National Academy of Sciences of Ukraine
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On Law and Logic
A Thesis against Legal Positivism

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

А факт — самая упрямая в мире вещь.
A fact is the most stubborn thing in the world.
Mikhail Bulgakov

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1. A functional point of view

In the famous axiomatization of mathematics by David Hilbert the primitive terms, such as "point," "line" or "straight line," correspond to their function in the axiomatized system. Even social acts could have the same definition as primitive terms in a legal system. There is more. On the basis of their "functional meaning" [*funktionale Bedeutung*] (the expression is used by Ernst Mally in his posthumous work *Formalismus I*, 1971) we can build both a rigorous logic of law and a relevant thesis against legal positivism.

Let me start from the concept of "function." I pose three questions. "*Tres vidit et unum adoravit*" ("He

saw three and worshiped one", to quote the beautiful comment by St. Augustin in *Genesis*: 18, 1–15). My questions are: (i) What is the difference between structure and function? (ii) Is function essential? Are there essential functions?

1.1. From structure to function

Structure is not function. Talking about *structure* I ask: "How is made something?." A different question is when I talk about *function*. Here the question is: "Why something?." I like to analyze this difference by a general theory of linguistic signs. I take a sign. The structure is the sign itself, while its function is the use of it in an utterance (what we call "meaning"). See for example the linguistic sign 'is' (the third person of the verb "to be") in these two utterances: (i) "The rose *is* red;" (ii) "Two plus two *is* four." I could say also "Two plus two *equals* four," but I cannot say "The rose *equals* red." The last one has no sense. We have the same signs, but two different meanings. If structure was function, we couldn't have one structure and two functions.

Is function essential?

It is enough a little phenomenology of common objects. I recognize the objects essentially through their function. I see a lamp. I don't know its structure (how it is made), but I know very well its function (its use in our life). So a musical note, as observes Husserl in his *Zur Phänomenologie des inneren Zeitbewußtsein* [*On the Phenomenology of the Consciousness of Internal Time*, 1928], has not sense alone but in its relations with other notes in a melody. I don't listen to many notes separated each other (it would be a big din); I listen to a melody. In other words I listen to every note in its relation with the others. This relationship is what we think as function of every musical note.

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

1.2. **Two kinds of rules**

My phenomenological premise is very important to introduce some basically elements for a rigorous theory of social and legal rules. I call "pragmatics" the logic of these rules because it studies the validity-conditions by which the existence of social and legal acts is founded. I will analyze some necessary rules. There are at least two different kinds of rules: (i) conditions that derive from the essential *structure* of acts; (ii) conditions that derive from the essential *function* of acts.

2. Praxeological validity

The "praxeological validity" reflects the validity-conditions that are deduced from the "idea" [*eîdos*] of the act whose validity we are stating. I take for example a common act as a promise. The promise is always a promise of something future and not of something past. This validity condition on the existence of a promise derives from the idea itself of promise. What is a promise? "Promettre est une manière de se summetre à une obligation" (J.-L. Gardies); "The essential feature of a promise is the undertaking of an obligation" (J.R. Searle). It is impossible an obligation to something past. The past cannot be an object of obligation.

2.1. ***Structure*-rules**

The condition by which a promise cannot be a promise of something past, but only of something future, is a typical example about necessary conditions for the existence of an act such as a

promise according to its structure. Without this condition the promise does not make sense and becomes impossible. There is no sense in “I promise that I have been faithful;” whereas there is sense in “I promise to be faithful.” 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. It is a general rule. With respect to the structure of legal acts are necessary all the elements that Emilio Betti calls “*essentialia negotii*” (i.e. necessary elements to constitute a specific legal act). The contracting parties, the consent and the subject matter of the contract are some necessary elements in constituting a sale. All of these conditions reflect 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. It is the same for the sale. I cannot say: “I sell to myself something of my own.” Without contracting parties, it is the structure itself of the sale to be compromised.

To confirm this result it is interesting to see the relationship between these 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.” They are judgments necessarily true because there is nothing more contained in the predicate than what is just contained in the idea of the subject. The following is an analytic proposition: “Every promise is a way of submitting to an obligation.” It is an analytic judgment as well as: “Each body is extended,” or “All bachelors are unmarried.” Now, the condition by which a promise must be a promise of something future and not of something past is entailed by the above analytic judgment necessarily true: “Every promise is a way of submitting to an obligation.”

2.2. *Function*-rules

I come back to consider the promise. The duty of keeping promises is a validity-condition with respect to the essential promise's function. It is one of the "perfect duties" [*vollkommene Pflichten*] exemplified by Kant in his doctrine of the categorical imperative. Making an untruthful promise is really possible, but cannot be an universal rule. Promising in such a case would not be possible, because its function would fail. None indeed would ever believe in a promise anymore. Now, the function of a promise is to satisfy the interest of the promisee, and in the second place to build the promisee's trust. Without the fundamental duty by which the promise must be truthful and not untruthful the promise no longer has its essential function and denies itself as social act. If the function is offended, the structure fails too. At the end the promise has not existence at all. In his study on the *a priori* fundaments of civil law, 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*]. The claim is extinguished because the function fails. The effects of performance become impossible, and the obligation is not a real obligation anymore. The legal value of performance is generally a validity-condition of legal acts with respect to their function. All legal acts require the interest of the recipients as their essential function. In this sense the validity-conditions of the agreement are linked to the effect or to the legal value of the performance, such as terms of payment (see paragraph 1498 of the Italian civil code) and terms of delivery (see paragraph 1470 of the Italian civil code) in the act of selling. These rules are necessary as well as the effects of the contractual fact. According to these rules, among other things, legal acts may be called

"good"—in this case, "*legal* good" (which in *common law* may be "property"), because they realize their function towards the community.
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 an 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: "The promiser's obligation is a means of awakening the promisee's trust." 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 and the concept of trust identifies a specific function of the promise (the interest of the promisee), but the relation between the promiser's obligation and the promisee's trust is necessary. On this necessary truth the duty of keeping promises is founded.
Here is a first conclusion. The structure of an act establishes an eidetic relation with the function. If the structure fails, the function fails too; if the function fails, the structure fails too. Legal acts can really exist only if they implement structure and function together.

3. On legal order and its value

The passage from pragmatics to the general theory of law has the same logical consequences. In his work of 1977 entitled *Dalla struttura alla funzione* [*From Structure to Function*] Norberto Bobbio showed how legal theory in the twentieth century divided itself mainly on the value of "function" in the concept of law. Hence, for example, the division between *Reine Rechtslehre* [*Pure Theory of Law*] by Hans Kelsen (1934, 1960) and *The Concept of Law* by Herbert L.A. Hart. According to Kelsen "the pure theory of law [*reine Rechtslehre*] does not consider [...] the purpose that is pursued and achieved through the legal system itself; it considers the legal system in the autonomy of its own structure and not in relation to its purpose, as a possible cause of a specific effect. For Hart, however, law does not exist without its effectiveness, and this implies, inevitably, the question "Why is there the law?."

3.1. Kelsenian reductionism

The Kelsenian doctrine excludes that the concept of "function" could be compatible with the "purity" [*Reinheit*] of the theory of law. The function, in fact, would have compromised the scientific notion of law by introducing some partial and relative views that are only the result of a sociological or political approach to the meaning of legal system. To understand Kelsen's thesis it is sufficient to recall two definitions of "rule" in the two famous editions of *Reine Rechtslehre* (1934, 1960). The legal rule is not seen as a means of human realization, but as a mere "social technique," decided, in its forms, by the will of the legislator.

In the first edition of *Reine Rechtslehre* (1934) Kelsen defines "legal rule" as a "scheme of qualification [*Deutungsschema*]:" a natural fact, which in itself has not legal qualification (see, for example, the simple act of smoking by a smoker), is qualified by a prescription that assigns to that

fact a ban. The rule states, for example: “It is forbidden to smoke.” What is, then, the scheme? The scheme establishes the link between the offence and the consequences which arise from, that is the penalty. “If *X* ought to be *Y*,” where *X* (antecedent) is the unlawful and *Y* (consequent) is the sanction. Who smokes, going against the norm, undergoes a sanction. “Rule” for this reason is a sanction-prescribing proposition. A norm to be legal always implies, however, the penalty as a result of the offence.
It is different the definition of legal rule in the second edition of *Reine Rechtslehre* (1960). Here “rule” is “the sense of an act of will [*Willensakt*].” Kelsen passes from one meaning to another. Now it does not care what the rule is (the rule as a social technique), but where it comes from. To distinguish a valid rule from an invalid one it is necessary to identify objectively the power that can decide the so many obligations, prohibitions or permissions in a legal system. With what result? A legal rule derives from the legislator’s will which is recognized as objective under rules of structure that organize the legal order according to a specific “pyramid normative model [*Stufenbau*].” The rules of higher grade indeed serve to identify the legal power of the legislator, until the constituent power identified by the “basic norm” [*Grundnorm*]: “One must behave according to the actually established and effective constitution.”

3.2. Law and good of mankind

What is the question? The Kelsenian reductionism is evident according to the pragmatics’ point of view. The main problem consists in the absence of the functional meaning of law. The definition of law as “social technique” that simply imputes a sanction to an act of illegality, takes a back seat, and it seems as extremely reductive the thesis by Kelsen that leads back legal validity to the “sense of an act of will.” The negative consequences are

not slow in coming. Even legal systems based on totalitarianism have a sanctioning power. Probably, for those systems, the sanction is so important that they stand only on it, since the recipients would be unwilling to recognize them. The legal meaning of legislation is not, therefore, in *constraint*, but in the *obligation*. What separates "obligation" from "constraint" is precisely the justification in front of the recipients. Moreover, it is this difference that enables us to distinguish a legal rule by a delinquent order like "Your money or your life!." Who pronounces this order obviously does not intend to produce any justification; he simply wants to get "money" at all costs.

We are just at the conclusion. It is the same we found in pragmatics. If the function fails, the structure fails too. It is a logical and ontological principle by which is founded the existence of law.

3.3. Basic-*Value vs*. Basic-*Norm*

This concept of law which makes the existence of legal rules depending on justice requires, in turn, that legal system is not based on a merely formal principle as the *Grundnorm* by Kelsen. It is not enough, in short, a merely formal principle that focuses itself on the fundamental "ought to behave according to the actually established and effective constitution," regardless of the implementation of a system of values with respect to the good of mankind. The history of totalitarianism in the last century through the heart of Europe has definitively put in light that the legislator can be creator of real crimes. I am referring, in particular, to hate crimes or genocide. As Maritain observed, "genocide has faced the human essence as incompatible." The argument at the end is simple: law is unthinkable without its essential function to realize the idea of humanity; but it is also unthinkable to see humanity, without the absolute prohibition of committing violence against the

innocent.

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