept of what the legal system is is what determines the 'nature' of the legal system at the first level only. The relevant community collectively recognises that if something is created with the intention that it be a proper member of the institutional artifact kind 'legal system', then it is a legal system. This, no doubt, requires that the relevant community have at least some (however general) concept of what the legal system

19 Since in principle no one person creates a legal system from scratch, since usually a legal system has no precisely identifiable authors, and since it seems that many people with different roles over a long period of time contribute to the emergence and continuous existence of a legal system, the artifact theory of law sets and uses a very broad concept of authorship. The theory does not preclude collective authorship and accepts as authors a wide range of persons, even including those who sustain the artifact in question and its active users. However, it takes it to be a conceptual truth that legal systems, being man-made entities, have authors.

20 The author's concept of the legal system is, of course, a 'non-theoretical' or 'practical' concept of law constitutive of a legal system.

21 It may seem too constraining for a theory of law to limit itself a priori only to those instances of a legal system that were intentionally created. However, since legal systems are undoubtedly highly complex institutional artifacts, it seems strange to claim that such complex entities could emerge (wholy) unintentionally. It is not like someone messed around, produced an entity *x*, and later realized that it was an instance of a legal system. Furthermore, the intention condition does not preclude that a part (or even the greater part) of the process of an institutional artifact's coming into existence involve its gradual emergence from a standing practice. Additionaly, if it is true that legal officials are the authors of a legal system, then it seems plausible to assume that they act with the intention that what they produce is to belong to the kind 'legal system' and not some other system of rules.

22 Compare Thomasson (2003: 591–592).

is.[23] However, since a legal system is an artifact after all, it must have an author. The author must have particular intentions. He must also have a substantive (and substantively correct) concept of what the legal system is. The correctness of his concept is then judged by the fit between the community's collective concept and the author's concept of the legal system. For the author's concept to be correct, it should at least substantively match the relevant community's concept of the legal system. However, since the author only needs to have a substantive (and substantively correct) concept and since this concept needs to be realised only largely successfully, it may be said that the final real 'nature' (character) of a produced legal system is, at the second level, nevertheless shaped by its author's intentions (and the intentions of those sustaining it). Of course, apart from being relevant to the making of a legal system, the relevant community's (collective) concept is relevant to its continued existence. A legal system exists only in so far as the relevant community collectively recognises it as being a legal system or only in so far as the author's intentions at least largely match the relevant community's (collective) concept of the legal system. This is in tune with Hart's claim that where there is a general disregard of the rules of a system, one should say that "in the case of a new system, that it had never established itself as the legal system of a given group, or, in the case of a once-established system, that it had ceased to be the legal system of the group".[24] It follows therefrom that some person or group of persons could create a new system of rules which would have its rule of recognition but which would not amount to a particular community's legal system since there would be a general disregard of its rules. According to the artifact theory of law, the authors and their intentions would no doubt exist but since collective recognition by the relevant community lacks, there would be no institutional artifact.

So how does Hart's rule of recognition fit into this account? The function of the rule of recognition is to make possible the existence of primary (i.e. 'first order') legal rules of a legal system. However, despite the fact that the said rule is constitutive of all legal rules of a system, it is constitutive of individual legal rules and not of the legal system as such. If one takes a legal system to be a system of rules, the rule of recognition might best be conceived as a constitutive rule of the elements of a legal system. It could be formulated as follows:

> For any rule *x*, we (legal officials) collectively accept that if *x* meets certain conditions C, then it counts as a legal rule of our legal system.

The conditions C *x* is to meet in order to be counted as a legal rule could include, e.g., the fact that a certain rule is part of some authoritative text of rules, that it has been enacted by a specific body, that it has a long customary

23 The relevant community's concept of the legal system is, as is the author's concept, a 'non-theoretical' or practical concept of law constitutive of a legal system.

24 Hart (1994: 103).

practice or that it is related to a judicial decision.[25] These conditions, of course, presuppose the officials' concept of a legal rule since they specify, as Hart put it, "some feature or features possesion of which by a suggested rule is taken as a conclusive afirmative indication that it is a rule of the group to be supported by the social pressure it exerts",[26] i.e. that it is a 'legal' rule. Yet the conditions laid out in the rule of recognition also presuppose the officials' concept of a legal system. For, according to Hart, the rule of recognition, even in its simplest form (one amounting to only a reference to an authoritative text), introduces "the idea of a legal system" and may be understood as a "defining feature of a legal system".[27] If one remains within the framework of Hart's theory, it is reasonable to assume that the concept of a legal system officials have includes at least the following two features: that the legal system is a system of valid legal rules, i.e. rules that are members of one and the same system of rules, and that the legal system is structured as a union of primary and secondary legal rules. However, given that for Hart the rule of recognition is the ultimate rule in a legal system, the question of how legal officials (e.g. judges or legislators), in whose practice the actual existence of the rule of recognition consists, acquire their status of 'legal' officials remains unanswered. It seems that in order to account for the emergence of legal officials and to avoid the circularity problem (the dilemma about how the rule of recognition can account for legal officials when it is the practice of legal officials that constitutes the said rule) one requires a constitutive rule of the following form:

> Of this group of people *z*, we collectively recognise that *z* counts as legal officials.

According to Searle's theory of the construction of social reality, 'legal officials' as an institution in some context C can only be created if there exists collective intentionality imposing a special status, that of 'legal officials', (and consequently a function with certain "deontic powers", i.e. rights, authorisations, duties, obligations, etc.) on some group of people.[28] And this holds regardless of how the group was initially distinguished – whether the group distinguished itself as legal officials by means of power or was recognised as such by others.[29] The collective intentionality needed for imposing the status of legal officials is expressed through collective recognition of a particular group as having this special status. Those collectively recognising the group as legal officials are or-

25 Hart (1994: 95).

26 Hart (1994: 94).

27 Hart (1994: 95 and 111).

28 Searle (1995: 114) and Searle (2010: 6–11). Note that Searle's "deontic powers" include both powers and obligations, which avoids the problem of attributing to judges only powers.

29 Of course, one could claim that the latter situation makes law a (more) legitimate system of rules. See Taekema (2008: 171). However, even in the former situation the group has to be collectivelly recognised as the group of legal officials in order to have the status function 'legal officials'. Just like a gang is not a gang if not collectivelly recognised as such.

dinary citizens (addressees of rules produced by officials) as well as potential legal officials themselves. By imposing the status of legal officials on a particular group, members of the relevant community assign to the group special functions with corresponding "deontic powers": the functions of identifying, creating, modifying and applying law.

Yet in order to impose the status function of 'legal' officials on some group of people and to assign to this group certain "deontic powers" it is necessary that the relevant community already have at least some general concept or idea of what 'law' or 'legal system' and 'legal' is. Furthermore, since legal systems are institutional artifacts, there already has to exist an appropriate constitutive rule laying out a set of conditions that have to be met for there to be a legal system. Such is, of course, the rule through the collective recognition of which the relevant community makes it the case that something has the status function 'legal system' thus creating the context in which an instance of a legal system can emerge. This constitutive rule may be formulated as follows:

We (collectively) recognise that, if conditions C obtain, then there is a legal system.

As has been said above, the conditions laid out in a legal system's constitutive rule (which amount to the concept of a legal system) include at least the conditions that have to be met in order for there to be an institutional artifact 'legal system', but they can also include other conditions. Thus, conditions C from a legal system's constitutive rule may vary from the simple requirement that whatever a group of people whom the community (collectively) recognises as its legal officials counts as a legal system is a legal system to the more detailed and informed existence conditions of a legal system (e.g., that the totality of rules legal officials count as belonging to a legal system is a legal system or that a legal system is whatever legal officials count as a legal system as long as they themselves are also legally limited by it or provided that the legal system upholds human rights, expresses the rule of law principle, etc.). The concept of law is, after all, the concept of an artifact and since artifacts are susceptible to change (depending on human interests), their concepts can also change.

In this way, by collectively recognising a legal system's constitutive rule, the relevant community stipulates the 'nature' of its legal system. This, however, is a first-level stipulation only. The relevent community thus sets out the general idea of its legal system but does not as yet create an instantiation of it. For an instantiation of a legal system to emerge, someone has to concretise or implement the general idea (i.e. someone has to bring about that conditions *C* from the legal system's constitutive rule obtain). Since the relevant community empowers legal officials to identify, create, modify and apply the law, one may say that legal officials are the true authors of a particular instantiation or token of the legal system. And if legal officials are indeed the authors of a legal system, collectively recognised by the relevant community as having the status function

'legal officials' (a function which implies the corresponding "deontic powers" of identifying, creating, modifying and applying law), it should not be false to assume that their practices are intended by them as practices exercised in view of fulfilling their official role. The manifestation of their intention to act in such a way is most discernable in their regarding their patterns of behaviour as a rule – a rule (of recognition) which, according to Hart, forms the foundations of a legal system.[30] It may thus be said that their intention is the intention to create a legal system. So what the relevant community's constitutive rule of a legal system does is create the context in which the practice of legal officials as authors of a legal system, resulting in the rule of recognition and other secondary rules, can be understood as concretising or implementing the community's general concept of a legal system and stipulating the 'nature' of the legal system at the second level. For, as Finnis says, "the making of the artefact is controlled but not fully determined by the basic idea (say, the client's order), and until it is fully determinate the artefact is non-existent or incomplete".[31]

A legal system acquires its main feature (i.e., that of being a system of rules) through the rule of recognition. For the rule of recognition unifies the thus far unconnected set of rules into a system of legal rules. And it is against this background that Hart's claim that the rule of recognition introduces "the idea of a legal system" and that it may be understood as a "defining feature of a legal system" should be interpreted.[32] Since legal systems are institutional artifacts, in need of collective recognition for their existence, the rule of recognition alone, of course, does not suffice to bring about a legal system. In order to fulfil its role of constituting legal rules as elements (members) of a system of rules, thus giving shape to the existing system, the rule of recognition requires such context as is established by the relevant community's practice of recognising what counts as a legal system and who counts as a legal official. So in addition to the rule of recognition being a token-element constitutive rule, practiced by officials, at least two other constitutive rules are required – a constitutive rule of a particular legal system and a constitutive rule of this legal system's legal officials, both of which are practiced by the relevant community, i.e. the community whose members are addressees of the legal rules of their legal system. However, since officials are the authors of a legal system and since it is mainly through the rule of recognition that they concretise the community's concept of a legal system, it may be said that the rule of recognition is not 'merely' a token-element constitutive rule, but also a legal system's implementation or concretisation rule.

30 Hart (1994: 100).

31 Finnis (1984: 284).

32 Hart (1994: 95 and 111).

4 RECONSIDERING SOME OBJECTIONS TO HART'S ACCOUNT OF THE RULE OF RECOGNITION

In Section 2 I pointed to four objections that are often levelled against Hart's account of the rule of recognition. Analysis of each of them revealed that the rule of recognition alone is not sufficient to fully account for what one might suppose it should account for. Thus, for instance, it was shown that the rule of recognition, as conceived by Hart, is incapable of accounting for its, or indeed the other secondary legal rules', being a member of a legal system, or for the status of legal officials, or for why acceptance by officials is sufficient for its emergence, or for why ordinary citizens have a duty to obey the law. However, after having introduced some basic theoretical tools of the artifact theory of law in Section 3, it is now possible to reconsider these objections. Since the issue of accounting for the status of officials has already been dealt with in the previous section, I will tackle the remaining three objections and try to show how additional constitutive rules that were identified as the necessary conditions for the emergence of both the rule of recognition and a particular instance (token) of the legal system in conjunction with the overall framework of the artifact theory of law may provide us with more plausible answers.

Let us start with the problem of accounting for the fact that secondary (i.e. second-order) rules (rule of recognition included) are members of a system of legal rules. According to the constitutive rule of a particular legal system, the relevant community collectively recognises that if certain conditions obtain, then there is a 'legal system'. As has been said above, these conditions, in their simplest form, can stipulate that a legal system is whatever legal officials count as a legal system, or they can be more elaborate stipulating, e.g., that the totality of rules legal officials count as belonging to a legal system is a legal system. One set of rules officials undoubtedly count as forming a legal system are primary (i.e. first-order) rules. By performing their main function under the rule of recognition officials identify certain rules as the system's primary legal rules. However, primary legal rules do not exhaust the list of rules belonging to and thus forming a legal system. The list includes secondary rules as well. So what needs to be shown is that legal officials count secondary rules, in addition to primary rules, as legal rules belonging to a system of rules. And for the reasons explained above this cannot be shown by invoking the rule of recognition. According to Hart, secondary rules do not emerge solely out of a certain pattern of behaviour followed by officials. Officials also need to have a distinctive critical attitude of acceptance towards this pattern of behaviour, which attitude of acceptance raises the said pattern to the level of a public standard to which they should conform. So what officials in fact do is *count* their pattern of behaviour as a rule. But do they count such rule as a legal rule and a rule belonging to their legal system? Since secondary rules consist of *legal* powers and duties (to iden-

tify, make, change or apply law) ascribed to a group of people by the relevant community's collective recognition of a constitutive rule in virtue of which this group acquires its status function '*legal* officials', then the rules in question cannot be anything but *legal* rules. It is thus the character of the deontic content of the secondary rules of a system, ascribed through the rule constitutive of legal officials, that gives these rules the status of legal rules. Furthermore, as has already been said, the rule of recognition presupposes some concept of a legal system that is shared by officials (as the legal system's authors), which concept presumably includes the officials' understanding of the special structure of the legal system represented as a union of primary and secondary legal rules. Eventually, if ordinary citizens regularly take rules defining the sources of law or empowering someone to enact new legal rules or making authoritative determinations in legal disputes as legal rules, it can hardly be denied that legal officials act in the same manner, i.e. that they count these rules as legal rules and members of their legal system.

The second issue relates to why acceptance by officials is sufficient for the emergence of the rule of recognition. What Hart advances is that, even though in the simple society the rule of recognition might be accepted by both citizens and officials, in the complex modern state "the reality of the situation is that a great proportion of ordinary citizens – perhaps a majority – have no general conception of the legal structure or of its criteria of validity".[33] Since the complex modern state necessarily has a legal system, it then suffices that only officials accept the rule of recognition. This argument, however, amounts to an intuitive claim unsupported by empirical evidence. Moreover, while it might be true that the great majority of ordinary citizens have no general conception of a legal system's structure or its validity criteria, it cannot be inferred from this that no acceptance or, e.g., some minimum acceptance by ordinary citizens is necessary. G. Lamond offers two arguments in support of the claim that acceptance by officials is sufficient for the emergence of the rule of recognition. In modern legal systems, so his first argument goes, the rule of recognition "seems to be a rule constituted by the practices of officials, since it is the rules identified by official practice that amount to legal rules".[34] His second argument states that since "in contemporary systems it would seem that the views of non-officials are not usually regarded by officials as partly determinative of what the criteria of recognition are in those systems /.../ the rule of recognition is constituted exclusively by the practices and the beliefs of officials in these systems, and are social rules of officials".[35] While the first argument represents the logical fallacy *petitio principii*, the second argument is again an intuitive claim unsupported by

33 Hart (1994: 114).

34 Lamond (2013: 109).

35 Lamond (2013: 110).

empirical evidence. Moreover, even if it were true that the views of non-officials are not determinative of the validity criteria, the fact that the views of non-officials are not *usually* regarded by officials as partly determinative of these criteria cannot lead one to infer that the rule of recognition is constituted *exclusively* by the practices and beliefs of officials. On the other hand, the argument following from the artifact theory of law is rather a conceptual one. By collectively accepting the rules constitutive of a legal system and of legal officials the relevant community imposes on a given group the status function 'legal officials' and makes this group the authors of their legal system. Since officials are the authors of a legal system and since their status function includes the function of identifying rules as legal rules and rules belonging to a system of rules, it is the practice and the distinctive normative attitude of those who were ascribed the status function of officials by the relevant community that are sufficient for establishing the rule of recognition.

Finally, there is the question of how the rule of recognition can account for the ordinary citizens' duty to obey primary rules when it is the rule of officials alone. While it is true that the rule of recognition, as envisaged by Hart, cannot account for the duty of non-officials to obey the law, the account of the rule of recognition as part of a set of higher constitutive rules (one constitutive of a legal system and the other of legal officials) fares far better in this case. Since the relevant community (both ordinary citizens and potential officials) collectively accepts that whatever the group on which it has imposed the status function 'legal officials' counts as law is law and since it assigns to officials relevant "deontic powers", including the power to make binding pronouncements, it also commits itself to obeying such pronouncements when they are created as valid legal rules. So it is the fact that members of the relevant community (ordinary citizens included) establish the above described context in which the rule of recognition can emerge that explains how primary legal rules of a system can create legal duties on the part of citizens and not the rule of recognition itself.

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On Coherence as a Formal Property of Normative Systems

The paper deals with the notions of consistency, completeness, and coherence within the normative domain. It investigates their mutual relations by singling out relative (to negation) and absolute consistency, weak, strong and trivial completeness, and three different functions of coherence (simplification, integration, and defeasance). The main upshot of the inquiry is that coherence may be regarded as a complex combination of weak completeness and possible absence of consistency and strong completeness of a system of rules regarding a non-trivially complete/non-absolutely inconsistent system of underlying principles.

Key words: consistency, completeness, coherence, conditionals, normative systems

1 INTRODUCTION

'Consistency' and 'completeness' are age-old concepts which are traditionally related to logic and logical calculi. They have received a great elaboration and their mutual relations have been widely studied in the field of logic. They have also been extensively analyzed by legal dogmatics and analytical jurisprudence regarding their application to normative systems.

By contrast, 'coherence' is a relatively new concept, which has raised some issues in the epistemological and legal philosophical debate during the last decades.[1] The intensional properties and the boundaries of this concept are quite blurry, and its relations with consistency and completeness are consequently uncertain.[2]

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1 The formal analysis of coherence was introduced in Rescher (1973). In the domain of jurisprudence, among the major contributions to understanding the applications of the concept are MacCormick (1984) and Peczenick (2008). For recent surveys, see Araszkiewicz & Šavelka (2013) and Amaya (2015).

2 For a formal approximation, see Amaya (2007) and Alonso (2013).

The present paper, by elaborating on some notions of propositional calculus, aims at providing a basic reexamination of the notions of consistency, completeness, and coherence, when applied to the normative domain, and, on such a basis, elaborating on which mutual relations they have.

2 CONSISTENCY AND COMPLETENESS IN PROPOSITIONAL LOGIC

In propositional logic,[3] *consistency* is usually and broadly defined as the property of a set of sentences of being free of contradictions. It is not uncommon to distinguish between *consistency with respect to negation* and *absolute consistency*. A set S is *consistent with respect to negation* if and only if for every proposition *p*, if *p* belongs to S, then ~*p* does not belong to S. By contrast, a set S is *absolutely consistent* if and only if there is at least one proposition *p* that is not implied by S.

S is *consistent with respect to negation* iff $\forall p\ (p \in S \Rightarrow \sim p \notin S)$

S is *absolutely consistent* iff $\exists p\ (p \notin \mathrm{Cn}(S))$[4]

Two corresponding notions of inconsistency may be defined as the negations of these properties: a set S may be called *inconsistent with respect to negation* if and only if there is at least one proposition *p* such that both *p* and ~*p* belong to S, and *absolutely inconsistent* if and only if every proposition *p* is implied by S.

S is *inconsistent with respect to negation* iff

$\sim\forall p\ (p \in S \Rightarrow \sim p \notin S) = \exists p\ (p \in S \wedge \sim p \in S)$

S is *absolutely inconsistent* iff

$\sim\exists p\ (p \notin \mathrm{Cn}(S)) = \forall p\ (p \in \mathrm{Cn}(S))$

From these characterizations it is interesting to note that the properties of consistency and inconsistency with respect to negation are defined in terms of the elements that belong to a given set, while the properties of absolute consistency and inconsistency are defined in terms of the logical consequences of a given set.

In fact, as Žarnić and Bašić claim, the notions of logical closure and absolute consistency are interdefinable according to the following equivalence:[5]

$S = \mathrm{Cn}(S)$ iff $\forall p\ (p \notin S \Rightarrow (\bot \notin \mathrm{Cn}(S \cup \{\sim p\})))$

3 See Hughes & Londey (1965: 137-140).

4 Strictly speaking, a specification of the logical system under consideration should be added to each formula (e.g. 'S is absolutely consistent *in logic L* iff $\exists p\ (p \notin \mathrm{Cn}_L(S))$'). For the sake of simplicity we shall omit such a qualification here.

5 See Žarnić & Bašić (2014).

This means that a set S is closed under logical consequence if and only if the negation of any element not belonging to S may be added to S preserving its absolute consistency.

Completeness, in turn, is regarded as the property of a finite set of sentences (axioms) – or sentential forms (axiom schemata) – of being exhaustive *qua* axiomatization of a certain field, so that every correct sentence, relevant for that field, is derivable from – i.e. is a theorem of – the axiomatic basis.

It is common to distinguish between sets which are *weakly complete*, for they are capable of generating the set of all its correct theorems, and sets which are *strongly complete*, i.e. those sets which cannot be further supplemented regarding their axiomatic basis without being rendered inconsistent. To these two notions, one can add *trivial completeness*, the property of a set of demonstrating any sentence whatsoever.

In formal terms, this translates into:

S is *weakly complete* iff $\forall p\ (p \in \mathrm{C} \Rightarrow p \in \mathrm{Cn(S)})$ (where C is the set of correct or relevant sentences)

S is *strongly complete* iff $\forall p\ (p \notin \mathrm{S} \Rightarrow (\bot \in \mathrm{Cn(S} \cup \{p\}))$

S is *trivially complete* iff $\forall p\ (p \in \mathrm{Cn(S)})$[6]

From these definitions it follows that a set may be called *weakly incomplete* if and only if at least one correct sentence is not derivable from it; *strongly incomplete* if and only if it can be further supplemented regarding their axiomatic basis without being rendered inconsistent, and *trivially incomplete* – though the label may sound a little awkward – if there is at least one sentence that it cannot demonstrate.[7]

In formal terms:

S is *weakly incomplete* iff

$\sim\forall p\ (p \in \mathrm{C} \Rightarrow p \in \mathrm{Cn(S)}) = \exists p\ (p \in \mathrm{C} \wedge p \notin \mathrm{Cn(S)})$

6 Along with these notions of completeness, which may be deemed *semantic*, several *syntactic* notions of completeness are conceivable, the most natural of which may be defined as follows: S is syntactically complete iff $\forall p\ (p \in \mathrm{Cn(S)} \vee \sim p \in \mathrm{Cn(S)})$ (see Hunter 1971: 33). This syntactic concept of completeness is closely related to the notion of *normative* completeness that will be presented above.

7 Jan Woleński suggested in private communication that the notion of post-completeness should be introduced into our analysis for the sake of clarity. Post-completeness is usually defined as follows: '*A system of logic is post-complete if every time we add to it a sentence unprovable in it, we obtain an inconsistent system.*' We tend to reject such a suggestion, since we are not dealing here with completeness of the calculi (in meta-language), but with completeness of the object-language. At any rate, if we reinterpret post-completeness as a first-order notion, and drop the 'unprovable' connotation, we think it collapses into what we call strong completeness.

S is *strongly incomplete* iff

$\sim\forall p\ (p \notin S \Rightarrow (\bot \in Cn(S \cup \{p\}))) = \exists p\ (p \notin S \wedge (\bot \notin Cn(S \cup \{p\})))$

S is *trivially incomplete* iff

$\sim\forall p\ (p \in Cn(S)) = \exists p\ (p \notin Cn(S))$

The mutual relations between these notions of consistency and completeness are as follows. First, trivial completeness is equivalent to absolute inconsistency and, consequently, trivial incompleteness is equivalent to absolute consistency. Second, trivial completeness (as well as absolute inconsistency) implies weak completeness, because if any sentence is derivable from a certain set, then the partition of all sentences that are 'correct' theorems are derivable from it. Third, if one accepts the *ex falso quodlibet* principle, then inconsistency with respect to negation entails absolute inconsistency (as well as trivial and weak completeness). Finally, if strong completeness is defined in the way proposed *supra*, then an absolutely inconsistent set satisfies strong completeness vacuously.

For the sake of the argument to follow in the paper, particular stress should be put on the formalization of consistency (and completeness) regarding conditional sentences. In formal logic, states of inconsistency stemming from conditional sentences are usually represented by the following conjunction of a conditional with the corresponding *denied conditional*:

[1] $(p \Rightarrow q) \wedge \sim(p \Rightarrow q)$

Which, by definition of the conditional $((p \Rightarrow q) \Leftrightarrow \sim(p \wedge \sim q))$, is equivalent to:

[2] $\sim(p \wedge \sim q) \wedge (p \wedge \sim q)$

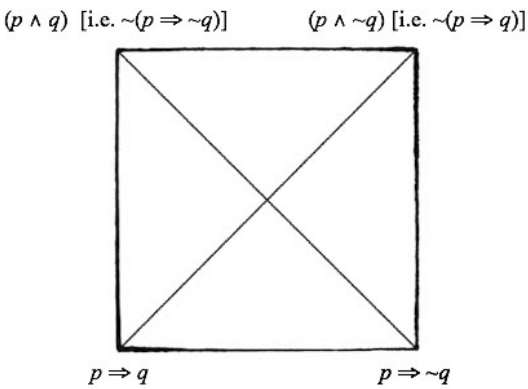
From [1], or [2], any sentence whatsoever follows under the assumption of the *ex falso quodlibet* principle. In such a case, the resulting set is weakly and trivially complete. By contrast, the following sentence:

[3] $(p \Rightarrow q) \wedge (p \Rightarrow \sim q)$

brings about no contradiction, despite what may appear at first sight. The conjunction of a conditional with its corresponding *conditional denial* is materially equivalent to the negation of the common antecedent of both conditionals.

[4] $(p \Rightarrow q) \wedge (p \Rightarrow \sim q) \Leftrightarrow \sim p$

This happens since a conditional and its conditional denial are *subcontraries*; they are consequently neither contraries nor contradictories. Indeed, a conditional is contradictory to its negation, namely the conjunction of its antecedent and the negation of its consequent. This in turn is contrary to the conjunction of the antecedent and the consequent of the original conditional. These relations are expressed in the following square of propositional opposition:



On the top side, there is contrariety: the conjunctions that appear there (which are equivalent to denied conditionals) cannot both be true, but they can both be false. On diagonals, there is contradiction: if one sentence is true, the other is false (and vice versa). On the verticals, there is subalternation (*viz.* implication): if the conjunction (i.e., the negation of the conditional denial) is true, then the corresponding conditional is also true. On the basis of the square, there is subcontrariety, which states that such conditionals can both be true, but they cannot both be false: indeed, when one of the two is false, the other is necessarily true, but when one of the two is true, it is not the case that the other is necessarily false.

When contradictions or contrarieties are contained by a certain set, this set becomes of course inconsistent, and also trivially and weakly complete. But when subcontrary sentences like $(p \Rightarrow q)$ and $(p \Rightarrow \sim q)$ are contained by a certain set, such set will not necessarily be inconsistent *for that reason*. It will be strongly complete regarding those worlds in which p is true, since p cannot be added to the set without generating an inconsistency.

Indeed, the subcontrariety of conditionals is exhaustive of a certain world, in the sense that it connects a certain atomic sentence (in our example, p) to a partition of sentences which are mutually exclusive and jointly exhaustive (in our example, q and $\sim q$). When both conditionals are simultaneously asserted (and hence the sentence p is connected, at the same time, to q and $\sim q$), one can derive the falsity of p and, as a consequence, the truth of $\sim p$.

3 CONSISTENCY AND COMPLETENESS IN NORMATIVE SYSTEMS

In the legal philosophical domain, consistency and completeness have been frequently examined. In the most relevant literature, 'normative consistency' denotes the situation where the same set of operative facts is not connected to incompatible normative consequences, whereas 'normative completeness' denotes the situation where there is a legal consequence for any set of relevant operative facts.[8] Nevertheless, formal logical relations between normative consistency and completeness have seldom been taken into account.[9] In order to do so, it is necessary to distinguish genuine *norms* from *propositions about norms.*[10]

Though the thesis that norms are proposition-like entities and, as such, are apt to truth-values, is highly controversial, there is no disputing the propositional character of the discourse *about* norms. Von Wright characterizes norm-propositions as propositions 'that such and such a norm exists'.[11] But since norms usually exist as a part of complex systems of norms, the syntactical form of deontic statements expressing norm-propositions often hides a relevant part of their conceptual content.[12] Thus, a statement like *'Parking is not allowed here'*, understood as a norm-proposition, though apparently referring to the deontic status of an action without qualifications, is in fact a *relative* statement that reports the deontic status of an action *according to a particular normative system*. Norm-propositions are thus true or false depending on the set of norms taken as relevant. Therefore, the structure of norm-propositions may be represented as '$Op \in S$', where *Op* is the norm that is being *mentioned* (not *used*) by this norm-proposition, and S is the normative system to which, according to the proposition at hand, *Op* is said to belong.

The standard system of deontic logic validates the principle of normative consistency, namely, that no action can be both prohibited and permitted, and the principle of normative completeness, namely, that every action is either pro-

8 See Rodríguez (2002: 62 ff).

9 The most sophisticated model of normative systems – the one developed by Alchourrón & Bulygin (1971: 98-101) – analyses in depth the relations between the two concepts regarding universes of cases characterized by different levels of specificity.

10 See Alchourrón & Bulygin (1971). With different names, the distinction has been noticed by several authors, e.g. Bentham (1970), Hedenius (1941), Wedberg (1951), Hansson (1969), among others.

11 Von Wright (1963: 106).

12 Referring to the legal domain, Hart (1983: 329) observes *'There is frequent occasion for lawyers to describe what they might call the 'legal position' in relation to some subject without referring to the particular enactments or regulations or other sources of the relevant law, though of course it would be always understood that 'the legal position' thus described is that arising under the laws of a particular system, and a more accurate formulation would make this explicit by including such words as* '*according to English law*'.'

hibited or permitted. Now, as Alchourrón and Bulygin have shown, it is wrong to assume that logical relations among norm-propositions are equivalent to those that hold among norms themselves.[13] A simple way to explain the differences between a genuine logic of norms and a logic of norm-proposition is to take due notice of the different ways in which negation affects the former and the latter. When applied to norms, negation seems to behave in close analogy to descriptive discourse: the negation of a norm (e.g. Op) is also a norm ($P{\sim}p$);[14] for each norm there is only one norm that is its negation; a norm and its negation are reciprocal (if $P{\sim}p$ is the negation of Op, then Op is the negation of $P{\sim}p$).[15] Moreover, a norm and its negation are mutually exclusive and jointly exhaustive, since ${\sim}(Op \wedge P{\sim}p)$ and $Op \vee P{\sim}p$ are valid formulas in a logic of norms.

By contrast, the negation of norm-propositions is more problematic. *'In normative system S act p is forbidden'* is a complex metalinguistic statement that asserts that a certain norm belongs to a normative system. Therefore, its negation can be understood in two different ways: *'In system S act p is not forbidden'* may be read as expressing that S does not contain a norm prohibiting *p*, in which case the negation operates over the *membership* of the norm in the system (*external negation*, represented as '~'); or it may be read as expressing that *S* does contain a norm not-prohibiting *p* (i.e. a norm permitting *p*), in which case the negation affects the *norm* referred to in the statement (*internal negation*, represented as '¬'). While external negation of a norm-proposition is an operation that switches the value of membership of a given norm within a normative system, internal negation of a norm-proposition is an operation that leads to another norm-proposition asserting the membership in the system of the negation of the original norm. For example:

External negation: $\sim F_S p =_{\text{df.}} Fp \notin \text{S}$

Internal negation: $\neg F_S p =_{\text{df.}} \sim Fp \in \text{S} =_{\text{df.}} Pp \in \text{S}$

Here, the external negation of the proposition according to which *p* is forbidden in normative system S is a proposition that negates the membership of a norm prohibiting *p* in system S, whilst the internal negation of such a proposition is a proposition asserting the membership in S of a norm to the effect that *p* is not prohibited, i.e. a norm permitting *p*. Accordingly, 'permission' is an expression that may appear in a genuine norm, or in a norm-proposition. In the first case, i.e. on a prescriptive interpretation, to say that an action is permitted is unambiguously equivalent to saying that it is not prohibited. By contrast, when 'permission' appears in a norm-proposition it becomes ambiguous, since there are two alternative senses in which an action can be said to be permitted

13 See Alchourrón (1969), Alchourrón & Bulygin (1971).

14 See Alchourrón & Bulygin (1988: 231).

15 The expression 'negation-norm' was coined by von Wright (1983: 130-209).

according to a set of norms: a *negative sense* – there is no norm in the set prohibiting it – and a *positive sense* – there is a norm in the set permitting it.[16] We may call these two notions negative permission ($P^{-}{}_{S}p$) and positive permission ($P^{+}{}_{S}p$):

Negative permission: $P^{-}{}_{S}p =_{df.} Fp \notin S$

Positive permission: $P^{+}{}_{S}p =_{df.} {\sim}Fp \in S =_{df.} Pp \in S$

It is easy to see that the negative permission of *p* is equivalent to the external negation of the prohibition of *p*, while the positive permission of *p* is equivalent to the internal negation of the prohibition of *p*.

The first presentation of the differences between a genuine logic of norms and a logic of norm-propositions was put forward by Carlos Alchourrón, and later developed in work co-authored with Eugenio Bulygin.[17] Their proposal can be set out axiomatically as follows:

System of logic of norm-propositions (LNP):

(LNP A_1) $O_S(\alpha \wedge \beta) \Leftrightarrow (O_S\alpha \wedge O_S\beta)$

(LNP A_2) $O_S\alpha \Rightarrow P^{+}{}_{S}\alpha$

(LNP A_3) $P^{+}{}_{S}(\alpha \wedge \beta) \Rightarrow P^{+}{}_{S}\alpha$

(LNP RI_1) From $\vdash (\alpha \Leftrightarrow \beta)$, it follows $\vdash (O_S\alpha \Leftrightarrow O_S\beta)$

(LNP RI_2) From $\vdash (\alpha \Leftrightarrow \beta)$, it follows $\vdash (P^{+}{}_{S}\alpha \Leftrightarrow P^{+}{}_{S}\beta)$[18]

If we compare this system with the standard system of deontic logic,[19] we should notice first that norm-propositions are relative to a given normative system, and that is reflected in the subscripts ($_S$) in the formulas. By contrast, the expressions of the logic of norms do not refer to any particular normative system, since they represent absolute concepts. Second, in the system of logic for norm-propositions there is nothing like the principle of $Pp \Leftrightarrow {\sim}O{\sim}p$[20] which is accepted as valid in deontic logic. This is so because, as we have seen, there are

16 We prefer this terminology to the more common dichotomy *weak* vs. *strong* permission, since the latter seems to suggest that the strong/positive concept implies the weak/negative one, which is not necessarily the case.

17 See Alchourrón (1969), Alchourrón & Bulygin (1971).

18 See Alchourrón (1993: 46).

19 One possible presentation is the following:

(SDL A_1)	All tautologies of PL	
(SDL A_2)	$O(\alpha \Rightarrow \beta) \Rightarrow (O\alpha \Rightarrow O\beta)$	(OK)
(SDL A_3)	$O\alpha \Rightarrow {\sim}O{\sim}\alpha$	(OD)
(SDL RI_1)	If $\vdash \alpha$ and $\vdash (\alpha \Rightarrow \beta)$, then $\vdash \beta$	(*Modus Ponens*)
(SDL RI_2)	If $\vdash \alpha$, then $\vdash O\alpha$	(*O*-Necessitation).

20 In the system LNP there is also an axiom and a rule of inference (A_3 and RI_2) that are not found in the usual systems of deontic logic. This is, however, a minor difference; were it possible to add to LNP an analogous principle to the principle $Pp \Leftrightarrow {\sim}O{\sim}p$, A_3 and RI_2 would be superfluous because they would be derivable from the other axioms and rules.

two different forms of negation of norm-propositions, which give rise to two descriptive concepts for each of the deontic operators. And although external negation satisfies all the properties that we expect from ordinary negation, that is not the case with internal negation. A norm-proposition and its internal negation can both be true – in which case the system will be inconsistent – as well as both false –in which case the system will be incomplete.[21] That is why the equivalence expressed in $Pp \Leftrightarrow {\sim}O{\sim}p$, though valid in the logic of norms (LN), is not valid in the logic of norm-propositions.

In spite of these differences, however, it can be proven that, under certain assumptions, LNP and LN are equivalent, and consequently, that positive permission P^{+} will be equivalent to negative permission P^{-}. And that is so since an analogue of the principle $Pp \Leftrightarrow {\sim}O{\sim}p$ is indeed valid in LNP under the conditions of consistency and completeness of the normative system taken into account:

[5] ${\sim}(O_S{\sim}p \wedge P_S p)$ $(\text{Cons}_S p)$

[6] $O_S{\sim}p \vee P^{+}{}_S p$ $(\text{Comp}_S p)$

It is important to see that the conjunction of [5] and [6], i.e.

[7] ${\sim}(O_S{\sim}p \wedge P^{+}{}_S p) \wedge (O_S{\sim}p \vee P^{+}{}_S p)$

is equivalent to

[8] $P^{+}{}_S p \Leftrightarrow {\sim}O_S{\sim}p$[22]

and since by the definitions already seen, ${\sim}O_S{\sim}p$ is equivalent to $P^{-}{}_S p$, then:

[9] $((\text{Cons}_S p) \wedge (\text{Comp}_S p)) \Leftrightarrow (P^{+}{}_S p \Leftrightarrow P^{-}{}_S p)$

Moreover, if one accepts that a contradiction implies everything, normative inconsistency entails normative completeness,[23] and normative incompleteness entails normative consistency, what is tantamount to saying that, at least within the normative domain, implication, consistency, and completeness are unavoidably connected concepts.

21 See Bulygin (1995: 135, 137).

22 Proof: by commutativity of conjunction in [5] we obtain ${\sim}(P^{+}{}_S p \wedge O_S{\sim}p)$; by definition of conditional in the latter expression we get $P^{+}{}_S p \Rightarrow {\sim}O_S{\sim}p$, and now, by introduction of conditional from [5] to this latter step we get ${\sim}(O_S{\sim}p \wedge P^{+}{}_S p) \wedge (P^{+}{}_S p \Rightarrow {\sim}O_S{\sim}p)$. By definition of conditional in [6] we obtain $({\sim}O_S{\sim}p \Rightarrow P^{+}{}_S p)$, and now by introduction of conditional we get $(O_S{\sim}p \vee P^{+}{}_S p) \Rightarrow ({\sim}O_S{\sim}p \Rightarrow P^{+}{}_S p)$.

23 One could think that if a contradiction implies everything, then does normative inconsistency not only imply normative completeness but also its negation, i.e. normative incompleteness. However, this would be an incorrect conclusion derived from the identification of norms and norm-propositions, since from the fact that a normative system is inconsistent what follows is that *every norm* belongs to it, not that *every norm-proposition* (i.e., the one affirming its incompleteness) is true about it.

Indeed, i) if a normative system S is inconsistent regarding a certain action *p*, it is complete regarding that same action. This is shown in the following derivation:

[10] $O_S{\sim}p \Leftrightarrow P^+_S p$	
[11] $O_S{\sim}p$	by simplification in [10]
[12] $O_S{\sim}p \vee P^+_S p$	by introduction of disjunction in [11]
[13] $(O_S{\sim}p \wedge P^+_S p) \Rightarrow (O_S{\sim}p \vee P^+_S p)$	by introduction of conditional from [10] to [12].

And ii) If a normative system S is incomplete regarding a certain action *p*, then it is consistent regarding that same action. This is demonstrated by the following inference:

[14] $\sim(O_S{\sim}p \vee P^+_S p)$	
[15] $\sim O_S{\sim}p \wedge \sim P^+_S p$	by De Morgan in [14]
[16] $\sim O_S{\sim}p$	by simplification in [15]
[17] $O_S{\sim}p \wedge P^+_S p$	assumption
[18] $O_S{\sim}p$	by simplification in [17]
[19] $O_S{\sim}p \wedge \sim O_S{\sim}p$	by introduction of conjunction in [18, 16]
[20] $\sim(O_S{\sim}p \wedge P^+_S p)$	by introduction of negation from [17] to [19].[24]

In fact, these two demonstrations can be generalized in virtue of an application of the principle *ex falso quodlibet* as follows:

iii) If a normative system S is inconsistent regarding certain action *x*, it is complete regarding any action $(\exists x \sim(\mathrm{Cons}_S x) \Rightarrow \forall x\, (\mathrm{Comp}_S x))$.

iv) If a normative system S is incomplete regarding certain action *x*, it is consistent regarding any action $(\exists x \sim(\mathrm{Comp}_S x) \Rightarrow \forall x\, (\mathrm{Cons}_S x))$.[25]

Now, let's assume, with Alchourrón and Bulygin, that legal rules are correctly represented as conditionals of the form $p \Rightarrow Oq$.[26] Denying a norm of this sort would *prima facie* result in the following sentence:

[21] $\sim(p \Rightarrow Oq)$

Sentence [21] can be translated –due to the definition of conditional and the interdefinability of deontic modalities – into:

[22] $p \wedge P{\sim}q$

24 If A leads to contradiction, then ~A.

25 For an alternative system of logic for norm-propositions where normative conflicts and gaps are avoided 'whenever possible', see Beirlaen & Straßer (2013).

26 This is far from being an unproblematic assumption, but we cannot enter into such details now.

However, deontic logicians and legal theorists do not regard [21] and [22] as the negation of the conditional sentence $p \Rightarrow Oq$. They rather reserve this title for the normative sentence, which is analogous to conditional denial in propositional logic, to wit:

[23] $(p \Rightarrow \sim Oq)$

Which, for the inter-definability of deontic characters, equates to

[24] $(p \Rightarrow P\sim q)$

Hence, regarding hypothetical normative systems,[27] consistency and completeness are world-sensitive, in that they only apply to the world referred to by the antecedent of conditional normative sentences, whenever they are actually instantiated. Normative inconsistency *via* certain facts does not trivialize the system globally. In other words, the presence in a normative system of the sentences $p \Rightarrow Oq$ and $p \Rightarrow \sim Oq$ renders the system inconsistent with respect to negation, but only regarding those worlds in which p is the case. Here, again, if we accept the principle *ex falso quodlibet*, the system will also be absolutely inconsistent for those worlds in which p is true, and since absolute inconsistency is equivalent to trivial completeness, this latter property will also be predicable of the system regarding p-worlds.

Of course, all these considerations are compatible with the claim that in hypothetical normative systems, completeness and consistency are independent properties, in that a normative system correlating normative solutions to certain cases may be complete/incomplete regarding a given case and consistent/inconsistent regarding another case, as well as consistent/inconsistent regarding a given case and complete/incomplete regarding another case.

4 NORMATIVE COHERENCE

The concept of coherence is a highly contested one. There are many conceptions of coherence, each one predicated on a web of notions which only occasionally and partially overlap. However, if one were to search for the common kernel of such conceptions, one would probably affirm that coherence is a justificatory relation among principles and a certain set of rules to which such principles supposedly underlie.[28] In many cases, coherence is left at this rather pre-theoretical stage, which in turn is predicated on the fuzzy way principles are defined.

27 By 'hypotethical normative systems' we mean systems which are not made solely of unconditional (viz. categorical) norms.

28 Within this compass, rules are usually understood as conditional normative sentences connecting certain operative facts to the deontic qualification of a state of affairs (according to our previous symbolization: $p \Rightarrow Oq$).

However, we can make a preliminary attempt to distinguish principles from rules by pointing to (a) their fundamental character; (b) their defeasibility; (c) their need of being specified prior to their application.[29]

Principles are fundamental in that they justify several rules, but they do need further justification. They are regarded as defeasible for their antecedents are not taken to be sufficient conditions of their consequents (what entails that they are not liable to being formalized as material conditionals). They need to be specified in the sense that they do not allow *modus ponens*, and must consequently be developed into rules, although there are many alternative ways of specifying a principle into an unexpressed (*viz.* implicit in a non-logical sense) rule.

A normative system can be said to be coherent regarding a certain set P of underlying principles if and only if all (or most) of its rules are instances of P,[30] in the sense that all (or most) of its rules are justified by P. According to this idea, coherence – unlike consistency and completeness – is not an all-or-nothing property, but a gradual one.

Coherence has been said to serve three main functions:[31] a *simplifying* one, an *integrating* one, and a *defeating* one. Simplification is given by the circumstance that a certain normative system can be traced back to a limited array of underlying principles, liable to be further developed into new rules. Integration consists in the possibility of filling up gaps in the normative system by reaching out to its underlying principles, so that the norm introduced into the system to fill the gap increases the overall coherence of the normative system. Defeasance points to the fact that rules which bring about incoherent results can be revised accordingly.

Nevertheless, it is important to note that there are to different ways of understanding the relation of justification between rules and principles, and accordingly two different ways of understanding the very notion of principles, that have considerable impact over these three functions of coherence. A first interpretation of the idea that principles 'justify' rules, and of conceiving the former, is to understand 'principles' as general norms that are obtained through a process of abstraction or complete induction from the rules of a given normative system. The expression 'general principles' of law or of a concrete legal institution is usually employed to refer to this notion. On this interpretation it seems perfectly sensible to maintain that principles function as a simplification of a system of rules, and that they cannot conflict with those rules. Principles

29 Here we are indebted to Guastini (2011: 173 ff).

30 Here we are fundamentally following MacCormick's notion of coherence in law (see MacCormick (1984: 235-244)). We shall not discuss here other possible paths, like the ones developed by Jaap Hage (e.g., 1997, 2005).

31 On this point, see Alonso (2010: 155 ff).

so understood are not able to display either the integration or the defeasibility function, since in this sense principles do not allow deriving solutions different from those that follow from the rules, as they would be but mere reformulations of the rules, even though some authors have correctly pointed out that so inferred principles are normally used by jurists to create "new" rules by means of strengthening the antecedent.[32]

As an alternative, it could be claimed that though rules 'exemplify' principles, the latter are not mere reformulations of the former, but express values or ends presupposed by the rules. On this reading, principles may eventually allow deriving solutions for cases not regulated by the rules, so that arguments based on principles will have certain 'ampliative' character, and they may even justify solutions in conflict with the rules of the system, and thus are capable of displaying the functions of integration and defeasibility. By contrast, it is not clear whether principles, on this understanding, can work as a simplification of a system of rules, since the idea of simplification loses its proper sense if we are not dealing with axiomatic bases with identical normative consequences where one of them is more economical than the other. But here, insofar as the considered principles allow deriving normative solutions for cases which are not regulated by the rules of the system, and even normative solutions incompatible with those that follow from the rules, it is clear that the system of rules and the system of principles may have different consequences. And it is only here, on this second understanding of principles, that the idea of coherence of a system of rules with a set of underlying principles is significant and not merely trivial, as in the previous understanding, where rules cannot but cohere with the principles abstracted from such rules.

It is interesting to inquire into the relations between coherence (understood as a relation between a system of rules and a system of principles) and the previously examined properties of completeness and consistency of both systems. First, the simplifying function of coherence seems to be connected to weak completeness, in that it allows one to build an axiomatic basis, liable to be developed into all its relevant consequences. However, it should be kept in mind that this function of coherence only holds in a proper sense for the first understanding of principles, and that on this reading any system of rules is trivially coherent with the principles abstracted from them.

Now, on the second understanding of principles, and when it comes to the system of rules, coherence is not necessarily connected to strong completeness or consistency (at least with respect to negation) of this latter system. In fact, coherence sometimes seems to require the introduction of a new (unexpressed)

32 See Guastini (2011: 188-189).

rule in the system which is in conflict with an older (expressed) one: the famous case *Riggs v. Palmer*[33] is a clear instance of this phenomenon.

As everybody knows, the legal question in *Riggs v. Palmer* was whether Elmer Palmer, who had poisoned his grandfather, was entitled to inherit his grandfather's assets under the Statute of Wills which was in force, at that time, in the state of New York. The Statute of Wills was completely silent about unworthy beneficiaries, and only provided that one was entitled to inherit if one was so vested by a valid will. One could maintain – as Gray J. actually did in his dissenting opinion – that Elmer was entitled to inherit under both the Statute of Wills and his grandfather's will. However, the majority opinion, drafted by Earl J., offered a different solution: the U.S. legal system could not admit, from an axiological point of view, the extremely unjust result of letting the inheritance go to someone who killed his own testator. The rejection of such a solution was founded on the presumed existence, within the U.S. legal system, of the principle according to which *'No man should profit from his own wrong'*. On the basis of this principle, an unexpressed rule was introduced according to which *'The unworthy beneficiary, though granted the inheritance by a valid will, is not entitled to inherit'*.[34] Manifestly, such a rule conflicts with another rule (regarded as in force until the *Riggs* case) according to which a valid will is sufficient in order to inherit the testator's assets. This case exemplifies a situation where the exigencies of axiological coherence brought the legal applicators to introduce a rule into the system which made it normatively inconsistent.

If this is correct, coherence sometimes runs counter to the preservation of strong completeness and consistency of the system of rules, for it can encourage legal applicators to introduce rules which bring about new inconsistencies, which were not present before. Recall that strong completeness has been defined as the situation where no sentence can be added to the axiomatic basis of a certain set without rendering it inconsistent. It is easy to see that coherence of the system of rules with a set of underlying principles is an exigency which can (and do) often conflict with this ideal, for it requires the continuous introduction of new ('apocryphal') rules on the basis of axiological judgments regarding the inadequacy of the existing rules.

This last conclusion has to be balanced with another usual role assigned to principles: sometimes we appeal to a set of underlying principles to give priority to one normative solution within a set of inconsistent solutions derivable from the system of rules. In such case, principles would be used to restore consistency in the system of rules. Moreover, though this idea deserves a thorough justification that we shall not try to offer here, it may be suggested that coherence with

33 115 N.Y. 506 (1889).

34 Indeed, such a rule is a defeasible and frequently defeated one, as is shown in Schauer (2009: 34).

a set of underlying principles could even stop whatever consequences to follow from a normative contradiction within the system of rules, for they would not match the requirements set by those underlying principles. If this is correct, coherence would thus work as a warrant for absolute normative consistency.

When it comes to the system of underlying principles – again, on their second understanding – a meaningful predication of coherence of a set of rules regarding such system seems to assume that the latter is not trivially complete or absolutely inconsistent, since an absolutely inconsistent/trivially complete system of principles justifies any rule whatsoever.

However, consistency is a problematic property when it is predicated of a system of principles, if principles are regarded as defeasible norms. Indeed, if – as we mentioned before – the antecedent of a principle is not taken to be a sufficient condition (or to provide sufficient conditions) of its consequent, their proper formal representation should be something like:

[25] $(p > Oq)$

Here the corner ('>') is used to symbolize a defeasible conditional, one which neither allows *modus ponens* nor strengthening the antecedent.[35] For this reason, a system of principles can contain [25] together with

[26] $(p > P{\sim}q)$

with no inconsistency derivable from them, even for p-worlds, since p does not constitute a sufficient condition for the provided consequence to follow.

It would seem, then, that the system of principles cannot be inconsistent by definition, since it is composed of defeasible normative standards. If it is so, however, it is not clear, from a logical point of view, how the relation of coherence between the system of principles and the system of rules should be framed. An option consists in regarding the principle as a "tentative confirmation" of the normative consequence provided by a certain set of rules. The more confirmed a certain normative solution provided by a rule is, the stronger appears the relation of coherence between underlying principles and such a rule. However, what is important to stress here is that the idea of competing confirmations presuppose inconsistencies of solutions within the system of rules. Coherence relations would thus be, or might be used, as tools liable to solve antinomies affecting sets of rules.[36]

As a conclusion, coherence, as a theorized logical item, may be said to be a rather ambiguous combination of weak completeness, and possible absence of consistency and strong completeness of a system of rules regarding a non-trivially complete/non-absolutely inconsistent system of underlying principles.

35 For a recent survey on defeasible norms, see Ferrer Beltrán & Ratti (2012).

36 This is an idea expressly maintained by Dworkin (1978: 27).

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Synopsis

Bartosz Brożek

On *tû-tû*

SLOV. | *O tû-tûju*. Avtor zatrjuje, da imajo t. i. posredniški pojmi ključno vlogo pri urejanju in tvorbi pravnega znanja. V izhodišču povzame Rossovo razmišljanje o takšnih pojmih, ki ga nato kritizira. Ross je skušal pokazati, da v pravu obstajajo pojmi, ki nimajo nobenega pomenskega ozira, a je njihova raba kljub temu nekaj razumnega, saj imajo pri predstavitvi pravnih pravil koristno vlogo. Avtor meni, da sta obe Rossovi trditvi napačni: zmoten je njegov sklep, da posredniški pojmi nimajo nobenega pomenskega ozira, Rossova opredelitev njihove vloge v pravu pa je preveč omejujoča.

Ključne besede: posredniški pojmi, pomenski ozir, pravno znanje, (notranja) skladnost, celovitost

ENG. | The goal in this short paper is to argue that so-called intermediary concepts play an essential role in organizing and generating legal knowledge. The point of departure is a reconstruction and a critique of Alf Ross's analysis of such concepts. His goal was to argue that there exist concepts in the law which have no semantic reference, yet it is reasonable to use them as they perform some useful function regarding the presentation of legal rules. The author believes that Ross is wrong on both counts: his argument to the effect that intermediary concepts have no reference is flawed, and his characterization of the functions such concepts play in the law is too limiting.

Key words: intermediary concepts, semantic reference, legal knowledge, coherence, completeness

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Synopsis

Riccardo Guastini

A Realistic View on Law and Legal Cognition

SLO. | *Realistični pogled na pravo in na (s)poznavanje prava.* Avtor očrta eno obliko analitičnega pravnega realizma kot stičišče treh temeljnih trditev. Po prvi trditvi so razlagalni stavki v pravnem govoru pripisovalni stavki, ki nimajo spoznavne funkcije. Po drugi trditvi je pravo množica vplivnih norm, tj. norm, ki so bile uporabljene v preteklosti (pri odločanju v konkretnih primerih) in bodo predvidoma uporabljene tudi v prihodnosti. Tretja trditev pravi, da pravne znanosti kot spoznavne dejavnosti ne gre zamenjevati s pravno stroko. Čeprav izvaja pravna stroka tudi spoznavno dejavnost, je njeno delo predvsem nespoznavne narave, tj. razlaganje in pravotvorje.

Ključne besede: pravni realizem, razlagalni skepticizem, ontologija prava, pravna stroka, pravna znanost

ENG. | The author outlines one form of analytical legal realism as the junction of three main theses. According to its first main thesis, interpretive sentences in legal discourse are ascriptive sentences with no cognitive function. According to the second thesis, the law is the set of norms in force, i.e. the norms actually applied (that is, used in deciding cases) in the past and predictably applied in the future by law-applying agencies. The third thesis is that legal science as a cognitive activity must not be confused with legal scholarship. Although legal scholars do engage in cognitive activities, their work mainly consists in non-cognitive activities such as interpretation and legal construction.

Key words: legal realism, interpretive scepticism, ontology of law, legal scholarship, legal science

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Synopsis

Andrzej Grabowski

Clara non sunt interpretanda vs. omnia sunt interpretanda

A Never-Ending Controversy in Polish Legal Theory?

SLO. | *Clara non sunt interpretanda vs. omnia sunt interpretanda. Brezkončni spor v poljskem pravoslovju?* Članek obravnava sodobno poljsko razpravo o mejah in namenu pravnega razlaganja. Najprej so predstavljene glavne trditve in značilnosti pojasnilne teorije pravnega razlaganja, ki jo je razvil Jerzy Wróblewski, in izvedbene teorije Macieja Zielińskija. Nato so kritično predstavljeni različni argumenti za in proti vsaki od teorij: ti so spoznavoslovne, etične, zgodovinske in praktične narave. Na osnovi kritike Zielińskijevega pojmovanja pravne norme pa avtor na koncu predlaga svojo rešitev. Trdi, da je Zielińskijevo pojmovanje utopično in neprioročljivo zaradi nesprejemljivih pojmovnih in praktičnih posledic.

Ključne besede: pravno razlaganje, *clara non sunt interpretanda,* izomorfija, *omnia sunt interpretanda*, pravna norma

ENG. | The paper addresses a contemporary Polish debate on the limits and functions of juristic interpretation of law. After presenting the main theses and features of Jerzy Wróblewski's clarificative theory of juristic interpretation and Maciej Zieliński's derivational theory of juristic interpretation, the author critically discusses various arguments (epistemological, ethical, historical, and practical) used in the debate. Finally, a tentative solution of the controversy, based on the criticism of Zieliński's conception of legal norm, is proposed. It is argued that his conception is utopian and not recommendable, due to unacceptable conceptual and practical consequences.

Key words: legal interpretation, *clara non sunt interpretanda,* isomorphy, *omnia sunt interpretanda*, legal norm

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Synopsis

Luka Burazin

The Rule of Recognition and the Emergence of a Legal System

SLO. | *Pravilo o priznanju veljavnosti in pojav pravnega sistema.* Avtor trdi, da pravilo o priznanju veljavnosti, kakor ga predstavi Hart, ne more biti konstitutivno pravilo nobenega pravnega sistema kot celote. Pravilo o priznanju veljavnosti je lahko kvečjemu konstitutivno pravilo posameznih (primarnih) pravnih pravil kot sestavnih delov pravnega sistema. Če slednjega razumemo kot institucionalni artefakt, potrebujemo ob pravilu o priznanju veljavnosti kot konstitutivnemu pravilu posamičnih pravnih pravil vsaj še dve konstitutivni pravili, da bi lahko razložili pojav pravnega sistema kot celote: eno konstituira pravne uradnike, drugo pa konstituira posamičen pravni sistem. Ker ima praksa pravnih uradnikov osrednjo vlogo pri vzpostavitvi posamičnega pravnega sistema, pa naj bi pravilo o priznanju veljavnosti po avtorju ne imelo le vloge konstitutivnega pravila posamičnih pravnih pravil, ampak naj bi imelo obenem tudi vlogo implementacijskega pravila pravnega sistema.

Ključne besede: pravilo o priznanju veljavnosti, konstitutivna pravila, artefaktna pravna teorija, institucionalni artefakti, pravni sistem

ENG. | The paper claims that the rule of recognition, given the way it is presented by Hart, cannot be a constitutive rule of any legal system as a whole, but rather a constitutive rule of (primary) legal rules as elements of a legal system. Since I take the legal system to be an institutional artifact kind, I claim that, in order to account for a legal system as a whole, at least two further constitutive rules, in addition to the rule of recognition as a token-element constitutive rule, are needed – one constitutive of legal officials and the other constitutive of a legal system as a token. However, given the central role the legal officials' practice occupies in establishing a particular instantiation or token of a legal system, I also claim that the rule of recognition cannot be understood as 'merely' a token-element constitutive rule but also as a legal system's implementation or concretisation rule.

Key words: rule of recognition, constitutive rules, artifact theory of law, institutional artifacts, legal system

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Synopsis

Giovanni Battista Ratti & Jorge Luis Rodríguez

On Coherence as a Formal Property of Normative Systems

SLO. | *O skladnosti kot formalni lastnosti normativnih sistemov.* Avtorja obravnavata pojme stanovitnosti, celovitosti in skladnosti na področju normativnosti. Preučujeta njihova medsebojna razmerja ter izluščita relativno in absolutno stanovitnost, šibko, močno in trivialno celovitost ter tri različne funkcije skladnosti (poenostavitev, povezava in uklanjanje). Osrednja ugotovitev je, da je skladnost mogoče razumeti kot zapleteni sestav a) šibke celovitosti ter b) mogoče odsotnosti stanovitnosti in močne celovitosti sistema pravil, ki zadevajo netrivialno celovit/ne-absolutno nestanoviten sistem temeljnih načel.

Ključne besede: stanovitnost, celovitost, skladnost, pogojniki, normativni sistemi

ENG. | The paper deals with the notions of consistency, completeness, and coherence within the normative domain. It investigates their mutual relations by singling out relative (to negation) and absolute consistency, weak, strong and trivial completeness, and three different functions of coherence (simplification, integration, and defeasance). The main upshot of the inquiry is that coherence may be regarded as a complex combination of weak completeness and possible absence of consistency and strong completeness of a system of rules regarding a non-trivially complete/non-absolutely inconsistent system of underlying principles.

Key words: consistency, completeness, coherence, conditionals, normative systems

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