THE PROVINCE OF JURISPRUDENCE NATURALIZED

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Preface

For the last several decades, one of the most influential approaches to philosophical issues has been naturalism. It is a consequence of a doubt, shared by many thinkers, that there are fundamental axioms which could support solutions to theoretical, and usually very abstract, controversies. In turn, many came to conclusion that discovering the truth about the world involves not only philosophy, but also the evidence of science. The scientific method is a powerful aid in transcending our particular perspective and acquiring a more comprehensive understanding – the perennial goal of philosophy and science. Perhaps unsurprisingly, however, adopting naturalism – despite its numerous advantages – comes at a price. One of its most significant flaws is immediately apparent when it is adopted as an approach to the study of law.

The study of law is, first and foremost, the study of a human practice. The full account of the practice of law can be given by explaining legal rule-following behaviour not only from the scientific, i.e. objective, perspective, but also from that of the person who must decide how she will respond to the law. Answers to various and persistent jurisprudential questions – such as "what is the law?" or "what is the difference between law and morality" – require an account of what it means that a person accepts a legal rule as a legal rule and not as a rule of any other normative system. Unfortunately, it seems that this subjective point of view is beyond the reach of scientific method. Science allows us to study the social behaviour in the legal context, but it does not allow us to distinguish between the acceptance and non-acceptance of legal rules.

At least this is the received view in the theory and philosophy of law. The overarching goal of this volume is to assess the possibilities and limitations of treating law as an object of a scientific inquiry. The present discussions on this issue – and various issues which lie in its immediate vicinity – are often full of hidden and dubious assumptions and simplifications. It is clear that the study of law cannot look as the study of the brain, but, on the other hand, it is not the case that – at least on a priori grounds – there cannot be any connections between them. We believe that the essays in this volume will enrich the current debate on the issue of whether the study of law should be closer to science or to the humanities.

The volume opens with a chapter by Edoardo Fittipaldi, *Naturalizing Legal Dogmatics*, in which the author attempts to naturalize the study of the content of legal rules. He claims that there are two approaches to this project. The specific approach consists in the transformation of legal dogmatic judgments into empirical judgments, whereas the general approach boils down to demonstrating that there is no science which is non-empirical. As for the former, Fittipaldi provides examples of the naturalization of legal judgments pertaining to, inter alia, the validity of a particular legal provision and that of a particular constitution. As for the latter, the author claims that even mathematics – the science often regarded as paradigmatically non-empirical – may be naturalized and that there are parallels between the naturalization of mathematics and legal dogmatics.

The following chapter, *Naturalism and the Demarcation Problem* by Giovanni Battista Ratti, aims at assessing the problem of the demarcation of law and morality. The solution to this problem – or the lack of it – is important to the question of whether law can be naturalized; at least on the account of legal naturalism proposed by Brian Leiter, one of the most influential contemporary thinkers writing on this subject. In the first part of the chapter, Ratti introduces Leiter's project, focusing on the role of American Legal Realism in its inception. In the second part, the demarcation problem and its threat to the very foundation of legal naturalism are discussed. Ratti claims that this threat may be avoided when one distinguishes between different aspects of the relation between law and morality.

Luka Burazin, in *Brian Leiter and the Naturalization of the Philosophy of Law*, provides a detailed overview of one of the prominent proposals of naturalization in the legal context. The author divides this proposal into three parts: the first part pertains to naturalizing the theory of adjudication, the second part is connected with the transformation of philosophy of law into social science and the third part boils down to emphasizing the role of experimental philosophy in the legal context. The chapter closes with a critical analysis of Leiter's version of legal naturalism as Burazin raises several objections to each part of his project.

The goal of Oleksandr Merezhko's chapter, *The Issue of Law's Objectivity in the Russian Legal Philosophy of the Beginning of the 20th century*, is to reflect on whether the law is essentially an objective or a subjective phenomenon. This question, central to the possibility of legal naturalism, is discussed in a historical context, i.e. in the context of Russian legal realism, a school of legal thought which emerged at the beginning of the previous century. Members of this movement may be regarded – similarly to their American counterparts – as pioneers of legal naturalism. Merezhko presents the answers to the question about law's objectivity provided by several Russian legal scholars of that period.

Marek Jakubiec's chapter, *Naturalizing Jurisprudence in the Light of Naturalized Epistemology*, is devoted to a comparative analysis of the naturalization of law and the naturalization of epistemology. The author focuses on the theses found in *Epistemology Naturalized*, a seminal paper by Willard Van Orman Quine, and

the possibility of their application in the legal context. Building on this work, Jakubiec introduces three aspects of legal naturalism – the practical, philosophical and theoretical. These aspects of legal naturalism correspond to different types of legal knowledge, in connection to which one may look for continuities between the study of law and scientific investigation.

In the chapter by Jaap Hage, *The Compatibilist Fallacy*, the arguments of compatibilists in the current debate on free will and responsibility are assessed. Proponents of this view claim that responsibility is compatible with the lack of free will. The author agrees with this thesis, but points to a fallacy in the compatibilist argumentation which represents a variant of the famous naturalistic fallacy. Crucial in this analysis is the distinction between the phenomenological view of the agent and its realistic counterpart. The former is the perspective of the acting agent and the latter is that of science; these views are hard to reconcile but required by the compatibilist.

In the following chapter, *Moral Experience, Generalizations and Fallibility. Kotarbiński, Czeżowski and Przełęcki on Ethical Systems*, Anna Brożek discusses the metaethical views of the members of the Lvov-Warsaw School, a movement in the history of Polish philosophy. The author indicates the methodological and science-like character of these ideas, as their proponents focused on the logical structure of ethical theories. These thinkers investigated the manner in which generalizations in ethics are typically constructed and emphasized the role of moral emotions in the formation of ethical theories.

Łukasz Kwiatek, in *The Naturalization of Morality: Between Nature and Culture*, examines the puzzle of the origins of morality, i.e. whether it is a biological phenomenon or a cultural invention. The chapter begins with a presentation of an account of how altruism evolved – perhaps the most important feature of the contemporary biological approaches to morality. Kwiatek then continues with an analysis of two thoroughly different interpretations of the natural history of morality, the selfish gene theory and the veneer theory. After assessing their distinguishing features, the author shows how one can enrich the purely biological accounts of the emergence of morality by taking into account *important and indispensable* cultural influences.

The goal of the following chapter, *Institutional Mimesis: An Experimental Study on the Grounding of Legal Concepts* by Corrado Roversi, Leonardo Pasqui and Anna M. Borghi, is to discuss the results of an experiment devised to investigate the foundations of basic legal concepts, such as contract, trial, right or property. In the experiment, based on the priming paradigm, two hypotheses were tested. According to the first one, the conceptualizations of basic legal institutions can be grounded on image schemas, representing physical interactions. According to the second one, the conceptualizations in question are dependent on social factors. The authors discovered that there are important differences between institutional, legal concepts and other abstract concepts, such as reasoning, will or dialogue.

Łukasz Kurek's chapter, *The Knowledge Condition of Moral Responsibility and the Sciences of the Mind*, provides an analysis of experimental research pertaining to an agent's awareness of the causes of her actions in the context of ascriptions of moral responsibility. The knowledge condition, being a somewhat neglected condition of moral responsibility, states that the agent has to be aware of the reasons of her actions in order to be responsible for them. However, there is mounting evidence from the sciences of the mind that such awareness is severely limited – certainly more so than often assumed by moral and legal philosophers. The author attempts to outline an account of moral responsibility which would allow to take into account the discussed empirical evidence.

Karolina Prochownik, in the chapter *Do People With Legal Background Dually Process? The Role of Causation, Intentionality and Pragmatic Linguistic Considerations in Judgments of Criminal Responsibility*, attempts to answer the question about the nature of the cognitive mechanisms underlying ascriptions of blame. More specifically, the author is interested in how students of law process information in such cases. The results of her experiment suggest that even a limited legal background influences reasoning in situations when the agent tries to commit a crime and fails, but the intended outcome happens anyway, as compared to situations when the agent fails and the intended outcome does not happen. The nature of this influence is such that it seems to block moral evaluations which typically influence the judgments of lay people.

In the following chapter, *The Inadmissible Evidence Effect in the Context of Polish Law*, Bartłomiej Kucharzyk examines the empirical evidence pertaining to the influence of information which may not be used in legal proceedings on the actors involved in these proceedings. Kucharzyk presents some objections to the methodology of these empirical studies. Furthermore, he focuses on the unique nature of Polish legal proceedings as compared to common law regulations, from the perspective of which the inadmissible evidence effect is usually studied. He then offers some insights as to the relevance of the inadmissible effect in the Polish legal context.

Tomasz Zygmunt, in *Expert Intuition and Judicial Decision Making*, investigates the relevance of influential, scientific theories of expert intuition as applied to judicial decision making. In particular, he selects two such approaches to expert intuition – the Natural Decision Making approach and the Heuristics and Biases approach. The former emphasizes the advantages of expert intuition as compared to its non-expert counterpart. The latter, on the other hand, underlines the fallibility of expert intuition. Zygmunt analyses how these insights may be of relevance in the context of decision making by judges. The chapter closes with an attempt to answer the question of whether judges possess expert intuition at all, at least according to its descriptions found in the experimental literature.

The volume ends with a chapter by Karol Chrobak, *Can Violence Be Morally Justified*?, in which the author assesses different strategies for justifying violence. The

chapter opens with a conceptual analysis of the phenomenon of violence. Chrobak distinguishes between the too narrow, too broad and moderate definitions of this phenomenon. After accepting the latter, he examines the concept of violence in light of several different, but closely related concepts, such as autonomy, justification, in-defence justification and out-of-care justification. The author concludes that, for violent actions to be justified, they must meet two conditions, i.e. they must be directly related to its victims and that they must not target personal dignity.

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Naturalizing Legal Dogmatics[1]

1. Introduction

In this essay I shall *not* attempt to naturalize *jurisprudence*, or *legal theory*. The reason is that this endeavor is either *impossible* or *useless*.

It is *impossible* if by *jurisprudence*, or *legal theory*, we understand the kind of science *legal positivists* attempt to produce. This is so because legal positivism – unlike the natural law tradition – is an inextricable *mixture* of an empirical and a dogmatic science. In other words, legal positivism appears to be *an empirically oriented general theory of legal dogmatics*, where empirical and dogmatic judgments are intertwined without clear criteria as to how and why, except for the whim of the specific legal positivist considered[2].

It is *useless* if by *jurisprudence* we understand *empirical science of law*. As I shall say below, there are at least four successful (in the narrow sense of *non-circular*) attempts on the scientific market to conceptualize legal phenomena in a way that makes it possible to investigate them with purely empirical methods. So, there is no reason to give a short and necessarily incomplete summary of those projects here.

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[1] I wish to thank Enrico Pattaro, Wojciech Żełaniec, Andrej Kristan, and Guglielmo Feis for their criticism and suggestions. Needless to say, the responsibility for all mistakes is exclusively mine.

[2] The situation of contemporary legal positivism is akin to that of *linguistics* until the 19th century, when it was hardly possible to find grammars where *all* the linguistic phenomena present *in a given area* were *simply described* (1) without statements concerning the "validity" of this or that usage – e.g., the split infinitive in "English" – and (2) without using a carefully *depoliticized* concept of *language* (as is known, "a language is a dialect with an army and navy"). On the other hand, unlike legal positivists, most *natural legal theorists* confine themselves to producing *their own subjective axiomatic systems*; and so they cannot be accused of producing jumbled dogmatic-empirical mixtures.

What I shall do instead, will be to tackle *a yet unsolved problem*, namely, the problem of naturalizing *legal dogmatics*, which I understand as a science made up of *Rechtsätze* (as distinguished from *Rechtsnormen*) in Kelsen's sense of this term.

I shall argue for the possibility of naturalizing legal dogmatics in two complementary ways:

1. I will do it *specifically* (in section 2) by demonstrating that any legal dogmatic judgment can be *transformed* into at least two truth-apt (i.e., empirical) judgments.
2. I will do it *generally* (in section 3) by arguing that *there is no non-empirical science*. Since the only allegedly *non-empirical* discipline credited with the prestigious title of "science" is mathematics, I will sketch out how the naturalization of mathematics is possible. I will also show that the naturalization of mathematics should proceed along *the same lines* of that of legal dogmatics. To put it otherwise, my second argument will be as follows: if even the most recalcitrant case of a purportedly non-empirical science (mathematics) can be solved, there is one reason less for supporting the idea that legal dogmatics is a non-empirical science, as it would thus become an *unicum* no less than a *monstrum* among sciences. In doing so, I will also discuss what legal dogmatics can learn from the history of mathematics (as well as a few minor differences between those sister sciences).

Before addressing the topic of this paper, however, a few clarifications are in order.

Firstly, by *naturalization*, or – to be precise – by *degree of naturalization of a given science* I shall understand the degree to which the scientists practicing that science adopt the metaphysics, the epistemology, and the methods of *empirical,* or *reality sciences* (I use these terms as synonyms).

Secondly, I have the scientific obligation to declare the way I personally conceive the metaphysics, the epistemology and the methodology of empirical sciences.

Based on Hans Albert's version of critical rationalism[3], to which I adhere, I summarize these metaphysics, epistemology and methods as follows:

1. The *hypothesization* by the Subject[4] of the *existence of realities independent* of *Herself* – including the existence of other animate beings.
2. This hypothesization is made *to the goal* of explaining or predicting certain *internal experiences* She has.

[3] H. Albert, *Traktat über kritische Vernunft*, 5th edition, Tübingen 1991; H. Albert, *Traktat über rationale Praxis*, Tübingen 1978; see also E. Fittipaldi, *Scienza del diritto e razionalismo critico. Il programma epistemologico di Hans Albert per scienza e la sociologia del diritto*, Milan 2003.

[4] Throughout this paper I shall capitalize the term *Subject* (and the pronouns referring to Her) in order to distinguish the corresponding concept from the concept of the *subject in a judgment* (in a philosophical sense).

3. The internal experiences to be predicted and explained are those which appear to the Subject as independent of Her *will*[5] – *in particular, though not exclusively, those related to Her five senses*[6].
4. The adoption of the concept of *truth* as *correspondence* between (α) the Subject's representation of a given object – hypothesized by the Subject as causing some independent internal experiences She has (in most cases, Her sensorial experiences) – and (β) that object per se.
5. The conception of correspondence as the *attainment of a satisfying degree of resemblance* between (α) and (β), where the degree of resemblance is *decided* by the Subject based on the extent to which the representation under scrutiny makes it possible for Her to explain and predict the Subject-independent experiences She aims to explain and predict.
6. The Subject's *fallibility* in regard to the cognition of Subject-independent realities, owing to the transcendence from the Subject of those realities.
7. The *impossibility* of *conditions of truth* as a consequence of the Subject's fallibility.
8. The possibility of *conditions of falsehood*, understood as the setting, on the part of the Subject, of certain Subject-independent internal experiences (first and foremost, certain sensorial experiences) as conditions whose obtaining the Subject *decides* would oblige Her to renounce to Her belief in the truth of a certain hypothesis She made.
9. The *possibility of criticizing* the decision of setting the obtaining of certain conditions rather than others as *conditions for the falsehood of a given hypothesis*, based on the examination of the question of whether the obtaining of

[5] When using the term *will* I am not implying the adoption of the hypothesis of free will. When stating that a decision is taken *voluntarily* (I use *voluntary* as the heteroclite adjective of *will*) by the Subject I mean that She *believes* that She could have decided otherwise. My opinion is that this belief is an *illusion*. However, what matters for the hypothesization of realities by the Subject is Her belief in Her free will, *regardless* of whether or not that belief is an illusion. This is why there is no contradiction here in my borrowing the idea stated in point 3 from the Irish empiricist George Berkeley, who writes: «When in broad daylight I open my eyes, it is not in my power to choose whether I shall see or no, or to determine what particular objects shall present themselves to my view; and so likewise as to the hearing and other senses, *the ideas imprinted on them are not creatures of my will*. There is therefore some other Will or Spirit that produces them» (*A Treatise Concerning the Principles of Human Knowledge*, 2nd edition, Indianapolis 1970[1734], pp. 259–60, emphasis added). As can be seen, Berkeley, *to the goal* of explaining those internal experiences called sensations, hypothesizes the independent existence of some other Will or Spirit producing them. Therefore Berkeley must be regarded as a full-blown realist (H. Albert, *Kritik der reinen Erkenntnislehre*, Tübingen 1987, p. 47, fn. 7).

[6] Other Subject-independent internal experiences are memories, sadness, tastes, etc. It is not in the Subject's power to forget something, to remove Her sadness, or to stop liking a piece of music She really loves. This is not to deny that the Subject may use some *technique* to pursue those goals. For instance, in order to stop liking one of Her favorite pieces of music the Subject might decide to listen to it continuously until She will not stand it any longer.

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