Norm and Truth

Wyższa Szkoła Nauk Humanistycznych i Dziennikarstwa

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Preface

Truth seems to be an indispensable element of authority which presents itself as being based on more than just power and efficiency. In the domain of law, there is not only and primarily the problem of establishing the truth about the facts which are to be judged; there is also the problem of norms—does their authority rest solely on the act of establishing them, or is there "something behind", a truth which contributes to the strength of law, and which provides legitimacy to both legislator and to the legal norms themselves. In theoretical reflection, the very possibility of talking about true norms or true evaluations is under challenge, and this view dominates in the academic education of lawyers and other professionals. At the basis of this project lies the conviction that the problem of true norms, and the more general problem of the place of truth in law, is worth re-examining. In the course of such a re-examination, it is also worth returning to certain points in the tradition of thinking about the foudations of law. In the tradition recalled by the papers presented here—by both Italian and Polish authors—a prominent place is occupied by Polish thinkers such as Leon Petrażycki, Czesław Znamierowski, and Zygmunt Ziembiński

The book consists of three major parts. The titles—*Tradition, Theory, Practice* mark important points of reference in the reflection on truth in the context of law. The contributions relate to these points in different degrees, and each, though placed in one of these parts, also refer to the others.

This book is a result of cooperation between Italian and Polish scholars based on a project carried out by the Department of Philosophy of Law and Human Rights at the School of Humanities and Journalism in Poznań. A part of this project was the Italian-Polish Workshop "Norm and Truth", which took place on 13–14 November, 2008. Early drafts of the majority of the contributions were presented and discussed at this workshop. The authors of the papers

include renowned scholars, as well as young researchers. The contributors also include a number of legal practitioners.

On behalf of the participants of this project, I wish to express my gratitude to the School of Humanities and Journalism for the founding of the project. Stephen Mulraney was kind enough to help with the language and style of the contributions.

Marek Piechowiak

I. Tradition

STANISŁAW CZEPITA

Czesław Znamierowski's Conception of the Norm and the Problem of Truth

1. Introduction

The aim of this paper is to present and critically analyse the conception of the norm formulated by one of the founders of contemporary Polish theory and philosophy of law—Czesław Znamierowski (1888–1967)—in relation to the problem of truth. In my paper I will first present Znamierowski's conception of the norm as a special kind of statement in the logical sense, and his distinction between axiological and thetic norms; Secondly, I will consider the original critical interpretation of that conception due to the most outstanding of Znamierowski's students, Zygmunt Ziembiński. Thirdly, I will propose my own interpretation of Znamierowski's ideas.

2. Znamierowski's conception of the norm

It should be explained that in the beginning, Znamierowski's approach to the ontological status of the norm varied. The changes in his conception of the norm were connected to the evolution of his views on general philosophy.

In his early years, Znamierowski, who had studied philosophy in Germany and Switzerland, was influenced by phenomenological philosophy. What affected him most strongly were the ideas of Adolf Reinach—a student of Edmund Husserl—concerning the existence and recognition of objects and categories a priori (Reinach 1913; Gardies 1985).

It was under this influence that Znamierowski at first considered norms as organic entities (as he called them). Their existence was not limited to time and space, as the examples of musical compositions and legal norms illustrate. However, Znamierowski did not share Husserl's belief in essences ex-

isting beyond time and space. He claimed that for entities such as organic entities, their existence was not fulfilled entirely in time and space, but their essence, in a way, was manifested in particular items. For example, a musical composition is expressed by performances, or by notes; a legal norm is expressed in its acts of verbal expression and writing (Znamierowski 1921). Although Znamierowski's approach was obviously not clear, it needs to be added that in his early attitude norms were not, or at least were not assumed to be, linguistic utterances.

Znamierowski formulated his conception of norms as a special kind of proposition in the logical sense in the 1920s and 1930s, mainly in his books *Podstawowe pojęcia teorii prawa* (Basic concepts of the theory of law) and *Prolegomena do nauki o państwie* (Prolegomena to the study of the state) (Znamierowski 1924, 1934; 1947). As far as his philosophical assumptions are concerned, he was at that time influenced by Polish analytic philosophy, especially the so-called Lvov-Warsaw School. As is well known, the school held ideas similar to neopositivist philosophy, especially to the ideas of the so-called Vienna Circle (Czepita 1988, 14*ff*).

Generally speaking, Znamierowski was of the opinion that the norm was a special kind of proposition in the logical sense. This original point of view was connected with the fact that by a "norm", he meant a different kind of expression than is commonly intended. Expressions indicating that in certain circumstances one should behave in a certain way were treated by Znamierowski as just a part of the norm, which he called its core. According to him, a fully expressed norm must also indicate on the basis of what one should behave in the certain way. This part of the norm—which indicates the basis of the *ought* expressed in the core of the norm—Znamierowski called the "norm introduction" (Znamierowski 1934, 22*ff*).

Znamierowski assumed that the basis of the *ought* indicated in the core of the norm might be one's act of evaluation, or an act of norm-giving (norm-proclamation). As a result, he claimed that every norm is a special kind of proposition in the logical sense, and thus that it is either true or false. It is easy to see that the kind of utterance which he calls a norm is what is usually treated as a deontic statement—a statement which qualifies a given conduct from the point of view of a given norm (according to Znamierowski's terminology, from the point of view of the core of the norm). At the same time, Znamierowski claimed that the deontic statement qualifying one's behaviour according to "the norm" (i.e. the core of the norm) is in his terminology a norm only on the condition that the core of this norm is justified in somebody's real act of evaluation, or in a real fact of norm-proclamation.

Therefore it must be stated that those expressions called norms by Znamierowski are—in modern logical terminology—deontic statements in the strong sense (Czepita 1988, 40–46).

Znamierowski's approach in ascribing logical value to the norm was also not popular when he presented it in the first half of the twentieth century, and it did not meet with a response then. In the common approach to the norm of Polish philosophy of law of the time, the norm was treated as an expression that was neither true nor false. Nevertheless, it should be mentioned that according to the Polish logical thinking of the day (and in particular in the thought of Witold Wilkosz, an outstanding Polish logician), the problem of whether the norm had a logical value or not was considered to be an open one (Wilkosz 1925).

3. Ziembiński's interpretation

Czesław Znamierowski's conception of the norm as a true or false utterance was critically analysed by his most outstanding student, Zygmunt Ziembiński (1920–1996).

As far as Ziembiński's methodological and philosophical approach is concerned, he assumed analytic philosophy and neopositivist ideas, and he held the main idea of emotivism in ethics in high regard. In consequence Ziembiński assumed that there was a sharp difference between descriptive utterances and evaluative ones, and so there could be no logical passage leading from *is* to *ought*.

Ziembiński was of the opinion that Znamierowski had misinterpreted the introduction as a part of the norm. The norm was thus, according to accepted terminological conventions, the utterance indicating that one ought to behave in such-and-such a way, i.e. the utterance which Znamierowski called the core of the norm. The indication is not a part of the norm, but indicates its justification. Every norm expresses what ought to be done, but does not describe anything. So it is neither true nor false. The logical value belongs only to the proposition (statement) in a logical sense, i.e. an utterance which states either that such is the case, or such is not the case (Ziembiński 1970).

According to Ziembiński, the distinction between axiological and thetic norms formulated by Znamierowski was not a distinction between two kinds of norms, but rather between two ways of justifying norms. The axiological norm is the one that is to be justified in reference to somebody's act of evaluation. The thetic norm is justified on the basis of a proper act of norm-mak-

ing (norm-promulgation). Ziembiński emphasized that one and the same norm might be simultaneously justified from both the axiological and thetic points of view (Ziembiński 1963).

4. Another interpretation

Now I would like to propose another interpretation of Znamierowski's ideas, one which is different from the above interpretation formulated by Ziembiński. The key problem is whether it is possible to at the same time presume that on the one hand, the norm is a proposition (statement) in the logical sense—i.e. it is either true or false—and that on the other hand, the introduction is not a part of the norm. To analyse this problem I will use the conception of presupposition formulated by Peter F. Strawson (Strawson 1952, 175*ff*).

As was noticed by Ziembiński, what is expressed by the norm introduction (in Znamierowski's terminology) is not expressed by the norm itself (by the core of the norm). But in opposition to Ziembiński's interpretation, the relationship between the norm introduction and the core of the norm does not only seem to be a relationship of justification. What the norm introduction refers to is the condition sine qua non of saying whether one ought to behave in a particular way in a particular situation. In case of the norms which Znamierowski calls "thetic", we state first of all that there was an act of norm-making (norm-proclamation). This is a presupposition of the true or false statement determining that one ought to behave in this or that way. Consequently, the presupposition concerns the state of the world created by the act of norm-making (norm-proclamation).

In case of the norms which Znamierowski calls "axiological", the character of the presupposition depends on the accepted ontology of values. Assuming ethical cognitivism, the presupposition says that there are certain objective values and—in such situations—the norm (the core of the norm) ascertains that one objectively ought to behave in such-and-such a way. Assuming ethical noncognitivism, the presupposition is an utterance expressing somebody's subjective attitude, and the norm states that in the light of one's evaluation, addressees of the norm ought to behave in such-and-such a way. Consequently an axiological norm is, in the first case, a logical proposition (statement) which ascertains that one ought to behave in such-and-such a manner, providing that there are objective values. In the second case, the axiological norm is a psychological statement saying that one approves or disapproves of certain behaviour, providing that there has been an act of ethical evaluation.

From the point of view presented, one can say that norms are true or false propositions (statements) which state that one ought to behave in such and such way, formulated on the assumption that some other utterances concerning the ontological status and the sources of the *ought* are true.

Two objections might be raised to the above conception. First, that it is not precise enough; and one has to agree that as given, it is a draft that requires some clarification. What in particular needs clarification is what is meant by a norm presupposition—whether we opt for a semantic or pragmatic conception of presupposition.

Second of all, one may claim that the conception presented requires so-called strong ontological assumptions. But it seems that in discussing whether or not norms are true or false, no strong ontological assumption whatsoever would be avoided, and neither would strong ontological assumptions be avoided in believing that any objective *ought* or objective value does not exist.

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JAKUB MARTEWICZ

Truth of Legal Norms in Czesław Znamierowski's Philosophy

"Radici: oscure immagini dei rami."
"Korzenie: ciemne obrazy gałęzi."
*Amedeo Giovanni Conte (*1934, Pavia)*[1]

Contents

[1] Polish translation by Wojciech Żełaniec.

1. Znamierowski's three theses on the *nature* of norms

In chapter 1, I will expose Znamierowski's three theses on the *nature* of norms.

The *first* thesis is an *ontological* thesis, the *second* thesis is a *semantic* thesis, and the *third* thesis is a *metalogical* thesis.

1.1. Znamierowski's *first* thesis (*ontological* thesis): Norms are (logical) sentences/propositions

Znamierowski's *first* thesis on the nature of norms is an *ontological* thesis.

In *Podstawowe pojęcia teorji prawa* (Basic concepts of the theory of law), Znamierowski (1924; 1934)[2] states that norms are *sentences/propositions* (*zdania*):

> *W [...] sporze o* istotę *normy słuszność mają niewątpliwie ci, którzy ją uważają za* zdanie. (Znamierowski 1934, 22).[3]

> In the discussion of the *essence* [*istota*] of the norm, those who claim that the norm is a *sentence/proposition* [*zdanie*] are right.[4]

Znamierowski, again in the same work (ibid., 22–31), introduces the concept of *logical form* (*forma logiczna/postać logiczna*) of norms, and says that the "*zdanie*" ("sentence"/"proposition") is, in fact, a *logical form* (*forma logiczna/postać logiczna*) of the norm (ibid., 24).

Given the ambiguity of the Polish term '*zdanie*', I will offer only the following interpretative hypothesis: the *ontological* thesis that norms are sentences/propositions (*zdania*) makes plausible the *second* thesis—the *semantic* thesis.

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[2] The year when Znamierowski's *Podstawowe pojęcia teorji prawa* was first published, 1924, was also the year of the death of Franz Kafka (*3 July, 1883, Prague, Austria-Hungary, †3 June, 1924, Kierling near Vienna, Austria), and the year of the birth of the eminent Italian philosopher of law, Uberto Scarpelli (*19 February, 1924, Vicenza, Italy, †16 July, 1993, Milan, Italy).

[3] My emphasis throughout. All the translations from Polish are mine.

[4] We could ask, which *definition* of the term '*zdanie*' [in English, '*sentence*'; in Italian, '*enunciato*'; in German, '*Satz*'], of the more than 140 definitions of this term given by John Ries in 1931, was believed by Znamierowski to be *true*? (Ries 1931, 208–224).

1.2. Znamierowski's *second* thesis (*semantic* thesis): Norms are capable of being true or false

Znamierowski's *second* thesis on the nature of norms is a *semantic* thesis.

Znamierowski maintains that norms are sentences/propositions [*zdania*] capable of being true or false (ibid., 31).

In his discussion with Witold Wilkosz, 1925, Znamierowski holds that the following sentences/propositions (*zdania*):

(i) "*Prawdą* jest, że *powinno* być to a to"
"It is *true* that something *ought to* be";

(ii) "*Fałszem* jest, że *powinno* być owo"
"It is *false* that something *ought to* be";

do not only make sense, but are *themselves* capable of being true or false ("mogą być *prawdą* lub *fałszem*") (Znamierowski 1925, 253).

The claim that norms are capable of being true or false was maintained (together with the thesis that norms are sentences/propositions [*zdania*]) by Znamierowski in his later book, *Oceny i normy* (1957):

> *Normy to [...]* zdania logiczne*, to znaczy: takie [zdania], które mogą być prawdziwe albo fałszywe [...]* (Znamierowski 1957, 511).[5]

> Norms are *logical sentences/logical propositions* [*zdania logiczne*], i.e. *sentences/propositions* that can be true or false.[6]

1.3. Znamierowski's *third* thesis (*metalogical* thesis): Norms are subjects of logical relations

Znamierowski's *third* thesis on the nature of norms is a *metalogical* thesis.

In *Oceny i normy*, Znamierowski (1957) maintains that norms can be connected by a *relation of entailment* (*stosunek wynikania*):

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[5] Statements that norms are true or false can be found also in Znamierowski (1934, 31–40).

[6] For the analysis of the concept of "*zdanie w sensie logicznym*" ("*sentence in the logical sense*") in Znamierowski, see Czepita (1988, 40–46).

Normy to [...] zdania logiczne [...] które wiązać może stosunek wynikania (Znamierowski 1957, 511).

Norms are *logical sentences/logical propositions* [*zdania logiczne*] that can be connected by a *relation of entailment* [*stosunek wynikania*].

2. Znamierowski's distinction: *axiological* norms *versus thetic* norms

In *Podstawowe pojęcia teorji prawa*, Znamierowski distinguishes between *thetic* norms (*normy tetyczne*) and *axiological* norms (*normy aksjologiczne*) (Znamierowski 1934, 36).

In fact, the names '*thetic* norm' and '*axiological* norm' *do not* denote two different *concepts* of norm, but are referred to the two different ways of *justification* or *foundation* (*uzasadnienie*)[7] of a norm. *Thetic* norms are justified/founded [*uzasadniane*] in virtue of the act of their production, while *axiological* norms are justified by/founded on [*uzasadniane*] an evaluation (Ziembiński 1963, 93).

Znamierowski claims that all *legal* norms are a subset of *thetic* norms, although the inclusion of legal norms in the set of thetic norms does not exclude the possibility of their *axiological justification/foundation* (*uzasadnienie*).

3. Znamierowski's theory of truth of norms

According to Znamierowski, both *thetic* norms (*normy tetyczne*) and *axiological* norms (*normy aksjologiczne*) are *sentences/propositions* (*zdania*) capable of being true or false.

There is, however, a difference between the *criterion of truth* for *thetic* norms, and the *criterion of truth* for *axiological* norms.

3.1. Truth of *axiological* norms

3.1.1. Znamierowski holds that *axiological* norms are true or false irrespective of any legislative (in Amedeo Giovanni Conte's language, *nomothetic*) act:

[7] As observed by Giuseppe Lorini, in this particular context, a perhaps better xenonym of the Polish substantive '*uzasadnienie*'—instead of the usually used term '*justification*'/'*giustificazione*'—would be '*foundation*'/'*fondazione*'.

Norma aksjologiczna 'x powinno być *a' lub 'P powinien* wykonać czyn *c'* obowiązuje, *zdania te są prawdziwe, gdy w danych warunkach* w_x, *względnie* w_P, *posiadanie przez x własności a, względnie wykonanie czynu c przez P, jest najlepszą ze wszystkich możliwych ewentualności* (Znamierowski 1934, 31–32).

The axiological norms *'x ought to be a'* or *'P ought to do c' are valid* norms [*obowiązują*]—that is, these sentences/propositions [*zdania*] *are true*, if under the circumstances w_x or w_P, the fact that *x* has a certain feature *a* or that an agent *P* undertakes an activity *c*, respectively, is the best option of all possible options.

3.1.2. Znamierowski gives an example of a true axiological norm:

Jeżeli [...] prawdą jest [...] że w danych warunkach nadanie takiego a takiego kształtu danemu posągowi stworzy dzieło sztuki piękniejsze, niż inne ukształtowanie tego samego posągu, to prawdą jest jednocześnie, i dlatego właśnie, że posąg ten powinien być taki a taki (Znamierowski 1934, 31–32).

If it is true that moulding a certain sculpture into certain shape, in a certain time and place, will make the sculpture more beautiful than it would have been if shaped differently, then it is true that the sculpture should be [*powinna być*] shaped exactly in this way.

3.1.3. As we can see in the quotation in section 3.1.2, the truth of an axiological norm (e.g. that the sculpture *should be* shaped in a particular way) depends on the evaluation (that moulding the sculpture into such a shape *will* make it the most beautiful).

In short, in Znamierowski's theory, the "truth" ("*prawda*"/"*prawdziwość*") of an *axiological norm* depends on an *evaluation* (*ocena*).

Yet at the same time Znamierowski affirms that the truth of axiological norms is not a subjective truth:

Zdania, będące normami [aksjologicznymi], są tak samo prawdziwe absolutnie, niezmiennie, jak wszelkie inne zdania, stwierdzające jakikolwiek inny stan rzeczy (Znamierowski 1934, 33–34).

Sentences/propositions [*zdania*] that are (axiological) norms are absolutely, immutably true, like all other sentences/propositions [*zdania*] which assert any other state of things.

3.2. Truth of thetic norms

3.2.1.1. In this passage from *Podstawowe pojęcia teorji prawa*, Znamierowski deals with the relationship between *truth* (*prawda/prawdziwość*) and *validity* (*obowiązywanie*) in the field of "thetic norms" ("*normy tetyczne*"):

> *Norma tetyczna* obowiązuje*, zdanie jest* prawdziwe*, jeżeli istotnie miał miejsce ów akt stanowienia i jeżeli* treść *tego aktu była istotnie tożsama z* treścią *przytoczonej normy* (Znamierowski 1934, 35).

> A thetic norm *is* a *valid* norm [*obowiązuje*], and the sentence/proposition [*zdanie*] is a *true* sentence/proposition, if [firstly:] there really did take place the nomothetic act [*akt stanowienia*], and if [secondly:] the *content* [*treść*] of that nomothetic act was identical to the *content* [*treść*] of the norm in question.

3.2.2. Here is my interpretation of Znamierowski's account of the truth of *thetic* norms.

3.2.2.1. In the case of *thetic* norms (*normy tetyczne*), neither the normative *sentence* (*zdanie*), nor the thetic *utterance* (*wypowiedź/wypowiedzenie*) of the normative sentence ("*akt stanowienia*") coincide with the thetic normative state of affairs (*stan rzeczy*).[8]

But the *truth*-conditions of a thetic normative sentence (*zdanie*) *do* coincide with the *validity*-conditions of the thetic normative state of affairs (*stan rzeczy*). The reason for this coincidence is that in the case of thetic norms, both the *truth* (*prawda/prawdziwość*) of the normative sentence (*zdanie*) and the *validity* (*obowiązywanie*) of the thetic normative state of affairs (*stan rzeczy*) are the *product* (in Kazimierz Twardowski's language, *wytwór*) of the thetic utterance (*wypowiedź/wypowiedzenie*) of the normative sentence (*zdanie*).

Znamierowski explains the difference between validity (*obowiązywanie*) and truth (*prawda/prawdziwość*) of thetic norms in the following way:

> Obowiązywanie *[normy] polega na pewnem ustosunkowaniu normy jako całości, jako pewnego samodzielnego przedmiotu, do podmiotu lub podmiotów działających,* prawdziwość *[normy] zaś—na ustosunkowaniu treści zdania do wyznaczonego przez tę treść* stanu rzeczy (Znamierowski 1934, 31).

[8] The thetic utterance (*wypowiedź/wypowiedzenie*) of the normative sentence (*zdanie*) is the "*akt stanowienia*" (in Conte's language, the *nomothetic* act [*akt nomotetyczny*], i.e. the thetic act [*akt tetyczny*] of production [*stanowienie*] of a thetic norm).

> The *validity* [*obowiązywanie*] of a norm consists of the relation between the norm as a whole, as an autonomous object, and the agent or agents. On the other hand, the *truth* [*prawda/prawdziwość*] of a norm consists of the relation [*ustosunkowanie*] between the content of the sentence [*treść zdania*] and the state of affairs [*stan rzeczy*] stipulated [*wyznaczonego*] by the content.

3.2.2.2. In the case of thetic norms, the thetic utterance of a normative sentence ("*akt stanowienia*") plays a *twofold* role in Znamierowski's deontics:

(i) On the *semantic* level, the thetic utterance of a normative sentence produces the *truth* ("*prawda/prawdziwość*") of the normative sentence (*zdanie*).

(ii) On the *ontological* level, the thetic utterance of a normative sentence produces the *validity* ("*obowiązywanie*") of the thetic norm.

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GIUSEPPE LORINI

The Threefold Role of the Logical Value of Norms

Logika jest nauką o przedmiotach szczególnego rodzaju: wartościach logicznych.

Logic is the science of a particular type of objects: the logical values.
Jan Łukasiewicz[1]

Contents

[1] Łukasiewicz (1921, 189).

1. The logical value of norms

1.1. The logical value of *propositions* in Jan Łukasiewicz

It was the Polish logician Jan Łukasiewicz (Lvov 1878–Dublin 1956) who introduced the term "logical value" (Polish *wartość logiczna*) to the language of philosophical logic.

Łukasiewicz first used the term *wartość logiczna* in the essay *O wartościach logicznych* (On logical values), a brief essay which appeared in 1911 in *Ruch Filozoficzny*, the philosophical review edited by Kazimierz Twardowski.

In this essay Łukasiewicz investigates the logical value of *propositions* (*zdania)*, and uses the term "logical value" (*wartość logiczna*) as a synonym of "truth value".

1.2. The logical value of *norms* in Jerzy Kalinowski

While Łukasiewicz investigated the logical value of *propositions* (*zdania*), the Polish logician and philosopher Jerzy Kalinowski (Lublin 1916–Dijon 2000), one of the founders of deontic logic, investigated the logical value of *norms*.

The question, "What is the logical value of norms?" shapes the whole of Kalinowski's research into the grounds and the possibility of a logic of norms. Kalinowski deals with this question in the first lines of his 1953 essay *Teoria zdań normatywnych* (Theory of normative sentences):

> *Zdania, które maja wartosc logiczna prawdy, falszu lub posrednia miedzy prawda a falszem, mozna podzielic ze wzgledu na to, co wyrazaja, na zdania teoretyczne i zdania normatywne* (Kalinowski 1953, 112).
>
> Sentences having a logical value of true, a logical value of false, or an intermediate logical value between truth and falsehood, can be classified with regard to their *content*, into theoretical sentences and normative sentences.

In this brief passage, Kalinowski introduces two fundamental theses (both counterintuitive) on normative sentences (*zdania normatywne*).

(i) First thesis: normative sentences are *apophantic* sentences (i.e. sentences that can be true or false).

(ii) *Second thesis*: the logical value (*wartosc logiczna)* of normative sentences is *truth* (*prawda*).[2]

1.3. The thesis of the *plurality* of logical values

1.3.0. I have distinguished between Kalinowski's two theses on normative sentences.

The second thesis, that the logical value (*wartosc logiczna*) of normative sentences is their *truth* (*prawda*), is only apparently a mere specification of the first thesis, that normative sentences are apophantic sentences.

Yet these two theses are logically unrelated: the thesis that normative sentences are apophantic does not imply the thesis that the logical value of normative sentences is their truth.

We can understand that these two theses are not related if we are acquainted with an idea which was revolutionary in the philosophical logic of the twentieth century—the idea that beyond the pair of logical values, *true* and *false*, there can be other pairs of logical values, such as *valid* and *invalid*.

1.3.1. The thesis of the plurality of logical values is explicitly upheld by Kalinowski (1965):

> *Les logiciens admettent presque à l'unanimité que la* valeur logique *s'identifie à celle de* vérité *ou de* fausseté [...]. *Cependant le logicien contemporain s'intéresse aussi aux* propositions *(au sens grammatical du mot)* impératives*, interrogatives* [...] *ou exclamatives qui manifestement ne possèdent pas la valeur de vérité* [...]. *D'aucuns se posent de ce fait la question de savoir si l'on peut encore parler ici de logique.* [...] *C'est un fait qui existe des raisonnements ayant pour prémisses et conclusions des propositions ne possédant pas la valeur de vérité ou de fausseté.* [...] *On est donc bien obligé d'admettre une pluralité de valeurs logiques* (Kalinowski 1965, 15–16; 1967).
>
> Logicians admit almost unanimously that *logical value* coincides with the logical value of truth or falsehood. […] Nevertheless the contemporary logician is also interested in propositions as *imperative* (in the grammatical sense of the word)

[2] The question of the logical values of norms was also discussed by a disciple of Kalinowski—the Polish philosopher Karol Wojtyła (later Pope John Paul II), in the book *Osoba i czyn* (1969). In the same year, another Polish philosopher, Feliks Wojciech [Felice Adalberto] Bednarski, dealt with the problem of the logical value of norms in the essay *La deduzione delle norme morali generali dalla legge naturale* (Bednarski 1969, 10).

> *propositions*, interrogative propositions, and exclamatory propositions that evidently do not have a logical value. […] For this reason we may ask whether in these cases we are still dealing with logic. […] We must recognize that there are arguments in which premises and conclusions do not have the logical value of truth or falsehood. […] Therefore we must admit the plurality of logical values.

1.3.2. In particular, it is just on the plurality of logical values that Kalinowski (who believes that norms can be true or false) bases the possibility of a deontic logic, even in cases where we hold that norms cannot be said to be true or false:

> *Même si les normes ne possédaient pas la valeur de vérité ou de fausseté, la logique déontique serait encore possible,* la vérité et la fausseté n'étant pas les seules valeurs logiques (Kalinowski 1965, 81).

> Even if norms did not have the logical value of truth or falsehood, deontic logic would be still possible, *since truth and falsehood are not the only logical values*.

According to Kalinowski, truth and falsehood are not the only logical values.

2. Five deontic counterparts (deontic análoga) of truth

Kalinowski was not the first philosopher to investigate the logical value of normative entities.

The following is a short list of predicates (properties) which the deontic logicians *ante litteram* (that is, those logicians who investigated the logic of normative entities before the deontic logic was founded in 1951 by Georg Henrik von Wright [Helsinki 1916–2003] in the essay *Deontic Logic*) considered to be *logical values of norms*.

We can distinguish five deontic counterparts (in the philosophical language of Amedeo G. Conte: five deontic *análoga*) of the logical value of truth:

(i) *słuszność*: Jerzy Sztykgold (1936, 493);
(ii) *satisfaction*: Albert Hofstadter [New York 1910–Santa Cruz 1989] and J. C. C. McKinsey [1908–1953], in Hofstadter and McKinsey (1939, 447);[3]
(iii) *Begründung* ("well-groundedness"): Manfred Moritz (1941, 240);

[3] Cf. Lorini (2003).

(iv) *validity*: Alf Ross [Copenhagen 1899–1979] (1941/1944, 35, 38), and Eduardo García Máynez [Mexico City 1908–1993] (1950, 47);
(v) *Berechtigtkeit* ("rightfulness"): Knud Grue-Sørensen [1904–1992] (1939, 197).

3. Three questions on the logical value of norms

3.0. In section 2, I mentioned five predicates (properties) which seven deontic logicians *ante litteram* recognized as logical values of norms.

These seven authors seem to give *five* different answers to a *unique* question: "What is the logical value of norms?" Yet these authors answer *three* different questions about the logical value of norms. Let us examine these three questions on the logical value of norms.

3.1. First question: the role of the logical value of norms in *formal logic*

The first of the three questions which the deontic logicians *ante litteram* tried to answer is the following:

> What is the predicate of *norms* that allows us to define the meaning of deontic logical connectives?

Albert Hofstadter and J. C. C. McKinsey answer this question in the essay *On the Logic of Imperatives* (1939). In this work, a logical syntax is elaborated for imperatives, based on the analogy between *truth* and *satisfaction*.

> We understand an imperative to be satisfied if what is commanded is the case. Thus the fiat "Let the door be closed!" is satisfied if the door is closed. The satisfaction of an imperative is *analogous* to the truth of a sentence (Hofstadter and McKinsey 1939, 447).

According to Hofstadter and McKinsey, the logical functions of the logic of imperatives are not *truth-functions*, but *satisfaction-functions*:

> The connective symbols which we introduce [...] may, on the analogy with the *truth-functions* of the calculus of sentences, be thought of as *satisfaction-functions* of imperatives (Hofstadter and McKinsey 1939, 447).

In the logic of imperatives of Hofstadter and McKinsey, the meaning of the logical connectives of the logic of imperatives can be defined in terms of "*satisfaction*".

3.2. Second question: the role of the logical value of norms in the *theory of syllogisms*

The second of the three questions which the deontic logicians *ante litteram* tried to answer is the following:

> What is the predicate that is transmitted from the (deontic) premises to the conclusion in a *deontic syllogism*?

Manfred Moritz answers this question in the essay *Gebot und Pflicht* (Command and duty) (1941). It is well known that in declarative inferences (that is, in those inferences where the premises and the conclusion are declarative sentences), truth is transmitted from the premises to the conclusion. Moritz, applying this thesis to normative inferences, asks, "What is the predicate that is transmitted from the (deontic) premises to the conclusion in a *deontic syllogism*?"

Moritz holds that this "hereditary predicate" is the well-groundedness (*Begründung*) of the imperatives:

> *Wie bei den Schlüssen, deren Prämissen Urteile sind, die Wahrheit des gefolgerten Satzes von der Wahrheit der Prämissen abhängt, so liegt es auch bei den imperativen Syllogismen. Hier geht zwar nicht um die* Wahrheit von Imperativen*, aber statt der Wahrheit wird nach der* Begründung der Imperative *gesucht* (Moritz 1941, 240).

> As in the case of inferences that have judgements as premises, where the truth of the inferred sentence depends on the truth of premises, so it happens also with the imperative syllogism. Here, it's obviously not a matter of the *truth of imperatives*—but rather than truth, the *well-groundedness of the imperatives* is looked for.

3.3. Third question: the role of the logical value of norms in the *theory of logical principles*

The third of the three questions which the deontic logicians *ante litteram* tried to answer is the following:

What is the predicate (analogous to truth) that allows us to apply *logical principles* to norms?

The Mexican philosopher of law Eduardo García Máynez answers this question in the essay *Los principios jurídicos de contradicción y de tercero excluído* (The legal laws of noncontradiction and of the excluded middle) (1950). In this work, García Máynez investigates the applicability of *logical principles* to norms. In particular he asks, "How can we apply the law of noncontradiction (Polish: *zasada sprzeczności*) to norms, if we conceive norms as non-apophantic entities?"[4]

According to him, the solution of this puzzle rests on the analogy between truth (*verdad*) and validity (*validez*). García Máynez holds that validity (*validez*) is the predicate which allows us to apply the law of noncontradiction to norms.

He distinguishes between two areas or orders (Spanish: *orden*)—the logical order (*orden lógico*) and the legal order (*orden jurídico*):

(i) In the *logical order*, the logical principle of noncontradiction states that "two contradictory declarative sentences cannot be both true":

El principio de contradicción, en el orden lógico, enseña que dos juicios contradictorios no pueden ser ambos verdaderos (García Máynez 1950, 47).

The principle of noncontradiction, in the logical order, teaches that two contradictory judgements cannot be both true.

(ii) In the *legal order*, the legal principle of noncontradiction states that "two contradictory normative sentences cannot be both valid":

El principio jurídico dice: dos normas de derecho contradictorias no pueden ser válidas ambas (García Máynez 1950, 47).

The principle of noncontradiction says: two contradictory legal norms cannot be both valid.

[4] The Italian philosopher Giovanni Vailati [Crema 1863–Roma 1909] in the essay *La distinzione tra conoscere e volere* (The distinction between knowing and wanting) (1905/1967, 173) examines the possibility of applying the law of noncontradiction to a particular kind of nonapophantic sentences—*buletic* sentences. Vailati argues that the law of noncontradiction holds for the apophantic sentences, but not for the buletic ones.

García Máynez formulates a normative counterpart of the law of noncontradiction, not in terms of "truth" (*verdad*), but in terms of "validity" (*validez*).

This application of the logical law of noncontradiction to normative sentences is, according to García Máynez, based on the analogy between the logical value of declarative sentences, truth (*verdad*), and the logical value of normative sentences, *validity* (*validez*):

> *Validez y carencia de validez son a las normas lo que verdad y falsedad a los juicios existenciales. Las normas son o no son válidas; de las enunciaciones decimos que son verdaderas o falsas* (García Máynez 1950, 47).
>
> Validity and lack of validity are for norms what truth and falsehood are for existential judgements. Norms are valid or not-valid; on the contrary, we say that statements are true or false.

4. Three roles of the logical value of norms

4.1. In section 3, I distinguished between three questions on the logical value of norms.

(i) *What* is the predicate of norms that allows us to define the meaning of *deontic logical connectives*?

(ii) *What* is the predicate that is transmitted from the (deontic) premises to the deontic conclusion in a *deontic syllogism*?

(iii) *What* is the predicate (analogous to truth) that allows us to apply *logical principles* to norms?

4.2. The distinction between these *three questions* about the logical value of norms is a contribution towards a study of the nature of the logical value of norms, since it points out the threefold role played by the logical value of norms in the logic of norms:

(i) the logical value of a norm is the predicate that allows us to define the meaning of *deontic logical connectives*;

(ii) the logical value of norms is that "hereditary predicate" that is transmitted from the (deontic) premises to the deontic conclusion in a *deontic syllogism*;

(iii) the logical value of norms is the predicate (analogous to truth) that allows us to apply the *logical principles* to norms.

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EDOARDO FITTIPALDI

Illusions of Imperatives, Norms, and Truth[1]

1. The limits of Petrażycki's projective hypothesis

When Petrażycki explained his hypothesis about the projections of ethical[2] feelings, he treated in the same way the process through which we happen to ascribe to a certain thing or course of action a certain (projective) *quality,* and the process through which we happen to feel and think that *entities*, such as prohibitions and imperatives, exist and hold sway.

My hypothesis is that the process through which we project certain qualities onto things or courses of action is *simpler* than the process through which we begin somehow to feel the existence of actual imperatives and prohibitions where there has never been any imperator or prohibitor.

I will discuss the following problem: *why do many people seem to feel and think that there are entities—such as imperatives and prohibitions—even when no such linguistic phenomena exist in external reality?*

While the explanation of the illusion of ethical qualities doesn't require a discussion of the *differentia specifica* of ethical qualities vis-à-vis other kinds of projective qualities, the explanation of the illusion of imperatives and prohibitions does require this discussion of the *differentia specifica*.

Since according to Petrażycki, an important *differentia specifica* of ethical emotions consists of their mystic-authoritative character, I hope I will be able to show that both the illusions of imperatives and prohibitions and the mystic-authoritative character of ethical emotions in general have the *same cause*.

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[1] This paper is an adaptation of the third chapter of my forthcoming book, *Illusions of Legal Realities. I. The Intrasubjective Features of Legal Emotions and their Offsprings: Tentative Answers to Some Open Questions of Petrażycki's Legal Solipsism*.

[2] I will use the terms *ethics/ethical* as hypernyms of *morals/moral* and *law/legal*, as Petrażycki himself did.

Now because Petrażycki—to the extent of my knowledge—wasn't able to find the cause of the mystic-authoritative character of ethical emotions, he wasn't able to explain the illusion of imperatives and prohibitions either, and he tried to show that this kind of illusion is caused by the very process of projection.

That's why he tried, in my opinion unsuccessfully, to show that illusions of imperatives are produced in the realm of aesthetic emotions as well.

> In the field of the aesthetic psyche (where, in general, impulsive projection plays no small part), not only are fantastic . . . attributes [*svoystva*] ascribed to objects and phenomena, but there are fantastic processes in operation; confusing representations [*predstavleniya*], some demanding [*trebovaniye*] and obtaining [*dobyvaniye*] certain conduct from subjects, or of not permitting—and of rejecting for some reason—a certain behaviour originating from somewhere. (Petrażycki 1910, 39; 1955, 41; translation modified).

The very fact that Petrażycki uses in this context the word *trebovaniye*, which has a strong legal connotation in Russian, and which in English could be expressed by terms such as *legal claim*, *pretension*, etc., indicates that he was here trying to show that the creation of such *trebovaniya* is somehow a natural consequence of projections in general, which holds true also for projections of aesthetic origin.

However, it remains unexplained why this process takes place much more in the realm of ethical experience, than in any other realm—including the realm of aesthetic experiences. In other words, my impression is that the illusions of imperatives and prohibitions are much more common in the realm of ethics than in the realm of aesthetics.

As I have already said, my opinion is that the illusions of imperatives and prohibitions have the same cause as the mystic-authoritative features of ethical emotions. Therefore I think that if similar illusions seem to exist also in the field of aesthetic emotions, like the emotions we feel in the case of certain movements of the body, or certain grammatical behaviours, it is first of all because such emotions happen to be to a certain degree *ethical* emotions in the particular (Freudian) meaning which will be discussed in the next paragraph.

2. The *differentiae specificae* of ethical emotions

As I have already said, according to Petrażycki ethical experiences have a specific feature: they seem to have a mystic-authoritative character.

Let's read a quotation where Petrażycki refers to this feature.

> [Ethical] motorial excitements and incitements are of unique mystic-authoritative character: they stand opposed to our emotional propensities and appetences [etc.] as impulsions with the loftiest aureole and authority, proceeding as from a source unknown and mysterious, and extraneous to our prosaic ego, and possessing a mystic coloration not without a tinge of fear. This character of ethical impulsions finds expression among others in popular speech, poetry, mythology, religion, and similar creations of the human spirit in the form of phantastic ideas, and particularly in the idea that in such cases some being other that our ego is also present opposing our ego and inciting it to a certain conduct: some mysterious voice [*golos*] addressing us and talking to us. (Petrażycki 1910, 34; 1955, 37 – – 38).

It is easy to recognize in this description a similarity with Sigmund Freud's hypothesis of a superego.

In particular, Freud's theory is able to provide us with some conjectures on the following features of ethical emotions:

1. they seem to stem from something *different from the ego*;
2. they seem to exist *linguistically*, as if provided with some sort of *voice*;
3. they seem to have a *tinge of fear*;
4. they seem to have a *mystic coloration*;

These features can be explained if we make the conjecture that *Petrażycki's ethical emotions are caused by Freud's superego*. The motorial excitements that people with superego experience toward or against certain courses of action, would then be the result of the superego activity on the ego.

In order to understand why Freud's superego has the features that Petrażycki considers typical of ethical emotions, we must examine the origin of the superego according to Freud.

According to Freud, individuals are *not* born with a superego, which is rather the result of interactions of the child with her or his caretakers (mostly her or his parents). Actually, the superego is the result of the internalization of the caretakers by the child.

Let's read Freud:

> Young children are amoral and possess no internal inhibitions against their impulses striving for pleasure. The part which is later taken on by the superego is

> played by an external power, by parental authority. Parental influence governs the child by offering proofs of love and by threatening punishments which are signs to the child of loss of love and are bound to be feared on their own account. This *realistic anxiety* [*Realangst*] is the precursor of the later *ethical anxiety* [*Gewissensangst*]. So long as it is dominant there is no need to talk of a superego and of a conscience. It is only subsequently that the secondary situation develops (which all are too ready to regard as the normal one), where the external restraint is internalized and the superego takes the place of the parental agency and observes, directs and threatens the ego in exactly the same way as earlier the parents did with the child. (Freud 1964, §31:62; translation modified, emphasis added).

The very conjecture that the psyche can be split into multiple parts, and that one part can control another, is able to explain the *first* point, namely why ethical emotions are perceived to stem from something different from the ego.

As regards the *second* point—namely the *tinge of fear* that seems to characterize ethical emotions—this can be explained by considering that the child first obeys the prohibitions and imperatives of its caretakers for two reasons:

1. the fear of loosing their love;
2. the fear of their punishment.

An explanation can be reached if we assume that the superego somehow retains the power to produce in the ego a fear similar to the fear which the child experienced toward his or her caretakers.

This explanation requires the assumption that a process of *internalization* takes place and that, in particular, the child decides to be *like* his or her caretakers, rather than just being subject to them.

If the superego is the result of the *internalization* of the prohibitions and imperatives issued by the caretakers, it is understandable why some people may experience it as a voice talking to the ego. The voice of the superego would echo the voices of the caretaker issuing prohibitions and imperatives.

This seems to explain (1) why ethical emotions are experienced as something different from the ego; (2) why they seem to be provided with some sort of voice; (3) why they seem to be associated with a tinge of fear.

We have still to explain their mystic nuance.

Freud explained the connection between religion and ethics in the following way:

> The third main item in the religious programme [after giving people information about their origin, as well as some sort of protection in and beyond life], the ethical demand, also fits into the *childhood situation* with ease. I may remind you of Kant's famous pronouncement in which he names, in a single breath, the starry heavens and the moral law within us. However strange this juxtaposition may sound—for what have the heavenly bodies to do with the question of whether one human creature loves another or kills him?—it nevertheless touches on a great psychological truth. The same father (or parental agency) which gave the child life and guarded him against its perils, taught him as well what he might do and what he must leave undone, instructed him that he must adapt himself to certain restrictions on his instinctual wishes, and made him understand what regard he was expected to have for his parents and brothers and sisters, if he wanted to become a tolerated and welcome member of the family circle and later on of larger associations. The child is brought up to a knowledge of his social duties by a system of loving rewards and punishments, he is taught that his security in life depends on his parents (and afterwards other people) loving him and on their being able to believe that he loves them. All these relations are afterwards introduced by men unaltered into their religion. Their parents' prohibitions and demands persist within them as a moral conscience. With the help of this same system of rewards and punishments, God rules the world of men. The amount of protection and happy satisfaction assigned to an individual depends on his fulfilment of the ethical demands; his love of God and his consciousness of being loved by God are the foundations of the security with which he is armed against the dangers of the external world and of his human environment. (Freud 1964, §35:163–164; emphasis added).

According to Freud, there is a connection between ethics and *monotheistic* religion, the role of the father being basically the same in both.

Freud's hypothesis doesn't imply that there is a connection between religion and ethics in the context of animism or polytheistic religions. Let's read Freud:

> We may suppose that even in the days [of the animistic mode of thought], there were ethics of some sort, precepts upon the mutual relations of men; but nothing suggests that they have any intimate relation with animistic beliefs. (Freud 1964, §35:166).

Freud's hypothesis, therefore, would be unable to explain the mystic nuance with which ethical emotions may be experienced

1. by peoples with polytheistic or animistic religions;
2. by atheists.

My opinion, though, is that Freud's basic idea that the superego—and therefore ethical emotions—can be explained by examining the childhood situation, can be used also in order to explain the fact that there may be people who have not been raised in a culture affected by monotheism, *who still experience a mystic nuance in ethical experiences*.

I think such an explanation can be given if we consider Pierre Bovet's *Le sentiment religieux et la psychologie de l'enfant* (1951).[3]

If we consider Bovet's ideas, we can state that one basic feature of the childhood situation Freud talked about is that the child ascribes to his or her parents (or more broadly, to the caretakers) *omnipotence*, *omniscience*, and *moral perfection* (Bovet 1951, §1.3). According to Bovet, the child ascribes to his or her parents *omnipresence* and *eternity* as well.

Bovet—like most psychologists after him (and also including Freud, as we have already seen)—thought that the attitude of the child vis-à-vis his or her parents is characterized by a fusion of *love* and *fear*. Bovet called this fusion of *love* and *fear* "respect" (Bovet 1951, § 1.4).

All this implies that the attitude the child has vis-à-vis his or her parents already has all the features that some people would later transfer to the monotheistic god, *if* they happen to be in the right context.

According to Bovet,

> Religious sentiment is filial sentiment. The first objects of this sentiment for the child are his or her parents. The father and the mother are the child's gods: they have all divine perfections. But life experience forces the child to change, if not his or her religion, at least his or her God. He is forced to transfer to a further being the marvellous attributes he earlier referred to his or her parents. (Bovet 1951, §1.4).

Therefore according to Bovet, rather than talking of a *divinization of the parents*, we should talk of a *fatherization of god*.[4]

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[3] Less relevant to our goals is Bovet's *Les conditions de l'obligation de conscience* (1912). I want to stress that Bovet himself considered his work compatible with Freud (see Bovet's introduction to *Le sentiment religieux*).

[4] It is worth stressing that Bovet thought that showing that religious sentiment originates from filial sentiment is not at all tantamount to showing that the object of religious worship does not exist (see Bovet 1951, conclusion).

If all this is true, this implies that the superego, once developed, may retain a mystic characterization, even in a non-monotheistic context. This happens because the religious nuance pertains to the way the child experiences whatever stems from his or her parents. This has clear implications as to the way children experience imperatives and prohibitions issuing from their parents.

Jean Piaget (1978, 36–37), in his *Le jugement moral chez l'enfant*, found evidence confirming Bovet's hypotheses.

Now we can also explain why we talk of a *mystic* nuance of ethical emotions, without necessarily attributing them a divine or *religious* nuance. I use the adjective *mystic* in order to refer to a *religious* nuance devoid of any explicit reference to any personal god.

We can now make the conjecture that, if the superego becomes autonomous from imperatives or prohibitions of parents or personal gods, it can still retain a religious nuance devoid of any such reference, and that, therefore, the ethical emotions produced by such a superego may have such a *mystic* nuance.

I must stress here, that Piaget thought that the child, after this kind of ethics which he called *moral de l'autorité*, develops a second kind of ethics, which he called *moral du respect mutuel*, and which lacks any such mystic nuance.

I think that, in this respect, Freud and his followers were right when they made the hypothesis that the superego, once developed, can become enriched with new contents, even contents completely incompatible with the first parental imperatives and prohibitions, because it still retains its basic way of functioning, *including mystic nuances*.

I hardly believe there can be a *moral du respect mutuel* completely independent of the *moral de l'autorité.*

3. Norms and imperatives

Up to now, I have discussed the causes of the illusions of imperatives and prohibitions, and of certain features of them.

I think that the illusion that there exist norms, understood as normative utterances, even where there are no linguistic phenomena at all, can be explained in a way similar to the explanation of the illusions of imperatives and prohibitions.

Imperatives and prohibitions are a subset of normative utterances, and therefore, if the superego originates from the first caretakers' imperatives and

prohibitions, it is easy to make the conjecture that norms are conceived in terms of imperatives and prohibitions, because of the very origin of the superego.

An issue I want to discuss here is the following: *Is it possible to avoid the reduction of norms to imperatives, without bringing back the concept of norm to Freud's superego, and to Petrażycki's ethical emotions?*

I will try show that this is *not* possible, and that the only way to really explain ethical phenomena is to assume that their ultimate explicative basis is not in norms, but in ethical emotions, of which norms are but superficial manifestations, while the deeper ultimate reality of ethical phenomena is the superego.

I think that a good way to make this point is to briefly discuss one of the most serious attempts I know of distinguishing *norms* from *imperatives*.

Theodor Geiger, in his *Vorstudien zu einer Sociologie des Rechts* (1964), thought that

1. neither is the ultimate reality of ethics the superego,
2. nor can norms be conceived in terms of normative utterances.

Geiger had a behavioural conception of *norm*. According to Geiger there exists a *norm* according to which in certain situations *s*, a certain course of action *g* must be taken, if *either* that course of action is actually taken by the addressee of the norm, *or*—in case of noncompliance—some negative reaction occurs to the addressee.

Furthermore Geiger, famously, distinguished *declamative* and *proclamative* normative utterances (and sentences).

Deklarative Normsätze are linguistic descriptions of ethical phenomena, as in the case of the description of a certain custom.

Proklamative Normsätze introduce not-yet existing rules. Imperatives, according to Geiger's language, are a subset of the set of *proklamative Normsätze*.

According to Geiger, the reason why norms are conceived of in terms of imperatives, is that actually only *proklamative Normsätze* are taken into consideration, while there are fields—as is the case of customs—where nothing like this can be found (Geiger 1964, 65).

He doesn't really explain why such an *Orientierung am proklamativen Normsatz* takes place. Maybe he would have answered such an objection by referring to the important role of legislation in Western culture. As we have seen in the preceding paragraph, my opinion is that another explanation can be found by taking into consideration the origin of the superego.

It is important to stress that if Geiger's explanation is the *only* true one, we should expect that in cultures which have only customary ethics, ethical emotions shouldn't be conceived of as provided with some sort of voice. This is an empirical question which I cannot endeavour to answer in this paper.

As I have tried to show in the preceding paragraphs, I think it is impossible to give the *differentia specifica* of ethical phenomena without taking into consideration the imperatives and prohibitions first issued to the child by the caretaker, and that therefore every ethical experience is somehow connected with imperatives and prohibitions, even where there are no official *proklamative Normsätze* at all.

While legal positivists think on one hand that there is an *identity* between *proklamative Normsätze* and *ethical phenomena*; and while Geiger, on the other hand, thinks that *ethical phenomena* can be completely autonomous from *proklamative Normsätze*, I think that *ethical phenomena* have a necessary link with *proklamative Normsätze*, but only from a *genetic* point of view, and that without this link it is impossible to distinguish ethical phenomena.

Geiger tries to describe ethical phenomena without making use of psychology. He discusses the case of a norm that originates from custom, rather than from a certain explicit command of the head of the family. According to Geiger, an ethical norm (unlike a mere regularity) can exist even if it is violated, but in this case it is necessary that:

1. an external spectator would have some sort of blaming reaction,
2. and/or the actor would experience some sort of "bad conscience". (Geiger 1964, 58–59)

The concept of *bad conscience* in Geiger, though, doesn't lead to the concept of any sort of superego.

Actually, Geiger seems to have reduced *schlechtes Gewissen* to some sort of insecurity related to the anticipation of the reactions other people may have, rather than to something that takes place inside the psyche of the individual.

In fact, *Geiger did reduce conscience to social anxiety*:

> Gewissen ist soziale Angst (Geiger 1964, 57).

Stating that conscience is social anxiety is tantamount to reducing ethical behaviour to economic behaviour. In this way the specificity of ethical phenomena, in general, as well as of legal phenomena, in particular, is lost. Geiger's distinction between norms and regularities doesn't provide us with a way to distin-

guish ethical actions from economic actions. Geiger wasn't able to make this distinction because he refused to introduce psychology into his sociology of law.

The reduction of ethical phenomena to psychic phenomena related to the superego instead, rather than ignoring the specificity of ethical phenomena, allows the explanation of their specific features. *Ethical behaviour cannot be identified by an independent concept of norm, but only by the theoretical notions of superego and ethical emotions caused by the superego.*

4. The role of norms in legal theory

If norms cannot be considered a particular kind of behavioural regularity, and we don't want to reduce them to really existing imperatives or prohibitions, is there some room in legal theory for a concept of norm?

Even though—as we know—according to Petrażycki, the ultimate reality of law is certain ethical emotions, Petrażycki did make a proposal for a *stipulative* definition of *norm*.

> The existence [*sushchestvovaniye*] and operation [*deystvie*] in our psyche [*psikhika*], of immediate combinations of action representations [*aktsionnye predstavleniya*] and emotions [*emotsii*] (rejecting or encouraging corresponding conduct—i.e. repulsive or appulsive) may be manifested in the form of judgments [*suzhdeniya*] rejecting or encouraging a certain conduct *per se*—and not as a means to a certain end: "a lie is shameful"; "one should not lie"; "one should tell the truth"; and so forth. Judgments [*suzhdeniya*] based on such combinations of action ideas with repulsions or appulsions we term . . . normative judgments [*normativnye suzhdeniya*]; and their content we term norms [*normy*]. The corresponding dispositions, the dispositive judgments we term . . . normative convictions [*normartivnye ubezhdeniya*]. (Petrażycki 1910, 20–21; 1955, 30).

We have therefore the following theoretical entities:

1. *Normative convictions*, that can be identified with superego.
2. *Combinations of representations and ethical emotions*, caused by the superego.
3. *Normative judgments*, that are based on those combinations.
4. *Norms*, that are the representational content (in Carl Bühler's meaning) of normative judgments.

5. Can truth be predicated to normative judgments or norms?[5]

I think that at least three different answers can be given to this question in the theoretical frame of legal solipsism.

First. From a theoretical point of view, Petrażycki's ethical solipsism implies that, since ethical realities don't exist (butin the psyches of the individuals who pretend, these realities have some sort of external existence), only *vacuous truths*[6] can be predicated of normative judgments or norms.

Second. If we pay attention to the emotions underlying *norms* and *normative judgments*, we could say that they are true or false according to the fact that the one who makes them is really experiencing the ethical emotion that usually should underlie them.

In this case *truth* would be understood as *truthfulness*.

Third. As we all know, legal phenomena, according to Petrażycki are a source of conflicts between individuals, because of what I would call the natural drift of legal opinions.

> A psychic source of destruction, malice, and vengeance—a dangerous explosive material—is latent in . . . the legal psyche where the opinions and convictions held by individuals or by masses do not coincide; unquestionably many millions have suffered death on Earth, and countless human groups have been destroyed or exterminated, because of the non-coincidence of opinions regarding the existence and compass of mutual obligations and rights. (Petrażycki 1910, 172; 1955, 113).

Even though from a *theoretical* point of view, Petrażycki's legal solipsism does imply that normative judgments are capable only of vacuous truth, it is nevertheless true that from a practical point of view, certain mechanisms have developed that made certain normative judgments dependent on facts (*normativnye fakty*) happening in real reality, thus *artificially creating a sort of objectivity*, that reduces the natural drift of legal opinions. Petrażycki talked of the unifying tendency of law (*unifikatsionnaya tendentsiya prava*):

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[5] A completely different question is whether *normativnye fakty* (in Petrażycki's meaning), among which there are also real imperatives or prohibitions, are capable of truth. I won't discuss this question here.

[6] By *vacuous truth* I mean:

1. a truth about the members of a class that is empty (e.g. "All pink elephants are nice"), or
2. the truth of a conditional in the form $p \rightarrow q$, where p is false (e.g. "If Rome is in Poland, then Poznań is in Italy").

> Associated with this, on the ground of, and explained by, socio-cultural adaptation is the tendency of law to development and adaptation in the direction of bringing legal opinions of the parties into unity, identity and coincidence, and in general toward the attainment of decisions as to obligation-rights which possess the utmost possible degree of uniformity and identity of content from both sides, and—so far as may be—exclude or eliminate discord.
>
> This tendency . . . may be called briefly the *unifying . . . tendency*. (Petrażycki 1910, 172*ff.*; 1955, 113; translation modified, emphasis added).

Petrażycki described four "tendencies" that, though imperfectly, limit what I will call the *natural drift of legal opinions* (Petrażycki 1910, 173*ff.*; 1955, 112):

1. the tendency for a *single pattern* of norms to develop, as is the case of positive and official law;
2. the tendency of legal concepts toward *precision and definiteness of content* and *compass*;
3. the tendency to have the facts, on which the "existence" of legal obligations and rights is felt to depend, *susceptible of proof*—these facts are called by Petrażycki *normative facts* (normativnye fakty);
4. the tendency toward "subjecting disputes to the jurisdiction of a disinterested third party" (Motyka 2007, 33).

Petrażycki didn't explain what causes these tendencies and, therefore, seems to commit a functionalist fallacy. However, it is not the goal of this paper to try to explain the causes of these tendencies.[7]

If we focus on the third tendency, we can reach the following conclusion: *while from a* theoretical *point of view, normative judgments (and norms) are capable only either* (1) *of vacuous truth or* (2) *of the reduction of truth to truthfulness, civilization—for* practical *reasons—has successfully made more and more ethical emotions—and therefore also normative judgments (and norms)—of people dependent on the fact*

[7] Znamierowski was wrong when he said that Petrażycki's lack of explanation of the unifying tendency of law is a necessary consequence of the logical and metaphysical foundations of his theory (Znamierowski 1922, 58–59).

Even though Petrażycki's explanation of this tendency is lacking, his conception permits establishing an important sociolegal problem: *what factors do cause the situation that, under certain circumstances, many people happen to have similar or complementary psycholegal experiences?*

In Fittipaldi (2007), I have developed an explicative hypothesis of the second and third tendency pointed at by Petrażycki, by strongly modifying Priest's (1977) theory about the causes the allegedly lead common law toward economic efficiency.

that certain external happenings have taken place (i.e. Petrażycki's normative facts, including also the fact—for instance—that a certain imperative has been really issued by some king)*, so that the useful illusion comes into existence, that normative judgments (or norms) are themselves* directly *capable of truth.*

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PAWEŁ ŁĄCKI

Ethical cognitivism in Finnis's Theory

1. Introduction

John Finnis is considered to be one of the most important contemporary natural law theorists. His 1980 book, "Natural Law and Natural Rights" has had significant effect in attracting renewed attention to natural law in moral and legal philosophy. The theory developed and defended by Finnis is sometimes labelled "the New Natural Law Theory",[1] and here the adjective "new" should be understood not so much as referring to the original contributions to jurisprudence made by Finnis—which is not to deny that he has made such contributions—but primarily as referring to the restatement of the very philosophical foundations of the classical natural law theory rooted in the thought of Thomas Aquinas.

This paper deals with one of the aspects of these foundations, namely the issue of moral cognitivism. By moral or ethical cognitivism I mean a view that there are true and objective moral judgments which can be known and rationally argued for. Such a view is opposite to the views of ethical scepticism and relativism. Ethical cognitivism is an indispensable part of every natural law theory—indeed, within every such theory there are justified nonpositive and objective standards of critical evaluation of human action and social institutions. Being a natural law theorist, Finnis describes himself as an ethical cognitivist—he considers himself as a defender of "nonsceptical ethics", and believes that there are "normative propositions" which are "true, and choice otherwise than in accordance with them is unreasonable"; these standards also "provide the premises for endorsement or justified rejection of [positive] laws, conventions or practices" (Finnis 1998, 686).

[1] It must be stressed that the New Natural Law Theory was not developed by Finnis alone. With regards to its philosophical foundations, Finnis collaborated closely with Germain Grisez and Joseph Boyle. In fact, it was Grisez who initiated this original interpretation of natural law. See especially Grisez (1965).

I am going to present Finnis's ethical cognitivism, and confront it with the views characteristic of other Thomists. Such a confrontation seems to be especially interesting, because of the critique directed at Finnis on the part of numerous Thomistic natural law thinkers—whom I will call the "traditional Thomists". Those thinkers argue that Finnis undermines and contradicts the essential elements of the classical natural law tradition. The question has even been raised whether Finnis is a natural law thinker at all (Veatch 1981, 298). For his part, Finnis believes that the understanding of natural law presented by traditional Thomists is rationally indefensible. The subject of this controversy bears directly on the problem of ethical cognitivism.

In what follows I will briefly discuss natural law and ethical cognitivism according to traditional Thomists. Then I will present the structure of natural law according to Finnis, and the problem of the relationship between human nature and knowledge of natural law. In the final part, I will discuss moral knowledge and the concept of moral truth in Finnis's theory.

2. Natural law and ethical cognitivism according to traditional Thomists

Undoubtedly one of the most crucial concepts in traditional natural law theory is the concept of human nature. Human nature is understood as a dynamic reality, and has a teleological character. Man is "a creature who is not all that he might be, and whose present or actual condition needs always to be compared with what . . . he might be" (Veatch 1981, 302). This nature constitutes at the same time—at least to some extent—the end or goal for the human being, his perfection or fulfilment. Therefore, what is meant by human nature is not merely the factual reality of man, but his true or full reality. On the other hand, nature determines the proper way of man's functioning—the way man achieves the fullness of his being.

To have a nature means to possess some "essential and necessary ends" (Maritain 1954, 78), some dispositions and inclinations. But "since man is endowed with intelligence and determines his own ends, it is for him to attune himself to the ends that are necessarily demanded by his nature" (ibid). Since man is free and rational, it is up to him whether he will realize his nature or not. Morality consists in no more and no less than in acting in accordance with nature. Therefore, human nature is the basis for morality. Nature is also a criterion of right and wrong in human action. We can distinguish right and wrong action by relating them to nature, to the ends inherent in the ontological structure of the human being. We can judge whether an action is right or

wrong by assessing whether it is compatible or not "with the general ends and normality of functioning of the rational essence" (Maritain 1954, 80).

Reference to human nature as a reality which has to be realized by rational and free action justifies moral normativity—the moral "ought" (Maritain 1954, 78, 79). In order to explain the moral "ought", one can use an analogy with the nonmoral dimensions of human activity, such as craft, skills, or techniques: taking the example of medicine, "one justifies a certain care and treatment of patients as being naturally required on the basis of the end of the medical art, which is health. So likewise, given that the natural end of human life is the attainment of one's natural fulfilment as a human being, then one can come to recognize what it is that is naturally required of one, and what one needs to do or what it is right for one to do, in order to attain such an end" (Veatch 1978, 26). All this has its consequences for ethical knowledge. In fact, moral knowledge depends entirely on knowledge of human nature. One has to know first what man is, in order to know how he should act. There is no illicit transition from "is" to "ought", because the very "is" of human nature already has its "ought" contained within it (Veatch 1981, 303). Nature is in some way normative.

Moral truth consists of "conformity of thinking with reality, with the full reality" (Messner 1955, 48) of the human being. As judgments about what is in accordance with human nature, moral judgments are factual judgments. There is no specific method of applying the predicate "true" or "false" to normative judgments. What is important is that the objectivity of ethics is established in this way. Morality is objective because it is founded on a reality existing independently of the human mind and human action. At the same time, ethics depends on metaphysics and anthropology, or even can be viewed as their extension.

3. Finnis's theory

3.1. The structure of natural law

In Finnis's theory, natural law consists of three sets of principles:

Firstly, there is a set of principles directing human choice and action toward basic human goods. These goods are the basic reasons for action, i.e. their character as reasons does not depend on any more fundamental reasons to which they are the means. For the acting person, they are ends in them-

selves. Basic goods also are intrinsic aspects of human fulfilment. Human fulfilment consists of participating in those goods. What kinds of goods are these? In Finnis's "Natural Law and Natural Rights", we find the following list: life, knowledge, play, aesthetic experience, friendship, practical reasonableness and religion (Finnis 1980, 85–90).[2] The principles directing human action toward those goods are called the first principles of practical reason. They are all specifications of the formal principle that good is to be done and to be pursued. These principles are not moral norms. Although an action performed in accordance with one of them is always a reasonable action, it is not necessarily entirely reasonably (i.e., morally) good.

The second set of principles of natural law consists of the basic requirements of practical reasonableness. The role of these intermediate principles is to order the realization and pursuit of basic human goods in such a way that human action will be fully reasonable, and therefore moral. They guarantee that human action responds fully to the combined directiveness of all the basic principles. The secondary principles are also specifications or implications of a single principle, which is called the master principle of morality and which states, "in all one's deliberating and acting, one ought to choose and in other ways will those and only those possibilities the willing of which is compatible with integral human fulfilment—that is, the fulfilment of all human beings and their communities in all the basic goods" (Finnis 2002, 28). Among the basic requirements of practical reason mentioned by Finnis are such principles as "do not answer injury with injury", "do not do evil that good may come", and the Golden Rule (Finnis 2002, 29–30).

Finally, the third set of principles consists of moral norms directly forbidding or requiring certain specific types of human action. Among them are exceptionless norms, identifying acts that are intrinsically evil, e.g. forbidding the killing of an innocent person.

In Finnis's account of natural law, there are two important methodological distinctions. Firstly, he is very attentive to the distinction between "is" and "ought". Recognizing that there is no valid transition from "is" to "ought", he insists that classical natural law theory is free from such a fallacy. Furthermore, Finnis stresses the distinction between theoretical and practical reason or thinking. Theoretical reason (thinking) is concerned with what is—with discerning the truth about some issue—whereas practical reason is concerned with what is to be done. According to Finnis, these modes of thinking

[2] In Finnis's later works, this list is subjected to some modifications, among the most important of which seems to be the addition of the good of marriage. See Finnis (1998, 80–86).

should not be confused. They have different principles of operation; principles of natural law are principles of practical, not theoretical, reason.

How do we come to know the above-mentioned principles of natural law? The first principles of practical reason are self-evident (*per se nota*). Being first principles, they cannot be proved by referring them to something more basic. Knowledge of them is by no means inferred from knowledge about human nature. But how can they be identified? Finnis points to reflecting on human action and asking questions about the reasons for the action. Many reasons for action have only instrumental value, and some are more fundamental than others. Nor can there be an infinite regress of reasons in a particular action of an acting person. There are reasons which are really fundamental, and which do not require further justification; every intelligent acting subject can identify and understand them.

Although basic goods are self-evident, it does not mean that they cannot be rationally defended. Finnis believes that the results of anthropological and psychological investigations affirm that the goods he identifies are really universal. Of course, data from empirical sciences cannot establish or prove the truth of the first principles which point to some basic goods. But they can support our identification of them. For instance, if the outcome of cultural analysis was that friendship is not valued in some cultures, it would cast some doubt on the judgment that friendship is a basic good.[3]

Furthermore, in respect to one of the goods in particular Finnis applies a special dialectical argument: He argues that sceptical doubts are self-defeating in respect to the good of knowledge. Finnis argues in the following way: Someone who holds that knowledge is not a good and that it is not worth pursuing the truth, is nonetheless willing to contribute to rational discourse—he implicitly accepts the judgment that it is valuable to make such a judgment because it is true. Such a person also expresses the conviction that it is valuable to know the truth.

It should be stressed that such a defence is presented by Finnis only for one of the basic goods and not the others. Anyway, the above-mentioned arguments do not change the fact that knowledge of first principles directed at basic goods is underived, and that these principles are self-evident. Rather, they defend them from sceptical doubts.

How do we get to know the intermediate principles? They are inferred from the master moral principle, which is also self-evident. The master moral

[3] This is an example given by Robert P. George who is a prominent adherent of Finnis's theory (George 1999, 62).

principle refers to the ideal of integral human fulfilment, and our knowledge of it comes from comprehending all the first principles of practical reason directing human actions to basic goods (George 1999, 68).

3.2. Human nature and moral knowledge

From the above it is clear that there are substantial differences between Finnis and the traditional Thomists on the subject of knowledge of natural law. This difference is stressed in a critique directed by Finnis at traditional Thomists. One of the main lines of criticism raised by Finnis refers to the relationship between ethics and metaphysics. Finnis does not agree with the view that ethics depends on metaphysics, that moral judgments can be inferred from judgments about human nature.[4] According to Finnis, the main problem with the position of traditional Thomists is that they are "indifferent to the question why I should regard the supposed truths of ontology . . . as entailing any moral obligation". He believes that "asked how one moves from the 'is' of true propositions in ontology, anthropology, metaphysics, etc., to the 'ought' of normativity for praxis . . . [they] give, answers which at bottom are . . . voluntarist, and . . . mistaken" (Finnis 2003). So his main line of criticism is based on the conviction that acceptance of the traditional position on the relationship between morality and human nature renders it impossible to justify the moral "ought", because the theoretical knowledge of nature as such does not have any practical relevance for the acting person.

Finnis, while contradicting the thesis that knowledge of human nature is a condition of moral knowledge, argues that practical knowledge is a condition for knowing human nature. We cannot know human nature before we reflect on that which man should do. Knowledge about that which is good for man is a precedent condition for full knowledge of human nature (Finnis 1981, 270). Finnis says that "practical reason's . . . underived understanding of basic . . . goods precedes our theoretical understanding of . . . human nature" (Finnis 1991a, xvii). What is more, he holds that "by theoretical reflection upon truths first grasped in practical understanding, we can reach . . . theoretical . . . judgments about human nature" which can be called anthropological (Finnis 1997).[5]

[4] "[knowledge of] human nature is not 'the basis of ethics'" (Finnis 1983, 21); "Ethics is not deduced from metaphysics or anthropology" (Finnis 1983, 22).

[5] To justify his position Finnis very often recalls "the most fundamental . . . axioms of Aquinas's philosophy: that one comes to understand the nature of an active reality (for example, human

So in the epistemological dimension, practical knowledge of human good has priority over theoretical knowledge about human nature. But ontologically there is a priority of human nature: there are such and such basic goods because man has such a nature. If human beings had different nature, there would be different basic goods. So Finnis believes that there is an interconnection between morality and human nature, but not in the way that the Neo-Scholastics think. For instance, Finnis admits that the realization of a human good means the actualization of the potentiality of the human being (Finnis 1980, 102–103).

Now an important question to be answered is this: since moral knowledge does not depend on knowledge of human nature or knowledge of reality—what guarantees the objectivity, the truth of morality? What is the criterion of truth in respect to principles of natural law?

3.3. The concept of moral truth

As previously said, Finnis makes a clear distinction between theoretical and practical reason. Correspondingly he distinguishes between the truth of theoretical knowledge and the truth of practical knowledge. According to him, "'true' is said in radically diverse senses" (Grisez, Boyle, and Finnis 1987, 117) in each case of knowledge. In the first instance, truth consists in the conformity of propositions to prior reality. "This truth is signified by 'is': So it *is*" (ibid., 115). In the case of practical truth, matters are different: truth in this respect does not mean "conformity of knowledge to subject matter, adequation of mind to reality" (ibid., 116), be it actual or possible. Instead there is another kind of adequation—conformity. According to Finnis, principles of natural law are true "by anticipating the fulfilment possible through action in conformity with them". They are also true by directing action toward that realization. So the truth of the principles of natural law is "their adequetion to possible human fulfilment considered insofar as that fulfilment can be realized through human action" (ibid., 125). But this does not mean that they are "true by conforming to anything" (ibid., 116). Finnis says that the relationships between the human mind and its objects are opposite in the case of theoretical and practical knowledge; in the second case, reality must conform to the mind.

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persons) by understanding its capacities and inclinations, and one comes to understand them by understanding the corresponding activities, and one understands these activities by understanding their objects" (Finnis 1991, xvii); and these objects are basic goods.

Thus formulated, the Finnis conception of moral truth differs significantly from that of traditional Thomists. Yet one can find in Finnis's works some statements that bring his theory quite close to the traditional Thomistic position. For example, when he says that "moral directiveness is essentially a matter of truths about the relationship between the activity directed and human . . . fulfilment" (Finnis 1991a, 41), or when he states that "the truth of ethical claims is assessed by considering whether they correctly identify how the kind of action . . . in issue relates to the well-being of human persons" (Finnis 2004). The crucial role of the concept of human fulfilment in the Finnis's theory is undoubtedly a common element shared with the traditional Thomists. But for Finnis, human fulfilment is not treated as a prior reality which can be known theoretically by the acting subject.

As has been said, actions chosen according to one of the first principles of practical reason are reasonable, but not necessarily morally good. Similarly, Finnis differentiates between practical truth and moral truth. Not all practical truths are also moral truths. Only those normative propositions which are integrally directed toward possible human fulfilment are moral truths. So-called moral falsities (Grisez, Boyle, and Finnis 1987, 126) lack that integrity, and are characterized by incompleteness in directing toward human fulfilment.

The question remains why Finnis uses the term "truth" at all, in respect to practical reason, when there is such a difference. He says the usage is analogical, and also holds that in both cases of theoretical and practical knowledge, there is a relationship of the mind and its object to the mind of God. But still the term appears in the philosophical account of natural law, and Finnis stresses that one can analyze natural law without asserting God's existence (Finnis 1980, 49).

4. Concluding remarks

There is an important difference between traditional Thomists and Finnis in terms of comprehending the standard or criterion of moral truth—on one hand, it is an objective reality, independent from human reason and will (human nature). On the other hand, it is an ideal of practical reason. Finnis's theory requires a very peculiar treatment of the concept of truth in respect to morality. In the traditional view, knowledge of natural law depends on knowledge of the reality of human nature. In Finnis's view, in order to get to know the natural law, we have to uncover the self-evident principles of our practical reason from which we can derive further principles.

It has been argued against Finnis that self-evidence as a way of knowing natural law is less convincing than acceptance of nature as a foundation of natural law. He has been criticized for trying to defend the classical natural law theory, without the necessary philosophical baggage of metaphysics, nowadays considered unacceptable in dominant intellectual circles. It has been argued that the consequence of such an approach is to compromise the objective status of natural law. For Finnis, we cannot base natural law on metaphysics because of the impossibility of deriving normativity from descriptive judgments, yet moral norms may be objective without conforming to an existing reality as a criterion of their truth.

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ANDRZEJ SPYCHAŁA

On the Transition from Being to Ought—Is the Problem Real?

1. Introduction

Out of the range of issues to be tackled during this conference, I intend to focus on what is doubtless one of the essential questions: the relationship between being and duty. I would like to share my reflections on some of the philosophical assumptions that constitute the context of this issue.

While studying law from the popular coursebook of the late Professor Zygmunt Ziembiński—one of the most prominent representatives of the Polish theory of law—I happened to come across the fundamental assumption of legal positivism that separates being and duty, which states that "judgments of duty cannot be concluded from statements of reality by way of purely logical operations. The *world of being*, empirical reality, is cognizable, while the *world of duty*, of what is good, right, and due, is not" (Redelbach, Wronkowska, and Ziembiński 1993, sec. 6.2). I also learned of the intellectual threat of "hypostatizing, reification of norms of conduct by assigning them *being* in the ordinary meaning of the word" (Ziembiński 1980, 112 – – 113). Even though the initial assumption of the separation of being and duty supported the splendid edifice of the theory of law built by Ziembiński, this assumption was accepted as an axiom that required no further explanation or evidence. Briefly, the axiom indicates that statements which express evaluation, duty, or norms have no logical value—they are not, and cannot be, true or false, because they are beyond the world of "being".

What really are the philosophical foundations of this view, which so carefully places a borderline between the sphere of "being" as an empirical reality, and the sphere of "ought"? These foundations, which seem to have been created by David Hume, can be summarized in a few sentences, but a simple description of them would be of little intellectual value. Therefore,

later in this paper, I attempt not only to present these foundations, but to also try to confront them with reality, as ordinarily experienced in our daily life.

Before proceeding to the discussion of David Hume's philosophy, I will apply to the ideas of another philosopher, Parmenides of Elea, this method of presenting philosophical assumptions and then confronting them with ordinary experience. Parmenides' philosophy is a radical example of a philosophical and logical consequence which is entirely opposed to ordinary experience. This particular example therefore leaves us no choice but to reflect on the meaning of ordinary experience as a criterion for reaching the truth.

2. Parmenides' ontological scissors

As a starting point for his philosophy, Parmenides accepted the following simple and obvious assumption: "Out of necessity, we have to say and think that only what there is, exists. For there is being, but there is no non-being" (Tatarkiewicz 2001, 32–33). Being is and non-being is not—so simple and logically captivating. But Parmenides, with iron consistency, chose to go further and, from the principle of ontological identity referred to above, he drew a number of conclusions which logically follow from his starting assumption. These include the statement that being must, out of necessity, be unchanging because as being, it would only be able to change into non-being—but there is no such thing as non-being. Thus, with much consistency, Parmenides denied that the world of phenomena existed, because the world of phenomena is changing. One can say at best that the world of phenomena "becomes", but in no case can it be said that it "is". Briefly, in Parmenides' opinion, the reality that surrounds us does not exist. His ontological "scissors" have cut it from the sphere of being and from the class of useful objects of cognition.

Parmenides' conclusion is a logical outcome of the assumption, his original statement that, "there is being, but there is no non-being". And this statement, prima facie, raises no doubts. Yet something is wrong. Parmenides' conclusion is in conflict with our ordinary experience, which tells us something quite different. We believe rather that the reality around us does exist, and does so objectively. Even if this belief is challenged, its object—reality—compels us to accept it as the foundation of our practical life.

If, on the other hand, we accept our ordinary experience as a criterion of truth—if sensually perceived things do exist—then Parmenides' assumption has to be revised. In fact, it has been revised before, and today we understand

that Parmenides employed the idea of simple being, the essence of which is existence; being in this sense is unchanging, and is not capable of "not being". In this sense, Parmenides' assumption is correct, although when applied to a reality that can be experienced, the same assumption appeared to be a theoretical, a priori prejudice.

Keeping this test of ordinary experience in mind, let us proceed.

3. Hume's epistemological scissors

Let us now reach towards the source of the assumption of the separation of being and duty. In his *Enquiry Concerning Human Understanding*, David Hume comments on the difference between the predicates "is" and "ought": the statement "is" is empirically verifiable, while for "ought", empirical verification is not possible. Furthermore, what is empirical amounts to the world of phenomena, and more specifically to "sensual perception". The scope of the thus perceived empirical reality was formulated by Hume in his *Treatise of Human Nature*, in a somewhat provocative, though rather accurate phrase that people are "nothing but a bundle or collection of different perceptions, which succeed each other with an inconceivable rapidity, and are in a perpetual flux and movement" (Hume 1739/2006, Book I, Part IV, sec. vi.). This approach represents empiricism at its extreme.

At the same time, this is an epistemological approach, saying that what we experience is merely our sensual perception, rather than saying that nothing more than what can be encompassed by our sensual perception exists at all. Either way, these assumptions cause the foundation of phenomena ("substance") to disappear. This involves, *inter alia*, challenging the object of cognition, and also challenging the subjective self, since inner experience only allows direct statements of experience, of a stream of perception ("inward sentiments"). What we do not experience includes, for instance, cause-and-effect relationships and forces being exerted (because we "experience" merely the fact that phenomena do follow one another). According to this approach, there is little difference between the world we experience, and the virtual world of *The Matrix* (referring to the well known film) or the world of dreams, except that it is a virtual world with no infrastructure—no hardware—a dream world without a dreamer.

Interestingly enough, one consequence of the phenomenon is that the possibility of learning as a reliable cognition is questionable, because scientific theories of, for example, the existence of black holes, or the force of grav-

itation, do not reflect reality (in the sense of phenomena). From such a prospect, science was "saved" only by Immanuel Kant, who reworked Hume's theories and added to them theories of a priori cognitive categories which are found in the experiencing individual subject,[1] rather than in an extra-subjective reality—and which enable the scientific arrangement of data collected in empirical experience.

Assuming the above philosophical perspective, being is viewed from epistemological positions, and is reduced to the surface of the world of phenomena (sensual perceptions); the crucial notion of being remains to serve the purpose of the assumed epistemology. More specifically, according to the above approach, the world of "being" should be referred to as "sensuality" or "phenomenonality" (instead of reality).[2]

The world of the cognizable being, according to Hume, is the world of phenomena, shapes, colours (sensual perceptions). Duty, obviously, is not a phenomenon; it has no shape or colour, and cannot be measured or calculated mathematically. Hence, duty is not "being", and cannot be an object of cognition. Having accepted Hume's epistemological assumptions that define being, we have no choice but to share this opinion.

However, ordinary experience is opposed to this epistemology. What is our answer to the questions, Am I an objectively existing subject of my thoughts and actions? or, Does the force of gravitation objectively exist (despite the fact that no one has ever seen the force of gravitation—while some physicists just assume it is in the form of particles, which we are not yet able to detect)? The answer to the two questions, suggested by our ordinary experience, tends to indicate that Hume's epistemological "scissors" have brought about some kind of devastation. Hume cut out a fragment of ordinary experience which, though only in a very general way and not measurable by scientific methods, does tell us about the objective presence of something more than phenomena, for example the objective presence of the force of gravitation, and other subjects—that is, individuals.[3]

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[1] In a transcendent subject, to be more precise.

[2] According to Kant, being is an a priori cognitive category, and therefore it is what seems to exist, rather than an existing object of sensual perception (i.e. an "object" is not something beyond the subject, and is not something ontologically independent from the subject; hence there is no place for a *Ding an sich* with its objective existence.

[3] Taking into consideration the classification of propositions into synthetic a posteriori propositions (the world of phenomena) and synthetic a priori ones (the world of cognitive structures that go beyond the world of phenomena, including the world of science), the contents of living, ordinary experience could be classified as (integral) synthetic a posteriori–a priori propositions (with strong accent on its ontological objectivity—i.e., its existence).

The question can and should be asked, of whether a similar devastation is caused by Hume's approach in the practical domain. If Hume's solutions in the theoretical domain may reasonably be challenged, and his assumptions may reasonably be challenged as well, then why is so little criticism seen in accepting the theories that result from such assumptions, such as the assumption that statements of duty are not statements of reality?

4. Conclusions

In ordinary experience, reality appears to us and imposes itself on us as a being that objectively exists, but also as something more than just "phenomenonality". And if genuine ordinary experience is approached as something of value or, metaphorically speaking, as a living creature of cognition, then the question must be asked, if this creature may be subjected to an epistemological vivisection, so that it may remain as a living and genuine cognition of reality.

The problem of the existence of duty (the significance of "ought") does not seem to be a problem of ordinary, genuine experience. From the point of view of ordinary experience and common sense, the statement that duty does not exist is either absurd or dangerous. The problem of the existence of duty is a problem which will persist as long as certain theoretical assumptions concerning the possibility of cognition of reality are made. However, such assumptions lead us to conclusions that are in conflict with the ordinary experience of reality. There is also the important question of the cultural impact of such assumptions, and their authentic usefulness in the area of scientific methodology, as well as in theories of law[4]—for it is methodologically useful to discriminate between the world of phenomena (which can be measured), and the world of values and duties. Nevertheless, the problem of the initial philosophical assumptions for which no evidence is required remains open.

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[4] It can be methodically justified and useful for the theory of law to make such assumptions (but only methodologically).

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II. Theory

AMEDEO GIOVANNI CONTE

Xenonyms. Xenonymy Synonymy Synsemy

Contents

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3. Intransitivity of the xenonymy—relationship

Mottos

"Dwuznaczności płodzą wiele znaczeń."
"Words with two meanings generate many meanings."
Stanisław Jerzy Lec

"Gdy dwuznaczniki tracą jedno znaczenie, nie znaczą nic."
"When words with two meanings lose one, they no longer mean anything at all."
Stanisław Jerzy Lec
[Lvov 1909–Warsaw 1966][1]

Dedication

1. My paper *Xenonyms. Xenonymy Synonymy Synsemy* is dedicated to the memory of Kazimierz Ajdukiewicz [Tarnopol 1890–Warsaw 1963], Tadeusz (Tadeusz Marian) Kotarbiński [Warsaw 1886–Warsaw 1981], Alfred Tarski [Warsaw 1902–Berkeley 1983], Zygmunt Ziembiński [Warsaw 1920–Poznań 1996].

2. I had the honour of meeting Ajdukiewicz, Kotarbiński, Tarski, and Ziembiński at the international Congress of Logic held in Louvain/Leuven (Belgium), in September 1958.[2]

It was there that Tadeusz Kotarbiński taught me the verses of the Polish national anthem, Mazurek Dąbrowskiego, which refer to the ties between Poland and Italy:

"Marsz, marsz Dąbrowski
z ziemi włoskiej do Polski."[3]

Amedeo Giovanni Conte

[1] Lec (2007).

[2] Ajdukiewicz, Kotarbiński, Tarski, and Ziembiński were, in 1958, all younger than I am today in 2008. In 1958, I was a 24-year-old postgraduate student of Mathematical Logic at the *Institut für Mathematische Logik und Grundlagenforschung* at Münster in Westfalen, Germany.

[3] "*March, march, Dąbrowski / from Italy to Poland*".

0. Prologue. Three theses on the functions of language

0.1. There are two opposing theses on the relationship between language and thought:

(i) *First thesis*: The function of language is to *express* thoughts (Molière).
(ii) *Second thesis*: The function of language is to *conceal* thoughts (Voltaire).

0.2. These antithetical theses do not exhaust the possibilities: *Tertium datur*. The *tertium* is my own thesis:

(iii) *Third thesis*: The function of language is to *conceal* the *lack* of thoughts [*brak myśli*].

1. Xenonymy. Synonymy. Synsemy

Motto

"Dużo rzeczy nie powstało z niemożności ich nazwania."
"Many things have never come to existence
because of the impossibility of giving them a name."
Stanisław Jerzy Lec[4]

1.1. *Xenonymy* [*ksenonimia*; *Xenonymie*; *xénonymie*; *xenonimía*]

1.1.1. The concept of xenonymy.

1.1.1.1. By a *xenonym* [Polish: *ksenonim*; German: *Xenonym*; French: *xénonyme*; Italian: *xenónimo*] *of a term* ***t1***, I mean any term in a *foreign* language which translates ***t1***.

1.1.1.2. By *xenonymy* [Polish: *ksenonimia*; German: *Xenonymie*; French: *xénonymie*; Italian: *xenonimía*], I mean the dyadic relationship between a term ***t1*** and any xenonym of ***t1***.

[4] Lec (2007).

1.1.2. Five examples of xenonymy.

(i) The Polish term "*prawo*" is a Polish xenomym of the Finnish term "*oikeus*";
(ii) the Polish term "*prawda*" is a Polish xenomym of the Russian term "истина" "*istina*";
(iii) the Polish term "*sprawiedliwość*" is a Polish xenomym of the German term "*Gerechtigkeit*";
(iv) the Polish term "*Bóg*" is a Polish xenomym of the Hungarian term "*Isten*";
(v) the Polish term "*ksenonym*" is a Polish xenomym of the Slovenian term "*ustreznica*".

1.1.3. Etymology of "xenonymy"

The etymology of "xenonymy" is clear:

(i) "ξένος" "xénos" "foreign" ("obcy"; "fremd"; "étranger"; "straniero". Cf. "xenophobia", "xenogamy");
(ii) "ὄνυμα" "ónyma" or "ὄνομα" "ónoma" "name" ("nazwa"; "Name"; "nom"; "nome". Cf. "homonymy", "synonymy", "pseudonymous").

1.2. Synonymy (or synonymity) [*synonimia*; *Synonymie*; *synonymie*; *sinonimía*]

1.2.1. The concept of synonymy

In my definition of *synonymy* I refer to Gottlob Frege's well known distinction between *Sinn* and *Bedeutung*.[5]

I define *synonymy* [*synonimia*; *Synonymie*; *synonymie*; *sinonimía*] as *Frege-Sinn*-identity (*Frege-Sinn*-Identität; identità-di-*Frege-Sinn*). In other words, synonymy is the relationship between terms that have (share) the same Frege-*Sinn*.

[5] (Friedrich Ludwig) Gottlob Frege [Wismar 1848–Bad Kleinen 1925]. See Frege (1892).

1.2.2. Three *examples* of synonymy

(i) The German noun "*Oxygenium*" is a synonym of (has the same Frege-*Sinn* as) the German noun "*Sauerstoff*".[6]
(ii) The German noun "*Hydrogenium*" is a synonym of "*Wasserstoff*".[7]
(iii) The French noun "*sémiotique*" is a synonym of "*sémiologie*".

1.2.3. Etymology of "synonymy"

The etymology of "synonymy" is clear:

(i) "σύν" "*sýn*" "with" (cf. "synthesis", "symbol", "synaesthesia");
(ii) "ὄνυμα" "*ónyma*" or "ὄνομα" "*ónoma*" "name" (cf. "homonymy", "metonymy", "pseudonym").

1.3. Synsemy [*synsemia*; *Synsemie*; *synsémie*; *sinsemía*]

1.3.1. The concept of synsemy

1.3.1.1. The semantic phenomenon called *synonymy* [*synonimia*; *Synonymie*; *synonymie*; *sinonimía* (§1.2)] differs from the semantic phenomenon I have called *synsemy* [Polish: "*synsemia*"; German: "*Synsemie*"; French: "*synsémie*"; Italian: "*sinsemía*"].

By *synsemy,* I mean the relationship between terms that have (share) the same Frege-*Bedeutung*.

I define *synsemy* [*synsemia*; *Synsemie*; *synsémie*; *sinsemía*] as *Frege-Bedeutung*--identity (*Frege-Bedeutung*-Identität; identità-di-*Frege-Bedeutung*).

1.3.1.2. By *synsemic*, I mean those terms that *designate* (*bezeichnen*) the same entity.[8]

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[6] In each of Polish, French, and Italian there is just *one* noun: Polish "*tlen*", French "*oxygène*", and Italian "ossígeno".

[7] In each of Polish, French, and Italian there is just *one* noun: Polish "*wodór*", French "*hydrogène*", and Italian "idrógeno".

[8] In short, *synonymy* [*synonimia; Synonymie*; *synonymie*; *sinonimía*] is *Frege-Sinn*-identity, whereas s*ynsemy* [*synsemia*; *Synsemie*; *synsémie*; *sinsemía*] is *Frege-Bedeutung*-identity. The relationship between synonymy and synsemy can be summarized by the following proportion:

synonymy : *Frege-Sinn* = synsemy : *Frege-Bedeutung*.

1.3.2. Three examples of synsemy

(i) The phrase "Fryderyk Franciszek Chopin" is synsemic with the phrase "the musician from Żelazowa Wola";
(ii) the phrase "the morning star" ["*gwiazda poranna*"; "*der Morgenstern*"; "la stella del mattino"] is synsemic with the phrase "the evening star" ["*gwiazda wieczorna*"; "*der Abendstern*"; "la stella della sera"];
(iii) the phrase "the square root of four" is synsemic with the arithmogramme representing the first prime number.

1.3.3. Etymology of "synsemy"

The etymology of "synsemy" is clear:

(i) "σύν" "*sýn*" "with" (cf. "synthesis"; "symbol"; "symptom").
(ii) "σημαίνω" "*sēmaínō*" "to mean" (cf. "semiotics"; "semantic"; "semiology").

2. Is synonymy a necessary condition of xenonymy?

Motto

"Denke nicht, sondern schau!"
"Don't think, but look!"
"Nie myśl, lecz patrz!"
"Non pensare: guarda!"
Ludwig Wittgenstein[9]

2.0. Introduction

2.0.1. In §1.1.1, I defined *xenonymy* [*ksenonimia*; *Xenonymie*; *xénonymie*; *xenonimía*]; in §1.2.1, I then defined *synonymy* [*synonimia*; *Synonymie*; *synonymie*; *sinonimía*]; in §1.3.1, finally, I defined *synsemy* [*synsemia*; *Synsemie*; *synsémie*; *sinsemía*].

[9] Ludwig Josef Johann Wittgenstein [Vienna 1889–Cambridge 1951]. See Wittgenstein (1953, I, §66, p. 30; 1972, 50).

One question arises: Does xenonymy require synonymy? Is *synonymy* a necessary condition [*warunek konieczny*; *notwendige Bedingung*; *condition nécessaire*; *condicio sine qua non*; *condizione necessaria*] of *xenonymy*?

2.0.2. My answer is negative: synonymy is *not* a necessary condition of xenonymy. I will enumerate eleven examples (§§2.1–2.11) which corroborate my negative answer.

2.1. *First* example of xenonymy *without* synonymy: Polish "*prawo*" vs. Slovenian "*pravo*"

2.1.1. The Polish noun "*prawo*" is a xenonym of the Slovenian noun "*pravo*", but it is *no* synonym thereof.

2.1.2. Indeed, the Polish noun "*prawo*" means

(i) not only (*first* meaning) "*pravo*" ("*law*"; "*objektives Recht*"; "*norma agendi*" [Armenian/Hay: "*orenk*"; Basque/Euskara: "*zuzenbide*"; Chinese: "*fǎ*", "*fǎlü*"; Hebrew: "*hok*"; Persian/Fārsi: "*qānun*", "*hoquq*"; Japanese/Nihongo: "*hōritsu*"; Modern Greek: "δίκαιο" "*díkaio*"; Icelandic: "*lög*"; Tagalog: "*batás*"; Turkish: "*hukuk*"; Welsh: "*cyfraith*"]);

(ii) but also (*second* meaning) "*pravica*" ("*right*"; "*subjektives Recht*"; "*facultas agendi*" [Armenian/Hay: "*irawunk*"; Basque/Euskara: "*eskubide*"; Chinese: "*quánlì*"; Hebrew: "*zehūt*"; Persian/Fārsi: "*haqq*"; Japanese/Nihongo: "*kénri*"; Modern Greek: "δικαίωμα" "*dikaíōma*"; Icelandic: "*réttur*"; Tagalog: "*karapatán*"; Turkish: "*hak*"; Welsh: "*hawl*"]) (Conte 2008).

2.2. *Second* example of xenonymy *without* synonymy: English "language" vs. French "*langue*"

2.2.1. The English noun "*language*" is a xenonym of the French noun "*langue*", but it is *no* synonym thereof.

2.2.2. Indeed, the English noun "*language*" means

(i) not only (*first* meaning) "*langue*";
(ii) but also (*second* meaning) "*langage*".

2.3. *Third* example of xenonymy *without* synonymy: German "*Recht*" vs. English "*right*"

2.3.1. The German noun "*Recht*" is a xenonym of the English noun "*right*", but it is *no* synonym thereof.

2.3.2. Indeed, the German noun "*Recht*" means

(i) not only (*first* meaning) "*right*";
(ii) but also (*second* meaning) "*law*".

2.4. *Fourth* example of xenonymy *without* synonymy: French "*propriété*" vs. German "*Eigentum*"

2.4.1. The French noun "*propriété*" is a xenonym of the German noun "*Eigentum*", but it is *no* synonym thereof.

2.4.2. Indeed, the French noun "*propriété*" means

(i) not only (*first* meaning) "*Eigentum*" ("*własność*");
(ii) but also (*second* meaning) "*Eigenschaft*" ("*właściwość*").

2.5. *Fifth* example of xenonymy *without* synonymy: Italian "proprietà" vs. Modern Greek "ιδιότητα"

2.5.1. The Italian noun "proprietà" is a xenonym of the modern Greek noun "ιδιότητα" "*idiótēta*", but it is *no* synonym thereof.

2.5.2. Indeed, the Italian noun "proprietà" means

(i) not only (*first* meaning) "ιδιότητα" "*idiótēta*" ("*właściwość*"; "*Eigenschaft*");
(ii) but also (*second* meaning) "ιδιοκτησία" "*idioktēsía*" ("*własność*"; "*Eigentum*").

2.6. *Sixth* example of xenonymy *without* synonymy: Spanish "*propiedad*" vs. Polish "*właściwość*"

2.6.1. The Spanish noun "*propiedad*" is a xenonym of the Polish noun "*właściwość*", but it is *no* synonym thereof.

2.6.2. Indeed, the Spanish noun "*propiedad*" means

(i) not only (*first* meaning) "*właściwość*" ("*Eigenschaft*"; "ιδιότητα" "*idiótēta*");
(ii) but also (*second* meaning) "*własność*" ("*Eigentum*"; "ιδιοκτησία" "*idioktēsía*").

2.7. *Seventh* example of xenonymy *without* synonymy: Italian "assoluzione" vs. Polish "*rozgrzeszenie*"

2.7.1. The Italian noun "*assoluzione*" is a xenonym of the Polish noun "*rozgrzeszenie*", but it is *no* synonym thereof.

2.7.2. Indeed, the Italian noun "*assoluzione*" means

(i) not only (*first* meaning) "*rozgrzeszenie*" (in German: "*Absolution*") in the sacrament of *confession*;
(ii) but also (*second* meaning) "*uniewinnienie*" (in German: "*Freispruch*") in a criminal *trial* (Conte 1977; 2002).

2.8. *Eighth* example of xenonymy *without* synonymy: Italian "causa" vs. Polish "*przyczyna*"

2.8.1. The Italian noun "*causa*" is a xenonym of the Polish noun "*przyczyna*", but it is *no* synonym thereof.

2.8.2. Indeed, the Italian noun "*causa*" means
(i) not only (*first* meaning) "*przyczyna*" (in German: "*Ursache*");[10]

[10] Example: "The *cause* of Napoleon's death was poisoning"; "Przyczyną *śmierci Napoleona było otrucie*".

(ii) but also (*second* meaning) "*spór prawny*" (in German: "*Rechtssache*", "*Rechtsstreit*").

2.9. *Ninth* example of xenonymy *without* synonymy: Polish "*ofiara*" vs. French "*sacrifice*"

2.9.1. The Polish noun "*ofiara*" is a xenonym of the French noun "*sacrifice*", but it is *no* synonym thereof (Conte, forthcoming).

2.9.2. Indeed, the Polish noun "*ofiara*" means

(i) not only (*first* meaning) "*sacrifice*" (in Finnish/Suomi: "*uhraus*");
(ii) but also (*second* meaning) "*victime*" (in Finnish/Suomi: "*uhri*").[11]

2.10. *Tenth* example of xenonymy *without* synonymy: Hungarian "*igazság*" vs. English "*truth*"

2.10.1. The Hungarian noun "*igazság*" is a xenonym of the English noun "*truth*", but it is *no* synonym thereof.

2.10.2. Indeed, the Hungarian noun "*igazság*" means

(i) not only "*truth*" ("*prawda*"; "*Wahrheit*"; "истина"; "*veritas*"; "ἀλήθεια"; "*sannleikur*");
(ii) but also "*justice*" ("*sprawiedliwość*"; "*Gerechtigkeit*"; "справедливость"; "*iustitia*"; "δικαιοσύνη"; "*réttlæti*").

2.11. *Eleventh* example of xenonymy *without* synonymy: Greek "ἀληθής" vs. Polish "*prawdziwy*"

2.11.1. The Greek adjective "ἀληθής" "*alēthēs*" is a xenonym of the Polish adjective "*prawdziwy*", but it is *no* synonym thereof.

2.11.2. Indeed, the Greek adjective "ἀληθής" "*alēthēs*" means

[11] Cf. "Katastrofa spowodowała wiele *ofiar*"; "The catastrophe claimed many *victims*".

1. not only "*prawdziwy*" ("*true*", "*wahr*", "vero");
2. but also "*ważny*" ("*valid*", "*gültig*", "valido").

These two semantic values of "ἀληθής" are both present in the Gospel according to John, in two passages on testimony [μαρτυρία *martyría*, *świadectwo*]. In particular:

(i) The Greek adjective "ἀληθής" "*alēthēs*" means "*true*" ("*prawdziwy*", "*wahr*", "vero"), for instance, in John 21:24,

> Οὗτός ἐστιν ὁ μαθητὴς ὁ μαρτυρῶν περὶ τούτων [...] καὶ οἴδαμεν ὅτι ἀληθὴς αὐτοῦ ἡ μαρτυρία ἐστίν.
>
> *Hoûtós estin ho mathētēs ho martyrōn perì toutōn* [...] *kaì oídamen hóti* ***alēthēs*** *autoû hē* ***martyría*** *estín*
>
> This is the disciple who testifies of this things [...]; and we know that his **testimony** [μαρτυρία] is **true** [ἀληθὴς]
>
> A to właśnie jest uczeń, który składa świadectwo o tych rzeczach, [...] a wiemy, że **świadectwo** [μαρτυρία] jego jest **prawdziwe** [ἀληθὴς].

(ii) On the contrary, the Greek adjective "ἀληθής" "*alēthēs*" means "*valid*" ("*ważny*", "*gültig*", "valido"), for instance, in John 8:17,

> Ἐν τῷ νόμῳ δὲ τῷ ὑμετέρῳ γέγραπται ὅτι δύο ἀνθρώπων ἡ μαρτυρία ἀληθής ἐστιν.
>
> *En tōi nomōi dè tōi hymetérōi gégraptai hóti dýo anthrōpōn hē* ***martyría alēthēs*** *estin.*
>
> It is also written in your law, that only the **testimony** [μαρτυρία] of at least two men is **valid** [ἀληθής].
>
> A przecież w zakonie waszym jest napisane, że tylko **świadectwo** [μαρτυρία] dwóch ludzi jest **ważne** [ἀληθής].[12]

[12] When Jesus says "ἐν τῷ νόμῳ τῷ ὑμετέρῳ" ("in your law"; "w zakonie waszym"), he refers to an anankastic-constitutive rule [*reguła anankastyczno-konstytutywna*; *anankastisch-konstitutive Regel*; *règle anankastico-constitutive*; *regola anankastico-costitutiva*] (Deuteronomy 17:6 and 19:15) lay-

3. *Intransitivity* of the xenonymy—relationship

3.1. X*enonymy* is an *intransitive* (*nontransitive*) relationship:

> The xenonymy relationship between the terms ***t1*** and ***t2***, and the xenonymy relationship between the terms ***t2*** and ***t3***, do *not* imply or entail a xenonymy relationship between ***t1*** and ***t3***.

For instance:

> The English term "*sentence*" (***t1***) is a xenonym of the German term "*Satz*" (***t2***).
> The German term "*Satz*" (***t2***), in its turn, is a xenonym of the French term "*mouvement*" (***t3***).
> Nevertheless, the English term "*sentence*" (***t1***) is *not* a xenonym of the French term "*mouvement*" (***t3***).[13]

3.2. Vice versa, it is possible that the term ***t1*** is a xenonym of the term ***t2***, that ***t2*** is *not* a xenonym of the term ***t3***, and that nevertheless ***t1*** *is* a xenonym of ***t3***.

An example:

> The Polish term "*koń*" (***t1***) ("horse") is a xenonym of the German term "*Springer*" (***t2***) ("knight in chess").
> "*Springer*" (***t2***) is *not* a xenonym of the Latin term "*equus*" (***t3***) ("horse").
> Nevertheless, "*koń*" (***t1***) *is* a xenonym of "*equus*" (***t3***).

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ing down a necessary condition of validity [*ważność*; *Gültigkeit*; *validité*; *validità*] of testimony [*świadectwo*; *Zeugnis*; *témoignage*; *testimonianza*].

[13] Indeed, "*Satz*" can mean (i) not only "sentence" ("*zdanie*", "enunciato"), (ii) but also "movement of a symphony" ("*część symfonii*", "tempo d'una sinfonia").

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MAREK PIECHOWIAK

Can Human Rights be Real? Can Norms be True?

On the 60th anniversary of the Universal Declaration of Human Rights

1. Introduction—can logic be ethics?

The problem I am going to discuss seems at first glance to belong to logic, semantics, or the philosophy of language. A basic course in logic for lawyers will describe the distinction of three major types of utterances: descriptive (declarative statements), such as "an apple is red"; evaluative (evaluations, axiological statements, value judgments), such as "an apple is good"; and prescriptive utterances (norms, orders), such as "people should eat apples", or "eat an apple!". Most Polish lawyers as students have probably come across the following words from Zygmunt Ziembiński's *Practical Logic*: "An utterance is true or false only if it describes some state of matter or some event in agreement with or contrary to reality. If an utterance does not describe anything, but expresses only somebody's evaluation, we cannot assert that it is either true or false" (Ziembiński 1976, 123).[1] An evaluation is then characterized as an emotional attitude (of approving or disapproving) toward a particular state of affairs.[2]

Of course, according to Ziembiński, prescriptive utterances also may be neither true nor false. I am interested primarily in legal norms, which are an instance of norms of conduct. Ziembiński characterizes a norm of conduct as "a pronouncement which orders (or forbids) somebody directly to behave so

[1] The Polish version of this manual, *Logika praktyczna*, has appeared in 26 editions, from the earliest in 1956, to the recent edition of 2007.

[2] "Some utterances formulated by us express not only our conviction that it is so and so, or that it is not so and so, but they can at the same time express our evaluation, that is to say our emotional attitude to this particular stat of affairs" (Ziembiński 1976, 122).

and so under definite circumstances" (ibid., 126). He argues that "the utterance '*x* should do *C*' does not in itself state that it is so and so, or that it is not so and so, hence it cannot be either false or true" (ibid., 126).

The above statements seem to be nothing more then basic clarifications belonging to logic. We tend to think that there is nothing less ideological or more morally neutral than logic. How wrong we are! When the above solutions are applied to morality—moral evaluations and moral norms—then the most fundamental metaethical dispute has already been solved: I mean the dispute between cognitivism and noncognitivism.

Cognitivism is generally characterized as "the claim that moral attitudes are cognitive states rather than noncognitive ones" (Dancy 1998, point 1). In this paper, I accept quite a "strong" version of cognitivism. By cognitivism I understand the claim that there are moral evaluations which are a result of cognition, and therefore they are judgments and they inform us about a certain reality, about certain states of affairs; consequently there are moral evaluations which can be true or false—accordingly there are also evaluative utterances which can be true or false. Noncognitivists deny that there are moral evaluations which result from cognition; such evaluations for them never inform us about reality, and cannot be true or false.

Ziembiński's position is a typical noncognitivist one, called emotivism. This view dominates in the contemporary education of lawyers in Poland, and it is taken for granted as an obvious statement in the field of logic or semantics that descriptive utterances can be true or false, while evaluative or prescriptive ones cannot.

I am going to challenge this view. Moreover, I accept a "strong" concept of truth based on a correspondence theory of truth. According to this theory, "every truth bearer: proposition, sentence, belief, and so on, is correlated to a possible fact. If the possible fact to which a given truth bearer is correlated actually obtains, the truth bearer is true; otherwise is false" (Kirkham 1998, point 1). In the traditions to which this theory refers, the main idea was expressed as a definition: "veritas est adaequatio rei et intellectus" (*truth is an adequacy between a thing and an intellect*).

The major problem in defending a view that a given evaluation or norm is true or false is indicating the fact to which this evaluation or norm is supposed to be correlated—a state of affairs that this evaluation is about. The simplest solution is to recognize that evaluations are about values which objectively exist (are valid), and are pure intellectual entities (like Plato's ideas), which we can get to know about by a special kind of intuition. Validity or normativity is something given, and it is a fundamental property of these en-

tities. A similar position can be outlined for norms—we accept that there is an objective correlate of norms which has a structure analogous to the norms and contains normativity as such. I do not share such convictions, especially because I have difficulties with the supposed intuition, and because of problems with the intersubjective discourse on values and norms, understood as specific entities. I have never had an intuition of the type required, but I am nonetheless convinced that there are evaluations, and even norms, which can be true or false in the strong sense. So I am looking for a more modest ontology. The first step is to give up the claim that the validity or normativity which is found in our mental states (or in their linguistic expression) has an objective correlate (similarly, recognizing generality as a property of concepts does not require recognizing the existence of objective entities of a general character, as Plato did, arguing for the existence of the world of ideas). It would be enough to indicate certain existing structures (relations), on which validity or normativity is based.

2. Human rights as an object of human rights law

I am going to base my considerations on evaluations and norms which pretend to be true independently from positive law but are in fact related to it. Such evaluations and norms are to be found in the domain of human rights and their legal protections. I am going to take seriously what the legal acts related to human rights state about the rights that are protected by them, and I aim to identify the basic elements of the ontology which allows us to explain the major features accepted in the legal protection of human rights. Human rights law seems to be a promising point of reference, because such rights are recognised by the very legal systems themselves as universal, inherent, inalienable, primary to the legal order, derived from the inherent dignity of human beings, and as rights which are not created by positive law, and should be protected by law; so that a clear distinction appears between human rights and human rights protection in positive law (cf. Piechowiak 1999, 110–124).

I am not discussing these features critically from a point of view external to the legal order. The very framework of my consideration is shaped by law, and is essentially internal to it; in other words, I am proceeding from law through ontology to objective reality, rather than from objective reality through ontology to law.

Taking into account the above listed features of human rights, we have to accept that they are something objective, given, "rooted" in the human being

(the inherent dignity of the human being). Consequently, the evaluations and legal norms which can be identified in the legal protection of human rights can be considered as truth bearers referred to human rights themselves, as independent and primary to the legal order.

A crucial question is, what are human rights? What are we talking about when we are talking about human rights? I would like to consider this question, starting from some analyses of the normative structure underlying human rights as subjective rights.

3. Evaluation in a basic structure of human rights as subjective rights

Let us take a simple example—the right to life. According to article 6, para. 1 of the *International Covenant on Civil and Political Rights* (1966), "Every human being has the inherent right to life."

What does this formula say about reality? First of all it states a relation between each human being and life. We can say that the life of a human being is a certain state of affairs which is of such special importance to the person, that it is due to the person. From a linguistic point of view, the formula analysed is not a norm of conduct in the strict sense. We are talking about a relation, let's call it the relation D, the relation of being due, between a subject p and a certain state of affairs A_1. Of course there are many such states of affairs, $A_1, \ldots, A_k, \ldots, A_n$, which can be the terms of a relation of being due to p. I understand A_k as a state of affairs in the broadest sense (possibly a natural object, an action, or also the absence of an object or an action).

What is the foundation of the relation D? Among theories of human rights, there are two major approaches. The choice theory claims that if p has a right to A_k, then A_k is at the disposal of p, and by exercising a right, what is decisive is the choice made by p, that, for example, p wishes A_k. But referring to human rights law, which without any doubts sometimes talks about something due independently of choices (e.g., the right to education, or freedom from slavery) one has to accept the so-called benefit theory. According to this theory, human rights protects the basic goods of a human being, where a "good" is understood as something beneficial, something needed independently of choices, and which is necessary for well-being. Being an object of a right, A_k is a certain kind of good for p. In other words, objects of rights constitute a subset of the set of goods. An utterance "A_k is a right of p", includes an evaluation stating that A_k is a certain kind of good for p.

In searching for an ontological foundation of good, and consequently of evaluations, let me revoke the classic attempt made by Aristotle in his theory of the "golden mean". An idea of being "proper", of "fitting" something, was central to Aristotle's concept of virtue, which was understood as the fundamental perfection, or fundamental good of a human being. Virtue seeks the mean, which is relative to us, and which is characterized as follows:

> *In everything continuous and divisible we can take more, less and equal, and each of them either in the object itself or relative to us; and the equal is some intermediate between excess and deficiency.*
>
> *By the intermediate in the object I mean what is equidistant from each extremity; this is one and the same for everyone. But relative to us the intermediate is what is neither superfluous nor deficient; this is not one, and is not the same for everyone.*
>
> *If, e.g., ten are many and two are few, we take six as intermediate in the object, since it exceeds [two] and is exceeded [by ten] by an equal amount, [four]; this is what is intermediate by numerical proportion. But that is not how we must take the intermediate that is relative to us. For if, e.g., ten pounds [of food] are a lot for someone to eat, and two pounds a little, it does not follow that the trainer will prescribe six, since this might also be either a little or a lot for the person who is to take it—for Milo [the athlete] a little, but for the beginner in gymnastics a lot; and the same is true for running and wrestling. In this way every scientific expert avoids excess and deficiency and seeks and chooses what is intermediate—but intermediate relative to us, not in the object* (Aristotle 1985, 1106a).

"The mean", which is nothing else but a good for a given subject, is something beneficial and proper, which allows the development of certain abilities. The relation of congruence between the things and the person is what is constitutive for being good.

In this approach to ethics, and to practical philosophy in general, a **good is by nature relational**. One cannot talk about a good as such, but only about a good for someone. Without this relation there is simply no good. The state of affairs A_k is good for p, if and only if there is a congruence C between A_k and p. An identified element of the ontological structure of a right can be represented in the following way:

$$A_k \ — \ p$$

However this approach, though relational, is not a relativistic one. The relation of congruence mentioned is something objective, something given that can be grasped cognitively.

If we accept the benefit theory, there is no problem in ascribing a value of truth to evaluations, even within the framework of a noncognitivist theory, such as Ziembiński's.

4. Instrumental evaluations

Let me again refer to *Practical logic*:

> *Of course, when we say that utterances that are exclusively evaluative cannot be either true or false, we have in mind the so-called basic evaluations, not the instrumental ones. The later are really statements about the usefulness or effectiveness of something as a means to a certain goal according to the knowledge we have concerning causal nexuses* (Ziembiński 1976, 123–124).

One of Ziembiński's examples of instrumental evaluations is as follows:

> *We often use a word which normally express our approval or disapproval of some object for the purpose of stating that the object corresponds to a certain characteristic, that it possesses definite properties. So, we would say, for example, "This is a good key, that is a bad key", having in mind that the former key fits some definite lock, while the latter key does not fit it. "A good key" is an expression corresponding to the properties of a key fitting some lock, though the same "good key" is a "bad key" for another lock. "Good" especially, may be equivalent to "adopted as a means to attain a wished goal" (instrumental evaluation).*

It is striking how close to classical tradition are the above characteristics of the foundations of instrumental evaluations. We can observe that instrumental valuations can be true, even when the object of evaluation does not actually exist. We may meaningfully characterize "a good key" before we get it—before it is produced. The reality to which an instrumental evaluation refers, from ontological point of view, is a relation of congruence between a subject and an object. This relation of congruence can be characterized as relation of "fitting", "being proper", and the like—in the field of human rights we can talk about being beneficial.

5. Why is *A* good for *p*?

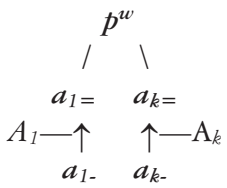
What is constitutive for a relation of congruence between a subject p and state of affairs A? Have we already escaped from basic evaluations, and is our problem solved in favour of ascribing true values to evaluations underlying human rights? Of course not.

We have to ask why A_k is beneficial for p—what does it mean to say this? We have to ask about the aim to be achieved with A_k. We evaluate as positive certain states of affairs that we are striving for. If we are weak because of poor nutrition, we need food to achieve better health. Following this example, A_k is good, is beneficial, for a subject p, because it is capable of transforming a certain aspect of p, an aspect in which a subject p is (or can be) deprived of something—let's call it a_{1-}—into a state of balance, $a_{1=}$. The state a_{1-}, like $a_{1=}$, may be an actual or possible state. So we have another relation, the relation of a_{1-} being ordered, or directed, to $a_{1=}$, and we can call this relation O_{a1}. The subject p comprises many aspects a, such as $a_1, \ldots, a_k, \ldots, a_n$, and the relations of a_{k-} to $a_{k=}$.

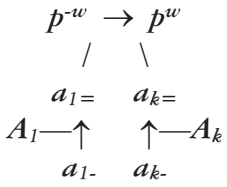
We have to modify the previous schema, obtaining:

$$A_1 \;\text{—}\!\!\uparrow \begin{matrix} a_{1=} \\ a_{1-} \end{matrix}$$

When we take into account the idea of dignity being the source of all human rights of a particular subject, and that "all human rights are universal, indivisible and interdependent and interrelated", and that "the international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis" (*Vienna declaration* 1993, I.5)—it then is possible to transform an evaluation of $a_{k=}$ into an instrumental one. A given $a_{k=}$ is a means to achieve the general well-being or flourishing of a human being. Using the language of classical tradition, a_k contributes to happiness of p. There is a certain state of the subject p as a whole, which is evaluated positively. Let's represent this state as p^w, and call it "p's well-being". Knowing that something is beneficial for someone, we presuppose something about well-being. Now we can enrich the schema:



What can be said about p^w? Is it really based on a basic evaluation[3] of a certain possible state of affairs? First we should notice that p^w correlates to a certain state of the subject p, a state of not well-being—let's call it p^{-w}, "p-not-well". We can say that $a_{k=}$ is valued positively because of the relation of p^{-w} being ordered to p^w, because $a_{k=}$ is capable of transforming, or rather contributing to the transformation of p^{-w} into p^w. So we need a further extension of our schema:

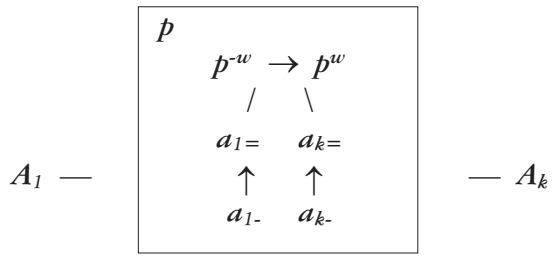


It can be seen that p itself has somehow vanished from our schema, and not without reason. A very important question arises: is the subject p equal to p^{-w}, or to p^w?

One possibility is that p equals p^{-w} or p^w. In this case, consequently, the relation O_p is something external, added to p (e.g., by certain paradigms present in a culture). Similarly O_p is an external relation if neither p^{-w} nor p^w equals p.

The other possibility, which I think more plausible, is that the subject p includes the relation O_p as an inherent relation. In this case, being human includes a relation to the development toward well-being. In particular, we have to go this direction in the case of rights which we recognize as inherent, or as derived from inherent dignity. Being a subject of a right includes also the relation O_p, and simultaneously the subject p also includes different aspects a_k of the development or well-being.

[3] I mean "basic" as opposite to "instrumental". A basic evaluation in this sense can be a complex one, on account of various aspects that are taken into account in the act of evaluation.



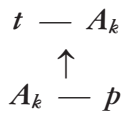
We can talk meaningfully about universal human rights with some definite content if there are some a_k and relations of the O_a-type which are typical of and inherent to each human being. There are possible states a_{k-} of a subject p, whose presence excludes the possibility of well-being or fulfilment of p—for example, being enslaved.

There is no need to know exactly what p^w is. We can accept that p^w is partially determined by free choices, agreements, and so on. Therefore not knowing p^w is not only a matter of difficulties of cognition.

What is specific in the approach presented here is the identification of the existence of relations and their terms, without an exact determination of their content. The questions of what exactly is the exact nature of the identified relations, or what exactly are the terms of these relations, can be left open. Because evaluations do not constitute these relations, they can be regarded as a tool used to refer to a certain reality, which has yet to be analysed concretely.

6. Why should *t* do *A* for *p*?

I have considered the question of why a state of affairs A_k is good for p. In constructing a theory of human rights, I am interested in a specific type of good—goods which are so important that they are due to p. One of the major features of such a good is that it is the foundation of an obligation on the part of other members of society. Relations of being due require another agent, which we can call t—someone who is under obligation, and who should behave in a certain way because of the relation of A being due to p. The basic schema looks as follows:



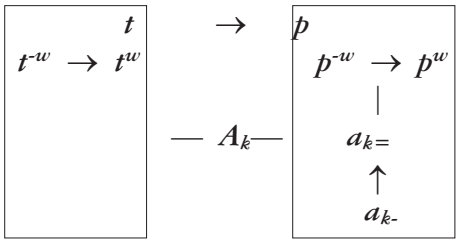
I call the relation between t and A_k the relation of obligation. When discussing the rights of p, being an object A_k of t's obligation involves a relation of A_k being due to p. There is a discussion whether it is possible to exhaustively characterize a subjective right in terms of obligation. Referring to our schema, we can say that it involves a question of the possibility of characterizing the relation of being due, by a relation of being obliged. I cannot go into details now (cf. Piechowiak 1999, 135–188; 2003), but let me only observe that in the legal protection of human rights, there is sometimes a reference to rights with clear presuppositions that the subjects who are obliged to do what is due to a subject of a right have not yet been determined (e.g. *International Covenant on Civil and Political Rights* 1966, art. 2, para. 2; cf. Piechowiak 1999, 150–162); on the other hand, an obligation of t is always toward p. My aim, however, is not to sketch an adequate theory. I am looking only for an ontological structure which allows us to talk meaningfully, at least in some cases, about true rights.

Referring to the example of the right to life, I would like to consider the question of why t should refrain from killing p, or why t should provide p with some life-saving services when p's life is endangered. Generally speaking—why should t do A_k for p? Why is the relation of being due the foundation of p*'s* obligation? A more general question is also involved—why should t act at all? I am interested in obligations which are independent of any act of norm giving—we can call them natural obligations. I am going to identify relations about which there could be statements of obligation, prescriptive utterances.

In the framework sketched above, the first answer is "because A_k is good for p". But why should being good for someone else be a **reason for** t to do A_k? Applying the benefit theory, we can answer thus: to do good to p is at the same time good for t. But actually A_k itself does not necessarily suit t; it is not the case that there is a specific deficit fulfilled by A_k. Providing A_k to p can very often be a burden for t, and t may lose something that he or she has. Staying within the framework of benefit theory, we can say that t benefits **from the very acting** for p, benefits as an acting subject as a whole. In accordance with the classic European philosophical reflection on the foundations of law, one can say that t becomes a just person, that he or she "has" less but "is" more. Tradition would add that justice is the highest virtue, and the highest perfection of a human being. Though this claim is simple, its justification is not. For our purposes it is enough to identify which relations we are talking about. Analogously with the relation O_p (p^{-w}, p^{w}), we can also talk about the relation O_t (t^{-w}, t^{w}). Acting for the benefit of others is an indispen-

sable, inherent element of well-being. This idea is expressed also in the *Universal Declaration of Human Rights* (1948). To take this document seriously, we have to accept what it states in article 1, about the human being as the foundation of human rights: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood". This article is stating what human beings are like. From a grammatical point of view, the only prescriptive element is contained at the end: "should act towards one another in a spirit of brotherhood". But taking into account the whole wording of this article and its function, this last expression can be treated not as a prescriptive utterance, but rather as a statement of what human beings are like. To be a human being includes not only being free and endowed with dignity, reason, and conscience, but to be a human being also includes the relation of acting for the benefit of others.

The basic ontological structure underlying the norm "t should do A_k for p" can be represented as follows:



The utterance "t should do A_k for p" is correlated to a certain set of relations—it claims to describe it. It is true if these relations obtain. At least in some cases, it is very plausible to recognize that the indicated relations exist objectively and are a possible object of cognition, and consequently "t should do A_k for p" can be true in a strong sense.

Let us take the example of the right expressed in article 5 of the *Universal Declaration*: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment" (similar rights are expressed in international treaties, e.g. in art. 7 of the *International Covenant on Civil and Political Rights* 1966; art. 37 of the *Convention on the Rights of the Child* 1989). This right certainly comprehends a more particular right: "No small child shall be subjected to cruel physical torture". In this case, the state of affairs A_1—which is the object of a right—consists of being free of cruel physical torture; the subject p is a small child. We can identify an evaluation, "A_1 is good for p". This evaluation is saying something about reality, namely that there is

a relation of congruence between being free of cruel physical torture, and a certain aspect a_1 of p. This evaluation is based on a relation between a possible or real state a_{1-} caused by torture, and a state of a certain balance, $a_{1=}$.

Intuitively it is very difficult to claim that this evaluation is based solely on emotional reactions, choices, education, or cultural standards. If this formula is true, then it informs us about reality, and consequently we can claim that someone who rejects it is objectively wrong.

We can also identify the norm, "subject t should refrain from A_1—the cruel physical torturing of a small child p", or a norm "t should prevent other subjects from cruelly physically torturing small children". If we accept the existence of the identified relations, there it possible to say that these norms are true in the strong sense. They inform us about reality.

Right can be regarded as a complex structure of relations. If these relations exist, then we can say that human rights are real and that statements about these rights may be true.

7. Final comments

The basic ontological condition for statements about rights, as well as for norms and evaluations being true, is the objective existence of relations. Relations have to be recognized as something given, and something more than the sum of their terms. Therefore all approaches which deny the real existence of relations (like nominalism) cannot be reconciled with the approach presented here, and it seems very doubtful if it is possible to talk at all about true norms or about true evaluations in the strong sense, in a framework of approaches which denies the real existence of relations.

In the proposed approach, true norms inform us about objective reality. We can say that it is so that t should do A for p. A normative element is borne in certain relations.

There is no need to know exactly the nature and the content of the terms of the relations (in fact, in the case of declarative statements like "the sun is shining", most people do not know exactly what the sun is and what is meant by "shining", and here also a certain relation is decisive for being true). Statements about inherent rights and norms comprised in these rights refer to an objective reality, which determines the content of rights, obligations, and so on.

Consequently, the relations and the terms of relations are subjects for discussion. Moral dilemmas and discussions about rights could be real in the sense that both parties are discussing something which is given, though so-

metimes very difficult to find out about. Such a discussion is something more than sharing evaluative convictions and seeking compromise.

There are some limitations to the theory sketched above. The provided schemes are related to norms which are individual and concrete. An extension which also includes general and abstract norms seems to be possible, but it is evidently more complicated, and it involves the old problem of universals.

The identified relations could also be useful in clarifying discussions on truth in a "weaker" sense, when one or more of the identified relations are not objective in the strong sense, e.g. are constituted by legal norms.

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PAOLO DI LUCIA

Founding Norms on Truth versus Founding Truth on Norms

Omnes de veritate significationis loquuntur;
veritatem vero quae est in rerum essentia,
pauci considerant.

For all speak of the truth of signification,
but few consider the truth that is in the
essence of things.

Anselm of Aosta [1033–1109]

Contents

1. Truth of norms: truth as a *predicate* of norms, truth as a *product* of norms, truth as a *foundation* of norms

On the relationships between truth and norms, we meet three fundamental theses:

> *first thesis*: truth as a *predicate* of norms (§1.1);
> *second thesis*: truth as a *product* of norms (§1.2);
> *third thesis*: truth as a *foundation* of norms (§1.3).

1.1. First thesis (the *predicate thesis*): truth as a *predicate* of norms

1.1.1. According to the Polish logician and philosopher Jerzy (Georges) Kalinowski (1916–2000), truth is a *predicate* of norms.

In particular, the truth of norms consists in the relation of correspondence between norms (deontic sentences) and what Kalinowski calls "deontic reality", "*la réalité déontique*" ("*rzeczywistość deontyczna*") (Kalinowski 1964, 98).

1.1.2. Kalinowski's thesis—the *predicate thesis*—is highly controversial.

The controversial nature of Kalinowski's thesis is connected to the controversial nature of Kalinowski's metaphysical view, according to which a deontic reality exists prior to norms (deontic sentences).

But as I will show when introducing the *second thesis* on the relationships between norms and truth, the logico-semantical thesis that truth consists of the relation of correspondence between norms and deontic reality *doesn't necessary imply* the metaphysical thesis that a deontic reality exists prior to norms. (We could say that a logico-semantical thesis doesn't depend on the existence of a reality at all.)

1.2. Second thesis (the *product thesis*): truth as a *product* of norms

1.2.1. According to Amedeo G. Conte (b. 1934), we can conceive of a relation of correspondence between norms and deontic reality without subscribing to a metaphysical view on the existence of deontic reality (without any ontological commitment about the existence of deontic reality).

Even if a deontic reality did not exist prior to norms (deontic sentences), still we could conceive of truth of norms as a relation of correspondence be-

tween a norm (deontic sentence) and a *deontic status* created (*thetically* constituted) by means of the *thetic* performative utterance of that norm (of that deontic sentence).

In the language of Kazimierz Twardowski (1866–1938), we could say that according to Conte, truth is not a *predicate* of norms, but a *product* (*wytwór*) of norms.

1.2.2. To lay down a norm, in Conte's view, is a *thetic* (act of) position. Every norm position implies a *thetic* position, i.e. is the position of the *truth* of a deontic sentence.

> *Ciò che 'prescrivere' significa non è una mera* rhêsis *che* Op (rhêsis *che come tale, non reagisce sulla verità di* Op*), ma una* thésis *che* Op*, una posizione [dal verbo greco* títhemi = *porre] della verità dell'enunciato deontico* Op (Conte 1977; 1989, 184).[1]
>
> The meaning of the verb 'to prescribe' is not a mere *rhêsis* that *Op*, but a *thésis* [from the Greek verb *títhemi* = to lay down] that *Op*, a position of the truth of deontic sentence.

1.3. Third thesis (the *foundation thesis*): truth as a *foundation* of norms

1.3.1. The first two theses (the *predicate thesis* and the *product thesis*) I've mentioned were very deeply debated in deontics and in the philosophy of normative language.

I don't want to underestimate the significance of either of these theses, but in this paper I will start from another point of view, according to which norms are *not apophantic* sentences (i.e. sentences capable of being true or false).

1.3.2. In particular, even though norms are not *apophantic* sentences, nonetheless I will explore the possibility that it would be meaningful to put norms into a relation with truth.

Let us consider a *third* possible *thesis* on the relationships between norms and truth. I will call it the *foundation thesis*.

According to the *foundation thesis*, truth is neither a *predicate* of norms nor a *product* of norms, but a *foundation* (*Grundlage*, *basis*) of norms.

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[1] See also Conte (1988, 448–449). On 'thetic' in Czesław Znamierowski, see Stanisław Czepita (1988), and Giuseppe Lorini (2006).

According to this third thesis (the *foundation thesis*), which is one of the most original contribution of the Italian legal philosopher Sergio Cotta (1920–2007) to the ontology of norms, the *foundation* of norms consists of the truth of "the propositions concerning the nature or the structure of entities which are governed or ruled by law" (*nella* verità *di proposizioni teoretiche vere, relative alla natura o struttura dell'ente cui il diritto si riferisce*)

1.3.3. This paper is devoted to the analysis of the *foundation thesis* in Sergio Cotta's contribution. In particular, the goal of the present paper is to call attention to the "polar opposition" between *norm* and *truth* in the *foundation thesis*.[2]

2. The *foundation thesis*: anankastic truth vs. eidetic truth

2.0. Sergio Cotta gave two different arguments for the *foundation thesis* (the thesis according to which the *foundation* of norms consists in the truth of "the propositions concerning the nature or the structure of entities which are governed or ruled by law").

Since the *first argument* is centred on the concept of *necessity*, I will call the first argument the *ananke argument* (from the Greek word *ananke* "necessity") (§2.1).

Since the *second argument* is centred on the concept of the *essence* of a being (Cotta uses the phrase "*struttura d'un ente esistenziale*"), I will call the second argument the *eîdos argument* (from the Greek word *eîdos* "essence") (§2.2).[3]

2.1. First argument: the *ananke argument*

2.1.1. A first argument for the *foundation thesis* of norms is given by Cotta in the essay *Le problème de la justification scientifique des normes*:

> *Considérons la* proposition théorétique *"l'obéissance aux lois est nécessaire à l'existence de la cité" et la* norme *correspondante "tous les citoyens ont le devoir d'obéir aux lois de la cité". Si la vérité de la proposition théorétique aura été établie, le devoir d'obéir aux lois de*

[2] Polar opposition (*Gegensatz*) is the subject of a new disciple—the science of opposites, *Gegensätze*—that Romano Guardini (1885–1968) named "*Enantiologie*". See Guardini (1912).

[3] On "eidetic truth" Conte (2007).

> *la cité apparaît justifié par la relation fonctionnelle du comportement prescrit avec l'existence de la cité* (Cotta 1979, 15).
>
> Let us consider the *theoretical proposition*, "obeying laws is necessary to the existence of the city", and the *corresponding norm*, "all citizens have the duty of obeying the laws of the city". If the truth of the theoretical proposition had been established, the duty of obeying the laws of the city would appear justified by the functional relationship of the stipulated behaviour with the existence of the city.

According to Cotta, the *norm*

(1) "Tous les citoyens ont le devoir d'obéir aux lois de la cité",
All citizens have the duty of obeying the laws of the city,

has a truth foundation. The *truth-foundation* of norm (1) consists of the truth of an *anankastic proposition.*[4]

(2) "L'obéissance aux lois est *nécessaire* à l'existence de la cité",

that is, the duty to obey the laws of the city is *necessary* for the existence of the city itself.

2.1.2. Notice the parallelism between Cotta's functional justification and the Kantian idea of the foundation of hypothetical imperatives. As Cotta himself remarks,

> *La funzionalità della norma all'esserci di un adatto contesto esistenziale costituisce giustificazione sufficiente dell'obbligatorietà di quella norma. L'imperativo chiamato* ipotetico *da Kant — quello cioè che prescrive un'azione che non è necessariamente buona in sé ma in quanto mezzo a un fine voluto — si basa precisamente sulla giustificazione funzionale* (Cotta 1979a, 190–191).
>
> The functional character of the norm gives the norm a sufficient justification for its obligatoriness. Kant's hypothetical imperative—an imperative which pre-

[4] The phrases "anankastic proposition" and "anankastic sentence" were first used by the Finnish logician and philosopher Georg Henrik von Wright (1916–2003). According to von Wright (1963, 158), "Anankastic sentences have a common use for expressing, beside *practical*, also *logical* and *natural* (causal, physical) necessities".

scribes an action that is not necessarily good in itself, but as a mean to an end—is based on a functional justification.

2.2. Second argument: the *eîdos argument*

A second argument for the *foundation thesis* is given by Cotta in direct comparison with a similar thesis affirmed by Edmund Husserl (1859–1938), in §§14–16 of *Prolegomena zur reinen Logik* (Husserl 1900–1901).

Husserl offers, within a context where the normative status of formal logic is at issue, a simple argument to affirm the *truth foundation* of norms: the well known argument of the warrior.

Since Cotta (1987; 2004) gives a new formulation of the warrior argument, and charges Husserl with a mistake, let us consider the theses of Husserl and of Cotta theses in comparison (§§2.2.1, 2.2.2).

2.2.1. First: the warrior argument by Edmund Husserl

According to Edmund Husserl, the *norm*

(3) "A warrior *ought* to be brave" (*Ein Krieger soll tapfer sein*)

is equivalent to (or better, is founded on) the following proposition

(4) "Only a brave warrior *is* a good warrior" (*Nur ein tapfer Krieger ist ein "guter" Krieger*) (Husserl 1901/1975, 53–54).

In other words, the *norm* (3) is founded on the truth of the *theoretical* proposition (4). I call this argument the "*eîdos argument*", since according to Husserl the *deontic* predicate "ought-to-be-brave" is founded in the *eîdos* of a "good warrior".

So what is Edmund Husserl's mistake, according to Cotta?

2.2.2. Second: the warrior argument by Sergio Cotta

2.2.2.1. According to Cotta, Husserl's argument fails because Husserl uses in the theoretical proposition (4) two axiological terms (or value-terms): "brave" and "good".

In Cotta's words,

> *C'è una falla nel discorso husserliano su cui si sono appoggiati i critici (per esempio Kelsen), ed è data dall'aver usato termini assiologici quali "valoroso" e "buon guerriero* (Cotta 1987, 76).

> There is a fallacy in Husserl's words stressed by the critics (such as Kelsen). The fallacy consists in having used axiological terms like "brave" and "good warrior".

Notwithstanding, according to Cotta, the soldier argument can be reformulated—as I will show in §2.2.2.2.

2.2.2.2. According to Cotta, it is possible to reformulate the warrior argument without the fallacy committed by Husserl, by eliminating/cancelling from theoretical proposition (4) the *axiological terms* (or value-terms) "brave" and "good".

Here is Cotta's proposal: The *norm*

(5) "A warrior *ought* to fight" (*Il soldato deve combattere*),

is founded on the truth of the *theoretical* proposition

(6) "Only a warrior who *ought* to fight *is* a (true) warrior" (*Soltanto il soldato che deve combattere è un vero soldato*).

In Cotta's words,

> *La falla è facilmente superabile e non comporta fallacia naturalistica se riformuliamo il suo esempio nel modo seguente: "Il soldato* deve *combattere, altrimenti non* è *un soldato": L'esserci del soldato quale modalità esistenziale* (giudizio di esistenza) *implica la norma "il soldato deve combattere", altrimenti quella figura si dissolve. Si avrà un* buon *soldato* (giudizio di valore) *se sarà valoroso, abile nell'uso delle armi, non disposto ad arrendersi ecc. Ma tale giudizio assiologico presuppone l'esistenza del soldato: non avrebbe senso, infatti, pronunziarlo nei confronti di un civile* (Cotta 1987, 76).

> We can reformulate [Husserl's] example without any fallacy as follows: "The warrior *ought* to fight, otherwise he *is not* a soldier". The essence of a warrior as an existential modality (*judgment of existence*) implies a norm, "The warrior ought to fight", otherwise this entity dissolves. We will have a good warrior (*judgment of value*) if he will be brave, apt to brandish weapons, and not disposed to give up.

But this axiological judgment presupposes the existence of the warrior: it would make sense to pronounce it regarding a non-warrior.

In Cotta's view, the *deontic* predicate "ought-to-fight" is not founded on the essence (*eîdos*) of a *good* warrior, but in the essence (*eîdos*) of a *true* warrior.

2.2.2.3. Notice that the argument based on *eîdos*, in both sentences (3) and (5), would be strengthened if we adopt a new formulation:

My proposed new formulation of Husserl's sentence (3) is the following:

(7) "It ought to be the case that a warrior *ought* to be brave".

My proposed new formulation of Cotta's sentence (5) is the following:

(8) "It *ought* to be the case that a warrior *ought* to fight".

In both sentences (7) and (8), the *first* 'ought' is an *eidetic* ought [*eidetisches Sollen*] (i.e. it depends on the *eîdos* of the entity) (de Caro 2000; Di Lucia 1997, 110–111).

The *second* 'ought' is a *deontic* ought [*deontisches Sollen*].

2.3. The warrior's truth as a *veritas essentiae rerum*

As we have seen in §2.2.2.2, according to Cotta, a warrior who *ought-not--to-fight* is not a *true* warrior.

But what is the statute of warrior's truth, truth that is the foundation of the norm (5) "A warrior *ought* to fight"?

An answer to this question requires a concept of truth that, in the language of Anselm of Aosta (1033–1109), is not a *speech-truth*, a "*veritas enuntiationis*" ("truth of statement"), but a *thing-truth*, a "*veritas essentiae rerum*" ("truth of an essence of things"):[5] a truth that Anselm (2006, chap. II) defines in *deontic* terms:

Non aliud est veritas quam rectitudo.

Truth is no different from rectitude.

[5] According to Anselm (2006, ch. IX), "*Omnes de veritate significationis loquuntur; veritatem vero quae est in rerum essentia, pauci considerant*" ("All speak of the truth of signification, but few consider the truth that is in the essence of things"). On the paradigm of "speech-truth versus thing-truth", see Joseph Bocheński (1959), Conte (1992; 1999), Josef Pieper (1948), Albert Hofstadter (1965).

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GUGLIELMO SINISCALCHI

Normality as Truth

1. Husserl

In *Logische Untersuchungen* (1900–1901), Edmund Husserl writes that "ein Krieger soll tapfer sein".[1] This statement that "a good warrior should be courageous" means that "only a brave warrior is a good warrior". More specifically, it means that bravery is a concept independent of any request or command, and is strongly linked to the idea or *eîdos* of the warrior. If warriors behave cowardly, or if they refuse to act bravely, the very idea of the warrior vanishes.[2]

Paraphrasing Husserl, we can declare that a courageous warrior is normally a warrior who fights without fear: his bravery and his readiness to battle derive from his being a *normal* warrior. We could say that the truth of the warrior is to fight without fear.[3]

This is Husserl's thought, even though his concept of normality is quite ambiguous: the truth that comes from normality may unfold in different ways in a normative discourse.

The truth of normality may be both a *product* and a *presupposition* of a juridical rule: there is both a "weak" normality—which is the result of normative pressure—and a "strong" normality, which is the foundation of the validity of normative discourse.[4]

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[1] In the section "Prolegomena zur reinen Logik" (Husserl 1928, 41)

[2] On the meaning of *eîdos* in philosophy of law, see Di Lucia (1997; 2003, 141–162). On the Husserlian concept of *eîdos*, see Benoist (1999, 2005).

[3] Naturally, I am considering not a semantic, but an ontological or ontic, concept of truth: the truth of a normal warrior is truth "*de re*" and not truth "*de dicto*". For the distinction between the concepts of truth "*de re*" and truth "*de dicto*", see Conte (2001, 843–879).

[4] For a complete analysis of the bilateral relationship between normal concepts and normativity, see Siniscalchi (2005, 81–103; 2007).

I'll explain my thoughts by quoting some examples taken from the works of two of the most important legal thinkers of the twentieth century: Herbert L. A. Hart (1907–1992) and Carl Schmitt (1888–1985).

2. Hart

In Hart's opinion, the truth of normality is simply the result of the legal rule's efficacy; for Schmitt, the existence of a situation of normality—the truth of normality—is a fundamental condition for the validity of rules and the legal system.

The first example comes from one of the early passages in Hart's *Concept of Law* (1961). Hart's strategy consists of two fundamental points: the distinction between habits and rules, and the demonstration that normality is always a product of a rule.

The first point is developed by the following question:

> *How does a habit differ from a rule? What is the difference between saying of a group that they have the habit, e.g. of going to the cinema on Saturday nights, and saying that it is the rule with them that the male head is to be bared on entering a church?* (Hart 1961, 54).

Hart's question already supposes a definite answer, for whenever English-speaking philosophers ask about the difference between habits and rules, they implicitly admit the differences between them.

Although Hart's positivism recognizes a relation between social regularity (*habits* in Hart's terms) and normative rules, the Oxford philosopher draws a definite boundary line between what normally happens, and what must happen because it is imposed by "normal" behaviour.

After highlighting the difference between rules and habits, Hart shows how *normality*—what regularly happens—may only be considered as the product of a rule, and never as its presupposition, writing that

> *when a habit is general in a social group, this generality is merely a fact about the observable behaviour of most of the group. In order that there should be such a habit no members of the group need in any way think of the general behaviour, or even know that the behaviour in question is general; still less need they strive to teach or intend to maintain it.* [...] *By contrast, if a social rule is to exist some at least must look upon the behaviour in question as a general standard to be followed by the group as a whole.* (Hart 1961, 55).

Thus, regularity is merely a social fact: it has no normative force.

Normality is only a product of a juridical rule: the awareness and the general acceptance of a behaviour imposed by rules turn the simple regularity into a social rule (*internal point of view*[5]).

So in Hart's opinion, the truth of normality is only the artificial construction of a juridical rule.

3. Schmitt

The second example comes from the famous essay by Carl Schmitt, *Über die drei Arten des rechtswissenschaftlichen Denkens* (Schmitt 1934/1993).

The German legal thinker, unlike Hart, affirms the necessity for each legal rule, and for each legal system, to presuppose a normal situation [*normale Situation*] and normal types [*normale Typen*].[6] Schmitt writes:

> *Wir wissen, dass die Norm eine* normale *Situation und* normale *Typen voraussetzt. Jede Ordnung, auch die „Rechtsordnung" ist an Konkrete Normalbegriffe gebunden, die nicht aus allgemeinen Normen abgeleitet sind, sondern solche Normen aus ihrer eigenen Ordnung heraus und für ihre eigene Ordnung hervorbringen.*
>
> *Eine gesetzliche Regelung setzt Normalbegriffe voraus, die so wenig aus der gesetzlichen Regelung entstehen, dass vielmehr gerade die Normierung ohne sie ganz unverständlich wird und man nicht einmal mehr von einer „Norm" sprechen kann.* (Schmitt 1934/1993, 19).

> We know that every rule assumes a normal situation and normal types. Each order, including the legal order, is linked to specific normal concepts [*Normalbegriffe*], which are not derived from general rules but, on the contrary, themselves produce such rules from and for their own order.

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[5] For an exhaustive explanation of Hart's concept of "internal point of view", see Bix (2003). Bix writes (2003, 42): "[Hart] argued that a legal theory should be constructed around the perspective of someone who accepted the legal system, but the theory itself (or, to put the matter differently, the theorist herself), need not, and should not, endorse the system (as one which is generally just or which creates binding moral obligations). In other words, the theory simultaneously: (1) attempts to take into account the participant's perspective, and (2) manages to choose among possible participant's perspectives without having to make moral judgments, while (3) keeping sufficient distance from the participant's perspective to allow for moral criticism of the whole system/enterprise".

[6] Schmitt's concepts of "normal situation" and "normal types" originally come from the social theories of Max Weber (see, for example, the concept of "Idealtypus") and Émile Durkheim (for example, the concept of "type normal"). See Weber (1922/1988) and Durkheim (1895).

> A law requires normal concepts independent of it—to the extent that, in their absence, the law itself becomes all the more incomprehensible, and cannot speak of "rules" at all.

He adds that a rule which doesn't presuppose normal concepts independent of the same rule, can't be considered as such.

If in Hart's theory, normality is a product created by a legal rule, for Schmitt it is normality which determines legal normativity. And further, normality seems to be a condition of existence for each legal rule.[7] Schmitt emphasizes:

> *Die Normalität der Konkreten, von der Norm geregelten Lage und des von ihr vorausgesetzten konkreten Typus ist also nicht nur eine äusserliche, rechtswissenschaftlich ausser Acht zu lassende Voraussetzung der Norm sondern ein inneres, juristisches Wesensmerkmal der Normengeltung und eine normative Bestimmung der Norm selbst. Eine reine, situationslose und typenlose Norm wäre ein juristisches Unding.* (Schmitt 1934/1993, 20).

> The normality of the definite situation regulated by law, and of the assumed definite type, is therefore not only a prerequisite outside the rule, which would not have to be considered by legal science, but also a legal essential and an internal property of the validity of the rules, and a normative definition of the rule itself. A pure rule, unrelated to any situation or to any type, would be something legally non-existent.

So the normality of a situation or of a type, following Schmitt's lexicon, is a fundamental condition for the validity, or legal existence, of the rule: normality—"strong" normality—determines legal normativity, and not the contrary.

From normality seen as a product of legal rules in Hart's theory, we have passed to Schmitt's idea of a constitutive normality[8] of legal rules: a rule in which the legal aspect is linked to and depends on the respect of a real condition of normality existing prior to the rule itself. In Schmitt, it is normality—the truth of normality—that constitutively produces the legal rule.

[7] On the relevance of the concept of "normality" in the legal theory of Carl Schmitt, see Schwab (1970) and Hofmann (1992).

[8] On the meaning of "constitutive power", see Di Lucia (2003a).

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ANGIOLA FILIPPONIO

Phenomenology of the Truth of Norms

Denken ist danken
Martin Heidegger, *Was heißt Denken*, 1956

1. Two questions

(i) In relation to norms, anapophantic semiotic entities—that is entities whose '*semantically*-true' term is not predicatable—is it possible to predicate other terms of truth?
(ii) Which terms of truth can be referred to norms?

These two questions constitute the theme of my contribution.

2. The names of truth according to A. G. Conte

In dealing with this theme, I will preliminarily expound some of Amedeo G. Conte's theses on some nouns of "truth". In *Adelaster. Il nome del vero* [Adelaster: The name of truth], Conte (2004) asks the philosophical question, "Of which entities is the adjective 'true' predicated?"

Conte answers the question thus—the adjective "true" is predicated in relation to heterogeneous, categorically different entities. "True" is predicated,

(i) not only in linguistic entities (in sentences / propositions),
(ii) but also in nonlinguistic entities.

In other words, "true" is predicated,

(i) both in a *dictum* (of a sentence and/or proposition),
(ii) and in a *res*.

For "true" as the predicate of a *dictum*, Conte proposes the term "*de dicto* true" (correlatively, for the predicated truth of a *dictum* he proposes the term "*de dicto* truth").

For "true" as the predicate of a *res*, Conte proposes the term "*de re* true" (correlatively, for the predicated truth of a *res* he proposes the term "*de re* truth").[1]

2.1. *De dicto* truth

De dicto true is the specific predicate of *dicta*, and more precisely of sentences and/or propositions.

The *de dicto* truth of a sentence is its correspondence to a state of things, precisely the correspondence to the state of things with which it deals. Examples of *de dicto* truth are:

(i) The mathematical sentence "3 is a prime number" is a *true* sentence.
(ii) The chromatic sentence "snow is white" is *true* if, and only if, snow is white (Conte 2004, 15).

2.2. *De re* truth

The *de re* truth commences from the ascertainment that it is false that "true" has only *de dicto* (semantic) sense; it is false that "true" is fitting only for sentences. On the contrary: the adjective "true" has other meanings with which it is predicatable for entities that are not sentences.

De re truths are either *eidological* truths or *idiological* truths.

2.2.1.Eidological truth

"True" in the eidological sense means a correspondence to an *eîdos*.

Eidological truth (*verità eidologica, eidologische Wahrheit*, *vérité eidologique*, *prawda ejdologiczna*) is an eidomorphic correspondence of an entity *x* to its *eîdos*.

[1] The concepts expounded above are fundamental concepts which govern the further development of Conte's essay (2004).

Other examples of eidological truth include:

(i) A theory that cannot be falsified is not a *true* theory;
(ii) A question that in principle does not allow for an answer is not a *true* question;
(iii) Only fulfilable obligations are *true* obligations;
(iv) An invalid norm is not a *true* norm (Conte 2004, 35–37).

2.2.2. Idiological truth

The second of the two types of *de re* truth is idiological truth.

The idiological truth (*verità idiologica*, *idiologische Wahrheit*, *vérité idiologique*, *prawda idiologiczna*) of an entity *x* is the identifying of *x* with an *idion*. Idiological truth is truth in relation to an *idion*.

Examples of idiological truth are:

(i) Novalis' *true* name is "Friedrich Leopold von Ardenberg";
(ii) Erik the Red is the *true* discoverer of America;
(iii) The *true* cause of Napoleon's death was not poisoning, but cancer (Conte 2004, 35–37).

3. Other forms of *de re* truth

Conte's concluding thesis on *de re* truth is: an entity *x* is true *de re* if, and only if, it is either eidologically true or idiologically true.

It is from Conte's conclusion that my contribution unfolds. It investigates what other forms *de re* truth may take on.

3.1. Eidetic truth

Are eidological truth and idiological truth the only forms that *de re* truth can take on? Do they exhaust the genus "*de re* truth"?

Not only are they not the only forms of *de re* truth, but eidological truth—as a concept in itself—refers to eidetic truth (*verità eidetica*, *eidetische Wahrheit*, *vérité eidetique*, *prawda ejdetyczna*), i.e. to the truth of the *eîdos*, as I will attempt to explain.

3.1.1. Eidetic *de re* truth

It is the concept of eidological truth as the correspondence of an entity to its *eîdos* which proves the concept of *eîdos* as essential.

I will use "*eîdos*" in the sense used by Edmund Husserl, the founder of phenomenology. Husserl posited that phenomenology is the science of essences, and not of facts. Husserl claimed to prefer as a name for essence the Greek term "*eîdos*" (in place of the etymologically similar term, "*Idee*"), and as an alternative to this term, the exquisitely German "*Wesen*". The corresponding Greek term for *Wesen* is *ousía* (in Latin, *essentia*), but Husserl does not interpret *Wesen* as *ousía*, but as *eîdos* (Husserl 1950, 10–15).

Hence in the *eîdos* we perceive *what* each entity is and *how* it is—in short, the *essence* of the being.

Eîdos as the essence of being is the truth of being itself, the truth of the essence—indeed, the essence of the truth as phenomenologically the same possibility of giving the self of true beings, as Heidegger explains (1988).

Eidetic truth is thus the truth of the *eîdos*: the *de re* truth par excellence. The *eidetic* de re *truth* (*verità eidetica* de re) is the original truth, on which all the other types of truth are founded.

The thesis that original truth is "of the thing" belongs to Aristotle, the founder of semantic truth—that is of the truth corresponding to the thought of the thing.

Aristotle wrote, "that which causes derivative truths to be true is most true. Hence the principles of eternal things must be always most true (for they are not merely sometimes true, nor is there any cause of their being, but they themselves are the cause of the being of other things), so that as each thing is in respect of being, so is it in respect of truth" (Metaphysics II, 1 993b 25–31).

Eidetic *de re* truth can be defined, therefore, as the truth of the being: it exhibits the essence of the being. Examples of eidetic *de re* truth include:

(i) *Ego sum via et veritas et vita*;[2]
(ii) True God from true God;
(iii) The true command commands its fulfilment;[3]
(iv) The true proposition affirms it is true;
(v) The true juridical norm implies itself to be axiologically valid.

[2] Jesus speaks of himself thus (John 14:6).
[3] Wittgenstein (1953, I §458).

3.1.2. Eidetic *de dicto* truth

Eidetic de dicto *truth*—the truth of judgement on *eîdos*—is the epiphenomenon of eidetic *de re* truth. The truth of judgement on *eîdos*, *de dicto* truth, is theorised on by Husserl, who calls it "*eidetische Wahrheit*"—eidetic truth *tout court*. I shall name this type of truth "eidetic *de dicto* truth" (*verità eidetica de dicto*), in contraposition to eidetic *de re* truth.

Having defined *eîdos* and how it can be learned, Husserl establishes some decisive correlations, writing:

> *In ersichtlicher Weise gehören nun zusammen die Ideen: eidetisches Urteilen, eidetisches* Urteil *(oder eidetischer* Satz*), eidetische* Wahrheit *(oder wahrer Satz); als Korrelat der letzteren Idee: der eidetische Sachverhalt schlechthin (als das in eidetischer Wahrheit Bestehende)* (Husserl 1950, book I, chap. 1, para. 6).

> It is now apparent that the following ideas belong together: eidetic judging, eidetic *judgement* or asserted eidetic *proposition*, eidetic *truth* (or true proposition); as correlate of the last idea: the eidetic predicatively formed affair-complex simpliciter (as what obtains in eidetic truth). (Husserl 1983, book I. chap. 1, para. 6).

The terms of eidetic *de dicto* truth are: eidetic judgment, eidetic proposition, and eidetic state of things. Eidetic *de dicto* truth is the truth of the judgement on *eîdos*.

Here are some examples of eidetic *de dicto* truth relating to juridical normativity:

(i) The proposition, "The *eîdos* of the juridical norm is that of a 'qualification scheme' [*Deutungsschema*]" is a *true* proposition;[4]
(ii) It is *true* that "Law is a community bond [*Gemeinschaftsband*]";[5]
(iii) The proposition, "*Eîdos* of the juridical norm implies validity, justice, effectiveness" is *true*.

[4] The thesis of the norm as "a qualification scheme" [*Deutungsschema*] is due to Hans Kelsen (1960).

[5] Law as "a community bond" [*Gemeinschaftsband*] is a thesis of Edmund Husserl's. Husserl writes: "Das Recht ist nicht ein Kulturgebilde, das als ein blosses Resultat des Zusammenwirkens miteinander verkehrender Menschen als eine 'Gemeinschaftsleistung' erwachts, wie Sprache, Literatur, Kunst, etc., sondern ein festes Gemeinschaftsband, Einheit schaffend, indem es Einheit des Willenbewusstseins herstellt, Einheit von Pflichten und Rechten etc" (Husserl 1973, 106).

3.2. Eidetic truth as the condition for eidological truth

Having perceived the *eîdos* in eidetic judgement, in relation to the eidetic state of things; having defined the eidetic *de re* truth, it is possible to formulate an *eidological truth*—in other words, that truth which is the correspondence between the *eîdos* already perceived and an entity.

For example: since the *eîdos* of the norm implies a judgement according to which in order for the norm to be such it must be valid, then an invalid norm is not a *true* norm. Eidetic truth is the condition of eidological truth, just as ontic truth is the condition of semantic truth.

4. Axiological truth

A paradigmatic example of *de re* truth in all the declensions investigated here is *axiological* truth (*verità axiologica*, *axiologische Wahrheit*, *vérité axiologique*, *prawda aksjologiczna*): the truth of the value, in the sense of *eîdos*, as an a priori fact, as Max Scheler explains. Indeed, axiological truth is said to be both like eidetic truth (*de re* truth of the value and *de dicto* truth of the judgement on value) and like *eidological* truth.[6]

4.1. Axiological *de dicto* truth

Firstly I will examine axiological truth as the truth of the judgement on the value which I name *axiological* de dicto *truth* (*verità axiologica* de dicto).

Axiological *de dicto* truth is the correspondence between the eidetic proposition and the eidetic value of the state of things. Examples of axiological *de dicto* truths include:

(i) The proposition, "Only a faithful friend is a *true* friend", is a *true* proposition;
(ii) It is true that "Only a brave warrior is a *true* warrior";
(iii) The proposition, "Only a just norm is a *true* norm", is true.

[6] Conte disregards the "axiological truth" because he considers it either an epiphenomenon or an allotrope of the "eidological truth".

4.2. Axiological *de re* truth

It is precisely axiological truth, as *de dicto* truth, that shows itself even more to be the epiphenomenon of the truth of *eîdos* (which, as previously mentioned, differs from the truth on *eîdos*) as *de re* truth. Scheler vigorously highlights this feature. Not only do propositions a priori not condition the a priori facts, the values, but they in fact generate the latter. It is the a priori facts that condition the true propositions a priori. Scheler writes:

> *Nicht also an die Sätze (oder gar an die Urteilsakte, die ihnen entsprechen) ist das Apriori gebunden, etwa als Form dieser Sätze und Akte (d.h. an «Formen des Urteilens», aus denen Kant seine «Kategorien» als «Funktionsgesetze» des «Denkens» entwickelt); sondern es gehört durchaus zum «Gegebenen», zur Tatsachensphäre, und ein Satz ist nur insofern a priori wahr (resp. Falsch), als er in solchen «Tatsachen» sich erfüllt* (Scheler 1954, 69–70).

> Hence the a priori is not dependent on *propositions* (or even on acts of judgment corresponding to them). It is not dependent, for example, on the form of such propositions and acts (i.e., on "forms of judgments", from which Kant developed his "categories" as "functional laws" of "thinking"). On the contrary, the a priori belongs wholly to the "given" and the sphere of facts.
>
> A proposition is only a priori true (or false) insofar as it finds its fulfilment in such "facts".

The propositions are true a priori because the very facts in which they materialize are a priori. So, the a priori propositions appear merely as an image in which the a priori facts—values—are reflected. Logical truth necessarily presupposes the ontological truth of the value—*the axiological* de re *truth* (*verità axiologica* de re).

Axiological *de re* truth is the truth of the value, what the value *is*.

Examples of axiological *de re* truth include:

(i) the *true* juridical norm needs to be *just*;
(ii) the *true* juridical norm implies itself to be *certain*;
(iii) *bravery* is typical of a warrior.

4.3. *De re* axiological truth.

As eidetic truth gives way to eidological truth as the correspondence of an entity to its *eîdos*, thus eidetic axiological truth gives way to eidological truth in value. Here there is also a correspondence of an entity to its *eîdos*: value.

Here are some examples of *de re* axiological truth (*verità de re axiologica*):

(i) Only a faithful friend is a *true* friend;
(ii) Only a brave warrior is a *true* warrior;
(iii) Only a just norm is a *true* norm.

4.4. Eidetic *ought* deriving from truth

An essential law of value is: a positive value must be, a negative value must not be. Values are terms of *idealen Sollens* in Scheler's lexicon, or of *eidetischen Sollens* (*dovere eidetico*, *eidetic ought, devoir eidétique*, *powinność ejdetyczna*) in my lexicon. The correlation between value and eidetic *ought* shows the nomogenic character (*nomogenico*, *nomogenisch*, *nomogénique*, *nomogeniczny*) of value. The nomogenic character of value is also shown at a semantic level.

As Scheler notes, the term "true" takes on an axiological connotation if it refers to a value. Axiologically, true means "authentic" (*echt*). Scheler writes,

> *In Fällen wie ein "wahrer Freundsrat", ein "wahrer Freund", der "wahre Gott", steht "wahr" für "echt" im Gegensatz zu "unecht" — ein Begriff, der die Wertwesen voraussetzt. "Echtheit" ist Selbstgegebenheit des Wertes im Unterschied zur Werttäuschung. Wahre Werturteile sind auf das Fühlen echter Werte fundiert* (Scheler 1954, 196).

> In phrases like "the true advice of a friend", "a true friend", and "the true God", the term "true" stands for "genuine" in contrast to "not genuine"—a concept that presupposes value-essences. "Genuineness" is the self-givenness of the value, in contrast to value-deception. True value-judgments are founded in the feeling of genuine values.

Note that the term "*echt*"—authentic—derives from "*ehe*", which in Old High German means "law" ("*Ehe*" in modern German means "marriage").

This is how the semantic sheds light on the essential normativity of value.

The correlation between value and eidetic *ought* makes it possible to predicate on the eidetic truth of eidetic *ought*. Here are some examples:

(i) a *true* friend *must* be faithful;
(ii) a *true* norm *must* be just;
(iii) a *true* norm *must* be certain.

4.5. Thetic duty deriving from truth

Just because there is an eidetic *ought* according to which "a warrior must be brave", and "a norm must be just", a warrior can be *required* to be brave, a norm to be just: *deontic-thetic duty* (*dovere*, *Pflicht*, *devoir*).

The essential link between eidetic *ought* and deontic-thetic duty is evident, as Husserl (1984) and Scheler (1954) clearly explain.

5. Philosophical salience of *de re* truth

The concept of *de re* truth is theoretically salient for philosophy. Indeed, it makes it the passage from what is *true* to *truth* possible, revealing the deep stratification of truth itself. The different types of truths investigated, since they are being's ways of giving itself and naming itself, are not unrelated, but relate to each other: specifically in a transcendental relationship. One is the condition of the other, where supremacy belongs to the truth of *eîdos*, eidetic *de re* truth.

6. Salience of *de re* truth for normative philosophy

It is now possible to answer the initial questions that innervated the development of my work. The two questions are: In relation to norms, anapophantic semiotic entities—that is entities whose "*semantically*-true" term is not predicatable—is it possible to predicate other terms of truth? Which terms of truth can be referred to norms? I will answer the two questions by revealing the fecundity of *de re* truth for normative philosophy.

The concept of *de re* truth is important for the truth of norms, for deontics and for the value of norms.

6.1. Truth of Norms

If in relation to norms, semiotic anapophantic entities, it is not possible to predicate semantic truth; on the contrary, it is possible in relation to them to predicate *de re* truth in all its forms: that is, as *eidetic truth*, as *eidological truth*, as *axiological truth*—as the examples provided in the text show.

6.2. Apophanticity of deontics

If in relation to norms *de re* truth is predicatable, then the formulation of apophantic deontics is possible.

Indeed, if apophanticity is the condition of truth, and if in relation to norms a truth—*de re* truth—is predicatable, it is clear that positive deontics, apophantic deontics, is thinkable and possible.

6.3. Value of norms

Axiological truth sheds light on other important aspects of norms.

The normative character of value highlights both the genesis of eidetic *ought* deriving from value, and the foundation of the deontic-thetic duty in eidetic *ought*.

By means of axiological truth, value reveals itself to be the *constitutivum* of moral norms, and one of the constitutive dimensions of juridical norms.

7. A-létheia

De dicto truth, *de re* truth, eidetic truth, eidological truth, idiological truth, axiological truth—is this phenomenology of the names of truth concluded and conclusive?

Of course not. Indeed, only "Truth unveiled by time" can be represented.[7] Being, truth reveals itself by hiding itself. Its name is *a-létheia*.[8]

[7] "Truth unveiled by time" (1645–1652) is the name of a sculptural group of Gian Lorenzo Bernini's exhibited in Galleria Borghese in Rome. "Truth unveiled by time" is also the name of the great painting (1743–1744) by Giambattista Tiepolo, kept in the Civic Art Gallery of Vicenza. The two works of art show the image of the inexhaustibility of the self-givenness of truth in time.

[8] Heidegger (1988).

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OLGIERD PANKIEWICZ

Reduction to Objectivity in Law

1. The objective acpect a legal regulations

Let us consider an exemplary prescription, say art. 415 of the Polish Civil Code (*Kodeks cywilny* 1964), which states, "He who through negligence has inflicted damage on another person is obliged to redress it". Keeping in mind this regulation, or any other more convenient one, will be helpful while going through this text.

The law's objectivity can be understood in many ways. From the point of view of radically sceptical theories, an objective attitude is impossible. The more objectively oriented programs such as pragmatism or argumentation theories believe that the only objectivity that can be achieved is based on a common opinion. I assume just the contrary—that objectivity consists in independence from anyone's thought.

This assumption does not determine where to seek for the objective essence in the phenomenon of law. For example, Adolf Reinach showed a century ago that civil law has its a priori foundations, such as obligation and right. That they are a priori means that in this perspective one can analyse an idea of law as being unchangeable and independent from factual regulations (Reinach 1983). The results of such an examination are not affected by potential nonaccordance with facts of law. Similarly, the factual law is not necessarily connected to the a priori legal foundations, though if it finds itself too far from these foundations, it will lose its integrity. Hence analyzing the legal a priori does not mean forgetting about problems of law, since the results are intended to serve as a frame of reference for the lawmaker.

Nevertheless, I will try to show that the feature of objectivity in law is not limited to its ideal and a priori essences. There are considerable reasons to ascribe this feature to legal facts—the given regulations construed and applied in the everyday practice of law. Apart from the factual characteristics of law

which stem from its being created and applied in a given time and space, regulations are linked to the factual world in the way that they govern social facts. Legal cases need to be dealt with objectively, because courts must give rulings. When the law is vague there is always a need for its clarification, since it affects essential values of the regulated realm. Citizens should be able to know and understand laws which affect their existence.

Analyzing the objective contents of factual law seems to be a useful task, but such analyses should not be constrained to the factual sphere. If there are indeed such objective contents, then from the phenomenological standpoint the regulations are linked to the regulated realm not only on the level of facts, but also in the eidetic sphere. Therefore I believe that each factual regulation and each regulated fact can be a starting point for an eidetic analysis of its particular essence.

Our first intuitions about law refer to subjective essences. When we encounter law in our business, on one hand we tend to ask the following kinds of questions: "What ought I do?", and "What can I feel entitled to, and demand?" On the other hand, questions like the following also arise: "What are the people behind the law demanding of me, or forcing me to do?", and "Do they intend to give me anything?" The first thoughts reflect the subjective side of the one to whom the law applies, whereas the latter ones point to the subjective side of these who made the law. The will to follow or violate the regulation might be added, and then there seems to be nothing left in law. Since this subjective realm splits into the area of making law and the area of being subject to it, and since there are people on both sides, what matters is their intentions and impressions—the social dialogue.

However, this dialogue is about facts, and these expectations, intentions, and impressions refer to objective things. When a businessman reads a new set of rules limiting freedom of contract, he worries about his business. And if the law limits the freedom of entering into commercial contracts too much, one would say it does not observe the reality of commerce. When a regulation imposes a duty which is impossible to fulfil, we say it is unrealistic. It is said that such laws do not correspond with the truth about the regulated realm. Nevertheless in some way it ought to, since this realm is supposed to follow the law. Not only there is something objective in law; one also notices that behind the two different subjective areas, i.e. the area of making law and the area of following it, lies the same state of affairs to which they both refer.

2. The reduction of theoretical categories

My intention to analyse the cited regulation in the way in which it is given—as an individual legal fact—encounters an obstacle of theoretical thinking. It is usually thought that to ask an essential question about law, one needs to stop looking at the variety of its elements, and find the category they all come within, such as *rule*, *norm*, *prescription*, or *language expression*. Provided that such a category is adequate, in this way one would characterize the feature that accompanies every possible creation and perception of law. Let me abandon this approach since it cannot do more than describe the environment of the legal dialogue under discussion. It could only provide me with the explanation that the lawmaker's situation is defined by language forms and the normative qualification of the results of his work. Respectively, it could be said that citizens perceive law by means of language and through its normativeness. However, there is no need to repeat time and again that legal expressions are of a normative kind.

The essential question should ask about the *what* of the lawmaker's or citizen's act, while its normative character can be taken for granted, or in other words, reduced from the examined phenomenon. At this stage of the examination we cannot yet reduce the linguistic form of law. It is necessary for us to perceive the analysed provision. Reading the aforementioned rule again now shows that it describes a state of affairs. The theoretical claim that rules cannot describe anything does not apply. After the reduction has been made, the essential content of law's phenomenon is simply a state of affairs. Moreover, a specific link between this state of affairs and the factual state of affairs in the regulated realm can be noticed. Even if logically, law does not have a truth value, it is subject to a kind of evaluation with respect to its correspondence with reality.

3. The reduction of linguistic form

After the reduction of normativeness, this provision should be considered as an expression, the meaning of which constitutes the specific state of affairs in which a person, who through his negligence has inflicted damage on someone else, is obliged to redress this damage.

Now the linguistic form of expression of the analysed phenomenon can also be left behind. This is necessary to consider the very essence of this phenomenon. Like any other, this state of affairs is a compound of a variety of el-

ements. These are persons, their behaviours, and legal qualifications of these behaviours—such as, for example the negligence described in the regulation analysed here. Furthermore, there are elements such as damage, the situation of being obliged to redress this damage, the obligation itself, and the redressing itself. And finally, the expressed state of affairs includes this relation between the redressing and inflicting, namely that the person who by his fault inflicted damage is obliged to redress it. Thus it can be stated that if the elements of law include descriptions of states of affairs, the meanings of these descriptions are the states of affairs themselves.

4. The contents of the legal state of affairs

Let me explain that I am not trying to reconstruct or foresee the effect of realization of the rule described. Trying to analyse an element of law as it is, I must accept the moment of the directive, expressed with the words "is obliged". Law should not be confused with the foreseen situation caused by obeying the law. Perhaps it needs to be explained here that the aforementioned reduction referred to the general category of norms imposed on legal expressions, and not to normative moments of the law. However, since the normativeness remains as an element of the analysed state of affairs, its elements are obviously not homogenic. Elements existing spatio-temporarily here become twisted up with purely legal constructs. Some of these objects, such as property, loss, persons, processes, and events, can be found in the real world. Naturally the analysed expression does not mean facts, and we are not talking about facts. These are just real phenomena which normally occur in the factual world, and which may occur in future. There are also other, nonreal, and essentially different elements, such as negligence, obligation, and legal personality (to name a few), enclosed in the very same state of affairs.

Let us also note that this state of affairs includes contradictions like inflicting damage and redressing it, like the negligence and the obligation of the faulty person to make things good. These elements could not coexist in a single real or ideal state of affairs. For this reason, the analysed phenomenon should be considered neither as a model nor as a project for the future factual world. It is something specific: it both refers to facts and abstracts from them. And it has to be added that in the very centre there is a tension between the things which can occur in the factual world independently from the law (such as owning property, or damage), and the things with which the law tries to influence facts (like legal personality and liability).

What connects these contents into a compound state of affairs is a creative intention which constitutes the state of affairs analysed. This creation combined elements such as recapitulations of complex phenomena normally found in the real world (such as the fault), inventions of new objects (like obligation), and modifications of real things into legal objects (such as personality). If such contradictory compounds exist, it is only due to somebody's intentions, and they exist as finished entities in the way in which they were intended. One notices a peculiar feature: having been completed, the intentional state of affairs must be incomplete—it must include certain undefined moments. Roman Ingarden named such compounds "purely intentional objects" (Ingarden 1961, 1–62). Here, for example the time and the mode of redressing the damage is not defined. Yet if this state of affairs exists only so far as it has been thought of, then it cannot be different from what it is. The undefined moments should therefore not be filled in, but treated as boundaries of the legal (intentional) state of affairs.

In particular, each of these elements has been defined in terms of its level of generality. The beginning of the cited expression, "He who", points to everyone capable of legal liability. The words "has inflicted damage on another person", with the lack of any further specification, means that the reference is to any damage, provided that it can be ascribed to someone. The words "through negligence" imply that the action causing damage must be wilful, or at least it must be possible to foresee the result. All other higher and lower levels of generality are undefined, and these undefined areas are indifferent to the essence of the analysed state of affairs. On the contrary, within the defined areas one cannot substitute elements of the state of affairs by any others. Changes within this scope would cause a loss of individual characteristics of this state of affairs, and establish a new state of affairs. In phenomenological terms, through free imaginative variation, one establishes which elements cannot be replaced and are essential.

The established essential content of the analysed phenomenon includes the dependence that every person capable of legal responsibility is obliged to redress the damage he has inflicted by his negligence. The fact that only the negligent person is obliged is also an essential feature. The obligatory redressing of any negligently inflicted damage belongs to the essence as well. One could easily think of different solutions. The damage could be redressed by a specialized state entity, or by long-term prisoners. However, since the negligent inflictor of damage is the one specified in the analysed state of affairs, the duty to redress can not be imposed on any other person. This dependence, that an infliction of damage results in an obligation on the negli-

gent person, may be called responsibility. It is defined by an unchangeable relation between the everyone, and the one who is at fault in inflicting the damage, the damage itself, and the redressing. This relation combines elements which can stand in various interrelations (persons, deeds, property, damage) and orders them in one, unambiguous configuration. Analogically it can be imagined that the damage is left not redressed at all. The damage could also be defined otherwise, for instance only as damage in material property; or only as direct loss, excluding lost earnings. When compared to these possibilities, the option of redressing all damage shows that the act of safeguarding against damage is crucial in the analysed state of affairs. It is safeguarded here that a wide range of goods are protected against potential damage.

The analysed dependencies definitively establish which elements belong to the state of affairs and which do not. For example, the durability of material and nonmaterial values of property and other goods is protected, while the loss is neither safeguarded against nor excluded. These dependencies characterize relations between elements as well. Note the two identity relations: the person inflicting damage and the person redressing it, are the same person; the damage inflicted is the damage redressed.

It is characteristic that changeable elements are bound and ordered by unchangeable dependencies. The unambiguity and unchangeability of these dependencies allows us to define the content of the state of affairs. This leads us to the following observation: any essential element, relation, and the whole state of affairs itself is defined as to its specific qualities, or in other words, as to what it is. One usually compares the law with the facts at this point, since facts are easily described in terms of such qualities. Accordingly, thanks to these qualities, regulations can be applied as models to the world of facts.

5. The constitutive role of values

It seems that qualities are primary and constitutive in the state of affairs; the state of affairs seems to be founded on qualities. Qualities are simpler than relations or dependencies, which are defined in terms of other elements. Qualities are also simpler than the described elements, which usually are compounds of other elements. This argumentation may be disturbed by situations where a quality covers the whole of a dependency, or the whole of a state of affairs. Are not qualities then the most, rather than the least, complex essences in the state of affairs? Moreover, some qualities can only be

found through establishing that certain elements of the state of affairs are ordered in a given way, through establishing a dependency. One could consider it paradoxical to claim that an essence which was established through an analysis of elements, relations, and dependencies of a state of affairs is primary and constitutive in this state of affairs. Yet it is not a paradox because the sequence of examination is not the same as the order of founding one essence upon others. In a state of affairs like this, one at first encounters the elements of its content, then their relations and dependencies. Only when I have an insight into the state of affairs can I ask what are its elements, relations, and dependencies like. A quality that covers a complex dependency is always as simple as the answer to the question about what is this dependency like, even if sometimes it is possible to give more than one answer to such question.

I come to the conclusion that qualities point at a relation between the legal state of affairs and external phenomena of values. These phenomena are at the same time constitutive for the law's individual essence, and independent from it. They are not included in the phenomena of legal states of matters, but can be determined indirectly through the examination of their qualities.

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ANTONIO INCAMPO

Rules from Truths, Truths from Rules

Es muß zu aller Reihe der Bedingungen nothwendig etwas Unbedingtes [...] geben.

There must necessarily be for every series of conditions something which is unconditioned.

Immanuel Kant[1]

1. Where does a rule come from? Rules from necessary truths

1.0. Everyone knows this rule deduced from natural necessity: "If you want to boil some water, you have to heat it to 100°C". This rule is entailed by a judgment whose truth is necessary: "Water boils at 100°C".

How are moral or legal rules related to truth? My question is suggested by the following note in Wittgenstein:

> *Jede Vorschrift kann als Beschreibung, jede Beschreibung als Vorschrift aufgefaßt werden.*
>
> Every rule can be conceived as a description, every description can be conceived as a rule (Wittgenstein 1964, 59).[2]

1.1. The condition that a promise cannot be a promise of something past, but only of something future, is a typical example of a necessary condition for the existence of an act such as a promise. Without this condition the promise does not make sense, and is impossible. There is no sense in "I promise that I have been faithful"; whereas there is sense in "I promise to be faithful".

[1] *Kritik der praktischen Vernunft* (Kant 1914, 48).

[2] The English translation is mine.

A promise of something in the past is a pragmatic paradox, in which the very grammar of the promise as a speech act is offended.

1.2. Some necessary conditions of legal validity include, for example, those elements that Emilio Betti calls "*essentialia negotii*" (i.e. the elements necessary to constitute a particular legal act).[3] The contracting parties, the consent and the subject matter of the contract are some elements necessary in constituting a rule.

1.3. There are at least two different kinds of necessary conditions of rules:[4]

(i) Conditions that derive from the essential *structure* of acts;
(ii) Conditions that derive from the essential *function* of acts.

There is a crucial difference between these two kinds of conditions, as the example of the promise shows. The necessary validity-condition of a promise is not only that the promise must be a promise of something future, and not something past, but also that the promise must not be untruthful. If the promise were universally untruthful, promising would not be possible.

1.3.1. These are both necessary conditions, but they are different with regard to the consequences. They both derive from the idea [*eîdos*] of the act of promising. However, on one hand the first necessity (promising something future) has no moral implications; whereas on the other hand, the second necessity (keeping a promise) has.

1.3.2. Is there a link between these different kinds of necessities and the difference between the structure and the function of the promise? Can we talk about essential functions?

It is essential for a lamp to light, not to decorate. The ability to light is the essential function of a lamp, and without this function it would not be a lamp.

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[3] "Gli *essentialia negotii* sono [...] cause essenziali del negozio, elementi necessari a costituire un negozio di quel determinato tipo che si considera, cioè tali che senza di essi un negozio di quel tipo non potrebbe sussistere" (Betti 1960, 186).

Emilio Betti's theory of "*essentialia negotii*" derives from the concept of "*substantialia contractus*" that we find in the *ius commune*. Here is Francesco Mantica's definition: "Quare substantia contractus dicitur, principalis ipsius essentia, qua submota contractus nullius est momenti. [...] Ea dicuntur *substantialia contractus*, sine quibus contractus non potest in esse deduci, et quae debent intervenire tempore contractus, et si non interveniant contractus non perficitur" (Mantica 1631, I, 12, 2–14).

[4] For a conceptual crossing from rules to conditions, and from conditions to rules, see Conte (2001; especially 926–928).

The capability of decorating is not an essential function. However, both lighting and decorating are surely functions of the lamp, and not its structure.[5]

1.3.2.1. The condition by which a promise must be a promise of something future and not something past is a validity-condition which reflects the structure of an act. The promise, in fact, is structurally a way (a "speech act") of submitting to an obligation, and an obligation always refers to something in the future.

Is there any relation between structure-rules and judgments of truth? Conditions that derive from the essential structure of an act are generated by judgments in which the relation between subject and predicate is the same as the relation of those judgments which Kant calls "analytic". The following is an analytic proposition: "Every promise is a way of submitting to an obligation".[6] There is nothing more contained in the predicate than what is already contained in the idea of the subject. Now, the condition by which a promise must be a promise of something future and not something past is entailed by the above analytic judgment.

1.3.2.2. The duty of keeping promises is a condition of the functional validity of the promise. This duty is one of the "perfect duties" (*vollkommene Pflichten*) exemplified by Kant in his doctrine of the categorical imperative. Making a promise without the intention of keeping it is possible, but cannot be a universal rule (Kant 1903, 422).[7] Promising in such a case would not be possible, for its function would fail. No one would ever believe in a promise anymore. Now, the function of a promise is to satisfy the interests of the promisee, and in the second place to build the promisee's trust.[8]

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[5] On the significance of "function" in "constitutive rules", see Incampo (2003).

[6] J.-L. Gardies' definition of "promise" is: "Promettre est une manière de se soummetre à une obligation" (Gardies 1987, 54). This definition repeats J. R. Searle's words: "The essential feature of a promise is the undertaking of an obligation" (Searle 1969, 60).

On the problematic relationship between promises and obligations, see Żełaniec (1992).

[7] For Searle's "sincerity rule", namely that "to promise (that A) counts as an expression of intention (to do A)", see (Searle 1969, 65).

[8] The same consequence ensues when the promisee is not interested in the object of the promise. As G. H. von Wright writes, "Even if he could make me Emperor of China, his words would fail to constitute a promise with me, i.e. with the writer of this essay on promises. For I am not in the least attracted by the prospect and my attitude to it would not change as a consequence of its being held forth to me as the object of a promise. I should *refuse* to enter into the relation of promisee to promiser with my interlocutor" (Wright 1962, 284).

This also occurs if you promise something that the promisee does not approve of. According to St. Thomas Aquinas, it is vain, for example, to promise God that you will lead a wicked life:

In his study of the conditions of functional validity, Adolf Reinach asserts that when the claim of a service becomes impossible, then the "claim and obligation have become incurably ill" ("*Anspruch und Verbindlichkeit sind unheilbar krank geworden*") (Reinach 1913, 723). The claim is extinguished because the function fails. The effects of performance (*Erfüllung)* become impossible, and the obligation is not a real obligation anymore.[9]

1.3.2.2.1. The legal value of performance is a general condition of the functional validity of legal acts. The conditions of validity of an agreement are those which are linked to the effect or to the legal value of the performance, such as the terms of payment (as in paragraph 1498 of the Italian civil code, *Codice civile* 1942) and the terms of delivery (ibid., paragraph 1470) in the act of selling. The rules which establish the typical legal effects of the contractual fact are legally necessary. This is about conditions derived from the "causa"[10] of a legal act. The "causa" is the sense of the performance act (*Erfüllungsgeschäft, Leistungsgeschäft*) in which the subject's interest is fulfilled. It is the "*causa finalis*" of the contractual fact. The necessity of the rule that prescribes the essential effects of a contractual act is the necessity of the existence of a fact which may in *civil law* be called the "good"—in this case, the "*legal* good" (which in *common law* may be "property"). The value of the legal fact resides in the functional meaning of the legal effect. The legal effect is a value, because it is the function that the legal fact has towards the community.[11]

1.3.2.2.2. The function of an act establishes an eidetic relation with the structure. If the structure fails, the function fails too; if the function fails, the

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"Vana esset promissio, si aliquis alicui promitteret id quod ei non esset acceptum. Et ideo, cum omne peccatum sit contra Deum; nec aliquod opus sit Deo acceptum nisi sit virtuosum: consequens est quod de nullo illicito, nec de aliquo indifferenti debeat fieri votum, sed solum de aliquo actu virtutis" (Thomas Aquinas 1882, II-II, qu. 88, a. 2).

The necessary acceptance by the promisee is an evident sign of the social institutional character of the promise, for which, see Oswald Ducrot (1972, 72).

[9] I think that the difference between *structure* and *function* is the same as exists between Reinach's "logische Richtigkeit" and "Gegründetheit". See Reinach (1913, 809).

[10] The concept of "*causa*" is comparable to the concept of "consideration" in Common Law.

[11] As Angelo Falzea writes: "Il fatto giuridico non è puramente e semplicemente un fatto comunque assunto, ma un fatto che ha una ben definita rilevanza sociale e pratica, un fatto che rivela ovvero incide su determinati interessi della vita umana. La sua analisi deve andare ben oltre il livello meramente strutturale e fenomenologico e deve tendere a mettere in chiaro le fondamentali prese di posizione e categorie valutative del diritto di fronte alle varie classi di situazioni del mondo esterno" (Falzea 1997, 738).

structure too fails. Only when structure and function are present together, do we have a necessary and sufficient validity-condition for an act.

1.3.2.2.3. Coming to the main question: what kind of relation is there between function-rules and judgments of truth? Conditions which derive from the essential function of an act are generated by judgments in which the relation between subject and predicate is the same relation as found in Kant's "a priori synthetic judgments". An a priori synthetic judgment is, for example, the one in mathematics that states, "the straight line is the shortest line between two points". It is a universal and necessary judgment, because its denial is always false; it is an a priori judgment, because it does not depend on empirical experience, but rather it sustains itself; it is a Kantian synthetic judgment, since it does not express in the predicate all that is contained in the idea of the subject: in the idea of a "straight line" there is nothing more than the line being straight. The functional validity-conditions assume an a priori synthetic proposition. An example of an a priori synthetic proposition is: "The promiser's obligation is a means of awakening the promisee's trust". This proposition is the basis of the necessary validity condition which is the duty of keeping promises. It is a synthetic proposition: it relates the concept of "obligation" (of the promiser) to the different concept of "trust" (of the promisee). The concept of obligation expresses the structural idea of the promise; the concept of trust identifies a specific function of the promise (the interest of the promisee), which is fulfilled only by the duty of executing the promise. The relation between the promiser's obligation and the promisee's trust is a necessary relation or eidetic relation (Kantian a priori).

2. Where does a truth come from? Truths from possible rules

2.1. There are conditions that are not related to the idea [*eîdos*] itself of an act, but to rules which are extrinsic to that idea. The first kind of condition expresses necessities; the second kind "merely possible" conditions which depend on "merely possible" rules. This second kind of duty determines truths, which in their turn, are possible and not necessary. Paragraph 32 of the Italian criminal code (*Codice penale* 1930), before reform 689/1981, set a validity-condition on the act of making a will, which excluded from valid wills those wills made by a subject sentenced to life imprisonment. This is a condition that does not derive from the idea of the will; rather, it derives from a rule which sets *ab extra* a validity condition regarding the idea of the will. It

is a condition that sets a particular function on the will and on its potential impossibility: the function of an additional penalty. The function of an additional penalty associated with the will is an inessential function of the will. An additional penalty is not a necessary function of a will. Wills, in accordance with their *eîdos*, are not there to punish those imprisoned for life by barring them from the possibility of drafting a will. In Italy, in fact, this additional penalty was eliminated by the reform of 1981 (Romano 1995, I, art. 1–84, p. 247).

2.2. An example of possible rules on legal validity are the "*accidentalia contractus*" (*Tractatus de contractibus*, XVI–VII century), or those contractual elements which do not exist unless the parties to the contract desire them. They can, but need not, be put into the contract if desired. The absence of these elements does not prevent the contract from being a contract, nor does their absence transform the contract in an irregular one. These elements do not belong to the basic idea of the contract, and the absence of these elements does not cause irregularity, since irregularity takes place when there is a deviation from those conditions ("*notissimi termini*"[12]) of a contract which are always asserted and which are not created only by desire.

2.3. With all the above mentioned extrinsic conditions, there is an inversion in the relation between rules and truths. Now we do not have rules from truths, but truths from rules.

2.3.1. The conditions that derive from the non-essential function of an act are expressed in Kant's a posteriori synthetic judgments. The following judgment is an a posteriori synthetic judgment: "Ernesto's shirt is black". The truth of this judgment is "merely possible", and not necessary or universal. The denial of this judgment, in fact, is not necessarily false. This kind of judgment requires experience. It is a synthetic judgment: there is more in the predicate than what is simply contained in the subject. The idea of a "shirt" does not include its black colour. The condition which prevents the validity of a will made by a subject sentenced to life imprisonment constitutes an a posteriori synthetic proposition: "The loss of the capability of making a will is an additional penalty". It is a synthetic proposition, because it relates the concept of the will to the different concept of penalty. The concept of an additional penalty is not in the definition of will. The concept of penalty indicates

[12] This expression is from Papinianus in *Digesta*, 16.3.24.

an inessential function of the will which results in the incapability of anyone who has been sentenced to life imprisonment of making a will. This can only be ascertained by an empirical examination (an a posteriori examination) of the particular Italian legal regulation which was in force before the 1981 reform.

2.3.2. There are conditions which derive from the inessential structure of an act. The fact that a will is hand-written, for example, is not an essential structure of the will itself. The holographic will is a kind of will which does not derive from the idea itself of a will. There may indeed be legal systems which do not provide holographs. The holograph is not necessary; what is necessary is the condition that it must be undersigned by the testator. What kind of condition is this? It is a "possible" validity-condition, because it depends on the existence of a particular rule (for example, paragraph 602 of the Italian civil code); at any rate, it expresses a necessary duty regarding the idea of a holograph. It seems that a condition of this kind assumes the relation between subject and predicate of a judgment which does not appear in Kant's doctrine of judgments: an a posteriori analytic judgment. "Every handwritten will is undersigned by the testator": this is a necessary judgment in which the predicate does not tell more than what is already in the idea of the subject; what is not necessary, if anything, is the idea itself of an holograph, because it is not a necessary idea of a will. It is an a posteriori analytic truth.

The legal institutions, founded on rules, generate an a posteriori analytic truth. This truth is a possible truth from possible rules.

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STEFANO COLLOCA

A priori versus a posteriori in Axiotics

"God can certainly make a circle into a square,
but He cannot create a square circle"

Robert Challe, *Difficultés sur la religion*[1]

"Whatever implies contradiction does not
come within the scope of divine omnipotence,
because it cannot have the aspect of possibility.
Hence it is better to say that such things cannot be done,
than that God cannot do them"

Thomas Aquinas, *Summa Theologica*[2]

1. Axiotics

Adolf Reinach, in the introduction entitled *Die Idee der apriorischen Rechtslehre* to his book *Die apriorischen Grundlagen des bürgerlichen Rechtes*, advises:

> *Wir beschränken uns im folgenden auf die Darlegung einiger apriorischer Grundlagen des bürgerlichen Rechtes. Wir sind aber der Überzeugung, dass auch die anderen rechtlichen Disziplinen, insbesondere Strafrecht, Staats- und Verwaltungsrecht, einer solchen Grundlegung fähig und bedürftig sind.*
>
> I will here deal only with the a priori grounds of civil law. However, I believe that other legal domains (in particular criminal law, public law, and administrative law) also admit such an a priori foundation, and need it (Reinach 1953, 13).[3]

[1] Challe (2000).

[2] Thomas Aquinas (1911), I, q. 25, a. 3: "*Ea guae contradictionem implicant, sub divina omnipotentia non continnentur: quia non possunt habere possibilium rationem. Unde convenientius dicitur quod* non possunt fieri, *quam quod* Deus non potest ea facere."

[3] I am grateful to Francesca De Vecchi for reminding me of this passage. See also Di Lucia (1997), García Máynez (1953), and Kelsen (1911).

This passage of Reinach's, suggesting the presence of a priori grounds of public law, encourages me to investigate, in particular, the a priori grounds of *axiotics*,[4] i.e. the a priori grounds of the theory of validity [Polish: *obowiązywanie*, *ważność*; Italian: *validità*; German: *Geltung*, *Gültigkeit*] of norms. The aim of this paper is to start to investigate the possibility of *a priori axiotics*.

2. The concept of the axiotic metanorm

If the subject of axiotics is the validity of norms, the key concept of axiotics is the concept of a metanorm (or metarule) on the validity of norms. Amedeo G. Conte calls the metanorm (or metarule) on the validity of norms an "axiotic metanorm" (Conte 2008).

2.1. Metanorms on the *validity* of norms versus metanorms on the *production* of norms

I believe that the concept of an *axiotic* metanorm—a metanorm on the validity of norms—is much more fruitful than the concept of a metanorm on the *production* of norms, because the concept of a metanorm on the production of norms can only explain the validity of those norms which are *thetically* produced—that is, it can only explain the *thetical* [*tetyczny*; thetica; *thetisch*] validity of norms.

Yet not all norms are generated by a thetic act of production: for example, customary rules have athetical validity[5]—they are not the product (*wytwór*) of a lawgiver. ("*Wytwór*" is a key term in the philosophy of Kazimierz Twardowski [1866–1938]).

So then, metanorms on the *production* of norms are only a *species* of the *genus* of axiotic metanorms.

2.2. An example of an axiotic metanorm on the athetical validity of norms

2.2.1. We can observe that athetical validity itself is also regulated by axiotic metarules: in several legal systems, the lawgiver thetically lays down the con-

[4] Axiotics is the science of the validity (*not* of value!) of norms. The German term "*Axiotik*" (and its xenonyms—Polish: "*axiotyka*"; English: "*axiotics*"; Italian: "*axiotica*") was created by Amedeo G. Conte (Conte 2001).

[5] On athetical validity, see Conte (1988).

ditions of the (athetic) validity of the customary rules, but he does not thetically create the customary rules themselves.

2.2.2. In the Italian legal system, for example, the first article of the *Disposizioni sulla legge in generale* is an axiotic metarule, which sets a condition on the validity of customary rules (*usi*: customs):

1. Indicazione delle fonti. 1. Sono fonti del diritto:
1) le leggi;
2) i regolamenti;
3) le norme corporative;
4) gli usi.

1. Indication of sources. 1. The following are sources of law:
laws;
regulations;
corporative norms;
customary rules.[6]

3. A priori truths versus a posteriori truths in axiotics

A study of a priori axiotics would have two related aims:

(i) the individuation of the (necessary) a priori truths, which are common to all possible legal systems (these a priori truths on the validity of norms constitute the *hardware* of legal systems);
(ii) the acknowledgement that several features of actual legal systems are not (necessary) a priori truths, but are (contingent) a posteriori truths (these a posteriori truths on the validity of norms constitute the *software* of individual legal systems).

Let us consider three examples of a priori truths in axiotics, and three examples of a posteriori truths in axiotics.

[6] *Codice civile, 16 marzo 1942* (Civil Code, 16 March, 1942).

3.1. Three examples of a priori truths in axiotics

3.1.1. *First example of a priori truth in axiotics*

Every legal system has a basic norm [*norma podstawowa*; *norma fondamentale*; *Grundnorm*].

3.1.2. *Second example of a priori truth in axiotics*

Axiotic metarules are constitutive rules.[7]

3.1.3. *Third example of a priori truth in axiotics*

A more complex example of a priori truth in axiotics is the following: Since axiotic metarules are genealogically superior[8] to the rules whose validity they regulate, no incompatibility is possible between a rule R1 and a metarule M1 which regulates its validity. If R1 is not in-conformity-with M1, then R1 is not valid and *is not a rule at all* (Kelsen 1960, 212).

Let us comment on this a priori truth. Kelsen, in *Reine Rechtslehre* (1960), deals with this topic, arguing:

> *Zwischen einer Norm höherer Stufe und einer Norm niederer Stufe (das heiât zwischen einer Norm, die die Erzeugung einer anderen bestimmt, und dieser anderen Norm) kann kein Konflikt bestehen, da die Norm der niederen Stufe in der Norm der höheren Stufe ihren Geltungsgrund hat. Wird eine Norm niederer Stufe als gültig angesehen, muâ sie als einer Norm höherer Stufe entsprechend angesehen werden* (Kelsen 1960, 212).

> There cannot be any conflict [*Konflikt*] between a *rule of superior level* (a higher-order rule) and a *rule of inferior level* (a lower-level rule), i.e. between a rule which determines the position of another rule and this second rule, since the inferior rule has its ground of validity in the superior rule. In order to be valid, an inferior rule must be in-conformity-with (in-accordance-to) the superior rule.[9]

3.1.3.0. Two criticisms can be raised against Kelsen's solution. In section 3.1.3.1, I consider an *immanent* possible criticism and will hold that it does

[7] On constitutive rules, see Azzoni (1988). In Herbert Hart's theory of legal systems (Hart 1961), axiotic metanorms are rules of competence.

[8] Let us take "genealogical hierarchy" to refer to a hierarchical structure in which the *higher-order rule* (or *superior rule*) conditions (determines) the validity of another rule, which is (in this sense) a *lower-order rule* (or *inferior rule*). Kelsen's *Stufenbau* is a genealogical hierarchy.

[9] The English translation is mine.

not get the point. In section 3.1.3.2, I consider a *transcendent* possible criticism, and will conclude that it is plausible.

3.1.3.1. First criticism to Kelsen's argument: an *immanent* criticism

One may simply reply to Kelsen that in fact inferior rules incompatible with superior rules do exist in legal systems. And, since *ab esse ad posse valet consequentia*, incompatibility is possible—the incompatible inferior rule remains valid, at least until a particular competent organ invalidates it. In other words, the metarule on validity would in this case be violated.

I believe that this criticism is not valid [*uzasadniony*]: metarules on validity are constitutive rules and structurally cannot be violated. It is true that, for instance, in a legal system some valid regulation can be in contrast with a valid law—but this only shows that the relationship between that law and that regulation is not a genealogical one.[10]

3.1.3.2. Second criticism to Kelsen's argument: a *transcendent* criticism

Kelsen analyses the question of the possibility of conflict between a metarule *M1* on validity, and a rule *R1*, whose validity is conditioned by *M1*. I believe—in agreement with Kelsen—that if *R1* is not in-conformity-with *M1*, then *R1* is not valid, and *is not a rule at all*.

However, it is not correct to say—as Kelsen does—that the invalid *R1* is in conflict [*Konflikt*] with *M1*. Nonconformity is not conflict (or antinomy). There is no conflict (antinomy), for the following two reasons.

(i) *M1* and *R1* do not concern the same matter: *M1* concerns the conditions of validity of *R1*; *R1* concerns its own, different matter.
(ii) Conflict between rules (antinomy) implies the existence (the covalidity) of two rules, while in this case, there is one only valid rule: *M1*.

This transcendent criticism (which I believe plausible), radically holds that *M1* and *R1* do not form an antinomy because they are not possible candidates to be the terms of a relationship of antinomy: in the first place, they do not concern the same matter; and in the second place, they are not *two* valid rules (since only *M1* is valid).

[10] On this topic see, for instance, the section *Gerarchia topologica* (Topological hierarchy) in Colloca 2006, 13–14.

3.2. Three examples of a posteriori truths in axiotics

3.2.1. *First example* of a posteriori truth in axiotics

The assertion that "the basic norm is a *necessary but not sufficient* condition of the validity of other norms", is not necessarily true. It is *true* in a dynamic system and *false* in a static system (Bobbio 1960).

(We could also say: The assertion that "the basic norm is a *necessary and sufficient* condition of the validity of other norms", is not necessarily true. It is *true* in a static system and *false* in a dynamic system.)

3.2.2. *Second example* of a posteriori truth in axiotics

Lex posterior derogat priori. This is one of the most common criteria for the solution of antinomies, but it is not a necessary truth that this criterion must operate in every legal system (Bobbio 1964).

3.2.3. *Third example* of a posteriori truth in axiotics

The process of constitutional reform in legal systems with a rigid constitution is determined by contingent rules on constitutional reform. Article 138 of the Italian Constitution states:

> Le leggi di revisione della Costituzione [...] sono adottate da ciascuna Camera con due successive deliberazioni ad intervallo non minore di tre mesi, e sono approvate a maggioranza assoluta dei componenti di ciascuna Camera nella seconda votazione. Laws of constitutional reform are adopted by each Chamber through two consequent deliberations within a period of at least three months, and they are passed by an absolute majority of the members of each Chamber in the second poll.[11]

The validity of such a norm is an a posteriori truth. In fact, a different norm on constitutional reform can be found, for example, in another Constitution—the current Polish Constitution, in Chapter XII, "Amending the Constitution", article 235:

> Zmiana Konstytucji następuje w drodze ustawy uchwalonej w jednakowym brzmieniu przez Sejm i następnie w terminie nie dłuższym niż 60 dni przez Senat.

[11] *Costituzione della Repubblica Italiana* (1947), article 138.

> Amendments to the Constitution shall be made by means of a statute adopted by the Sejm and, thereafter, adopted in the same wording by the Senate within a period of 60 days.[12]

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[12] *Konstytucja RP* (1997), article 235. I have discussed axiotic metanorms in Polish law with Jakub Martewicz.

LORENZO PASSERINI GLAZEL

True Norms

"Yearning for that True
Which has no qualities."
George Eliot, *College Breakfast Party*, 1878[1]

Contents

[1] George Eliot (pseudonym of Mary Anne [Marion] Evans) [Arbury 1819–London 1880], *College Breakfast Party*, 1878.

1. What sense of truth?

It is often maintained that norms are not capable of being *true* or *false*. But in what sense of "*true*"? In what sense of "*false*"?

2. *De dicto* truth versus *de re* truth

In his recent contributions to a philosophical theory of truth, Amedeo G. Conte has drawn a distinction between two different concepts of truth: *de dicto truth* on the one hand, and *de re truth* on the other (Conte 2004; 2007; 2007a).

De dicto truth [*prawda de dicto*; *verità de dicto*] is truth that is predicated of *dicta* (of *dicta qua dicta*).

De re truth [*prawda de re*; *verità de re*] is truth that is predicated of *res*.[2] I examine *de dicto truth* and *de re truth* in sections 2.1 and 2.2, respectively.

2.1. *De dicto* truth

2.1.0. Let's consider the three following examples:

(1.) As Tarski wrote, the sentence: "Snow is white" [*Śnieg jest biały*] is *true* [*jest* (*zdaniem*) *prawdziwym*; *è* (*un enunciato*) *vero*] if, and only if, snow is white.
(2.) A tautological sentence is necessarily *true* [*jest* (*zdaniem*) *koniecznie prawdziwym*; *è* (*un enunciato*) *necessariamente vero*].
(3.) A testimony that corresponds to reality is a *true* testimony [*jest świadectwem prawdziwym*; *è una testimonianza vera*].

2.1.1. In all of these three examples, truth is predicated of a *dictum*, of a λεκτόν *lektón*:

(i) in examples [1.] and [2.], truth is predicated of a *sentence*;
(ii) in example [3.], truth is predicated of a *testimony* (understood as the *dictum* of an act of testimony).

[2] A *de re truth* may also be predicated of a *dictum*, when that *dictum* is understood as a kind of *res*. For example, "A holophrastic sentence (e.g., 'Fire!') is not a (*de re*) true sentence". In this case, (*de re*) truth is predicated (not of a *dictum qua dictum*, but) of a *dictum qua res*.

For truth that is predicated of *dicta*, Conte proposes the name "*de dicto* truth".

2.1.2. The *subject* of a *de dicto truth-predicate* is a *dictum* (a *dictum qua dictum*).

The *criterion* of a *de dicto truth-predication* is (according to the correspondence theory of truth) the *res*: a *dictum* is *de dicto* true if, and only if, it is in a correspondence relationship with the state of affairs [*stan rzeczy*; *stato di cose*] it refers to.

2.2. *De re* truth

2.2.0. Let's now consider three further examples:

(4.) The horseshoe crab is not a *true* crab [*nie jest prawdziwym krabem*; *non è un vero granchio*].[3]

(5.) A tautological statement is not a *true* statement [*nie jest prawdziwym twierdzeniem*; *non è una vera asserzione*].

(6.) According to the ancient Jewish law of *Deuteronomy*, a testimony borne by a single witness is not a *true* testimony [*nie jest prawdziwym świadectwem*; *non è una vera testimonianza*].

2.2.1. The subject of example [4.] ("The horseshoe crab is not a true crab") is *the horseshoe crab* (an animal), which is clearly *not* a *dictum*.

Truth that is referred to the crab in example [4.] is *not*, evidently, *de dicto truth*.

The statement, "The horseshoe crab is not a true crab", means that entities (*res*) named "horseshoe crabs" are not conformable to the concept of "crab": they don't fit the zoological type, "crab".

In other words, horseshoe crabs lack at least one property which is a necessary *eidetic property* of the concept of "crab".[4]

So in this example, it is not a *dictum* that isn't true, it is a *res* (the horseshoe crab), that is not true—the horseshoe crab is not a *de re true* crab.

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[3] The horseshoe crab (scientific name, *Limulus polyphemus;* common name in Polish, *skrzypłocz*; common names in Italian, *limulo* or *granchio reale*), despite its common name in English, is more closely related to spiders, ticks, and scorpions, than to crabs [*kraby*; *granchi*].

[4] There is an idiom in English which is composed with the adjective "true" and the substantive "type": "true-to-type". Here is an example drawn from the *Oxford English Dictionary*: "This was indeed a true-to-type Devon: a good, compact animal with nice fleshing and conformation."

2.2.2. In example [5.] ("A tautological statement is not a *true* statement") too, contrary to appearance, it is *not* a *dictum* that truth is referred to.

The *dictum* (the proposition), indeed, of a tautological statement is necessarily *de dicto* true.

Nonetheless, a tautological statement is *not* a true statement.

Since a tautological statement does not state anything informative (just because its *dictum* is *necessarily de dicto* true), a tautological statement is not consistent with the function implied in the concept of "statement"—it is not a *de re* true statement.

2.2.3. Even in example [6.] ("According to the ancient Jewish law of *Deuteronomy*, a testimony borne by a single witness is not a *true* testimony"), contrary to appearance, it is *not* a *dictum* that truth is referred to.

The *dictum* (the proposition) of testimony borne by a single witness is not, *eo ipso*, *de dicto* false; it may well be *de dicto* true.

Nonetheless, the *res* (the *actus*): "act of bearing testimony by a single witness" is *not*, according to *Deuteronomy*, a *de re* true testimony: it is not conformable to (it doesn't fit) the *type of act* considered by ancient Jewish law as "bearing testimony".

More precisely, in this case the act of bearing testimony by a single witness does not fulfil a *necessary validity condition* of the (legal) type of act, "bearing testimony". It is not a *valid* act of bearing testimony, according to ancient Jewish law of *Deuteronomy*.[5]

3. *De dicto* truth of norms

In section 1 (*De dicto truth* versus *de re truth*), I examined the distinction between *de dicto truth* and *de re truth*.

In what sense of "true" it is maintained that norms are *not* capable of being *true* or *false*?

Evidently, the (negative) thesis that norms are *not* capable of being *true* or *false* is a thesis about *de dicto* truth of norms: norms are not capable of being *de dicto* true or *de dicto* false. In other words, *de dicto* truth, as well as *de dicto* falsehood, are *not* suitable predicates for norms.

[5] While still being consistent with the *intension* of the expression "bearing testimony", the act of bearing testimony by a single person is not part of the *extension* of the phrase "(validly) bearing testimony" as determined by an anankastic-constitutive rule [*reguła anankastyczno-konstytutywna*; *regola anankastico-costitutiva*] of ancient Jewish law. Cf. Conte (2007b).

But this (negative) thesis, that norms are not capable of being *de dicto* true or *de dicto* false, is *not* universally accepted: it has been questioned, for instance, by Jerzy (Georges) Kalinowski and Amedeo G. Conte.

3.1. Jerzy Kalinowski's theory of *de dicto* truth of norms

3.1.1. According to the Polish logician and philosopher Jerzy (Georges) Kalinowski [Lublin 1916–Buis-les-Baronnies 2000], both *de dicto* truth and *de dicto* falsehood are possible predicates of norms (understood as *prescriptive deontic sentences*).

Norms are *de dicto* true or *de dicto* false, Kalinowski maintains, depending on their relationship to a pre-existing *deontic reality* [*rzeczywistość deontyczna*]:

(i) a norm (a prescriptive deontic sentence) is *de dicto true* if, and only if, it is in a correspondence relationship with deontic reality;
(ii) a norm is, on the contrary, *de dicto false* if, and only if, it is *not* in a correspondence relationship with deontic reality.

3.1.2. Kalinowski's theory of *de dicto* truth (and *de dicto* falsehood) of norms has a strong ontological presupposition: the existence of a "deontic reality" [*rzeczywistość deontyczna*], which exists prior to norms, and which subsists in itself.

The criterion of *de dicto* truth of norms is, in Kalinowski's theory, this pre-existing deontic reality.

It is by comparison with this pre-existing deontic reality that a norm can be said to be either *de dicto* true or *de dicto* false.

3.2. Amedeo G. Conte's theory of *de dicto* truth of norms

3.2.1. Yet not every theory of *de dicto* truth of norms presupposes the existence of a deontic reality existing prior to norms and subsisting in itself.

A theory of *de dicto* truth of norms which does *not* presuppose the existence of a deontic reality existing prior to norms and subsisting in itself, is envisaged, for instance, by Amedeo G. Conte.

3.2.2. According to Conte's theory, it is *not* in virtue of a correspondence relationship to a *pre-existing* deontic reality that a norm (a prescriptive deontic

sentence) is *de dicto* true; norms (understood as prescriptive deontic sentences) are, in fact, *autoverifying* sentences.

The *performative utterance* of a prescriptive deontic sentence, indeed, *thetically produces* the deontic *status* (the deontic state of affairs) which the sentence itself refers to, and it therefore *engenders* the *de dicto truth* of the prescriptive deontic sentence itself.

For example, the *performative utterance* (performed by a lawgiver) of the prescriptive deontic sentence:

(7.) "It is prohibited to smoke in public premises",

thetically produces the *deontic status* (the deontic state of affairs): prohibition-on-smoking-in-public-premises (to which the prescriptive deontic sentence refers), and it therefore *engenders* the *de dicto truth* of the prescriptive deontic sentence ("It is prohibited to smoke in public premises") itself.

3.2.3. Thus, according to Conte's theory, a norm (a prescriptive deontic sentence) is *necessarily de dicto* true: it is *necessarily de dicto* true, because it is *necessarily* in a correspondence relationship with the *deontic status* (the deontic *state of affairs*) that is thetically constituted through the (thetic) performative utterance of the prescriptive deontic sentence itself.

4. A *de re* presupposition of theories of *de dicto* truth of norms

4.1. In section 2 (*De dicto truth of norms*), I examined two different theories of *de dicto truth* of norms.

Both these theories (as well as any other theory of *de dicto truth* of norms) have a common *de re* presupposition: the presupposition that norms are *dicta* (in this case, prescriptive deontic sentences).

Only a *dictum* indeed is, by definition, capable of being *de dicto* true (or *de dicto* false).

4.2. But is a prescriptive deontic sentence a *de re true norm*?

The thesis that norms are *sentences* (the thesis that norms are *dicta*) has been, indeed, frequently denied.

The thesis that norms are *sentences* has been denied, for instance, by the German sociologist Theodor Geiger (München 1891–Atlantic Ocean 1952), in his theory of *subsistent norm* [*subsistente Norm*], as opposed to *deontic sentence* [*Normsatz*] (Geiger 1964).

According to Geiger, a deontic sentence [a *Normsatz*] is *not* a *de re* true norm.

On the one hand, indeed, a *norm* (a *Norm*, which is not a *Normsatz*) may exist (may subsist) independently of any *deontic sentence* (independently of any *Normsatz*).

In Geiger's words:

> *Die Norm selbst auch ohne sprachliche Hülle des Satzes bestehen kann*.
>
> The norm [*Norm*] may subsist even without the linguistic coating of a deontic sentence [*Normsatz*].

On the other hand, a *deontic sentence* (a *Normsatz*) may exist without giving rise to any *subsistent norm* (to any *subsistente Norm*).

4.3. In other words: a *Normsatz* (a deontic sentence) is neither a *necessary*, nor a *sufficient* condition for the existence (for the subsistence) of a *Norm*.

According to Geiger, then, deontic sentences [*Normsätze*] are not *de re* true norms; only *subsistente Normen* are *de re* true norms [*normy prawdziwe de re*; *de re vere norme*].

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TOMASZ KOZŁOWSKI

Legalness—Philosophical Truth as a Concept of Law

1. Legalness: the lost formula

"The link between law and logic has been frequently acknowledged by the judiciary, and notably by Lord Devlin in Hedley Byrne v Heller & Partners [1964] AC 465 at 516, where he said: 'The common law is tolerant of much illogicality, especially on the surface; but no system of law can be workable if it has not logic at the root of it' [...] determining whether Jane Smith is likely to win her case, and what level of compensation she is likely to obtain cannot simply be looked up in a book. There is an important element of creativity, of working out an answer according to a whole range of supposedly rational criteria [...] we are concerned with how lawyers must go beyond the legal texts, to construct their own answers to discrete legal problems. It is this that constitutes what we have already called the process of legal argumentation" (Holland and Webb 2003, 319). What I am trying to do[1] could possibly be described as an archaeological job combined with an attempt to find a formula which is not necessarily true, but is useful. At present time, we've been through the *linguistic* turn and the *cognitive* turn, and we still have some more sharp turns ahead of us—of which the present book is hopefully a good example. Still, the spectacle of the end of philosophy hangs before us, at least in the form of a question mark. Taking all this into consideration, to present an essay describing the chances of finding a stability of thinking, or at least a chance of rediscovering authentic philosophical thought in the Heideggerian sense, could be seen as a rather strange move, or even a suicidal research step.

[1] I have to thank Marek Piechowiak and all the participants of the Italian-Polish Workshop *Norm and Truth*. It was a real acceleration of my thoughts, though the limits of space make it impossible at present to note the common intellectual traces that connect me with the other participants. At present, the readers of this book may be able to note these traces; for the participants, we will probably have to wait for our next meeting.

Still I've made the attempt. There were many inspirations—let me mention just one. Although most philosophical concepts and propositions in modern and postmodern times have an adversarial character, and a part-time truth in the Popper-Kuhn-Lakatos sense, there is a pretty seriously treated opinion that "everything has already been said", and that "that's the end of the story", and that now there is room only for polishing, criticizing, and deconstructing. I think that this discourse (not to say, research) situation is a little bit paradoxical, if not self-contradictory. But there is more to it than that: thanks to "legal thinking"—a social phenomena still operating, I think, alongside the pure political, financial, and ideological sources of law—one can observe that the law as such has preserved what we can call its philosophical sting. Thanks to this sting, some remarkable philosophical edifices, even cathedrals, have been erected. Due to many factors, from the forceful desire to build new structures on the same ground, to simple passivity in the face of the new faith, the techno-faith, they have been transformed into ash. "Concepts such as love, friendship, compassion, humility, or forgiveness lost their depth and dimensions, and for many of us they represented only psychological peculiarities, or they resembled gone-astray greetings from ancient times, a little ridiculous in the era of computers and spaceships" (Havel 1995, 37). But in my opinion, reflecting the title of the Polish writer Jerzy Andrzejewski's book *Ash and Diamond*—the core of philosophical thinking has been preserved in the core of legal thinking.

My research is quite extensive, and so it is presented here very synthetically, and in a somewhat parabolic and symbolic way: the idea is to show the whole structure of the concept and the internal way of thinking, assuming that in this holistic approach one can see the answer which in future will be presented in a much more detailed and thoroughly argued way. My endeavour is to work mainly by reductionism, and by rediscovering "established" concepts. With reference to reductionism, Dworkin and Hart are good examples. The framing of my problem was made to a large extent by Dworkin's two focal ideas, which I'll present in my own language—"taking law seriously", and "the empire of law is for the rights of everybody (moral politics, ideology etc.)". Yet the core of my thesis is a negation of the Dworkinian one: the law differs completely from moral arguments (notwithstanding that there may be "pure" or "political"), but this negation simultaneously differs from the Hartian one, for the serious reason that in my conception, normativity comes as the effect (though not the exclusive effect) of legalness—not as a part of it. The most direct influence is modern natural law on one side and Joseph Raz's social positivism and legal reasoning on the

other (Raz 1999; 2001). One of the important methodological assumptions comes from Leon Petrażycki. This is the assumption that the fundamental failure of jurisprudence is its failure to take into account in initial research the legal point of view[2] (especially the point of view of lawyers—Raz has indicated this as an interesting though obvious oversight). My concept is a constructive one in the descriptive and evaluative sense, but it still tries to proceed along the front line of critical legal studies: earlier movements, such as the Frankfurt School, and later movements including Derrida, and up to the present with Agamben and Legendre, especially sharing the idea that we are at the beginning—a beginning forcefully interrupted by totalitarianism and dogmatic utilitarianism—of legal thinking, and not at its end.

2. The origins of legalness

My main thesis is that to understand philosophical truth as a concept of law is to note that the fundamental aspect of law-being (one could propose a term in the style of Heidegger—*Recht-Sein*) has been missed: that the foundation of law lies in legalness (Polish *prawność*),[3] which is not factuality (i.e., is not formal logic in the direct and full sense; to that extent, one can agree with the famous phrase of O. W. Holmes that "law has not been logic", but at the same time one could disagree with the next part of the same phrase, "has been experience"), but is not normativity either.

The term itself and some initial traces are influenced mostly by the thoughts of Jan Woleński. In his essays, *Okolice filozofii prawa*, he mentions legalness as the essence of law-making, as opposed to statute-making. In an abstract prepared for the 2005 World Congress of the International Association for Philosophy of Law and Social Philosophy, he wrote what are for me crucial sentences, "the general idea is to show how general philosophy influenced legal philosophy. However, there is also the reverse order, namely the impact of jurisprudence on philosophy, not only ethics (as is obvious) but also logic, philosophy of language and epistemology. Kant's use of deduction

[2] For me, Petrażycki is a similar case to Dworkin, but I definitely do not share the view of the constant and ontologically inner interplay between morality and law, which is mentioned below; in my work, the place of the rational possibility of truth, as described in this text, is taken seriously, following the attitudes of Hart and Raz.

[3] In presenting this new "intellectual reality", I am trying to describe it with a new term—"legalness"; I am aware that the very term could be seen as unsatisfactory, but at least it gives a chance to distinguish my concept from both "legality" and "legalism".

modelled on the medieval meaning of this term is a very concrete but spectacular example. This order of mutual relations between jurisprudence and philosophy still awaits deeper reflection" (Woleński 2005, 21); what I am trying to do is just to go deeper into this. To sharpen my own attitude, let me return to the work of Zirk-Sadowski. Woleński uses a distinction which is precisely defined by Zirk-Sadowski in his division between two general jurisprudential currents—"from Philosophy to Law", and "from Law to Philosophy". I am saying that to solve the Woleńskian dilemma, one has to consider the third possibility, "Law within Philosophy", which is additionally an attempt to transform the meaning of Jan Łukasiewicz's works into jurisprudence, and an attempt to follow up the cultural meaning of law, and to search for a new legal order, as proposed in the Polish literature by Maria Szyszkowska, Marek Zirk-Sadowski, and Hubert Izdebski,[4] as well as an attempt to continue Jadwiga Staniszki's research on the necessity of new thinking in global society. From recent publications, I would like to underline John Sallis's idea that the essence of philosophy lies in its verge—indicated by the interference of different kinds of understanding—and not in its particular systems (Sallis 2008, 136–148). The reverse side of such thinking was presented by John Paul II in *Fides et Ratio*: "In reality, every philosophical system, apart from being worthy of appreciation as an integral entity free from any instrumentality, must acknowledge the first rank of philosophical thinking, in which it begins, and which it has to serve. From this perspective, it is possible to undercover a certain collection of philosophical truths, which in spite of the passage of time, and in spite of the achievements of science, is constantly present [...] —orthos logos, recta ratio." (Jan Paweł II 1998, no. 4).[5]

3. The core of Legalness—philosophical truth

What is important is the beginning of the above-mentioned philosophical thinking and those philosophical truths which are simultaneously the beginning of legalness. This beginning is a special one, because it is an ongoing be-

[4] I share Izdebski's view that the works of Leon Chwistek are of great importance for jurisprudence—especially his idea of "different realities"; in my perspective, legalness is exactly the "next" reality in Chwistek's sense. Other important issues aside, thanks to Chwistek, one can see that legalness means ever more sophisticated ways of thinking (as in science), and does not mean the emergence of more and more different *kinds* of legal thinking, as is presented in so-called legal postmodernism.

[5] My translation.

ginning, defined by the above-mentioned verge. Amadeo Conte returns to this beginning, having in mind Wittgenstein's thesis that "all facts belong to the enterprise, not to its solution". The beginning—or one part of the beginning—is *aletheia*, meaning "true"[6] and "valid", and which goes to the ancient Egyptian *maat* which means "true" and "justice" (Conte 2008). What is important in the very beginning of philosophy—*arche*, *logos*—is the discovery of the possibility of knowledge (Cassam 2007),[7] not only in relation to materiality, but in relation to human existence too.

What is crucial in order to grasp the very moment of initiation of the ontological coexistence of legalness and philosophy, is the recognition of the possibility of the existence of a different way of thinking, and the existence of a different way of behavioural structuring. Firstly, there is the difference from myth, religion, tradition, and morality. Secondly, and more complicatedly, there is the difference from the pure power of politics, money, and emotions—let's say human factuality, or the Kantian phenomenal existence. It is easier to understand this point when one returns to the roots of the emergence of citizen's law in the tenth and eleventh centuries—cities, and universities: the idea to create by ourselves the rules, apart from the *sacrum* and apart from the *imperium*—and to create it through *studium*.

Not to talk too much, I would like to present a quotation from Janusz Korczak's[8] disciplinary code as a brief characteristic of the grounds of *studium*— "The court is not justice, but should focused on it. The court is not truth, but the need for truth. Judges can make mistakes. Judges could punish acts committed by themselves, Judges could negatively evaluate acts committed by themselves. But it is a shame when judging is consciously false" (Korczak 1957, xliii).[9] Here we have the essence of legalness and truth: the sense of legal truth, its *creatio continua*—legalness as a never-ending search for truth, the sense of the truth negation, the sense of legalness as it was put forward many years ago by the English lawyer L. Fuller: "Be you

[6] It is probably worth recalling that it also means the journey to truth, the seeking of the truth, but the not truth itself.

[7] Quassim Cassam is, in an illuminating way, rediscovering the Kantian possibility of truth.

[8] Janusz Korczak, the pen name of Henryk Goldszmit (1877–1942), was a Polish-Jewish author of children's books, paediatrician, child pedagogue, and the director of an orphanage of his own design—a kind of a "republic of children", with its own parliament, court, and newspaper. His orphans were taken to Nazi extermination camps, and he accompanied them, refusing offers of sanctuary; most likely he was killed with most of his children in a gas chamber upon their arrival at Treblinka.

[9] My translation.

never so high the law is above you"—the creation of legalness is exclusively in human hands, though it is not *for* human beings, but for the ideas put by them in language, in order to claim authority.

The starting point of pro-truth thinking is the *logos* as the precise beginning of philosophy. This idea in a synthetic way was presented by Otfried Höffe—philosophical thinking in a search for truth, expressed initially by *logos*, means the common human mind characterized by adequate terms, coherent and conclusive arguments and reasons, as well as basic (elementary) experience, which together are focused on validity; and because universal validity is not possible, common verification is possible and necessary (Höffe 2001). When the philosophical search for truth is treated as legal reasoning, legalness begins (the ontological blending of method and social truth, as especially noticed by Hegel and Gadamer). *Logos* at the same time means *nomos* when it transforms *chaos* into *cosmos*[10] (a good example, especially in times of global crisis, is the term: *eco-nomos*, which had in Greece the broad sense of a good or reasonable way of conducting human reproductive activities (including home activity) in accordance with nature).

To some extent, legalness could be presented through a revision of the famous title of Hart's main work *The Concept of Law*. Rather than the concept of law, we have the law as a concept. Strictly speaking, legalness is the concept of inter-human relations; legalness is the constitution of law. In Hart's framework, legalness is the primary thesis of law, and the concept(s) of law is (are) the secondary thesis(es).

Legalness is different from both *sacrum* and *imperium*. This differentiation is an ontological one, as well as a practical one, as *sacrum* is separate from law, and *imperium* should be within the law. Legalness, in contradiction to normativity, is not already given, as are myth, religion, morality, and power. It is just a concept which can be constructed in normative language. In contradiction to most of the established formulas shared by natural law, positivism, and even Dworkin (or in a sense especially Dworkin), morality means externality, while legalness means internality (one could say that it is a reduction of the Hartian internal point of view). Only one part of my proposal is a part of this established formula: normativity means externality. It is worth adding, that I am not going to say that normativity is not an important part of law—indeed, it is: the best way of recognizing this is to grasp the common

[10] The interconnections between Chaos, Cosmos, Beauty, and Philosophy is elaborated in an elucidative way by Umberto Eco (2002).

law notion of law enforcement.[11] Nevertheless, I underline that legalness does not mean normativity in the strict sense. I suppose that this simplification is responsible for most of the failures of jurisprudence, especially in recognition of the different ontology of truth in legal normativity. This failure was made even by Hart, when he proposes the "minimum content of natural law", in relation simultaneously to "law and morals", departing from "reasons" (Hart 1994, 193–194). The position which comes nearest to identifying the issue was taken by Jürgen Habermas (1992). But paradoxically, his closest approximation to the issue is in showing how far away from the proper description one can go when using the traditional factuality/normativity division as the definitive division. Yes, there is space between them, but there is not a relation between them: there is a separate entity—legalness.

Modern philosophy and modern science provide new possibilities of more precise structuring of the philosophical search for truth. This might be achieved mainly through

- the presumption that human space is open for structuring: open society status (the negative dialectics of Popper and Adorno);
- the thesis that human relations are totally (from the open beginning) constructed (constituted) by individuals: nonontological pro-truth reductionism of constituting Being from Nothing (Jean Paul Sartre in philosophy; arte-fact in classical common law, and in the works of Neil MacCormick);
- the thesis that this construction should be made entirely by reasoning, for if not, it would be not pro-truth: nonontological pro-truth reductionism of rationalism;
- the thesis that the only way of searching the truth by human construction is totally transparent and open communication: nonontological pro-truth reductionism of communicative rationality (Jürgen Habermas);
- the thesis that the starting point of law has nothing to do with natural law, even in the Hartian sense—that it is always human law, and strictly speaking it is the pro-truth beginning of legalness, made in the way described way (Janusz Korczak's final choice is a good example—acting pro-truth is rooted in pro-truth action): The astro-philosophy of Andrzej Wolszczan; The eco-philosophy of Henryk Skolimowski; The space/environment philosophy of Jeremi Królikowski. On one point Hart

[11] The most useful term is probably that created by Amedeo G. Conte: "axiotics" as the particular notion of the validity of norms, but not of the value of norms: See Conte (2001b). I am grateful to Stefan Colloca for drawing my attention to this.

is right: pro-truth reductionism could be described in a pretty precise way by the word "trivial", but even triviality is not given from the outside; and as Hannah Arendt observed, evil is much more trivial than good. Put in a different way, even triviality is not common in common thinking—triviality is a part of philosophical thinking, where it becomes its evaluative ground.

Nowadays the coherent scheme of Pro-Truth statements is as follows:

(i) We already know a lot of reasons why the human race is bound to vanish altogether (for example, energy principles, the end of the sun's life, the transformation of our planet because of inevitable inner geological process), but it is possible for Our Human Mind, using Höffe's term, to react in an effective way, through (for example) thermonuclear energy and the possibility of moving to another planet. There is only one condition—that we change completely our laws and ourselves. It's probably worth thinking about if we keep in mind the value of *play*.

(ii) Nearer issues are closer in time and space, and therefore easier to grasp: here we see ecology as the only way for preserving the human race in the short-term future distance.

(iii) the necessity of living together in one space is the starting-point of lawmaking, monitoring, adjudication, and enforcement (and we do not start with political values such as right or left, as this notion show itself to be "one-dimensional"; but space *ex definitione* consists of all dimensions).

The task of tracing legalness, almost killed by totalitarianism, involves the tracing back of the concept through global law; alternative dispute resolution (ADR); the founding fathers of European integration (Monnet's idea of Europe as a concept completely different from the state systems of positive law; philosophy as the only source of law and the only source of totally European communication); common law; roman law; and social contracts, concepts, and human rights.

Why it is still so difficult to recognize? Unfortunately, one of the reasons lies in philosophy. Socrates discovered legalness, and left for us the difficult to overestimate motto that legalness based on philosophical truth is much more than just the power of the majority. Today's majority may be tomorrow's minority, but the philosophical truth will remain the same. Socrates' final decision was a sophisticated one: it was a vote not for democracy, but for legalness. But the whole power of this specific way of argument presentation

was completely destroyed by his pupil. Plato's mistake should be considered as one of the biggest mistake in human history—precisely speaking there are even two mistakes, expressed in *The Republic* and in *Laws*. The first is the transformation of Socratic legalness—rooted in the philosophical search for truth—into philosophy itself, and the consequent transformation of the law a the concept of inter-human relations into a philosophers' activity, which ended with legal nihilism and, at least potentially, with totalitarianism. The second transformation was that of legalness into legal (external) normativity. Legalness was killed by Plato with two blows. Within the open global society of knowledge, legalness is awaiting a full recovery.[12]

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[12] Eugeniusz Jarra noticed that the absorption of law by philosophers could be interpreted as an absorption of law by knowledge (Jarra 1918): in an age of advanced technologies this idea is much easier to understand—today's science is far ahead of law, and the process will accelerate if the idea of legalness remains abandoned.

MAURYCY ZAJĘCKI

Axiological Presuppositions of Legal Text: Some Ideas in the Neopositive Approach

1. Introduction

In the fundamentals of legal positivism there is a paradox. Positivists claim that moral values neither influence the shape of positive law, nor have any influence on its validity. Simultaneously, positivists agree that the law itself is a value of sorts. In a way the "internal" value is "stronger" that morality, because we should obey the law even if it is unjust. The dilemma arises when we realize that positivists usually agree with metaethical non-cognitivism (Brandt 1996, 350). This is a paradox. How it is possible to speak about value in the law itself, when we claim that morality is nothing else than psychological phenomena (moral feelings)? One natural—and very primitive—way of dealing with the problem is to reify the lawgiver and to think about him as a real person with moral feelings. More sophisticated positivists, like Joseph Raz, claim that the law possesses internal "authority" (Raz 1986, chap. I.2). Others, like Zygmunt Ziembiński, try to analytically differentiate between different kinds of justification of norms—such as thetic and axiological (Ziembiński 1976, 132–133).

Stanisław Czepita suggests in his paper here that it is possible to overcome some of the major drawbacks of Czesław Znamierowski's concept of norm. Czepita shows that presuppositions could be used to reformulate the fundamental concept of Znamierowski's theory of norms. Here I would like to give a (neo)positive interpretation of internal values in law, by using the semiotic category of axiological presupposition, which differs, in a way, from Czepita's proposition.

2. Presupposition

What is presupposition?
The classic answer was given by P. F. Strawson, who showed that some propositions lack logical value (that is, are neither true nor false). Strawson took an old example from Russell,

The present king of France is bald,

and showed that this proposition is true/false only when another proposition,

There is such person as "the present king of France",

is true. Such a proposition is called a presupposition (of the given proposition).

This idea is now widely recognized and formally developed (Tokarz 1993, 191*ff*), but the problem arises when we try to define the presuppositions of orders, requests, questions, etc.—all non-descriptive utterances. Jürgen Habermas has made some interesting remarks on this subject (Habermas 1984, 453*ff*): He has shown that speech acts may be divided into three groups: constative, expressive, and regulative speech acts. Each of these has its own validity claim:

- constative speech act → existential presupposition(s);
- expressive speech act → subjective truthfulness; and
- regulative speech act → rightness.

This idea has been developed by Habermas into a complex philosophical system. Its legal aspects are significant and should be discussed separately.

The third idea I want to mention comes from Tadeusz Buksiński (1992, 108*ff*). He showed that there are three groups of presuppositions:

- logical presuppositions (such as the one described by Strawson);
- existential presuppositions (for instance, for an order one must presuppose that the addressee is physically able to obey it— *impossibilium nulla obligatio*);
- pragmatic presuppositions.

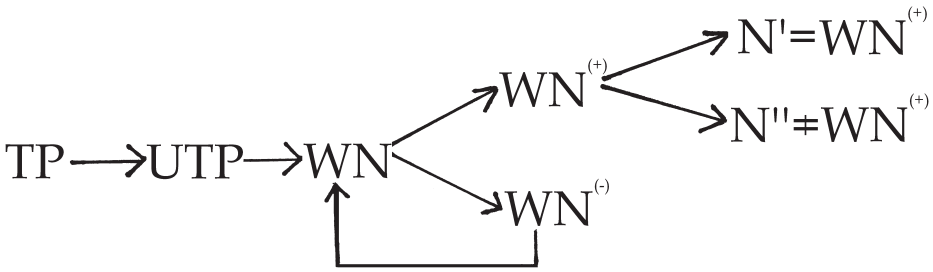
The third group is very interesting. Buksiński shows that when we want to adequately understand text, we must presuppose the author's knowledge, values, and attitudes. Otherwise interpretation will lead to misunderstanding.

I would like to show that the idea of pragmatic presuppositions can be used to clarify some axiological aspects of legal text.

3. Legal norm

I start with a linguistic theory of legal norms. This means that a legal text is an idiomatic expression which can, in the process of interpretation (exegesis), be deciphered into legal norms—i.e. unambiguous orders/prohibitions. Legal norms show what one person ought (or ought not) to do in certain circumstances. *Ex definitione*, the lawgiver creates only general and abstract norms.

The interpreter uses both linguistic and functional methods. In the Poznań School of the theory of law (as proposed by Maciej Zieliński (2002)), we can reconstruct the algorithm which describes legal exegesis (scheme 1) in every case—even the hardest.



Scheme 1

TP: legal text;
UTP: present legal text;
WN: legal norm *prima facie*;
$WN^{(-)}$: linguistically ambiguous legal norm *prima facie*;
$WN^{(+)}$: linguistically unambiguous legal norm *prima facie*;
N´: legal norm corroborated by functional exegesis;
N´´: legal norm modified by functional exegesis.

I would like to point out one thing here. When a lawgiver describes the circumstances and obligations of norms, he does not include a full picture of an ideal deontic world, but only gives characteristics of the relevant elements. This idea closely resembles the one presented by Olgierd Pankiewicz. We both claim that a legal text does not give us a full description of an ideal deontic world. From the perspective of a lawgiver, the world is a mereological sum of states of matter. Those states of matter include legally relevant fea-

tures, and many completely irrelevant features. When we consider the characteristics of a murderer in Polish law, what is relevant is his or her age, mental health, motives, etc., but many more features are irrelevant—such as race, sex, kinship to the victim, etc. It is obvious that in legal texts— unlike in literature—descriptions are reduced to those which are legally relevant. Unlike in Pankiewicz's presentation, in my definition relevant characteristics are meant to be objectively present in legal norms (or to be more specific, they are epiphenomena of legal norms). Therefore we do not need a lawgiver here as an intentional subject. I propose defining the "range of a norm" as a sum of those states of matter which ought to be preserved or ought to be avoided. This range of a norm is very similar to the "range of application of a norm", as proposed by Zygmunt Ziembiński. But unlike in Ziembiński's definition, we concentrate here on static elements (characteristics of final situations), rather than on dynamic elements (actions of an addressee). For example, let us consider a norm N which orders a school principal to have meals prepared in the school canteen for all pupils from poor families.

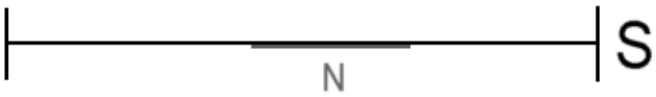


Fig. 1

In this example, the range of the norm is all those states of matter in which pupils from poor families have the option to eat a meal in the school canteen (fig. 1).

4. Axiological presuppositions

I now define axiological presuppositions of a norm. An axiological presupposition is a statement that for a normgiver, one or more features have value. The "range of axiological presupposition" is the sum of those states of matter which possess this feature. In our example of pupils in the school canteen, the axiological presupposition states, of course, that for the lawgiver well fed children are positively valued, or analogically that hungry children are nega-

tively valued (these states of matter are represented by the segment |BE| in fig. 2).

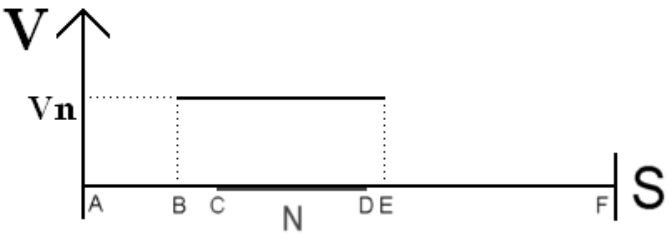


Fig. 2

We can see that the range of an axiological presupposition can be wider than the range of the norm. The norm in my example concerns only pupils from poor families, but the axiological presupposition concerns all children, whether poor or rich, whether attending school or not.

But there is a theoretical problem here. It is obvious that the relation between a norm and its axiological presupposition(s) is not purely semantic. We also need a pragmatic criterion of "obviousness". I think this criterion should somehow resemble linguistic competence. Before we start interpreting text, we must learn the language. Analogically, we need "axiological competence", i.e. knowledge of the standard usage of language concerning values. This is a pragmatic relation.

5. Evaluation

In a legal system, we have many norms and many axiological presuppositions. Therefore any single state of matter usually belongs to many ranges of axiological presuppositions (fig 3).

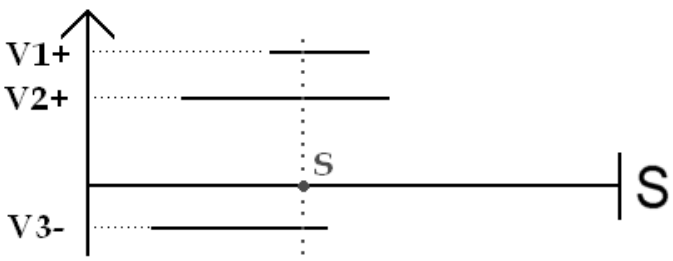


Fig. 3

Let us consider the state of matter S. We can see from figure 3 that the state S contains three legally relevant features—i.e., the state S belongs to three ranges of axiological presuppositions. Two presuppositions refer to positive values (V_1+, V_2+), and the third one refers to a negative value (V_3-).

The main role of jurisprudence is to analyse such situations *in abstracto* and determine the global evaluation of such states of matter. Analogically, judges try to determine *in concreto* the global evaluation of such states of matter. We understand well that for judges and lawyers the most important part of their work is to analyse the relevant features of everyday situations (that is what they are paid for). For example, the state of matter S (fig. 3) could represent a situation in which a mother pickpockets money (V_3-) to buy food (V_1+) and clothes (V_1+) for her children. We see that in such situations, it is essential to determine preferences concerning values.

"Hard-shoe positivists" may claim that the answer to the question of what are the preferences of the lawgiver, is hidden in legal text itself. We will find preferences when we thoroughly examine declarations of human rights, constitutional principles, preambles, the structure of legal text, the hierarchy of legal norms, etc. "Soft-shoe positivists" will claim that not all the preferences are expressed in legal text, and that an interpreter must analyse the social context of law (i.e. the dominant morality in society).

6. Conclusions

What is the main advantage of the "hard-shoe positivist" approach? It allows us to reformulate the classical problem of values in law, from the language of valuation to the language of description. The analysis of legal presuppositions is based on formulating statements about sets (classes of features aggregated into states of matter). The axiology of law is, in this approach, a *sui generis* linguistic (semiotic) phenomenon. Axiological presuppositions have a logical value—they can be true or false—which means that we can correctly say whether a specific value is expressed in a legal text. Lastly, we can always determine the global evaluation of any given state of matter. In other words: the truth (about axiology in law) is epiphenomenal to legal norms. This claim is vigorously denied by Lech Morawski (Płeszka 2003, 86*ff*). Of course, the algorithm proposed by Maciej Zieliński is counterfactual, and all the rules he described could be used only by a Dworkinian Hercules (Dworkin 1977, chap. IV.5.A). But I still believe that this concept adequately describes the "model" interpretation, and should be intelligently approximated to "real" situations in courts (Nowak 1973).

Yet the price of this is high: we are always speaking about values which have been expressed by a lawgiver. For a theoretician this is quite sufficient, in my opinion. But we must also take into account the metatheoretical (philosophical) consequences. "Hard-shoe positivism" brings many problems, and actually nowadays we hardly can imagine purely positive law. In democratic legal cultures there are many defensive mechanisms. We may call such systems "soft-shoe positivism". I would like to point out the most important such mechanisms:

- the rules of functional exegesis (*argumentum a fortiori*, *analogia iuris*, etc.);
- The principal rules of law (the dignity of human life, liberty, equality, etc.)—which state law practically cannot overrule;
- general clauses with axiological references (such as "a fair trial", "social noxiousness", etc.);
- finally, Radbruch's principle.

In conclusion I would like to point out one thing. Treating values in law as epiphenomena of legal norms does not mean underestimating those values. In fact, all the above-mentioned ways of "softening" legal positivism show that in modern theoretical reflection, coherence between values (Ricoeur 2003, 459*ff).* is often more important than purely linguistic coherence between norms. This is strongly emphasized in the algorithm of interpretation proposed by Maciej Zieliński (refer to scheme 1), where functional exegesis can potentially modify almost any linguistically unambiguous norm.

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III. Practice

JACEK SOBCZAK, AGNIESZKA STĘPIŃSKA

The Truth of the Court and the Truth of the Media

1. Introduction

All types of crime have always attracted public attention. The object of attention may be either the dramatic circumstances that led to the crime, or the person who actually committed it. In fact, even the disclosure of the crime itself might result in intensive attention from both the media and public. It is worth mentioning that not only the people who are directly influenced by a crime pay attention to it; every element of the process, including the search for perpetrators, the investigation into their characters and motives, as well as the legal proceedings may attract the attention of those who do not seem to be directly affected by the crime.

For centuries, people have followed legal proceedings and executions, right up to the moment of meting out of the punishment, or the moment of release of the person under suspicion. In particular, the moment of the enforcing the penalty—especially when performed in public—might have resulted in unhealthy curiosity, not to mention in fear and a sense of terror. Civil legal proceedings have usually attracted less attention, except when they have involved some well known or wealthy people, or when they have concerned cases of breaking moral norms.

Interestingly, state has long recognized the power to influence society that lies in the experience of legal proceedings. In particular, public interest in legal procedures can result in a social revision of legal norms, while the information about a punishment, or the witnessing of an execution, may discourage others from committing crime. Yet it has always been difficult to estimate the efficiency of such persuasion, especially considering reports such as those which describe the frequency of pickpocketing during the execution of thieves.

2. Journalists as an audience

Not surprisingly, journalists have realized that audiences have long sought information about both crimes and proceedings. Most of the early reports on these matters were created as scoops, without any analysis of the social reasons and consequences of the event. Later on however, editors and journalists recognized the fact that reports on crimes and legal proceedings may not only educate people, but also protect them against crimes. This change of perception of role of the media was supported by ongoing processes of development in fields such as law, philosophy, psychology, and sociology.

Furthermore, journalists have come to be perceived as extremely important sources of information for the public, who not only provide information, but also influence the public's perception of reality. The more attention has been paid to crimes and legal proceeding by the media, the less numerous have become the so-called court followers. It was during the 1970s when these people, who would follow any legal proceeding regardless of the crime or the defendant, eventually disappeared. No more do such people follow judge's decisions in the courthouses, make comments on the prosecutor's statements, lawyers' speeches and defendants' behaviour (Waltoś 1986; Flasiński 1976).

Consequently today, even the most confusing and shocking crimes seem not to encourage people to come to the courthouse to follow the proceedings. Usually the only people in the audience of a criminal trial are the victims and their relatives, relatives of the defendant, and journalists. The main reason for this change is not simply a lack of interest in crimes, but a lack of time for spending on such activities, and the higher frequency of criminal events within society.

At the same time, the public seems to be extremely interested in crimes, legal proceedings and their results. Newspaper readers and television viewers seek for news on legal procedures and punishment. Thus journalists provide information that cannot be gathered by the public. They are regarded as not only a source of information, but also as the guarantors of openness of the trial. In this way, they are not acting only as journalists, but as representatives of society—they are meant to follow the proceedings carefully and report them to the audience (Wójcicka 1992; Zgryzek 1991).

It is worth mentioning that this role of the media is the subject of the Polish Media Law (*Prawo prasowe* 1984), article 10, paragraph 1, where this role is described as in fact part of the public service of the media. Journalists, however, seem not to undertake that duty, acting more like salesmen of a highly desired product (as one Polish journalist put it). The perception of journalists

as salesmen is as inaccurate as perceiving the media as the stumbling block of regular legal proceedings (Parzyński 1969).

The metaphor of the theatre has long been present in the perception of the courtroom. Both venues share their decor, their unique dress codes, and their ritual behaviour. In a courtroom, most of the court officers wear formal clothes distinct from that of other officials, and they behave in a way that is formally described by court rules. Furthermore, all court officers play some roles. In terms of the theatre metaphor, we should notice that the features of the courtroom make the spectacle resemble more a modern theatre act, than a nineteenth-century dramatic piece, for the courtroom is a place where the spectacle depends not only on the behaviour of the main characters, but also on the audience's response.

Let us emphasize the fact that many judicial officers, as well as journalists, strongly dislike not only this metaphor, but also disapprove of the trend of dramatization of the courtroom in practice. Those who represent this group argue that the presence of the media and the audience in the courtroom is counterproductive for the trial, as it constitutes a serious distraction for both the court officers and the other participants of the trial. Being aware of the presence of the media, the participants of the trial tend to play some particular roles in front of the audience. Consequently, the process of recognizing the real motives and reaching the facts seems to be hardly possible (Szerer 1981).

Thus in many countries, the presence of the media in the courtroom is strictly limited. Sometimes, recording trials or taking pictures in a courtroom (even an empty one) is prohibited. In these cases, live television reports from the courtroom are replaced by sketches of the scene made by selected artists.

3. The investigative journalism

Not surprisingly, there are some journalists who do not accept their role as being exclusively reporters of a trial. Some of them tend to exceed it, and begin acting as judicial officers or policemen. The activity of such journalists has resulted in the recognition of a subgroup among journalists—the investigative journalists.

One method employed by these journalists is "undercover reporting"—pretending to be someone else while gathering information. In particular, journalists may play the roles of criminals, officers, governors, homeless people, investors, illegal immigrants, mentally disabled people, or people of a different colour (Goodwin 1983, 133–136, 144–145; Kronenwetter 1988,

85; Kovach and Rosenstiel 2001, 83). Other frequently used methods include provocation and the use of hidden microphones or television cameras.

Although all those methods mentioned above may be regarded as ethically controversial, they are accepted by most of the ethic codes developed by journalists. Nevertheless, those who introduce these methods usually act in a close cooperation with the editorial board.[1] In fact, such procedures allow the editors to control the process of news-gathering. The element of control is even more crucial in stories that involve the risk of a court action against the media.

It is worth mentioning that scholars from the Poynter Institute for Media Studies in Florida have created a list of rules pointing out when exactly using undercover reporting techniques can be viewed as ethical. In particular, the information to be gained should be of high social significance (e.g., revealing a case of abuse of power), while the potential harm caused by the method should not be more significant than the result of the investigation. Furthermore, the techniques mentioned above should be used only in those cases in which other more traditional methods have already failed. The authors of the list suggested that journalists should consider all the advantages and disadvantages of employing such techniques before making a final decision—including the possible social, professional, and legal consequences. Finally, the question of the appropriateness of using such methods in private places should be considered (Kovach and Rosentiel 2001).

According to Kovach and Rosenstiel, there are three main types of investigative journalism. The first is the traditional type, in which a journalist conducts research, collects the original data, and presents it to the audience. The main technique employed by journalists following such a paradigm is to gather data from sources open to public access, and from informers. Such journalists might additionally employ undercover reporting techniques. The second main type of investigative journalism is the so-called explanatory investigation journalism. Journalists who employ this approach focus on revealing new ways of looking at given facts or events. The third type of investigative journalism is that based on investigation reports and information leaks from police officers, officials, and event participants (Kovach and Rosenstiel 2001a; Adamczyk 2004).

It is worth mentioning that in Poland, both public opinion and journalists seem to perceive the role of investigative journalism exclusively in terms of

[1] See Goodwin (1983, 155, 185–186); Black, Steele, and Barney (1995, 120); and Day (2000, 86). Most academics accept undercover reporting techniques (Anderson and Benjaminson 1976, 6–7), while others do not think such methods are acceptable (Mollenhoff 1981, 359).

the third type. This type, however, may give rise to the most serious risks. In seeking information that has not been revealed, a journalist may expose a person to a danger or to an uncomfortable situation. Moreover, in seeking the truth, a journalist may expose a person to legal responsibility.

Thus the crucial aspect of that type of journalism is the nature of the investigation—its procedures, and the rules that might be broken by a journalist's activity. An investigation is one of the instruments of legal proceedings that begins when there is a well founded suspicion that a crime has been committed. An investigation should be, or even must be, preceded by a careful verification of the data. The aims of an investigation are to establish whether a crime has been actually committed; to find and detain the perpetrator; to collect data about the perpetrator; to explain the circumstances of the crime; and to collect, secure and preserve evidence.

4. The inquisitorial rule versus the rule of adversity

Yet journalists sometimes seem not to pay much attention to the fact that an investigation is an adversarial element of the legal proceedings, meaning that it is pursued according to a specific set of strict legal rules. First of all, during the investigation process, the suspect still has rights. Secondly, a trial progresses based on the rule of adversity, also called the contestability rule. According to this principle, proceedings must be commenced as an action between two parties who have the same rights in front of an impartial arbiter.

In the past, however, inquisitorial proceedings frequently occurred. During such proceedings, all functions—in particular the accusation, the defence, and the judgement—are performed by the magistrate. Furthermore, during inquisitorial proceedings, the parties have neither the right nor the opportunity to fight for their own interests, nor to oppose the other party's statements. Consequently, all participants in the proceedings are not perceived as subjects of the case. This situation may be extremely disadvantageous for a suspect who might be perceived as an object of manipulation of judicial officers. Hence inquisitorial proceedings are described as lacking rationalism and objectivity, and are believed to frequently lead to cases of miscarriage of justice (Waltoś 1996, 260; Cieślak 1984, 254; Daszkiewicz 1996, 94; Murzynowski 1994, 171; Marszał 1996, 69*ff*; Grzegorczyk and Tylman 1999, 102–109).

The criminal law systems in European countries assume the adversarial rule as a crucial element of legal proceedings (with some concessions). Yet

this fact seems not to be accepted by journalists. They usually neglect the possibility of indirect contact with the suspect, who is allowed to file a petition for some functions, participate in them, and question the decision during pretrial proceedings. Although the inquisitorial rule is a crucial one during pretrial proceedings, the proceedings themselves are not inquisitorial. Once the investigation has been completed, the adversarial rule becomes crucial. Consequently, suspects are aware of the fact that judicial officers have to consider all circumstances to their advantage. Furthermore, suspects know that in the absence of clear evidence of their guilt, the court officers would find them not guilty.

One of the crucial problems regarding investigative journalism is the fact that that journalists tend to judge suspects even before the end of the pretrial proceedings. Following their own investigation and perception of the facts, journalists may draw conclusions regarding a person's guilt or innocence. Since journalists may lack knowledge and experience in this, they may over- or under-estimate the significance of some of the data or charges. Moreover journalists, in presenting an event, may be swayed by their own or others' attitude to the suspect. Finally, some journalists do not pay sufficient attention to double-checking information and imputations.

As a result, a journalist may not actually play the role of the sheriff seeking the truth, but rather may act more like an inquisitor who wants to be both prosecutor and judge. Under such circumstances, suspects have no chance to explain anything, or to protect their names and reputations. Here defamation cases do not actually solve the problem, since they usually take time and create additional opportunities for repeating the imputations.

5. Legal limitations of the investigative journalism

It is worth mentioning that in all of the above, we do not aim to question the value of investigative journalism in general. The goal of our statements is to emphasize the responsibility of journalists who decide to focus on legal proceedings. What we are suggesting here is that such journalists should have the following characteristics—they should be responsible, socially sensitive, and ethical. An investigative journalist should be also aware of the fact that there is no single truth, and that one event may be perceived in many different ways accordingly to a person's knowledge, experience, motives, etc.

Under the Polish Constitution (*Konstytucja RP* 1997), journalists have the right to freedom of speech. However, a person who works as an investigative

journalist should be aware of the penal, civil, political, and professional liabilities that may arise in such work. While seeking information, a journalist may break the laws collected in the Confidential Information Act (*Ustawa o ochronie informacji niejawnych* 1999)—not only by revealing protected information, but also by encouraging others else to reveal it. Furthermore, journalists in their practice may reveal a state secret, a public service secret, professional secrets, or they may break confidentiality of correspondence. In fact, all these breaches have been committed in the past by investigative journalists.

It is worth mentioning that the interests protected by law, including secrecy and confidentiality, are mentioned in Chapter XXXIII of the Polish Penal Code (*Kodeks karny* 1997). According to the Polish legal system, both information theft and activities leading to the gathering of legally protected information are regarded as crimes. Furthermore, it is prohibited to gather information by wiretapping or eavesdropping. Finally, according to the Penal Code (ibid.), article 167, paragraph 1, not only is the information-gathering itself—including collecting the media which carries the information (e.g. a piece of paper, a CD, or a tape)—regarded as a crime, but so is making copies of such materials, as well as reading or watching them.

There are even more examples of prohibited activities, such as opening a confidential document, connecting to a wire, or breaking a security code or a security deposit (Wąsek 2004; Bojarski 1989; Grzegorczyk 1994, 47; Dudka 1998; Gajdus and Gronowska 1994). Furthermore, a journalist may bear legal responsibility for obstructing the right to present some information by destroying or changing the information (or its carrier), or else by preventing someone who is in charge from reading the information. Finally, a journalist may break the law by damaging or breaking computer systems which collect and provide data.

At the same time, a journalist has the right to criticize judicial officers while reporting ongoing legal proceedings. In fact, journalists may suggest other conclusions than those drawn by officers based on the evidence. Nor is there any legal barrier to prevent journalists from conducting their own investigation. The investigative journalists, however, should be aware of the fact that the final decision made by the judge is always the result of evaluating all available evidence and recognized circumstances.

6. Concluding remarks

Both the journalist and the judge seek the truth. The judicial officers will always base their decisions on the material truth, meaning that decisions are made based on the ascertainment of facts. Accordingly, the truth may be defined as a description of reality adequate to reality itself. Consequently, what may actually be true is not reality, but rather the opinion or description of reality. Thus, while we are able to experience reality, the truth may be only achieved by formulating a true opinion about that experience. In other words, reality exits in spite of the existence of true or untrue opinions about it. Obviously, both court officers and journalists may formulate their own such opinions.

According to the Polish Penal Proceedings Code (*Kodeks postępowania karnego* 1997), article 2, paragraph 2, the ascertainment of facts should be the basis for the final decision made by the court. Nevertheless, a journalist should be aware of the fact that although the rule of a material truth is not limited, the real chances of recognizing the facts may be in fact limited.

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KSENIA KAKAREKO

Human Rights in the Constitution of the Republic of Belarus: Between Declarations and Real Guarantees

1. Introduction

The Constitution of the Republic of Belarus (*Kanstytutsyya Respubliki Byelarus'*) was introduced in 1994, and extensively altered two years later; it was further amended in 2004. It consists of 146 articles. The third section (art. 21–63), entitled *The Individual, Society and the State*, is focused directly on human rights issues. I would like to examine the discrepancies which exist between the sometimes noble declarations and the real (true) guarantees.

2. Contexts

2.1. International law

Perhaps surprisingly, in the matter of human rights protection and freedoms this Constitution—like other post-Soviet constitutions—was inspired by the *Convention for the Protection of Human Rights and Fundamental Freedoms*, 1950 (Jaskiernia 2002). It is worth noticing that Manov (2001) claims that the guarantees of human rights in the Belarusian Constitution are on an equal level with international standards, and are in accordance with the conception of natural and basic human rights and freedoms. In his commentary he emphasizes that the Constitution is completely compatible with the *Universal Declaration of Human Rights* (1948); the *International Covenant on Civil and Political Rights* (1966); the *International Covenant on Economic, Social, and Cultural Rights* (1966); the *International Convention on the Elimination of All Forms of Ra-*

cial Discrimination (1965); and also with the *Convention for the Protection of Human Rights and Fundamental Freedoms* (1950). He additionally claims that the Belarusian Constitution is in accordance with the *Convention on the Prevention and Punishment of the Crime of Genocide* (1948) and with the *Convention on the Elimination of All Forms of Discrimination Against Women* (1979) (Manov 2001).

Belarus has ratified the *First Optional Protocol to the International Covenant on Civil and Political Rights* (1966), the *Convention on the Rights of the Child* (1989), the *Convention Relating to the Status of Refugees* (1951), the *Protocol Relating to the Status of Refugees* (1966), and the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women* (1999). A consequence of ratifying of the *First Optional Protocol to the International Covenant on Civil and Political Rights* (1966) is the recognition of the competence of the United Nations Human Rights Committee in the matter of realization of and compliance with these rights. Despite the accusations of human rights violations levelled at this country, it was there in 1995 where the *Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States* was signed.[1] The capital city of Belarus, Minsk, is the seat of the CIS Commission on Human Rights.

2.2. International organizations

Belarus is not at present a member of the Council of Europe, though in September 1992 it acquired special member status, which was suspended by the resolution of the Parliamentary Assembly (13 January, 1997) after the constitutional referendum in 1996. The suspension of this status was an expression of disapproval with the changes introduced in the Belarusian Constitution. It was also a condemnation of the internal situation in the country, in particular the Belarusian parliament's lack of democratic legitimacy, and the ongoing human rights violations. Still, there is an impression that the suspension of Belarus' Council of Europe membership was a step in the wrong direction. The Council of Europe deprived itself in this way of instruments with which

[1] *The Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States* (1995) has not been discussed in the Polish legal literature, having been mentioned only by Jasudowicz (1996). The Literature claims that the system of values of Western Europe may be incompatible with the axiology of the Orthodox Church. The social strains seen during the realisation of the ECHR in countries where the Orthodox Church is dominant may be an effect of the importation western ideologies, which are not always compatible with the Orthodox axiological system. See Kalinin (2002).

to influence the Belarusian authorities and to make them uphold the human rights and freedoms which are guaranteed by international standards, European regulations, and stipulated in the binding Constitution. But the governing bodies of the Council of Europe in fact continue to attempt to influence the upholding of rights and freedoms in Belarus by passing resolutions as required.[2]

Belarus has been a member of the Conference on Security and Cooperation in Europe (CSCE) and the Organization for Security and Cooperation in Europe (OSCE) since 13 January, 1992. From 1997 to 2002 there was a functioning Office of the Consultative-Observatory Group in Minsk.[3] Representatives of this office repeatedly pointed out serious violations of human rights and freedoms, especially during parliamentary and presidential elections. The Belarusian authorities did not accept this criticism, and accused workers of the Office of supporting the presidential opposition; journalists even accused them of espionage. After negotiations with the Belarusian government, OSCE returned to work in 2003, but significantly limited in scope and with reduced personnel.[4]

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[2] The Parliamentary Assembly of the Council of Europe (PACE) acts jointly with the European Parliament and the OSCE to decide on strategy relating to Belarus. On 13 September, 2006, the Committee of Ministers agreed on an answer to PACE recommendation number 1745 (2006) from 13 April, 2006, relating to the situation in Belarus after the presidential elections. This is a political document of the Committee of Ministers which critically considers the situation in Belarus, and demands the immediate end to violations of human rights and freedom standards. It also demands the immediate liberation of and dropping of accusations against opposition activists and demonstration participants, the end of the use of force, and a guarantee of freedom of assembly and freedom of speech, according to the international standards that have been accepted by Minsk. PACE was also disturbed by the expulsion of students involved in the political campaign of opposition candidates. The role of the independent media as an important element of the election process was stressed. Serious disturbances in the independent monitoring of elections were identified. All international organisations which collaborate in the monitoring of future Belarusian elections were called to enter into dialogue with all levels of society, including political parties, independent journalists, NGOs, academics, and political scientists.

[3] 6th Session of PACE, 1997; see Kronika Sejmowa No 175 (298) II cadence. In this session PACE called for the president of Belarus, Aleksandr Lukashenko, to restore the parliament chosen in 1995. PACE welcomed and supported the initiative of opening an OSCE Office in Minsk, whose main aim was to monitor human rights and freedoms, as a result of agreement between OSCE and the Belarusian Ministry of Foreign Affairs.

[4] The Political Commission of OSCE regularly analyses the situation in Belarus, and it even has a special body interested only in this subject. At the end of January 2007, the Chairman of PACE, Rene van der Linden, visited Minsk. He met the Chairman of the Belarusian Parliament, Vladimir Konoplev, and the Minister of Foreign Affairs. It was later claimed that Belarusian society was disturbed by the unceremonious speeches of the PACE Chairman, and that despite the good intentions of the Chairman, they were generally received as being disrespectful.

The protection of human rights was also an interest of the Helsinki Committee, which frequently pointed out that Belarusian public authorities contribute to the violation of human rights and freedoms of citizens by limiting the functioning of nongovernmental organizations, and by reducing of the freedom of means of social communication (Leshchenko 2004, 79).

Belarus is not a member state of the European Union, but the European Parliament has a lively interest in the upholding of human rights there.[5]

3. Rule of law and dignity

The Constitution of the Republic of Belarus does not mention if Belarus is a state ruled by law, or a social state ruled by law. It only observes that Belarus is a unitary, democratic, social state based on the rule of law (article 1). In Russian, a law-observing state is a synonym of a state ruled by law. It is noted in article 7 that the Republic of Belarus shall be bound by the principle of supremacy of law. The State and all the bodies and officials shall operate within the confines of the Constitution and the laws enacted.

It is not mentioned that dignity is a basic right of a person living in Belarus.[6] However article 25, sentence 1 declares that the State shall safeguard personal liberty, inviolability and dignity. Human dignity is not recognised as inherent and inalienable. Dignity is not a source of other rights and freedoms, and it is treated as being on the same level as personal freedom. Ar-

[5] See the resolution of the European Parliament on Belarus (5 July, 2001), accepted before the presidential elections of 2001 (C 65 E of 14 March 2003, p. 373); The report of the Parliamentary Three, delivered to deputies of the European Parliament and PACE (16 October, 2000) on the political situation in Belarus in the light of parliamentary elections (15 October, 2001), and on the presidential elections in 2001 (4 October, 2001); The resolution of PACE (26 January, 2006) on the situation in Belarus the day before the presidential elections; The resolution on the situation in Belarus (10 March, 2004) (C 320 E from 15 December 2005, p. 276); The resolution (7 July, 2005) on the political situation and the independence of mass media in Belarus, texts accepted P6_TA (2005) 0295; The resolution of the European Parliament on the situation in Belarus before the presidential elections (19 March 2006), P6_TA-PROV (2006) 0066. See also http://www.europarl.europa.eu/meetdocs/2004_2009/documents/ta/p6_ta-prov(2006)0066_/p6_ta prov(2006)0066_pl.pdf .

[6] This fact seems to have serious consequences, due to the contemporary idea that human rights are universal as a result of having human dignity—the most common normative base of the social and economic order—as its source. Human dignity is an axiological and normative base for international protection of human rights. It is a ground and basic norm for this system. See Oleksiewicz (2005, 77–90) and Piechowiak (1996, 50).

ticle 53 stipulates only that everyone shall respect the dignity, rights, liberties, and legitimate interests of others.

4. The subject of rights

The Constitution of the Republic of Belarus declares in its preamble its attachment to humanistic values by accenting the struggle to strengthen the rights and freedoms of every citizen. This claim has a very deep—and for most readers, unnoticed—sense, because it declares that the rights and freedoms are guaranteed only to citizens of the Republic of Belarus, and not to every human being, as is accepted in international human rights law.

The rule guaranteed in the preamble of the Constitution of the Republic of Belarus is strengthened by article 21 of Constitution, which stipulates that safeguarding the rights and liberties of the citizens of the Republic of Belarus shall be the supreme goal of the State. This is why, in the meaning of the Belarusian Constitution, the public authorities should take care only of citizens of the Republic of Belarus, and not of every inhabitant staying in the territory of the state.

This interpretation is confirmed by the stipulation of the third sentence of the article 21 which provides that the State shall guarantee those rights and liberties of the citizens of Belarus that are enshrined in the Constitution and the laws, and specified in the state's international obligations. Nevertheless it should be kept in mind that article 11 of the Constitution of the Republic of Belarus specifies that foreign nationals and stateless persons on the territory of Belarus shall enjoy their rights and liberties and execute their duties on equal terms with the citizens of the Republic of Belarus, unless otherwise specified in the Constitution, the laws, and the international treaties.

The declaratory sense of claims contained in article 21 of the Belarusian Constitution surprises with its generality. In fact, it is not known if the obligation prescribed in article 21, sentence 3 is a duty of the executive or legislative branch. It is also impossible to discover if the protection of rights and freedoms is a responsibility of local governments. The Constitution of Belarus only stipulates that the President shall be the guarantor of the rights and liberties of people and citizen, meaning that only the President is the guarantor of rights and freedoms. Contrarily to doctrine, the Constitution does not determine that this responsibility lies with the Supreme Court or Prosecutor (Leshchenko 2004, 82).

The Constitution of the Republic of Belarus, in its second section, entitled "the Individual, Society and the State", sets forth political rights and freedoms. Article 21, sentence 2 declares that every individual shall exercise the right to a dignified standard of living, including appropriate food, clothing, housing, and likewise a continuous improvement of necessary living conditions. Even though this stipulation of the Constitution seems to be coherent, it permits different interpretations. In particular, the interpretation of the phrase, "continuous improvement of necessary living conditions" may be very problematic.

5. Equality and limitations of rights

The Constitution provides that all shall be equal before the law, and entitled without discrimination to equal protection of their rights and legitimate interests (article 22). It seems that the assertion of equity of all before the law applies only to the citizens of the Republic of Belarus. According to article 23 of the Constitution, restrictions of personal rights and liberties shall be permitted only in those instances specified in law, in the interest of national security, public order, the protection of the morals and health of the population, and of the rights and liberties of other persons. It is stated that no one may enjoy advantages and privileges that are contrary to the law. In general, this rule is contrary to the declaration of equity in law, because it allows the use of advantages and privileges if they are provided by law.

It is worth noticing that limitations of human rights have also been provided by article 15 of the European Convention on Human Rights (*Convention for the Protection of Human Rights and Fundamental Freedoms* 1950). There is no general stipulation of freedom, as in for example article 31, section 1, of the Constitution of the Republic of Poland (*Konstytucja RP* 1997). The Belarusian Constitution does not seek the source of freedoms and right in natural law, as in most European constitutions, but sees them as given and guaranteed by the State (Wiśniewski 1997, 58; Dudek 1999, 105). Article 21 of the Constitution, which declares safeguarding the rights and liberties of the citizens of the Republic of Belarus to be the supreme goal of the State, is evidence of this.

It is also worth noticing that the Belarusian legislator does not ban the State from entering the sphere of individual freedoms. Although the clause of limitation in article 23 of the Constitution of Belarus is similar to the solution accepted in international law, and also, for example, in article 31, section 3 of

the Polish Constitution, it does not contain the important provision that the adopted means are necessary in a democratic society (state) to achieve the legitimate aims listed in the limitation clause.

The substance of article 23 of the Constitution of the Republic of Belarus allows freedoms, especially in connection with articles 21 and 22 of the Constitution, to be regarded as a subjective right. Article 53 of the Constitution, which provides that everyone shall respect the dignity, rights, liberties, and legitimate interests of others, is evidence of the subjective character of this regulation. Article 53 is directed first to the public authorities, and then to other subjects who are outside the public authority system. The horizontal effect of the rights and freedoms is guaranteed by a clear constitutional stipulation.

The essence of the Belarusian Constitution (article 23) affects every right and freedom covered by the section II of the Constitution. It seems that none of these guarantees apply to those constitutional regulations which enforce the rules of state policy. Regulations covered in that section are also binding for all freedoms and rights guaranteed in other sections and parts of the Belarusian Constitution.

It is worth noticing that the Belarusian legislator does not determine the rank of regulations which limit the use of freedoms and rights. In practice, these limitations may be set in under-statutory legislation.

The limitations of individual rights and freedoms is possible only in those cases prescribed in article 23 of the Belarusian Constitution. This limitation has an exhaustive character. In other words, the State cannot circumscribe rights or freedoms, without the legal basis provided in article 23, sentence 1 of the Constitution.

The basic legitimate aim which allows a restriction of rights and freedoms is "national safety". This notion is not defined in the Belarusian legal system. It is worth noticing that the notion of "state safety" stipulated in article 31, section 3 of the Polish Constitution is not defined either. Polish legal literature shows that "state safety" should be understood as a state of lack of threats, in which the State can enjoy safe existence and development (Wołpiuk 1998, 47). "National safety" should be understood as a lack of external threats relating to aggressive policies of other states and a lack of internal threats, but only of the kind that affects the basis of the state's existence, its territorial integrity, its citizens, or governmental system (Wojtyczek 1999, 184). Minor threats can only endanger the "social order". It is necessary to remember that article 3, sentence 3 of the Constitution stipulates that "any actions aimed at changing the Constitutional system and seizing state power by forcible means or by way of any other violation of the laws of the Republic of

Belarus shall be punishable by law", whereas the article 1 of the Constitution, which creates the basic rules of constitutional order provides that, "the Republic of Belarus is a unitary, democratic, social state, based on the rule of law".

The second legitimate reason for a limitation of rights and freedoms—the "public order"—is not defined either. This is a notion with a long tradition in European administrative law. This notion is also used by article 31, section 3 of the Polish Constitution. It has also been used by the *International Covenant on Civil and Political Rights* (1966) (Wojtyczek 1999, 184–187)—the French term is *ordre public* —as well as by the *Convention for the Protection of Human Rights and Fundamental Freedoms* (1950). It is disputable if the concept of "social order" and "public order" are identical. It seems that the first one has a broader range. In Polish doctrine, the "public order" is understood as a directive of organisation of public life, which ensures a minimal level of public interest, and presumes an organisation of society based on common shared values (Wyrzykowski 1998, 50). From another point of view, "public order" is understood as referring to a state, regulated by legal and extralegal norms, whose upholding permits the normal coexistence of individuals in the state (Bolesta 1983, 236). One of the values present in the concept of "public order" is the correct functioning, free of disturbances, of the public institutions. It seems that the Belarusian legislator in article 23 of the Constitution understood the notion of "social order" in this way, most likely conceiving a state which enables the peaceful functioning of state and society. It is probable that this notion is also intended to refer to the economic interests of the state.

Another legitimate source of limitations on rights and freedoms is "morality". This circumstance also exists in international law. In the Polish system, it is accompanied by the attribute "public". The protection of morality is necessary for the existence of a political community based on a certain value. It is disputable if legal intervention can be motivated only by the intention to protect morality. The concept of morality itself is also ambiguous (Ossowska 1994, 321–360; Ziembiński 1994, 13*ff).*

The circumstance of the "health of the population" as a ground of limitation of freedoms and rights exists in international law as "public health". It is quite unambiguous, and its use does not require assessment. The notion of the "protection of the health of a population" should be understood as a duty to remove all external threats to individuals' health, and to eliminate situations which are causing damage to individual's health.

The last of the circumstances—the need to protected the rights and freedoms of other people—has a universal character. It expresses the mutual con-

nection of the rights and freedoms of one individual to another. In practice, there maybe conflicts (Banaszak 1995, 69–90). Note that not every individual interest is a freedom or individual right.

6. Particular rights

The Belarusian Constitution indicates only a few of the human rights which, according to A. Łopatka, constitute the "world human rights constitution" (Łopatka 1998, 17*ff*; see also Kędzia 2003);[7] those present in the Belarusian Constitution are the right to life (article 24),[8] the right to personal liberty (article 25, sentence 1), the prohibition of torture (article 25, sentence 4),[9] and the right to be not arbitrarily detained or arrested (article 26).[10] The right to a competent, independent, and impartial court of law, as well as the right to legal assistance in the exercise and defence of rights and liberties, has also been declared (article 62). The constitution does not provide whether legal proceedings shall have one or two stages.

The Constitution does not guarantee the right to privacy, but the legislator has used the concept to declare that everyone shall be entitled to protection against unlawful interference in their private lives, including encroachments on the privacy of correspondence, and telephone and other communications, and on their honour and dignity (article 28). The right of people to be secure in their houses, and the right to property is also guaranteed (article 29). The Belarusian Constitution sets forth the right to marriage and establishing a family. This right is connected with rights of children, and the equal status of men and women (article 32).

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[7] On this subject, compare Piechowiak (1999; 1997, 8). There is a basic dispute in the literature about the character of human freedoms and their relations to human rights. Leszek Wiśniewski has stressed that human freedoms have a natural character; Marek Piechowiak disputes this point of view. See Wiśniewski (1997); Piechowiak (2003, 47*ff*).

[8] Article 24 stipulates that every person shall have the right to life. It is worth noticing that the death sentence may be applied in accordance with the law as an exceptional penalty for especially grave crimes, and only in accordance with the verdict of a court of law.

[9] Article 25 provides *expressis verbis* that no one shall be subjected to torture or cruel, inhuman, or undignified treatment or punishment, or be subjected to medical or other experiments without their own consent.

[10] It is interesting that Belarus does not prohibit the expulsion of citizens. The Constitution does guarantee that a defendant shall not be required to prove one's innocence, and moreover, that no person shall be compelled to be a witness against themselves, the members of their family, or the next of kin.

The Constitution allows also the freedom of thoughts and beliefs, and their free expression (article 33). Despite the common misconception, the Constitution of Belarus declares not only the right of association (article 36), but also the freedom to hold assemblies, rallies, street marches, demonstrations, and pickets, although only insofar as they do not disturb law and order, or violate the rights of other citizens of the Republic of Belarus. The procedure for conducting such events is to be determined by the law (article 35). Citizens also have the right to participate in the solution of state affairs, and equal access to any state bodies (articles 37–39).

Article 41 determines the right to work by very precisely formulating the rights and duties of citizens. This right is accompanied by wide range of social rights, such as the right to holidays (article 43), the right to healthcare (article 45), the right to a natural environment (article 46), the right to social security (article 47), and the right to housing (article 48). The Constitution lays down the right to education (article 49), and it also declares free and general access to secondary and vocation-technical education. Secondary specialized and higher education are to be accessible to all in accordance with the capabilities of each individual. This right is accompanied by the right to take part in cultural life, and freedom of artistic, scientific and technical creativity (article 51), but everyone is to preserve historical, cultural, and spiritual heritage, and other national treasures (article 54).

The Constitution gives the freedom to independently determine one's attitude towards religion, to profess any religion individually or jointly with others, or to profess none at all, to express and spread beliefs connected with one's attitude towards religion, and to participate in the performance of acts of worship and religious rituals and rites which are not prohibited by the law (article 31). This claim is far from the declarations of freedom of conscience, confession, and religion stipulated by the Council of Europe and guaranteed by international law.

7. Concluding remarks

Analysis of the legal norms of the Constitution of the Republic of Belarus allows us to mention that all important human rights and freedoms belonging to European standards are listed there. Nevertheless, this Constitution has only a "semantic" character. As with most post-Soviet constitutions, constitutional norms have only a declarative character, and are not accompanied by

norms guaranteeing the possibility of realizing those rights. There are no such guarantees in particular statutes. The norms in the statutes enable the public authorities to violate constitutional norms. What is more, these possibilities are also given by under-statutory acts.

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MARIA GOŁDA-SOBCZAK

Historical Truth and the Possibilities of its Normative Consequences

1. The constitutionally guaranteed freedom of scientific research

The conviction in the power of the human mind and its limitless possibilities arose as an axiom at the end of the eighteenth century. From the beginning of the nineteenth century, practically every year brought new discoveries and inventions that sometimes had almost immediate practical applications, making life easier and more comfortable not only for the elites, but for all of society. Questions on the limits of human understanding were not posed, nor was it worked out whether man should explore every domain of life, or had a right to carry out experiments—in fact to change the world at his own discretion without regard for others, including future generations. Those of dissenting views were laughed at, stigmatized, and labelled as obscurants. Freedom of scientific research became a dogma. Quite quickly, this certainty spread from the philosophical plane to the sphere of law, earning a permanent place in normative acts pertaining to both international and domestic legislation of individual countries, including constitutions.

For contemporary humans, the unlimited freedom of scientific research is an indisputable axiom. However, it is worth remembering that—as the history of scientific research shows—this freedom has been rationed, to a greater or lesser degree, throughout the centuries.

The postulation of the freedom of scientific research brings up the problem of the scope of this freedom. Pursuant to article 73 of the Constitution of the Republic of Poland (*Konstytucja RP* 1997), everybody shall be entitled to it—both Polish citizens, and others, such as foreigners and stateless persons.[1]

[1] The freedom to conduct scientific research provided for in article 73 of the Constitution refers to natural persons. Legal persons, higher educational institutions, scientific institutions, and

However, this leads to the question of whether any additional criteria, such as graduation from university, academic degrees or titles, or membership of scientific associations should be met in order to exercise this freedom. This question should be answered in the negative, not only because the drafters of the Constitution could not see any basis or possibility of subject limitation within the scope of scientific research, but also due to the fact that in practice much scientific research has been conducted by people lacking formal education and connections with scientific institutions.[2] It is however clear that a researcher from outside the "academic circle of scientists" may encounter considerable methodical and methodological problems in research. It is also impossible to conduct scientific research without access to information. With regard to this issue, a person conducting research on their own may encounter barriers difficult to overcome. Therefore a condition for conducting research (especially in the fields of medical, technical, and natural sciences) in the modern world is to be connected with some scientific institution (within the framework of a higher education institution or research institution), or with some business institution that would be interested in results of such research and is ready to provide funds for conducting it. Carrying out scientific investigations outside of such centres is possible only in cases where considerable funds are at the researcher's disposal, and even then, only in some fields. In practise, such research is conducted by some historians, specialists in Polish studies, and lawyers employed in various nonscientific institutions, for whom this research activity is a kind of hobby, often treated as a dream come true. The results of such explorations are extremely interesting, and answer a series of significant questions, especially those formulated by practice. However, the majority of them are of a contributory nature, and refer to marginal issues. It cannot be forgotten that modern scientific research (apart from some fields of social science and humanities) results from teamwork. The establishment of a team is possible due to existence of a scientific or industrial organization which organizes the team, provides funds for conducting the research, and demands results. However, it may happen in practice that such organizations fail to adequately recognize the value of the formulated hypotheses, and are not ready to

business institutions which organize and conduct such research are not included within the scope of this freedom. The provisions of article 73 do not themselves appear to be restricted to natural persons; however, both the individual and creative nature of research explicitly indicates that it can refer only to activities undertaken by natural persons, whereas the aforementioned educational or research units may only organise such activities.

[2] It is worth recommending the accessibly written deliberations of Daniel J. Boorstin as interesting and competent on this subject, e.g. Boorstin (1993; 2002).

incur the costs of laborious, multiyear investigations, if their results seem distant or difficult to obtain.

The provisions of article 73 of the Constitution[3] do not offer any means of demanding funds, tools, equipment, or opportunity for scientific creation that would contribute to the implementation of the ideas of a person willing to carry out independent investigations in isolation from scientific institutions. Nor is there any basis for employees of research institutions to make such claims. History shows that institutions established for the purposes of project assessment have not always measured up to the expectations placed on them, sometimes rejecting a series of valuable and interesting projects, while approving superficial ideas of dubious value, which happen to be supported by people of considerable standing and recognition. The freedom of scientific research cannot mean, however, that such research is to be conducted beyond any influence of the environment. The fact of conducting scientific research naturally assumes the existence of scientific criticism aimed at analysis and the assessment of scientific works for their formal and content-related correctness, their value, and their practical usefulness.

The provision in article 73 of the Constitution for the freedom of scientific research and artistic creation bans the public authorities from taking any actions curtailing or eliminating the freedom of conducting scientific research, the freedom of artistic creation, or the freedom of dissemination of research results. These obligations are of a negative nature, since their subject refers to freedom.[4] However, the Constitution does not stipulate any positive obligations on public authorities with regard to scientific research and those engaged in such research. Therefore the same authorities may define rules for awarding funds to support research or publications, and determine the composition of research teams according to criteria accepted by them, as long as they do not violate the aforementioned autonomy of higher education institutions.

The freedom of scientific research provided for in the Constitution does not mean, however, that it is absolute and cannot be subject to any legal re-

[3] Art. 73: "Freedom of artistic creation and scientific research, as well as the dissemination of the fruits thereof, the freedom to teach and to enjoy the products of culture, shall be ensured to everyone".

[4] A consequence of the differentiation between the "freedom" and the "right" of an individual is a fact that a citizen exercising their freedom does not have to seek any permission, but must only refer to the limitations on that freedom in valid law. When regulating a freedom, an act must exhaustively define a scope of law, or precisely indicate a ban. When referring to a case within the scope of the freedom, national bodies cannot issue a decision in the form of a permit, but can only register what has been decided by the citizen. See Wiśniewski (1997, 51*ff*) and (Banaszak 1993).

straints. Undoubtedly the limits of this freedom are defined in article 31 of the Constitution, especially in section 3, but also in section 2. When analysing these provisions, it is worth remembering that they are addressed to the public authorities, understood as a collection of entities that exercise competences of power, or prepare or organize the exercise of these competences (Garlicki 2003, 19). The prerequisites of the material limitations stipulated in article 31, section 3 of the Constitution with regard to the exercise of constitutional freedoms and rights (the catalogue of which is exhaustive), and which are particularly relevant to scientific research, seem to include those which are necessary for the protection of state security, public order, health, and public morals. The limitations regarding the protection of the natural environment and the freedoms and rights of other persons will be of less importance, though this does not mean that they will not be present—especially in the field of biology and medical sciences.[5] It should be noted in any event that in a democratic country, all the possible limitations can be established and imposed only when they are necessary.

2. Historical memory and revisionist versions of history

The practice of the social sciences may also result in serious risks to individuals, including violations of their dignity, privacy, or freedom of conscience and religion. An extremely dangerous phenomenon present in the practices of various states is to make attempts to establish or redefine national identity. This can lead to the "historical politics" that in the past was, more or less successfully, practiced by fascist regimes and the regimes of countries in the socialist bloc, which promoted such ideas as the myths of the special mission of the Germanic race, of Jewish plots, or of Proto-Slavic settlement in Biskupin (Dymkowski 2000, esp. 131–66; 2008).

It is possible to draw various stories from the infinitely extensive past and to interpret them in many different ways. It is possible to indicate the mission of the Teutonic Knights as being connected with civilization, and equally, to emphasize instances of their cruelty to Prussia; to glorify the conquests of Julius Caesar, or the revolt of Vercingetorix; to praise the heroism of the Warsaw insurgents, and to indicate the negative political effects of that Uprising. The reconstruction of Warsaw may be seen both as an attempt to maintain

[5] As a side effect of anxieties resulting from the rapid development of such sciences, bioethics, that is, the field of study concerned with the principles of ethical conduct of those undertaking medical activities on patients, has emerged. See Russo (1994, 950). Cf. Leone (1995, 18).

historical continuity, and at the same time as a desire to break with the past. It is possible to glorify American intervention in Vietnam, or to show its destructive character. Some want to present the French revolution as the beginning of a new society, abolishing social inequalities, as a movement bringing "liberty, equality, and fraternity"—whereas others emphasize only its cruelty, its striving for the destruction of religion and the existing social order, and stress its ferocity and its destructive actions on the fabric of society (Baszkiewicz 1993; 1989). The Round Table deliberations are seen by some as commendable examples of the authorities' readiness to hold out a hand to the opposition, while others see it simply as treason. Historical figures also provoke arguments: for some, Colonel Stauffenberg and Colonel Kukliński are patriots, whereas others consider them to be traitors. Kostka-Napierski and Jakub Szela are traitors for some people, while others perceive them as heroes fighting for social liberation. Similar discrepancies are visible with regard to the interpretation of various historical events by different ethnic groups inhabiting the territory of the same country. For Ukrainians, the Chmielnicki Uprising was a struggle for their own country; most Polish historians consider it only a rebellion, and only some are ready to admit that it was an uprising. For Poles, the Polish-Lithuanian Union is an indication of the long-range policy of the Jagiellons, whereas many Lithuanians see it as an act of treason and of the deceitful striving of Poles to deprive Lithuanians of their national identity. Similar disputes are generated by the so-called mutiny of General Żeligowski (Kula 2003, 2002; Stobiecki 1998).

It is obvious that every nation has a right to its own vision of history, and that these visions may naturally differ in the historical traditions of neighbouring countries. There is no doubt that new generations interpret history in different ways referring to various elements of tradition. The choice of tradition actually depends on various factors; it is the outcome of intellectual, philosophical, world-view related, economic, and other trends. Sometimes certain historical events functioning within the framework of the broadly understood tradition are (more or less intentionally) eliminated (Tazbir 2002, 360–367). Sometimes this results from the improvement of relations between neighbouring countries, while in other cases it is the effect of well-thought-out political actions. In the Polish situation, a clearly noticeable phenomenon involves the marginalization of the various Polish-Ukrainian conflicts, and a putting aside of the historical past for the sake of current political relations. The choice of tradition sometimes comes down to the choice of a national symbol—such as an emblem or a flag; examples include the eagle image as the national emblem of Poland, or the flag and national

emblem of Belarus. Clearly, these issues are influenced by the rich symbolism recorded in literature, art, film, and theatre, and manifesting itself in songs, legends, and tales.

Without denying the possibility, or even right, of new generations of historians to put each time new effort into the interpretation of history, it should be noted that this process may involve various doubts. The ruling class may choose the tradition to be cultivated by the state, may take over a foreign tradition, may reject some historical themes in the history of a given nation or state, or even forget about some "inconvenient" facts. However, it is unacceptable to attempt to shape tradition by way of penal law, with the assistance of prosecutors and courts, that is, by regarding other interpretations as crimes or offences. It is obvious that nobody, including historians, should lie. However, assessments and interpretations of events are subjective, and like any opinion on reality, they may have a more or less firm basis in fact. Therefore, they cannot be judged as true or false.

Attention should here be drawn to the issue of so-called Holocaust denial. The term is understood as the denial of findings related to the Holocaust, the extermination of the Jews conducted by Nazi mass murderers. These crimes are prosecuted under article 55 of the Act of 18 December, 1998, on the Institute of National Remembrance Commission for the Prosecution of Crimes against the Polish Nation (*Ustawa o IPN* 1998). It is worth noticing that pursuant to the aforementioned provisions, anyone who publicly and contrary to facts denies the crimes referred to in article 1, section 1 of the aforementioned Act, i.e. the crimes committed against persons of Polish nationality or Polish citizens of other ethnicity in the period from 1 September, 1930 to 31 December 1989, and therefore including Nazi, communist, and other crimes which constitute crimes against humanity or war crimes, shall be subject to a fine or up to 3 years' imprisonment. Such sentences of the court are obligatorily made public. Contrary to the common journalistic opinion that the provisions of article 55 are a barrier to any further research regarding the extermination of Jews, an analysis of the Act's provisions shows that such opinions are totally arbitrary. In no way does the Act curb research into the Holocaust, and there are no obstacles to verifying existing results, e.g. by presenting the roles of individuals who conducted the criminal activity, or by establishing new dates of certain criminal events. Only the formulation of the thesis that the Holocaust did not occur seems to be unacceptable (Arendt 2003; 2003a). This is clear from the disposition of article 55 of the aforementioned Act, which clearly emphasizes that the perpetrator meeting the criteria of the crime must contradict those crimes contrary to facts. This may obviously lead

to the "objectivization" of historical truth, but it does not stand in the way of scientific research being conducted. It is very accurately indicated in the literature that in the case of "Holocaust denial", there can be a "special combination of objective falsity and subjective bad faith" (Garlicki 2003a).

It is worth noticing that article 37 of the Act of 18 October, 2006 on the disclosure of information on documents of the organs of national security collected in the years 1944–1999 and on the contents of these documents— the so-called Lustration Act (*Ustawa o ujawnianiu informacji* 2006) amends the Penal Code (*Kodeks karny* 1997), by adding to its provisions a paragraph 1a in article 112 and article 132a, which penalizes the act of publicly accusing the Polish Nation of participating in communist or Nazi crimes, of organizing them, or being responsible for them.[6] The Commissioner for Civil Rights Protection appealed to the Constitutional Tribunal against the aforementioned provisions. In the judgement of 19 September, 2008, the Constitutional Tribunal decided as follows: "Article 112, paragraph 1a, and article 132a of the Act of 6 June, 1997, entitled the Penal Code (*Dziennik Ustaw,* no. 88, item 553, as amended) are inconsistent with article 7 and article 121, paragraph 2 in connection with article 118, paragraph 1 of the Constitution of the Republic of Poland". With this decision, the Tribunal remitted proceedings pursuant to article 39, section 1, point 1 of the Constitutional Tribunal Act of 1 August, 1997 (*Ustawa o Trybunale Konstytucyjnym*, 1997), rightly finding a violation of parliamentary procedure in the process of adoption of the aforementioned provisions, in particular of the Rules of the Sejm. This made the Constitutional Tribunal decide that in view of the violation of legislative procedure, substantive verification of the provisions questioned by the Commissioner was unnecessary.

[6] Pursuant to Article 122 of the Penal Code (*Kodeks karny* 1997): "Irrespective of regulations valid at the place where the prohibited act has been committed, the Polish Penal Code shall apply to a Polish citizen or a foreigner in the case of perpetration of: 1) a criminal offence against the internal or external security of the Republic of Poland, 1a) a criminal offence of slander against the Polish Nation". The amended Article 132a of the Penal Code provides: "Anyone who publicly accuses the Polish Nation of participating in, organising, or being responsible for any communist or Nazi crimes [...]" It should be noted that compared to the previously mentioned provisions, it has been indicated in the literature that the concept of the "nation" within the meaning of Article 132a of the Penal Code cannot be considered equivalent to the concept of the "state", stating at the same time that the concept of the "Nazi crimes" is not defined by any act, and for the purposes of interpretation of the term one should make use of interpretations of the terms "fascist" and "totalitarian", accordingly, used by the legislator in article 256 of the Penal Code. It has been also stated that the concept of "communist crime" was not defined by the legislator in the Penal Code, but it is explained in article 2 of the Institute of National Remembrance Act (*Ustawa o IPN* 1998). Cf. Budyn-Kulik et al. (2007, 271*ff*).

While raising this issue, the Tribunal did not refer to the factual contents of the argument by the Commissioner for Civil Rights Protection, or to the positions taken in the course of proceedings by the Public Prosecutor General and the Speaker of the Sejm. In particular, it did not take up the fundamental issue of whether the essence of the "insult" really lay in the impossibility of making an assessment of a given conduct in terms of logical truth or falsehood, or whether the term belonged to a category of terms having the nature of assessment. Neither did the Tribunal attempt to define the expression "Polish Nation". It did not consider the thesis which at base states that the participation of representatives of the Polish nation in communist and Nazi crimes could be traced in the historical record. Despite the existence of such records, public statements regarding them would have to be subject to criminal proceedings. The Constitutional Tribunal did not directly state what the relation of the provisions found unconstitutional was to article 73 of the Constitution. It is worth noticing that in his petition, the Commissioner for Civil Rights Protection emphasized that the freedoms provided for in article 73 were not of an absolute nature, but could be subject to limitations pursuant to article 31, section 3 of the Constitution. A statement in the petition of the Commissioner which seems very important says that the provisions subject to appeal may lead to a situation where the awareness of the penal sanction may result in the abstention of the public from statements and from scientific research.[7] It should be added that the state cannot create any historical dogmas in the course of legislative procedure. The determination of historical truth should be a matter for historians, and not for judges and prosecutors.

In this context, a problem appears of whether the provisions subject to appeal limit the freedom stipulated in article 73 of the Constitution in an excessive way and without any clearly identifiable necessity, thus posing a risk of shaping historical truth only within the limits accepted by the organs of public authority, the crossing of which limits would result in criminal responsibility.

The practise of social science cannot be a cover for actions which violate the rights and freedoms of other people, in particular those which violate their dignity, privacy, or freedom of conscience and religion. The freedom of scientific research may be limited when it turns into the "language of hatred", which is anyway subject to separate penalization in Poland, pursu-

[7] See the Judgement of the Constitutional Tribunal of 19 September, 2008, file no. K 5/07 (the sentencing part of the judgement was published in *Dziennik Ustaw*, nr 173, poz. 1080).

ant to articles 256 and 257 of the Penal Code. In humanities and social sciences, the determination of undeniable truths is much more difficult than in the natural, medical, or technical sciences. Social processes form less verifiable subjects of research, and they are more diversified and ambiguous that the subjects studied by mathematicians, physicists, or engineers. The history of mankind is interpreted in various ways, and practically each generation creates a new version of history. The common saying that historians are much more powerful than God seems very apt, since God merely created the world and set it in motion, whereas historians recreate history every few years, formally only commenting on historical events. Actually, the processes studied in natural science are also interpreted anew from time to time. The difference is that in social research—especially in history, sociology, and cultural anthropology—the process of searching for the truth is very complex, and the findings are not definitely verifiable.[8] Obviously it is impossible to question facts; however, it is always possible to differently assess events leading to their emergence. The effects also may be interpreted in different ways. Moreover, new sources, reports, and research methods appear, and make it possible to look at historical facts from new perspectives.

This may lead (and actually does lead), especially in the field of history, to the emergence of various controversies that result in prohibitions with penal law sanctions formulated by national authorities. Examples of such actions include the prosecutions by Turkish authorities of both historians and publicists who demonstrate that the authorities of Turkey were responsible for the slaughter of Armenians in the years 1915–1916. Conformism (fortunately typical of only some researchers) makes researchers uneager to take up some subjects, simply because they are unwelcome to public authorities.[9]

[8] As Marek Ziółkowski observes, there are areas of social knowledge "where the concept of truth (even historically relativized) cannot be reasonably or unquestionably applied . . . In numerous fields of social sciences and humanities it is impossible to show a single system of beliefs, a single theory or doctrine that would predominate over others and which could be treated as most accurately reflecting reality". In a situation where it is impossible to determine a group of true beliefs, Ziółkowski further states that "there is also a lack of a standard that would make it possible to assess the level of departure of other groups of beliefs from the truth, though on more than one occasion advocates of a given position, unjustly convinced of its absolute truth, claim the right to criticize the assessment of other people's views as 'false consciousness' or 'dark superstition'". Cf. Ziółkowski (1989, 46–47).

[9] With reference to this subject, see, for example Kula (2001; 2002; 2003). See also Iggers (2002) and Lacapra (2002).

3. Concluding remarks

History and historical research cannot be separated from the conflicts which disrupt societies. Such conflicts are the subject of historical research.

History, or historical ideology, becomes the basis of national identity.

Historical politics changes with the passage of time, and the past comes to be interpreted in a different way. It is unacceptable that the law sets limits on historical research.

It is also impossible to accept that the administration of justice protects the historical politics of the state.

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PIOTR PIESIEWICZ

The Real or Virtual World—Legal Norms in Virtual Worlds

1. Introduction

The Internet is a global phenomenon. It is steadily expanding, and has come to involve a large share of the world's population. People who are geographically scattered throughout the world can communicate on a new and dynamic foundation in which they may be both providers and users of the stream of information. The Internet has enabled a totally new way of communicating, not only by making geographical distances irrelevant, but also by modifying the way in which we communicate and perform activities. In other words, the Internet has come to involve every sector of our day-to day-life, and has altered the way in which we carry out our daily activities. Thus not only is the Internet a structure that enables information transfer, it has actually come to modify the way in which we carry out activities, from simple things such as mailing, to complex behavioural structures such as socialization (Pattaro and Sartor 2002).

The new forms of socialization have led to the creation of Internet meeting places such as chat rooms, forums, and Internet communities. However, further development has come to include entire so-called virtual worlds. These virtual worlds are computer-based simulated environments, which are intended for users to inhabit and interact in. Even though these virtual game worlds started out as mere fantasy role-playing games in which the content was clearly make-believe, they have developed into worlds in which the concepts of real and unreal have become more difficult to distinguish.

Developers of multiplayer online games use three-dimensional graphical representations and auditory sensations in order to imitate real human behaviours, and thus also real life. Users of these virtual worlds create avatars, which are humanoid representations of the user within the game. These avatars are able to perform an array of different actions related to the virtual world.

2. Types of virtual worlds

It is important here to distinguish between the two different kinds of virtual worlds that exist. At the lower level, all games operate on program code that defines the basics rules of the game. The higher level includes the simulations that generate the virtual social habitat. This higher level consists of visible features such as avatars, surroundings, and items. These elements are accessible, and may undergo transformations, in which the user may play the role of either creator or destroyer in the virtual environment. Consequently, the user does shape the virtual world. Still, not all games are equally open to manipulation. *World of Warcraft* (*WoW*) is an example of a virtual world with a closed design. *WoW* is a virtual reality game in which a large number of players unite in an adventurous fantasy setting. The goal of the game is to accumulate power and wealth by moving around in the virtual space. Players acquire tools and weapons by fighting other players, trading, and hunting. Ultimately it is the skills of the player that determine success in the game, and these skills are to a large extent dependent on strategy and on the amount of time spent playing the game. Blizzard Entertainment, the company behind *WoW*, generates income by selling copies of the game and by charging play time fees for online users of the game. On the other hand, the company Linden Research suggests another approach to virtual reality games. In their virtual role-playing game, Second Life, the virtual space is open to manipulation by users, who can design their own environment. The basics of the game consist just of the bare environment of the virtual world, and all the higher-level features are intended to be created by the users themselves. In this sense, Second Life is a very creative and innovative virtual world, where users with simple tools, governed by a basic set of rules, manage the game.

Second Life is an example of a virtual world that has taken several actions to make the virtual community even more lifelike. Its operators have even created an in-game economy, giving the player rights to virtual property. In line with the right to own property in the game, users are able to buy and develop virtual goods such as real estate, which can be sold on to other "residents" of Second Life. The Linden Dollar (L$) is the currency of the in-game economy in Second Life, and unlike the currency of *WoW,* the Linden Dollar is not entirely fictional, as it has real-life value, selling at an exchange rate of about L$270 to US $1 (Naone 2007).

Despite the Terms of Service presented in these virtual worlds, players and other forms of organized enterprises sell their avatars and virtual property for real money (Bartholomae and Koch 2008). Hence *Real Money Trading* (RMT)

has become a profitable industry. Analysts of virtual trade in 2005 estimated that virtual commerce ranged from US $200 million to US $2 billion a year (Terdiman 2005). In 2003, the Internet games section of the online auction site eBay held more than US $9 million in trades (BBC News 2005).

While virtual property in these virtual worlds is not in itself tangible, it evidently has genuine monetary value and can be exchanged in real life. The position of virtual game worlds, placed as they are at the boundary of the real and the make-believe, has given rise to the existence of an entirely new branch of virtual crime, as users of these virtual worlds struggle with problems similar to those of real life.

3. from virtual to real crimes

About 30 percent of people who play online games such as *World of Warcraft*, or use social networks such as Second Life, have experienced theft of money or virtual goods in these worlds. These are the data presented by the European Network and Information Security Agency (ENISA):[1] Stolen avatars, stolen accounts, and fraud are all part of the seamy side of these popular online games and networks on the Internet. According to the report, over 30,000 new malicious programs designed to detect and copy passwords were created on the Internet in 2007 alone. This represents an increase of 145 percent over previous years. These programs give full access to accounts and game characters, which can be further sold for real-world money, either legitimately or on the black-market. It is therefore not a surprise that the antivirus software company Kaspersky Labs named 2007 as the year of online-world fraud (ENISA 2008). ENISA's report describes in detail fourteen main risks:

1. Avatar identity theft and identity fraud. *Theft of account credentials (username and password). The main motivation is real-money financial gain, but identity fraud can*

[1] The European Network and Information Security Agency, ENISA, works for the EU Institutions and Member States and is the EU's response to the information security issues of the European Union. Formally, ENISA came into being following the adoption of the *Regulation (EC) establishing the European Network and Information Security Agency* 2004. The agency's mission to achieve a high and effective level of network and information security within the European Union. Together with the EU institutions and the Member States, ENISA aims to encourage a culture of network and information security for the benefit of citizens, consumers, business, and public sector organisations in the European Union.

also be used to damage reputation (real-life or, more commonly, in-world) and to avoid responsibility for crime.

2. MMO[2]/VW[3] privacy risks. *In privacy terms, avatars are no different from other forms of online persona. Users may even disclose more personal data because the MMO/VW gives a false sense of security. There is also a trend towards behavioural marketing by "eavesdropping" on avatars.*

3. Automation attacks. *Some forms of automation are very problematic for service providers because they allow attackers to obtain objects or services "for free". This leads to loss of in-game value for other users, disruption of gameplay, and loss of revenue for service providers.*

4. Cheating and security issues. *Cheating can be a serious problem both for users and service providers. We look at categories of cheating from an information security point of view, e.g. illegal object duplication* (duping) *and insider trading.*

5. Harassment. *In-game harassment, such as ganking*[4] *and verbal harassment, can be just as serious a threat to real-world people and resources as any other kind of online harassment.*

6. Trading and financial attacks—credit card chargebacks. *Whenever an in-game purchase is made with an online payment service (e.g. credit card or PayPal), a full refund can be claimed from the payment company (usually within a month). Retailers then lose money—even if the consumer has already made full use of the service paid for. For instance, in Second Life it is possible to spend tens of thousands of dollars on a single purchase of land, and then split it into a large number of subplots, which are sold on. If a chargeback is issued, reversing these transactions is technically and administratively very problematic.*

7. Risks to intellectual property. *Original works can be created in-world using official tools provided by the service provider. Original work can even be created by arranging virtual objects, e.g. sculptures from virtual coke cans. The actual rights held by the user are often only vaguely defined and may be invalidated by underlying rights. Also, users of virtual worlds often import copyrighted material without the permission of the copyright owner.*

[2] Massively Multiplayer Online
[3] Virtual World
[4] The repeated killing of an avatar by a malicious party.

8. Information security related risks for minors. *Minors can be exposed to inappropriate content in MMO/VWs either through the circumvention of age verification techniques or the failure of content rating systems. This exposes them to risks such as disclosure of real-world contact data and pornographic or violent images.*

9. Problems with online dispute resolution (ODR) in MMO/VWs. *Effective ODR is particularly problematic in MMO/VWs because many disputes are raised in order to gain advantage over other players or residents. In 2006, Second Life received one ODR request per day for every 15 users.*

10. MMO/VW spam. *Many bots (scripted avatars) exist within MMO/VWs, which peddle unsolicited marketing as well as offers and/or advertising services or products banned by the service provider;*

11. MMO/VW-specific denial of service (DoS) attacks. *Scripted objects and avatar action in MMO/VWs provide novel variants of DoS attacks. MMO/VWs are especially vulnerable to DoS attacks because of their centralized architecture and poorly authenticated clients.*

12. Malicious game servers. *Malicious game server software can be used to perform "virtual mugging"—theft of account details or objects of value. This risk is especially important in the emerging open MMO/VW architectures where MMO/VWs may be hosted on unauthenticated servers.*

13. Attacks on user's machine through game client. *A game client is a piece of network software with specific vulnerabilities that may allow an attacker to control a user's machine.*

14. Access and authorization problems in MMO/VWs. *Attacks on access control restrictions to parts of the MMO/VW world can allow attackers to access private sectors or data. On the other hand, avatars may collude to "physically" block other avatars from a sector of MMO/VW space* (ENISA 2008).

"It might seem strange to talk about real crimes being committed in computer games that revolve around slaughter" (Ward 2003). Nevertheless, activities such as "cyber-rape" cause real-life psychological damage. Players who have had their virtual houses raided by gangs that stole their virtual property, or that were cheated of their powerful magic items, are of a different opinion, since these actions have caused them both social and financial harm.

Hence, the ENISA report was bases on actual threats that exist within these virtual worlds.

One of the first major cases in the field of virtual crime concerns the killing of a Chinese man in a row over a sword in the online game *Legends of Mir 3*. The Shanghai gamer Qiu Chengwei killed the player Zhu Caoyuan when he found out that Zhu had sold his virtual "dragon sabre", an in-game sabre that Qiu had loaned to the victim. *Legends of Mir 3* is a fantasy role-playing game, like *World of Warcraft*, in which players take on the roles of warriors, wizards, and other magical creatures. As a long-time player of *Legends of Mir 3*, Qiu had only obtained the weapon shortly before Zhu sold it for the equivalent of US $670. Qiu attempted to take the dispute to the police, but this proved unsuccessful, since there was at the time no law in China to protect virtual property.

The argument over the sold sword arose due to problems with so-called Online Dispute Resolution (ENISA 2008). In 2006 alone, Second Life received 2,000 ODR requests per day (ibid., 45). At that time, the peak number of active accounts was approximately 30,000. The 2,000 ODRs might seem a rather high number, though it is typical for virtual worlds.

A number of these reported disputes are connected with the prevailing culture of virtual worlds, in which many users consider that "anything which is allowed by the software is acceptable as a means to gain advantage in the MMO/VW" (ENISA 2008, 45). China has since taken measures to develop a law regulating virtual theft, and in the case of Li Hongchen vs. Beijing Arctic Ice Technology Development Co., Li Hongchen, a video gamer who had spent over two years and more than US $1,200 playing an online game, had all his virtual weapons stolen via security holes in the game servers. Arctic Ice, the publisher of the game, claimed that Li's virtual armoury was merely data with no real world value. The verdict of the appeal court differed, and Arctic Ice was ordered to return all the stolen winnings and weapons to Li (Arias 2007).

China's higher-level court also ruled in the case of Yan Yifan, finding him guilty of online theft, thus making him the first person to be disciplined for stealing online property. Yan was employed by an MMORPG[5] publisher, where he had access to players' private information. By logging into their private accounts, he acquired their virtual goods and sold them to other players, profiting US $500. The ruling of the court was based on the argument that "the time, energy, and money spent by online players to gain the game's equipment, impart value to the virtual goods" (Arias 2007). After these

[5] Massively Multiplayer Online Role Playing Game

cases, China's criminal law actively began to provide protection from theft of virtual property.

Here it is also important to note the existence of in-game harassment, which can take many forms and may cause harm to real-world people. Actions such as ganking,[6] inducing avatar suicide,[7] and verbal harassment may pose serious threats to users of these online games (ENISA 2008, 36). More extreme forms of sexual harassment have occurred in games such as Second Life, where one avatar allegedly raped another. Some Internet bloggers dismissed the attack as being merely digital fiction, but Belgium police began an investigation of the case (Sipress 2007).

One of the major problems connected with these virtual worlds is the difficulty of monitoring the content of the virtual environment. Exposure to pornographic or violent images may be offensive to users (ENISA 2008, 44). German authorities have announced that they are investigating an incident involving virtual abuse in Second Life, after receiving pictures in which an animated child character engages in simulated sexual behaviours with an adult character. Even though it turned out that adults created both characters, the action could be considered as child pornography under German law. Linden Labs issued a response to the German authorities on their official blog, condemning the virtual child pornography, and further banned two participants in the incident—a 54-year-old man and a 27-year-old woman. However this led to a series of objections from Second Life users who argued that fantasy is not against the law (Sipress 2007).

Philip Rosedale, the founder and chief executive of Linden Labs, counters these arguments by claiming that he hopes Second Life will eventually develop its own virtual legal system that will regulate the virtual environment, but that for the time being, real-life laws should govern Second Life (Sipress 2007).

Ginsu Yoon, Linden Labs' vice president for business affairs, states that Linden has "invited the FBI several times to take a look around in Second Life, and raise any concerns they would like" (New Scientist 2007). As a result, FBI investigators have used avatars on several occasions to examine the virtual world, in particular virtual gambling. Their main concern is whether the virtual casinos of Second Life comply with US law (Sipress 2007). There are hundreds of casinos in Second Life that offer a variety of games such as poker, slot machines, and blackjack. Although it is difficult to estimate the total size of

[6] The repeated killing of an avatar by a malicious party.

[7] This is common scam in which an attacker lures a victim to a distant location and tells him or her to press Alt-F4a (a suicide key-sequence) to "enable cheat mode" or some other false "secret benefit", and then plunders the "corpse".

the gambling economy in Second Life, estimates of their income are around US $1,500 each per month. Most legal authorities in the United States would agree that playing in these virtual casinos most probably violates US antigambling statutes. Linden Labs forbid illegal activity, but Ginsu Yoon states that it is not always clear whether a three-dimensional simulation of a casino is, legally speaking, the same thing as a casino in real life (New Scientist 2007).

4. Virtual property as real property

The question of whether three-dimensional representations in the virtual world actually have real-life value also concerns the very essence of virtual property as being private property. Users of virtual worlds are repeatedly faced with arguments concerning the very existence of virtual property. Arguments of this nature are based on the notion that property of this kind has in fact no physical existence, nor is it the result of individual labour, and neither does it enhance the welfare of society in any evident way (Meehan 2006, 29).

Even though virtual property may be no more than a collection of data on a server, arguments of this sort can be easily abandoned—the law as a matter of fact has no problems treating the intangible as valuable, having recognized the right to ownership of intangible commercial rights such as, for example, intellectual property (Fairfield 2005, 1089). Dr Roger Leng, a lecturer on criminal law at the University of Warwick, supports this notion, stating that "it's certainly possible to steal intangible property. It's possible to steal any form of property right which is not represented by tangible objects". An analogous view is to consider a credit balance as an intangible property, since "in law a bank account is a credit balance. It's not a pile of money that can be stolen, even though it is not representing anything physical" (Ward 2003).

A frequently proposed validation of the idea of virtual property as private property comes from Locke's labour theory of property. According to this idea, the mere fact that users of virtual worlds have invested both time and effort in improving their avatars, skills, and other virtual possessions, implies that they deserve property rights to their virtual property (Mathias 2004, 9; Lastowka and Hunter 2004).

However, the Lockean labour theory does not provide the only justifiable justification of virtual property as private property. The most common alternative theories are the utilitarian theory of Jeremy Bentham, and Hegel's personality theory.

According to Bentham's utilitarian theory, private property interests should be granted if they increase the overall utility and social welfare in a society (Bentham 1970, 12–13). As previously mentioned, opponents of virtual property rights claim that these virtual worlds do not benefit social welfare. Yet virtual worlds can themselves be called societies, because their structure as aggregations of a variety of people is similar to real-life societies. This is considered to be a justifiable argument for the application of this theory to virtual private property (Lastowka and Hunter 2004, 29), yet the utilitarian theory of Bentham does seem rather cruel in recognizing property only when it maximizes the utility goals of the society. Hegel's view of private property as an extension of personality is far more tolerant. The theory is related to human rights such as the rights to liberty, identity, and privacy. It is also related to the effect of property on human needs, and these needs should presumably be the same for both virtual and non-virtual property. When it comes to avatars, it would seem that Hegel's theory favours the granting of property rights to virtual world gamers, since users can become very attached to their virtual characters.

Locke's labour theory of property seems to be in accordance with China's higher level court in the ruling against Yan Yifan. However virtual property does not emerge from a vacuum, and the operators of these virtual worlds have a competing claim, stating that their labour in creating and maintaining the virtual worlds gives them the property right to the entire virtual world. That leaves users with little or no claim of virtual property. Hence "there arises a question of allocation: do users or operators have a stronger Lockean claim to in-world products?" (Horowitz 2007).

Following this line of reasoning, based on Locke's labour theory, both players and operators have property claims in the virtual world, since clearly virtual property emerges from the time and effort spent on developing the game. Or in Locke's own words: "Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joyned to it something that is his own, and thereby makes it his Property" (Locke 1690, Chap. V, § 27).

5. Concluding remarks

Although one might argue that playing a game cannot be considered labour, there is no just distinction that one can make between these two states, at least not in legal matters. Consequently, the line between game values and

real values has become blurred in today's virtual environment, and it may be that we should reinterpret the boundaries of the old rules to accommodate the changes in society evoked by the Internet.

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