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Thinking of Impossibility in Following Legal Norms

Some Brief Comments About Bartosz Brozek's *Rule-Following* (Cracow: Copernicus Press, 2013)

The starting point of this article is the recent publication *Rule-Following. From Imitation to the Normative Mind* by Bartosz Brozek. The main scope of this comment is to show the definite importance of linguistic categories in relation to legal language for comprehending, following, and even infringing legal rules. The purpose is to introduce the ancient legal maxim *impossibilium nulla obligatio est* giving a preliminary rough sketch of the problem of impossibility in following laws. In this respect, some passages of Brozek's book regarding rules as patterns of conduct will be examined which are very useful to elucidate the role of linguistic categories in comprehending legal rules and the aforesaid problem of impossibility in law. In particular two general distinctions discussed in the book will be considered: the distinction between categorical and hypothetical rules on the one hand, and the distinction between the general criteria of rightness and correctness, on the other.

Key words: rules, language, rule-following, impossibility, ought, meaning, law

1 GOING BEYOND THE NORMATIVE MIND OF HUMANS

The recent publication *Rule-Following. From Imitation to the Normative Mind* by Bartosz Brozek (Copernicus Center Press, Cracovia, 2013) is a very readable book; and not just in the sense that it is clearly intelligible and really pleasant to read. It is enough to look through the table of contents of the book to appreciate the great effort rendered to elucidate quite all of the philosophical issues related to rule-following, from the genesis of the human attitude towards rules to the most complicated human capabilities related to logic and practical reasoning

Three general methodological merits of the book are (i) the unbiased approach, (ii) the disposition to discuss premises openly, and (iii) the systematic attention both to philosophical theories and common sense (see, for example, Brozek (2013), Introduction).

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The book gives a multifaceted analysis of rule-following, making examples of rules specific to all human experience: everyday life, games, language, morals, law, etc. At any rate, *language, morality* and *mathematics* are the main domains examined in the book.[1]

The Author describes its analysis as a 'journey through the philosophical and scientific theories connected to rule-following' in order to illustrate the most intriguing dimensions of the human mind.[2]

1 See e.g. Brozek (2013: 90)

2 In the book, the relation between language and rules is thoroughly examined, also with reference to the problem of the genesis of language and (rudimentary) rules. See especially Chapter 2 where *inter alia,* Merlin Donald's theory is recalled, according to which some forms of culture, based on mimetic skills, preceded language and enabled its evolution: see Donald (2005: 283-300). This theory, albeit not incompatible with the hypothesis that there would exist an innate language acquisition device, chiefly entails that language would emerge in group interactions and, hence, it would

The two main conclusions of the book are:[3]

(i) the human mind is not an exclusive product of our genes, but is co-constituted by our social interactions...it is not to say that the mind needs a social environment to flourish; rather there is no human mind without individual's participation in some communal practice;
(ii) the human mind, at its roots, is normative... our descriptive abilities (story-telling, construction scientific theories, proving mathematical theorems) are ultimately based on what ought to be done, even if the 'ought' involved is rudimentary and conceptually poor. We are able to utilize and understand such descriptive notions as truth only because our theoretical discourse is firmly placed upon a system of (primitively) normative rudimentary rules. Altogether, this is where the road from imitation seems to lead: to a socially co-constituted and primarily normative mind.

This brief comment is not the right place to go into detail and discuss all of the arguments rendered in the book in favour of these theses, *inter alia,* for instance, the interpretation of Wittgenstein's ideas,[4] the inquiry into imitation and the explanation of the recent developments in neuroscience about rule-guided behaviour, etc.

My purpose is very narrow and is to reflect on a topic ultimately secondary to the book. I will make just a very few notes to show the definite importance of linguistic categories in relation to *legal language* for comprehending, following or, as the case may be, infringing legal rules.[5] On top of that, I will allude to the ancient legal maxim *impossibilium nulla obligatio est* introducing a preliminary rough sketch of the problem of the impossibility in following laws.

This is a phenomenon fairly neglected in contemporary jurisprudence, but it is an intriguing topic to be mooted. In effect, according to many laws, impossibility is a relevant feature of legal norms, for instance, to excuse somebody from liabilities and/or punishments, to exclude a legal duty or to avoid established undertakings. In addition, legal doctrine and judges are acquainted with legal rules that appear fairly spurious as introduced only for a symbolic motive. Moreover, it is not rare to find in actual legal systems rules that seem unbreakable and/or prescribing something impractical, absurd or unreal. It happens also that legal rules seem to presuppose or depend on impossible requirements. Such impossibilities, according to the circumstances and the content of the rules involved, sometimes originate in logic and human intellectual faculties, while, other times, it is fundamentally related to facts and human capabilities of acting; besides, other times it is an outcome of the material situation in which peoples live. I will present and examine some paradigmatic examples at the end.

So, my analysis will be divided in two main parts: in sections 2, 3 and 4, I will examine some passages of Brozek's book that are very useful in elucidating the role of linguistic categories in comprehending legal rules and the aforesaid problem of impossibility in law. In the last section, I will present a very rough sketch of some cases of this broad phenomenon.

2 CATEGORICAL VS. HYPOTHETICAL RULES?

To begin, let us consider the first example discussed in the book[6] where the Author com-

be a phenomenon which is not individual, but co-created by humans within a community. On this topic see e.g. Schilhab et al. (2012).

3 See Brozek (2013: 224-225).

4 It is worth mentioning the analysis of rudimentary rules and abstract rules of Brozek (2013: 44 and sub.) and his conclusion that I subscribe to, that all our systems of rules, even the most sophisticated ones, form a network basically grounded on rudimentary rules. In brief, these rules depend on mental attitudes, but also on social interactions; they are independent of language (even if they involve some communication acts, they do not have to be formulated in language to work); they are simple and concrete, and followed unconsciously. While, abstract rules (including linguistic, legal and moral ones) depend on the system of rudimentary rules; they are followed consciously and formulated in language; they may be general and complex and are divided into types. On this topic see, in addition, e.g. Bix (1990: 107-121); Boghossian (2008: 9-50).

5 Thus, in this comment, I will consider only abstract rules, not rudimentary ones, using Brozek's lexicon. By the term 'rule(s)' I will indicate every legal prescriptions, distinguishing, only when needed, between legal rules *stricto sensu* and legal principles.

6 See Brozek (2013: 10).

pares the two following rules: (1) *One ought not to steal from other people;* (2) *One should apply the expression 'green' only to green objects.*[7]

The book explains that, according to an intuitive view, the rule (1) gives a justification for choosing a course of action and it is *categorical* to the extent that it 'is not merely an instruction of how one may act if one chooses or merely wishes so: it does not succumb to pure prudential (egoistic) motives'. This rule (1) is considered a typical moral rule, because 'while remaining *prima facie (i.e.* being prone to a defeat by some other moral rule), its normative force is not conditioned by some external normative criterion such as the precept to maximize one's gains and minimize one's losses'

Incidentally, such a characterisation of morality is not plain; it indeed excludes egoism from ethics, tracing a basic distinction between moral reasons, on one hand, and prudential reasons, on the other hand.[8] Of course, to discuss this issue goes beyond my analysis; and, above all, it is also not necessary in order to proceed, since the normative and the alleged categorical nature of a (moral) rule such as the rule (1) under consideration are thoroughly independent of the aforementioned conception of morality.

First, I fully agree with Brozek that the rule (1), as whatever moral rule, might be (a) in conflict with some other moral ones - such as the rule (3): *One ought not to let people starve*[9] or, to make other examples, the rule (4): *One ought to avoid suffering in the world,* or the rule (5): *Everyone has the right to attain happiness*[10] - and (b) defeated by another prevailing rule. Which rule should prevail within a moral system depends on the content of the meta-criteria recognized by the system itself (this is true, of course, in relation not only to moral systems, but to whatever normative system).

Second, the occurrence of an antinomy does not challenge the nature of the rules under consideration. Each one remains categorical to the extent that it imposes a certain course of action, all things considered, and under whichever circumstances. Rather, the occurrence of an antinomy depends on (how we conceive) the specific content of rules; for instance, there is an antinomy between the rule (1) and the rule (4), assuming that stealing generates suffering in the victim, and between the rule (1) and the rule (5), assuming that the deprivation of the property of another person reduces his happiness and so is an action in violation of his right to happiness.[11]

The rule (2): *One should apply the expression 'green' only to green objects,* is a typical linguistic

7 Incidentally, the latter presupposes a definition of greenness, and it is neither circular nor tautological, considering that it prescribes how to use *words* with reference to *objects* (of the real world where we live, as well of every possible world conceivable by human intellect).

8 This general view of morality has important defenders, but it is also under debate in contemporary moral philosophy. For an introduction see e.g. Sher (2012).

9 See Brozek (2013: 10).

10 The reference is of course the Declaration of Independence on July 4, 1776:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. - That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, - That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

Ferrajoli affirms that to use the term 'right' in relation to the action of - not simple pursuing, but even - attaining happiness is not proper, since the latter outcome cannot be guarantee by law on the strength of the principle *ad impossibilia nemo tenetur:* Ferrajoli (2006).

11 These are conceptual assumptions, that is to say artificial definitions. In this respect, I agree with the Author in his criticism of expressivism: Brozek (2013: 11). Rules and normative concepts (including moral ones) are not only expressions of human emotions. When we say 'One ought not to steal from other people' we do not simply try to convey the message that we find stealing displeasing or repulsive. To prescribe is neither (reducing to) stimulating nor expressing feelings and emotions. This is the very core of the prescriptivism of Hare (1952). For a critical appraisal of expressivism see Gibbard (2013).

rule and, according to this view, it is *hypothetical,* rather than categorical in its nature.[12]

As Brozek explains, it 'may be rendered as saying that if one has (an external) obligation to speak correctly, or merely wishes so, one should use 'green' in relation to green objects only'. In this view, linguistic rules would not have an inner justificatory power since 'they cannot back the choice of the given course of action'. This idea of language springs from a particular concept of human action: using linguistic signs and words (speaking, describing, requesting, asking, etc.) would be 'actions only in a very broad sense', and anyway, they would 'have little in common with actions prescribed by moral rules' such as, going back to the examples, stealing, starving, etc.

Of course, the rule (2) is a linguistic one as it is related to the use of linguistic signs. Besides, it clearly gives linguistic instruction as a general prescription for the use of a certain word, namely 'green'. In this respect, it is as normative in nature as the four rules above mentioned.

Moreover, it is categorical too, given that, identically to those preceding rules, it prescribes the application of the expression 'green' only to green objects in any case, *i.e.* without considering any possible exception, such as, for instance, the case of blind people and/or of objects with non-green pigments or which are multi-coloured, included green.

Furthermore, the rule (2) is categorical also on account of its generality: I mean that it presupposes the general idea of greenness in the absence of any relevant criteria to define this concept. As it is well-known, the general term 'green' has different meanings in relation to the linguistic context in which it is used: for instance, the ordinary meaning of 'green' is not equivalent to the scientific technical meaning that belongs to optics.

In this respect, I wholly agree with Brozek that 'despite appearances, there are arguably no sharp theoretical distinctions between types of [rules]' and 'a given category of rules (e.g. moral or linguistic) may be characterized in various incompatible ways'.[13]

12 See Brozek (2013: 10).

13 Brozek (2013: 11-12).

All the rules being thought about may be rendered as hypothetical, rather than as categorical rules.

So, it is possible to say, with regard to the rule (2), that *if* one has the obligation to speak *correctly/rightly (i.e. in compliance with such a rule), then* one should use 'green' in relation to green objects only.

As well, nothing precludes saying, with respect to rules (1), (3), (4) and (5), that *if* one has the obligation to act *correctly/rightly (i.e. in compliance with such a rule),* then one ought - respectively - not to steal from other people, or not to let people starve, or, again, to avoid suffering in the world, or, finally, to respect the right to attain happiness.

As the example shows, the hypothetical formulation is somewhat redundant, and the point is not the categorical/hypothetical form or nature of rules, but the 'source' of the normativity of rules in general. Instead of making a distinction between the internal *(i.e.* intrinsic) normativity of moral rules and the external normativity of linguistic rules,[14] it is fruitful to distinguish between the normative nature of rules that is, by definition, an essential feature of every rule, on one side, and the duty/obligation to observe a certain rule, that comes from a second distinct rule (i.e., a meta-rule or a meta-criterion for individuating binding rules), on the other side. Then, every rule can be seen in isolation (as a categorical rule), or rather in relation and pertinent to a normative system (e.g., a linguistic system, namely a language, or a moral system whatever). For instance, if I am Lutheran I am not under the obligation to act in compliance with Islam (or Judaism), but the rule: *One ought to observe sharia (or Talmud),* remains still a rule (of Islam and Judaism).[15]

14 This distinction is embraced in recent philosophical literature by some followers of *constitutivism* and presented as an offspring of a Kantian approach to normativity. On this topic see for a first introduction: Boghossian (2008: 95-108); Zlatev (2008); Finlay & Schroeder (2012).

15 To explain this point we can use also the distinction between the internal point of view and the external point of view originally elaborated by Hart (2012: 88-117). In short, a rule remains a rule even when it is seen from the external, rather than the internal point of view; the normative nature of a rule does not depend on the acceptance of anybody, and it is perfectly possible to describe rules.

In light of this distinction, I approve of the double way in which dictionaries are described in the book: it is definitely true that a dictionary is a collection of linguistic instructions (rules on how words have to be used); but, at the same time, 'it may be looked at as providing us not with norms, but rather with descriptions of how words are used, or what is the statistically prevalent way of speaking'.[16]

This is not exclusive to dictionaries, namely ordinary language. What is just said can be repeated, for instance, thinking of customs that may be looked upon as established rules originating in collective habits or, alternatively, as descriptions of traditional and widely accepted ways of behaving or doing something specific to a particular society, place, or time.[17] To make another example, etiquette can be seen as a set of rules of polite behaviour or, alternatively, as a report of good manners that are widely accepted and followed by a predetermined social group.

Rather, what makes the rule (2) above mentioned different from the rules (1), (3), (4), (5) and (6) is basically its referential substance. In brief, to use the word 'green' only to green objects - as the rule (2) states - is not a moral issue, at least, according to the common sense and our common moral intuitions.

But, this is a matter of chance; let us consider, for instance, linguistic rules such as these: *One should apply the expression 'man' only to white Catholic human male;* or *One should apply the expression 'necessity defence' only in urgent situations of clear and imminent peril when compliance with the law is demonstrably impossible* (see Supreme Court of Canada, *re Morgentaler v. The Queen,* 1976, 1 S.C.R. 616). These rules do not purely deal with the use of signs.

As these examples show, the uses of a language may be neutral or value-free, at least in some artificial contexts, as well as value-oriented. In reality, moral, political, and even theological ideas and values are incorporated in linguistic rules and usages; in this respect, ordinary language is a mirror of our ways of life and ideologies.

Law is very instructive as it is the domain par excellence where the meaning of words is systematically prescribed and governed by (linguistic) rules in order to guide human conduct, in the interest of political and social values.

As a further matter, legal rules show that speaking, reading, writing, etc. are all human actions, that, besides involving linguistic rules (for using signs and terms properly, making well-formed statements and texts), can be qualified by other kinds of rules - *i.e.* legal ones - as can stealing, walking, cooking, teaching, voting, and so on.

As the book emphasises,[18] linguistic rules are 'rules of how to do things in social settings'. Using an expression for effect, *language is action* and, in some way, embedded in social interactions. As well, 'our language skills are a double-inheritance: they are brought about by both biological and cultural forces'.[19] Going beyond the idea of John L. Austin, ordinary language is an *artefact* that embodies, at its bottom, more than 'the metaphysics of the Stone Age, namely...the inherited experience and acumen of many gen-

16 Brozek (2013: 11).

17 In addition, see page 98, where Brozek rightly observes: 'one may distinguish between the 'internal' normativity of language, and the external criteria that justify our playing the meaning rules. Moreover, the same strategy may be used in relation to paradigmatically intrinsically normative rules, e.g. moral ones'.

18 Brozek (2013: 104-112).

19 Brozek embraces *"the Embedded Thesis"* elaborated by Michael Tomasello (2003) that 'language is not a stand-alone product of evolution', but also a 'cultural-historical process'. This thesis is grounded in 'the so-called social-pragmatic approach to language acquisition' and the 'usage-based approach to linguistic communication' according to which 'meaning is use' and 'structure emerges from use'. See Tomasello (2009: 69 ss., spec. 70):

> 'Meaning is use' represents an approach to the functional or semantic dimension of linguistic communication. It originated with Wittgenstein (1953) and other pragmatically based philosophers of language, who wanted to combat the idea that meanings are things and instead focus on how people use linguistic conventions to achieve social ends. 'Structure emerges from use' represents an approach to the structural or grammatical dimension of linguistic communication .[that] want to combat the idea of a wholly formal grammar devoid of meaning and instead focus on how meaning-based grammatical constructions emerge from individual acts of language use.

erations of men...concentrated primarily upon the practical business of life'.[20]

3 THE CRITERIA OF RIGHTNESS AND CORRECTNESS

For Brozek, 'Abstract rules - *i.e.* moral, legal, linguistic rules and similar - *are* linguistic entities expressing obligatory (forbidden, permitted) patterns of conduct' and 'at this level /.../ one may distinguish kinds of rules simply by *formulating a theory* of how to act morally, legally or in a linguistically correct way. / . / These abstract (legal, moral, language) rules may be formulated in different ways, and so different theories of morality, law or language may be developed'.[21]

On the other hand, Brozek underlines that 'there are different, 'stronger' and 'weaker', normative criteria. A moral rule may justify an action if the prescribed action is considered just; a linguistic rule may prescribe that it is correct to use an expression in some particular way'.[22]

This idea that normative criteria and rules may be put on an ideal scale is very common and intuitive and it has been developed by many theories, especially in ethics. It has also been established that many conceptions of normativity are biased in favour of certain normative criteria (e.g., *fairness, rightness)* and tend towards drawing a distinctive line in particular between *rightness* and *correctness.* Accordingly, while to act rightly would denote a stronger normative criterion (as directly related to justice and morality), instead to speak correctly would denote, at the most, a very weaker normative criterion to the extent that linguistic rules would not be genuinely normative.

As Brozek shows (see Chapter 3) this is not so: this alleged difference between correctness and rightness is only superficial and it has both a *moral theory* and a *picture of language* at the bottom.

In reality, we can (say to) speak *rightly* or *correctly,* in the same way as we can (say to) act *rightly* or *correctly.* In both cases, the point is the compliance with a more general system of rules: a language, a system of moral rules or of religious precepts, a legal system etc.

It is not trivial to underline the fact that language expressions possess conditions of correct and, conversely, incorrect use. In this sense, meaning is normative and uses can be categorized into correct, incorrect or mistaken ones. A rule such as the aforesaid rule (2) *One should apply the expression 'green' only to green objects,* provides that if, at a certain time, 'green' means green, it is correctly applicable only to those things that are green.

But then, it is a logically distinct problem why we should apply such a rule and consequently 'green' to green things. This same problem occurs in all practical spheres: one thing is that a moral or a legal rule ought to do x, and another thing is to have the (moral or legal) obligation to follow and/or apply it.

Thus, I completely consent to the opinion that '[i]n the language, the rule 'One should apply the expression 'green' to green objects' may be deemed categorical in the sense that even if - due to some moral or prudential considerations - I do not follow it, I still break it. In other words, linguistic rules do have some autonomous standing vis-à-vis moral or prudential ones.[23]

In this regard, as the Author highlights, it is possible to understand and approach linguistic rules 'in two distinct ways: prescriptively and descriptively', as well it is demonstrated by facts that we can render this feature of language in various ways: we can say that 'there exist criteria for the correct use of linguistic expressions; or that there exist right and wrong (correct and incorrect) ways of using language; or that there is a way in which one should use words; or that 'what you mean by a word determines how you ought to use that word.[24]

Brozek discusses an interesting example of Hattiangadi[25] that is useful to review. So, let us consider the following three statements: (i) an application of 'rich' to a poor person is *incorrect;* (ii) an application of 'rich' to a poor person

20 Austin (1956-1957: 1-30).

21 Brozek (2013: 113).

22 Brozek (2013: 12-13).

23 Brozek (2013: 11).

24 Brozek (2013: 92).

25 See Hattiangadi (2009: 54-63) and Whiting (2007: 133-140).

is *wrong,* and (iii) 'rich' *should* not be applied to a poor person (emphases are mine).

Following Hattiangadi's view, these statements are 'ought-to-be' and not 'ought-to-do' statements and they do not express any genuine rules or obligations. The main argument is the so-called principle 'ought implies can' and its close version according to which 'ought implies can satisfy'. In other words, just as one cannot be obliged to do the impossible, one cannot be obliged to satisfy requirements that are impossible to satisfy. On the strength of this principle, 'If I have an obligation to perform action A, then it is possible to do A while being obligated to do A'. Clearly this is not merely a psychological or factual impossibility, but a logical impossibility;[26] we could say that it is analytical, due to it depends on a conceptual definition and a logical relation.

Brozek, going along with Hattiangadi, compares the aforementioned statements with the statement: *There should be no suffering!;* such a statement could be expressed in the same terms as the rule (4): *One ought to avoid suffering in the world.*

In the eyes of Hattiangadi, this statement does not express any duty or obligation since it is impossible to stop the suffering in the world. Similarly since it is impossible to apply 'rich' to rich people only, under all circumstances imaginable, then no obligation to do so would exist and, as a consequence, a linguistic rule should be considered not to be a genuine rule in the end. In the same way, 'if I mean *green* by 'green' then I ought to apply 'green' to every green thing there is. But since I can't do that and since *ought* implies *can,* it follows that I don't have such an obligation. The fact that I lack the obligation to apply 'green' to every green thing would in turn imply that, since there are green things, I don't mean *green* by 'green', which is absurd'.[27]

Such a theory is clearly counterintuitive and goes down a slippery slope, insofar as it begins from the sound and plausible principle that one cannot be obliged to do the impossible, but in conclusion it denies the existence of whatever general rule of whatever content. On account of this theory, since - under all circumstances imaginable - it would be impossible to impose an obligation to every human being, then all rules that impose a general behaviour upon everybody (so-called universal or very general prescriptions in the form of 'everybody ought to do *x)* would be impossible and not genuine rules. This is a deficient outcome to the extent that many fundamental social, moral and legal rules are such provisions. By way of exemplification, let consider the paradigmatic moral rule: *Everybody ought to tell the truth;* again, the social rule: *Everybody ought to follow etiquette according to the circumstances;* finally, the legal rules: *Everyone has the right to life, liberty and security of person* or *No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.*[28]

The basic fault of Hattiangadi's argument is to forget that the meaning of words and, hence, the content of rules, is a semiotic problem and not merely a logical-syntactic issue. Especially in law, it depends on legal semantics and pragmatics the possibility and, conversely, the impossibility in comprehending, following, and infringing rules. To make another example, the contractual clause according to which the debtor shall be responsible and accept unlimited liability for any risks undertaken is, beyond any doubt, a legal rule; and it is neither pointless nor worthless, although it seems unbreakable and/or impossible to be followed. In point of fact, it is a substantial rule typical of many commercial transactions and, it is currently implemented and enforced by the parties, as well as the courts and the arbitral tribunals around the world. How this may happen and rules as such are perfectly meaningful is explained by semiotics and numerous linguistic disciplines (this point is clearly stressed in the book):[29] in a word, the intelligibility of rules is a normative and context-dependent issue.

26 See also Bykvist & Hattiangadi (2007: 277-285). The correct use of a word, for Hattiangadi, depends on a set of conditions that are both necessary and sufficient for the word to refer to its extension.

27 See Elugardo (2008).

28 The latter legal rules are expressed at the articles 3 and 4 of Universal Declaration of Human Rights, adopted by United Nations General Assembly on December 10, 1948.

29 See e.g. Baker & Hacker (1986) and Laland & Brown (2011).

4 RULES AS PATTERNS OF BEHAVIOUR AND LANGUAGE

The book elucidates three aspects of rules which are fundamental to their intelligibility as patterns of behaviour.[30]

First, rules 'must be based on a mechanism of recognizing the similarity between objects or states of affairs. To apply the word 'green' to the given object correctly, one needs to have the capacity to recognize 'greenhood' in any object, and so to establish that those objects are similar relative to the feature of being green'.[31]

This means that a first requirement to comprehend the rules mentioned hitherto (both linguistic and legal ones) is the capacity to recognize what is 'stealing', 'starving', 'suffering', 'happiness', 'manhood', 'greenness', 'richness; etc. This requires: (i) to grasp a definition of these concepts; (ii) to apply the definition to reality establishing relevant similarities among objects, events, situations, courses of action, etc.

General concepts are in fact the ultimate constituents of whatever (abstract) rules and, consequently, their comprehension involves human understanding: first, the human skills of discerning and categorizing.

Rules are reasons for action, as we just said; and, leading up to this normative function, they are the standard for qualifying objects (i.e. natural events, human actions, situations in general). Their enforcement and application requires criteria to establish some relevant similarity among single cases and to categorise each one (e.g., on January 1, 2012, at 10 a.m. Albert kills Alfred in a car crash, as premeditated the night before) into the abstract case described by the rule (i.e. the unlawful premeditated killing of one human being is deemed to be punished as murder).

In this respect, the problem of similarity is worth our attention. In the book, its recursive nature is appropriately emphasised:[32]

> *when one claims that two things may be called 'great' because they are similar in virtue of a certain standard or measuring rod (the idea of greatness), one is forced to ask, what is the criterion for establishing similarity between any great thing and the idea of greatness. The natural answer is that there must be another standard, over and above the idea itself, and so a kind of meta-idea. This generates an infinite regress - no matter what is our standard of comparison (idea, meta-idea, meta-meta-idea), there always is a tertium homo or third man, a higher criterion which enables one to establish that the given two objects are similar. The same problem of similarity is pervasive in the context of rules.*

This infinite regress may be arrested by pragmatic rules and, hence, it is a variable of the concrete linguistic context in which rules are to be followed and/or applied.

Second, 'rules must be applicable to a potentially infinite number of cases', that is they 'must somehow 'contain' a potentially infinite number of its applications'.[33] This is another way of saying that rules have a degree of generality. Although many rules are addressed to a single individual or refereed to a single case, in virtue of the principle of universalizability, any rule is equally applicable to every relevantly identical situation. According to prescriptivism, the aforementioned principle is a logical feature of any normative judgement and whatever rule; and, what is more, it is not unique to morality since it is related to the use of deontic terms such as 'right' and 'ought' and similar.

Furthermore, even highly specific rules such as legal privileges, individual orders and/or those rules that contain deictic or indexical terms (e.g., *'put a sock in it here and now!')* are potentially general and, hence, genuine rules.

Overall, generality is a feature of language and, to be more precise, of whatever linguistic signs and terms, *i.e.* the relative concepts; and concepts - as we just said - are the basic constituents of rules. The feature of generality possessed by linguistic terms is demonstrated, to make an example, by proper names of a kind that 'David' that denotes not one single individual called David, but a class of individuals that have this particular feature of being called 'David'.

Thus, the rule: *One ought not to steal from David* and the rule: *One should apply the expres-*

30 Brozek (2013: 12-13).

31 For a further investigation see Gentnera & Medina (1998: 263-297).

32 Brozek (2013: 15).

33 Brozek (2013: 12-13).

sion 'David' only to individuals named as 'David' are equally general.[34]

Third, rules as patterns of conduct 'must be stable or projectable: they pick out as right or correct not only past or present, but also future courses of action'.[35] This point requires a further clarification. No one denies that rules may qualify - *i.e.* give a particular normative meaning to - foregoing situations recollecting normative effects to past actions and/or events: such rules, for instance in law, are currently called retrospective rules. By way of exemplification, let us consider the rule: *The Australia Taxation Office ought to tax the transfer pricing benefit allocated to an Australian entity or permanent establishment in relation to income commencing on or after July 1,* 2004;[36] and the rule: *The amendments made by subsections (1) to (3) are treated as always having had effect.*[37] But, even retrospective rules as such are related to the present and the future, insomuch as they are applicable since their enacting until their repealing, is exactly the same as all other rules.

For the purpose of my analysis, this feature of rules is of utmost importance. The fact that rules have the possibility to qualify whatever they like, in time and/or in space, explains why we can conceive nonsense rules (for instance internal contradictory rules) and/or rules that prescribe impracticable actions (e.g. *One ought to open tin cans by means of a spoon)* and/or presuppose unreal situations (e.g. *Everyone has the right to a nationality,* as stated at the article 15 of Universal Declaration of Human Rights, adopted by United Nations General Assembly on 10 December 1948).

This is a common feature of all rules whatever domain they belong to (etiquette, games, morality, law, etc.) and, basically, of ordinary language. Poetry and literature are emblematic of this virtue of human natural language: as it is well-known, in these spheres to make nonsense statements is even recognized as a main way of communicating feeling, emotions, beliefs, etc. By way of exemplification, let us consider the verse *Jabberwocky* of Lewis Carroll,[38] and the first line of Wordsworth's poem England 1802: *Milton! Thou shouldst be living at this hour,* while Milton actually died in 1674.

So, I completely agree with Brozek that the expression 'normative force' is metaphorical regarding rules and that 'a rule that has normative force is objective (i.e., independent of an individual's belief) and may serve to justify an action or a belief according to some normative criterion and given some facts'.[39]

However, I am not entirely convinced that a thorough explanation of the metaphor of *normative force* is that 'rules are normative when they - under some factual circumstances - justify a course of action against some selected normative criterion, and that any normative criterion determines which rules have justificatory force'[40]. Surely, rules can justify a course of action only according to an established normative criterion; and a chaining in the normative criteria entails differing practical justifications. But then, normativity of rules does not depend on factual circumstances, unless this is required by the selected normative criterion. On the other hand, in the case of this, it is true that rules that have practicable results are recognized as genuine prescription or pattern of conduct, while those ones prescribing or presupposing something impossible to happen or to do are not rules at all.

5 THE 'OUGHT IMPLIES CAN' PRINCIPLE AND THE LEGAL *MAXIM IMPOSSIBILIUM NULLA OBLIGATIO EST*

The book *Rule-following* can be interpreted as an investigation concerning the question of whether facts and, more precisely, 'the biological underpinning of humans, determine...in

34 Of course this thesis is discussed; see e.g. Monro (1967: 147-155; 155-169).

35 Brozek (2013: 12-13).

36 See the amendment introduced by Parliament on August 20, 2012 to Income Tax Assessment Act 1997 to include new Subdivision 815-A *'treaty-equivalent cross-border transfer pricing rules'.*

37 See Retrospective taxation Section 58 of the Finance Act 2008 Standard Note no. 6361, August 28, 2013, *www.parliament.uk.*

38 See e.g. Lecercle (1994).

39 Brozek (2013: 13).

40 Brozek (2013: 13).

some way the content of' rules, especially moral rules.[41] The Author points out that

> *[b]iological sciences such as evolutionary theory, experimental psychology, primatology or neuroscience do indeed explain, or are ever closer to explaining, human moral behaviour and the content of actual moral systems. However, they can never justify any course of action. This is not to say that facts - our biological constitution - have no bearing on the content of moral norms. The first insight is connected to the slogan 'ought implies can': if there is a moral norm, it should be practically realizable, otherwise it would be pointless. This is acknowledged in various normative contexts; for instance, lawyers usually claim that impossibilium nulla obligation est or that what is impossible to do cannot constitute an obligation. /.../Therefore, facts...dodetermine what may be called the field of the deontically possible. Its upper limit is well encapsulated in the 'ought implies can'slogan. The abstract rule we formulate - be they moral, legal, linguistic or other - must be practically realizable.*[42]

This thesis is shortly enunciated saying that: 'There is no normativity if you cannot be wrong'.[43]

There are three main situations where you cannot be wrong.

First, the rule itself is deemed as a nonsensical one (a paradigmatic instance is the rule: *One ought to paint the absolute blue).*

Second, the rule cannot be infringed or seems unbreakable because it prescribes something necessary for logical or conceptual and/or practical and/or factual reasons: for instance, in arithmetic '2 + 2 = 4'; for humans, it is impossible not to follow the rule that imposes everyone not to control his unconscious emotions and to generally observe the laws of physics.

Third, it cannot be followed those rules prescribing something logically and/or practically impossible for the receivers or presupposing something impossible or unreal such as the rule: *Men ought not to interfere with the working of the evolutionary process.* In this respect, problematic cases are represented, for instance, by the rules: *'Everyone has the right to respect for his or her physical and mental integrity*[1]*, 'The arts and scientific research shall be free of constraint, 'Human dignity is inviolable. It must be respected and protected* (all these rules are stated, respectively, in articles 3, 13, 1 of the EU Charter of Fundamental Rights.

As these simple examples show, in this subject some preliminaries distinctions and clarification must be traced out. At least, first of all the context or domain to which the rules belong to or are to be used in must be identified. Moreover, it is fundamental to distinguish between conceptual/logical/linguistic constraints, on one side, and practical/empirical/factual restrictions, on the other. Then, it must be clarified if it is relevant for only an absolute impossibility, i.e. regarding whatever human agent, or, instead, even a relative or context-dependent impossibility and, accordingly, which are the material features to be deemed.

Let us consider the following rule *'Children are allowed to paint the town red during carnival'.* Though it could seem meaningless for non-native speakers of English, it is far from nonsense: it simply permits children to go out and enjoy themselves flamboyantly during the carnival period.

Furthermore, impossibility, as well as its opposite possibility, may be construed as an all-or-nothing concept: one thing is, alternatively, possible or impossible, *tertium non datur.* But it may also construed as a more-or-less concept: in this perspective there is a sort of spectrum of infinite possibilities and everything is possible, or impossible, ever in a certain degree unless at the extremes.

In logic, impossibility is an all-or-nothing concept, while in ordinary language (i.e. according to common-sense) and in law it is typically a relative and continuous concept. In spite of

41 Brozek (2013: 145).

42 Brozek explains that 'the lower limit of the field of the deontically possible pertains to the stability of the system of rudimentary rules, punctuating that 'neither the upper nor the lower limits are determined in a precise way': Brozek (2013: 145).

43 See Korsgaard (1996: 161) and (1997: 215-254). In this analysis I reject the realist theses that it is impossible to have any obligations unless we may say that some actions are in themselves right or wrong; and, consequently, that it is senseless to ask why we are obligated to do or to avoid some actions if they are intrinsically right or wrong.

that, practical impossibility in law is not normally measurable.

In addition, as it has been observed, we are able to conceptualize and express, by means of language, other possible worlds over and above the real one in which we live. This is demonstrated, for instance, by conditional and counterfactual sentences, such as 'If John commits theft, he will be punishable', and 'Even if Jane would have thrown a brick at the window, the window would still not have broken'. But, in the real world, a time constraint makes it impossible that a train arrives before it departed,[44] assuming the concepts of 'train', 'arrival' and 'departure' in their common meanings.

As said it has just been mentioned, in legal thinking a very well-known maxim was originally coined by the Roman jurist Celsus expresses this general idea *impossibilium nulla obligatio est* (Digest 50, 17, 185).[45] Similar versions of the same maxim are, for instance, *nemo potest ad impossibile obligari,*[46] *ultra posse nulla obligatio o nemo obligatur,* and *ad impossibilia nemo tenetur.* This legal maxim is usually seen as a corollary of the philosophical moral principle 'ought *implies* can'.[47] It is worth noting that in law the aforesaid *implication* is interpreted in the sense of Charles I. Lewis' strict implication,[48] as a presupposition, rather than as it often happens in deontic logic as the so-called material implication. In other words, in the eyes of jurists, 'ought implies can' means that *it is necessary* that what it is prescribed is *possible* in order to be obliged. Where, of course, the point is in which sense we speak of *possibility* in this regard.

The range of applications of this maxim is very wide in actual legal systems; and its uses, both implicit and explicit, are uncountable and extremely various.

Sometimes legal categories are construed on the basis of certain assumptions of impossibility: for instance, the distinctive feature of aleatory contract is the uncertainty, at the moment of stipulation, of the economic outcomes related to the performance of the contractual relationship, as a consequence of the impossibility to evaluate a priori the allocation of risks among parties and the proportion between the advantages and the disadvantages that might result from this allocation.

Impossibility is also a constraint in drawing legal norms, as shown, for example, by the discipline of the invalidity of contracts: according to Italian law, a contract cannot be annulled if it is confirmed by the parties, but a void contract cannot be confirmed, unless a law allows it to be done (see art. 1423 Italian Civil Code). Legal doctrine explains that this limit to confirmation is in harmony with the rule that everybody is entitled to challenge a contract when it is void: the law excludes this power insofar as it would be practically impossible to delimit the class of persons that would be able to confirm the contract.

Another significant application of the idea *impossibilium nulla obligation est* is represented by excuses toward offences and the corresponding liability (e.g. necessity defence).

The principle 'ought implies can' and its corollary *ad impossibilia nemo tenetur* has frequently been the implicit basis of legal principles and rules; to make some examples, considerations about what is possible and impossible for human beings are on the basis of the principle of reasonable care, the precautionary principle, and the legal presumptions called *homo homini presump-*

44 See Hage (2013).

45 See e.g. Zimmermann (1996: 687):

> this maxim 'thus appears to be a rule, not only of venerable antiquity, but also of obvious and even axiomatic validity. It /.../ corresponds to the maxim "ought implies can" of modern moral philosophy. If we oblige somebody to do something, we presuppose in fact that he is able to do this act; anything else would be a kind of buffoonery *("lusisse tantum, et nihil egisse cense[m]ur"* in the words of Pufendorf). *Impossibilium nulla obligatio est* neatly encapsulates the idea that nobody can be obliged to perform what he cannot perform'.

See also Rabello (2010: 346-358).

46 *Regula iuris 6 Corpus Iuris Canonici.*

47 See e.g. Brecht (1941: 318): 'the Roman doctrine expressed a necessary, inevitable element of political and legal as well as of ethical thinking rather than an arbitrary statement of positive law. Just as we cannot expect someone to do what he cannot do, we cannot seriously bind or force him to do it. /.../ legal or moral duty, in the last analysis, can never go *ultra posse';* Stockhammer (1959: 25-35); Conte (1988: 139); Di Lucia (2012) and Feis (2012).

48 See Murphey (2005).

tions, that are, exactly, common-sense presumptions. With regards the aforesaid principles, the maxim *impossibilium nulla obligation est* plays a double role, on one hand, giving a justification as general legal rules, on the other hand, in relation to their concrete application to cases.

Then, laws give relevance to impossibility to a certain extent: for instance, both in civil and common law legal systems rules allow the termination of contracts when the performance undertaken by the debtor becomes (objectively) impossible. Such rules are currently interpreted and in fact applied by legal doctrine and judged as giving relevance not (only) to impossibility *stricto sensu* (in a logical sense or for everybody), but to a definitive material difficulty in performing obligations for every man being under the same circumstances of the debtor. So, a model of man is used, albeit, often implicitly, as a parameter for measuring the reasonable effort that can be pretended.

Besides this, from a certain view, legal norms (both rules and principles) should be interpreted according to a pragmatic general assumption that they should be followed when there are neither factual obstacles nor normative limitations (e.g., superior rules in the hierarchy of the legal system). The implicit conviction is that legal norms would be designed by the legislator taking into account normal factual conditions and the absence of legal limitations interfering with their realization.[49]

As well, the principle 'ought implies can' and its corollary *ad impossibilia nemo tenetur* is implicit in many conceptions of legal rules as defeasible, or *prima facie* rules that should be applied under normal circumstances, but are open to exceptions.[50]

This idea that legal rules are focused on normal situations often leads to the conclusion that all legal rules should be interpreted in light of the general principle that *ad impossibilia nemo tenetur.* As a result, for instance, legal norms concerning liability for damages caused by dangerous activities should be not applied when the harm occurs, but not as a normal consequence of those dangerous activities.

The conviction that impossibility is a limit of law is also a common presumption of legal thinking and it is used in favour of a certain interpretation of a discipline and/or to individuate the purpose of a law or the alleged legislator. In particular, the idea that *ad impossibilia nemo tenetur* is very close to the argument of the reasonable or rational legislator.

According to some theories of legal argumentation, the principle *ad impossibilia nemo tenetur* is also a criterion of the rationality of legal reasoning. In addition, some theories of fundamental rights, for instance, Robert Alexy's theory defines principles as 'norms which require that something be realized to the greatest extent possible, given the legal and factual possibilities';[51] incidentally, this definition of principles could also be applied to rules and it represents a very concept of law in general.

Furthermore, the principle 'ought implies can' and its corollary *ad impossibilia nemo tenetur* is commonly related to the avoidance of conflict in law (so-called legal antinomies). From an extreme point of view, no genuine prescription is able to exist if there is a conflict with someone else. In other words, since when there is an antinomy - two rules, one, that imposes to do x, and, the other one, that imposes *not* to do *x* or to do *non-x* - it would be impossible to follow them both, then a situation where two norms conflict with one another cannot exist. In this conception, consistency is an essential feature of law and, in general, of all normative domains.

Some rules can prescribe conduct to a class of persons that it is impossible to be performed by a sub-class. This situation of partial impossibility is usually named and discussed as over-inclusiveness: for instance, the rule 'Sons and daughters must obey their own parents' cannot be applied to orphans.[52]

49 See Brozek (2012: 223).

50 On this topic see Ferrer Beltran & Ratti (2012) and Kramer (2004: 249-294).

51 See Alexy (2003: 135).

52 I borrow this example from Gentili (2013: 172). Speaking of obedience towards parents is nonsensical in relation to orphans, unless one assumes a broad concept that includes obedience to the will expressed by the dead when they were still alive. On the contrary, the rule 'Sons and daughters must respect their own parents' is in any case applica-

What it is more intriguing is that the over-inclusiveness is usually neutralized by re-interpreting the rule. By way of distinguishing between orphans and non-orphans, it creates one more specific rule that prescribes, uniquely non-orphans, to obey their own parents. However, it is open to debate whether a complementary rule concerning non-orphans is also generated or, to the contrary, the situation of non-orphans in relation to their parents becomes simply irrelevant (un-ruled).

Finally, a further case of impossibility is related to the so-called legal gaps and, precisely, the technical gaps, using Hans Kelsen's lexicon.[53] When a rule A presupposes the existence of another rule B, but this rule B indeed does not exist, following the rule A is impossible and/or rule A prescribes it-self something impossible. Amedeo G. Conte has coined the expression 'praxeological gaps' (another name is 'gaps of construction') to denote the absence within a normative order of a rule, whose validity is (for the same normative order) a necessary requirement for the efficacy of a second rule. For instance, there is such a gap when in a legal system some rules are addressed to elective judges, but in the same legal order any rule that governs the election of judges does not exist.[54]

ble even to orphans since respect towards ones parents includes taking care to their memory and body after death.

53 See Kelsen (1970: 127-128).

54 See Conte & Di Lucia (2012: 167-178) who quote at page 172 Zygmunt Ziembinski, *Les lacunes de la loi dans le système juridique polonais contemporain et les méthodes utiliséespour les combler,* 1966, 41-42: Selon l'article 50 de la Constitution de la République Populaire de. Pologne du 22.VII.1952 les juges sont éligibles: la loi ordinaire déterminera le mode d'élection. Mais [...] aucune loi concernant l'élection des juges n'a été instituée depuis 1952 et les juges sont nommés par le Conseil d'état en appli- cation de lois instituées antérieurement. La Constitution a ordonné l'élection des juges, mais faute de règles d'organisation construisant cet acte, l'élection est impossibile. Elle ne peut pas ètre organisée d'une fa^on quelconque, parce qu'elle doit ètre organisée selon le dispositions d'une loi, et cette loi n'existe pas. C'est un exemple typique d'une lacune de construction.

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Synopsis

Silvia Zorzetto

Thinking of Impossibility in Following Legal Norms

Some Brief Comments About Bartosz Brožek's *Rule-Following* (Cracow: Copernicus Press 2013)

SLOV. | *O nemogočem v zvezi s problemom ravnjanja po pravnih normah. Nekaj kratkih komentarjev h knjigi Bartosza Brozka* Rule-Following. From Imitation to Normative Mind. Članek izpostavlja pomembnost jezikovnih kategorij pri razumevanju pravil in njihovem (ne)spoštovanju. Z obravnavo stare pravne maksime *impossibilium nulla obligatio est* avtorica odpre vprašanje nemogočega v zvezi z ravnanjm po pravilih. Tiste dele Brožkove knjige, ki pravila obravnavajo kot vzorce ravnanja, uporabi za osvetlitev vloge, ki jo imajo jezikovne kategorije pri razumevanju pravnih pravil in vprašanju nemogočega v pravu. Posebna pozornost je namenjena dvema splošnima razlikovanjema, ki ju potegne Brožek: na eni strani je to razlikovanje med kategoričnimi in hipotetičnimi pravili, na drugi strani pa razlikovanje med splošnimi merili za to, kar je prav (angl. *right)* in kar je pravilno (angl. *correct).*

Ključne besede: pravila, jezik, ravnanje po pravilih, nemogoče, najstvo, pomen, pravo

ENG. | The starting point of this article is the recent publication *Rule-Following. From Imitation to the Normative Mind* by Bartosz Brožek. The main scope of this comment is to show the definite importance of linguistic categories in relation to legal language for comprehending, following, and even infringing legal rules. The purpose is to introduce the ancient legal maxim *impossibilium nulla obligatio est* giving a preliminary rough sketch of the problem of impossibility in following laws. In this respect, some passages of Brožek's book regarding rules as patterns of conduct will be examined which are very useful to elucidate the role of linguistic categories in comprehending legal rules and the aforesaid problem of impossibility in law. In particular two general distinctions discussed in the book will be considered: the distinction between categorical and hypothetical rules on the one hand, and the distinction between the general criteria of rightness and correctness, on the other.

Keywords: rules, language, rule-following, impossibility, ought, meaning, law

Summary: 1. Going Beyond the Normative Mind of Humans. — 2. Categorical vs. Hypothetical Rules? — 3. The Criteria of Rightness and Correctness. — 4. Rules as Patterns of Behaviour and Language. — 5. The 'Ought Implies Can' Principle and the Legal Maxim *Impossibilium Nulla Obligatio Est.*

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