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Normativity according to Hayek

Friedrich August von Hayek, famous economist and social philosopher was not a philosopher of law. One could hardly find any references to his texts, articles or monographs in the classical philosophy of law. Most probably it was not his intention to study specially that branch of social science, as, judging upon his intellectual legacy, he used to envisage the law only as a part of much more complex normative order of the society. The part, which is understood as legislation, is not the most important one. Nevertheless in many essays devoted to the thoughts of that great thinker the issue of law plays a remarkable role. Needles to say that one of his most important, monumental, three volume work was titled "Law, legislation and Liberty"

The purpose of this text is not to, once again make a review of Hayek's concept of legal norms and its significance to the normative order, due to make the reader more familiar with this part of Hayek's ideas, but rather to reconstruct his concept of normativity in general, in light of the modern dispute on the ontological status of rules, especially but not exclusively legal rules. The essay consists of two parts. In the first one, the so called "the puzzle of normativity" is being presented. The general question of rules is quite often divided onto the set of specific questions which, in view of an asking philosopher should constitute the subject of the philosophy of law (or rather philosophy of rules). The set of specific questions shall be discussed and finally proposed. Furthermore the basic assumptions of the three main streams in theoretical legal studies shall be critically reviewed i.e. natural law ideas, legal positivism and legal realism. In the second part the Hayekian philosophy of law shall be commented in terms of legal realism. The main thesis of the text is that Hayek and his understanding of legal norms shall be envisaged as a part of legal realism, which is strongly biologically grounded. Moreover I will try to cope with some critical arguments against realism, most of them formulated by Brożek in the connection with his recent studies on the ontology of law.

The Puzzle of Normativity

Normativity is a Puzzle. We intuitively perceive the rules as the objective, independent from ourselves entities / beings which makes us do things we usually do. The image of the

rules acting in the world may be compared with our picture of, how the laws of nature act in the universe. The latter are perceived as the natural causes of any changes. If we observe any phenomenon we assume automatically that there must be a law of nature which governs it. The same assumption seems to exists in case of any observed human behaviour. The guess that there should be an instruction behind any action undertaken by an agent, seems to be intuitively very plausible. What kind of beings are these rules which causal (or like-causal) mechanism so strongly affects human decision? The analogy with law of nature is not a coincidence. When one looks back into the history of philosophical concepts of law, one may discover that ancient and medieval image used to be very monistic, what means that the difference between the laws of nature and moral or legal laws was not very remarkable. Both belonged to the same order – *logos,* and in principle used to be designed from the very beginning and stable. However in the modern philosophy this picture is no longer valid. Mainly due to the progress of natural science and our better understanding of the rules which governs the universe, the laws of nature are no longer considered to have the same ontological status as rules applicable to human societies. Moreover those "social" rules are at present divided onto separate sets, and each set has its own philosophy (both in terms of ontology and epistemology) or even its own science, which deals with it. We distinguish the rules of mathematics and logics. The philosophy of formal sciences is trying to cope with the problem of its existence and origin. Grammar and semantics deal with rules of language. Mores and moral rules are the domain of ethics as well as sociology. Sociology tackles religion rules too, although traditionally those are the subject of religion studies and theology. Last but least we have political studies and theory of law.

Legal rules had never been distinguished so clearly before the legal positivism emerged. Until XVIII/XIX century the dominant theory of law was encapsulated in *Summa Theologica* by St. Thomas Aquinas, wherein it was envisaged only as, not very important part of the much wider system of rules, originated from God's eternal law. It was legal positivists who ripped the system, and introduced the concept of law being an unrestricted expression of the sovereign will. Thus the legislation was specially favoured and put on pedestal, what was also reflected in growing significance of lawyers in the societies, which soon became the contemporary shamans, those who knows the reasons and can predict the future results. This concept is an everlasting burden in the philosophy, and one may have an impression that the part of contemporary thinkers are desperately trying to patch the flaw and put the law back

into its place, so into the normative order of the society. The author of this essay is one of those desperados as well as used to be Friedrich August von Hayek.

So what is normativity? Tackling the problem one may ask a set of questions. There is a lot of proposals in literature on the subject. One of them was formulated by Finnis (who quotes Green):

> *In short: a natural law theory of (the nature of) law seeks both to give an account of the facticity of law and to answer questions that remain central to understanding law. As listed by Green 2003 (having observed that "No legal philosopher can be only a legal positivist"), these further questions (which "legal positivism does not aspire to answer") are: What kinds of things could possibly count as merits of law? What role should law play in adjudication? What claim has law on our obedience? What laws should we have? And should we have law at all?*[1].

Those questions however, doubtless interesting, do not touch directly the problem of ontological and epistemological status of legal rules. The presentation of the problem is done in a much more inquiring way by Brożek, who formulates the following set of problems to be coped with[2]:

1. The ontological question. What are norms or rules of human behaviour?
2. The epistemological question: How we cognize norms / rules of human behaviour?
3. The question of normativity *sensu stricto*. How norms can be the objective reasons for action?
4. The psychological question. How norms can motivate humans for actions?

Those problems require further elucidation, but before it is done, they should be completed by one more issue which seems to play a crucial role in the philosophical and foremost, political debate – What laws should we have? That was reformulated by Załuski and respectively named:

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[1] Finnis, John, "Natural Law Theories", *The Stanford Encyclopedia of Philosophy (Fall 2011 Edition)*, Edward N. Zalta (ed.), URL = <http://plato.stanford.edu/archives/fall2011/entries/natural-law-theories/>.

[2] Brożek

5. *„The teleological-axiological question: what are the main goals of law and how those goals should be realized?”*[3]

The ontological question seems to be the most obvious for philosophers. Whilst tackling the philosophical problem we need to recognize the ontological status of the subject of our interest. There are lot of possible answers. Norms can exist independently from humans, just as the laws of nature do. On the contrary, norms can be exclusively the subject of human construction, the expression of sovereign's will. They can also be a psychological emotions of special kinds. They can be an extension of human biological skeleton. Last but not least they can be conventions agreed between humans, or more broadly, the product of more or less conscious, humans' social interactions. The epistemological question is generally dependent on the ontological answer. If we place norms in the world of Platonic forms, they can be recognized only if we presume the existence of special faculty of our mind, designed for such a sophisticated cognition. If norms are social or psychological facts, the respective sociological or psychological methods of research shall apply. The most enigmatic issues are the question of normativity and psychological question. It is worth to be mentioned that Załuski does not distinguish between them entirely and is of an opinion that both questions are only aspects of the same normativity problem. In fact, this distinction makes sense only in a few theories of norms, especially those, which ontologically places the existence of norms (or at least some norms) somewhere beyond humans, or more specifically, beyond an agent. If we refer to the "objective reasons for action", we have to presuppose that there is something objective (independent from an agent), which is different from our internal, psychological motives for action, which can be referred to. If law is reduced to the special kind of emotions, there is no room for objectivity.[4] The same applies to the most of the realistic theories of norms. If we accept the social and not psychological status of rules, the only difference is, that we look for the validity of certain regulations with the use of statistical methods. The reasons for action however are not objective, but are rooted in a mind of a statistical agent. The psychological motives are of no relevance. The evolutionary approach (at least in terms of

[3] Załuski

[4] Unless we, after Brożek, claim that this objectivity is hidden in the theory and can be eventually exposed. In case of Petrażycki's psychological theory, Brożek disclosed the objectivity in the directives formulated towards the legislator, which seems to be far from the emotional status of rules and come from nowhere so, they have no grounds in the theory itself, although they seem to be rules too.

Załuski's theory) makes the question even more problematic. Asking for objective reasons for action sounds senseless if the question is set against the objective reason for e.g. procreation. Certain revealed features of our behaviour are envisaged strictly in terms of an extensions of our biological constructions, which developed because of the evolutionary pressure. The same applies to sexual appetite as well as to the propensity to obey the rules. The only objectivity that may be pointed out is probably the universal, biological pattern of evolutionary mechanism. Nevertheless, even if the distinction between the objective reasons for action and internal motives can be meaningful only with reference to few theories, for the sake of clarity, it is still worth to ask about it.

The teleological-axiological question is specially interesting for all representatives of realistic approaches in legal philosophy. As those approaches seem to originate from two streams of philosophy: pragmatism (William James) and utilitarianism (Jeremy Bentham and John Stuart Mill), all aspects of social engineering, objective of normative order and its possible modifications by purposeful influence on legislation, is of great relevance. The legal theory which lacks any hints about those problems is envisaged as incomplete. Therefore this question will be tackled too.

Some of the most distinguishable concepts of normativity. Short reminiscence.

Natural law theories

The classical, natural concept of law refers to Aristotelian essentialism. The universe is perceived as the orderly *logos* governed by the efficient and final cause. Rules are necessarily bound to the latter. Their ontological status is similar to the laws of nature. Both are the constituent elements of the orderly *logos*. Essentially they are stable and stationary. Variability experienced by man is rather a result of a process of adjusting the non-perfect rules to its ideal primary patterns (forms) placed in the transcendent reality. Variability is thus a function of our flawed cognition of the universe, like the image of the world is a function of our still better cognition of the laws of nature.

Norms are cognizable. To understand our duties we deploy the special faculty of our mind – reason. In the most eminent version of natural law theory, developed by St. Thomas Aquinas, which is still supported by some philosophers, with the use of reason humans are

capable to discover the natural law, which reflects the law established by God – the eternal law. In this ontology the epistemological subject looks for the source of an order in God's design, which from one hand can be cognized by reason itself, but from another hand, searches for the support in revelation. It needs not always to be so. The reasoning may be conducted on the basis of non-religious assumptions e.g. on the universal and stable human nature.

The answer to the normativity question seems obvious. Natural law and respectively rules that can be reasonably derived from it constitute the objective reason for action. The positive law which contradicts natural law should be considered unjust and non-binding therefore it lacks the normativity. Such a law can nonetheless be motivating for an agent, especially by the deployment of a system of sanctions. It is one of the ways in which the psychological question may be coped with. However the motivation should be the strongest if the norm is recognized by an agent as the part of natural law with use of reason and is eventually internalized.

The answer to teleological question in the least obvious and is dependent on the specific theory from within the natural law circle. In the system of St. Thomas Aquinas the purpose of the positive law is to reflect the natural law, previously recognized by human reason. What is the objective of natural law however is not the direct subject of human cognition. The trust that the natural law derives from the stationary, and of God's design eternal law, should suffice. Although the trust should be strong, there is also the belief that the natural law is aimed towards common good. Therefore, identifying that good is helpful in defining the law, in some conceptions is even decisive. Natural law theories which answer the teleological questions by pointing at common good, come in the field of utilitarian ethics, and necessarily entangle themselves in disputes, wherein the practical consequences of certain regulation must be thoroughly considered.

According to Brożek, natural law theory did not survive the destruction of the classical picture of the world.[5] Cartesius became a symbolic destroyer. Ripping the reality onto *res extensa* and *res cogitans* he placed the rules in a different ontic category. The destruction was completed by Hume and Kant with the introduction of the distinction on *is / sein* and *ought / soll*. Accepting in principle that opinion, we have to remember that it applies only to the

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hardest version of naturalism – the one which is very close to the genuine thoughts of St. Thomas Aquinas. Later variations, which doctrinally are associated with the discussed branch of jurisprudence are more "ontologically resistant". Theories based on the social agreements or procedural justice are still vivid. More broadly the evolutionary theories of law, which presuppose the stationary human nature, are also, to the certain extend naturalistic[6]. What they propose is the frame of acceptable norms which can be successfully introduced and internalized by humans, which are compatible with the biological structure. Norms which are not within the frame shall never be binding and have no chances to be sustained in the society.

Legal positivism and Kelsen's normativism

This current restricts its interest to legal norms. The source of normativity is seen in some form of sovereign's will expression. In case of Kelsen's normativism this source is seen in the unidentified basic norm (*die Grundnorm*). The expression should be readable for the addressee and thus become the subject of his interpretation. The main interest is focused on that expression, so on the positive law (statutory law). Statutes constitute the foundations upon which the legal reasoning is to be conducted. For positivists there is nothing before the statutory law and after it, there is nothing more than an interpretation led in compliance with the prescribed rules of exegesis.

Ontologically norm is reduced to the will of sovereign. This reduction reflects the normativity too. The same will seems to be the source of the objective reason for action. The law is objectively binding because it was declared binding by the sovereign. There is no need for any further quest for justification of its normative power. Epistemological question is reduced to the principles of law interpretation. To recognize the law in force means to read with understanding the text of law declared by the sovereign as binding and to interpret it according to commonly accepted logic before the proper application to the factual state. The psychological question most often points out on the fear of sanctions, which are also a part of a legal statutory order. The legal positivism usually retreat from the teleological question. It is not the subject of jurisprudence to ask about the aim of statutory law. By some thinkers we

[6] Załuski

may find eventually the reference to the political conceptions, which exceeds the legal theory and thus introduce some extra-legal directives regarding the process or content of legislation.[7]

Unfortunately positivism became the main theory in jurisprudence, which, at least in continental tradition is still commonly accepted among lawyers. This is probably the main source of many misunderstandings. After Brożek, whose critique of positivism is hereby absolutely shared, I specify the three myths of this current in legal thinking that should be tackled[8]:

1. Myth of foundation: The statutory law constitute the foundation of legal norm and it exists before the interpretation.
2. Myth of method: The application of law should follow the strictly specified syllogism (which is still present in many students' handbooks for introduction to jurisprudence) i.e. abstract norm reconstructed on the basis of legal text – factual state – subsumption – concrete norm. The prescribed method should also apply to the interpretation itself – reconstruction of the norm. Positivists seem to be convinced that there exists the commonly accepted set of exegesis rules like the modal and deontological logic.

Both myths mentioned above clearly contradicts the daily legal practice (interpretation prevails and never follows one previously prescribed pattern), set of court experiments conducted mainly in the common law tradition and, last but not least, the current knowledge on normative language and formal possibility to construct the consistent and coherent normative logic.

3. Myth of metaphysical neutrality: The statutory law is independent of ontological assumptions and the way how the law should be interpreted or applied does not interfere with the ontological beliefs of the interpreter.

Our contemporary knowledge on biological implications on our normative judgments argues in favour of the contrary beliefs. Both on the stage of drafting and introduction of the law as well as on the stage of its application, axiology and metaphysical assumptions of a designer or a judge strongly influence the results. Moreover, positivism and especially normativism is not metaphysically neutral. Brożek notices two facts:

[7] Kelsen, Vom Wert Und Wessen der Demokratie

[8] Brożek

> *If the source of normativity lies in a merely thought-of hypothetical Basic Norm, Kelsen's theory pays a high price for its 'purity'. While formulating the Basic Norm, Kelsen only puts a label on what he does not know and cannot explain.*[9]

And after Stanley Paulson:

> *Kelsen's Ought can be considered a* de dicto *or a* de re *modality. In the former case, our utterances about legal obligations are just 'a way of speaking'. In a sense, they are fiction (they do not refer to any reality).* ***On the latter reading (de re), Kelsen's thesis is a strong metaphysical claim: he posits the existence the two, mutually independent ontological spheres, that of Is and that of Ought****.*

Legal realism

Legal realism has nothing in common with realism in philosophy. In this latter realism refers to those metaphysical conceptions, which claims that certain abstract beings, which are transcendent, truly exists. Platonism is realistic in this meaning and is in an opposition to nominalism. Legal realism philosophically refers to pragmatism and utilitarianism in ethics. The puzzle of normativity should be investigated in "law in action" and not in purely theoretical conceptions. Law is a phenomenon which really exists and acts in societies and in agents' minds and its merits should be analyzed therein. The term "real" refers not to the norms but rather to the perceived effects of its 'causal' power: What courts of law do (Holmes's realism)[10], how the legal duties and rights are experienced by an agent (psychologism of Petrażycki)[11] or how the effects of law can be observed in society (Scandinavian realism)[12].

The solution of the normativity puzzle proposed by legal realism can vary significantly depending on the particular school. Holmes proposed to focus on the real activity of the legal institutions like courts, and respectively to reduce the law to the predictions done by an agent regarding the future court's ruling. Ontologically the law detaches itself from the sovereign will expressed in legislation and even from the abstract instructions that can be somehow

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interpreted from the legal texts, and means exclusively the "predictions". Although Holmes did not put it clearly, it seems that law is thus perceived as one of the numerous phenomena which constitute the social order. The legal norm is not in any way distinct. In the same way as the predictions regarding the natural environment must have been constructed in humans' minds to let them survive in the natural state, the predictions regarding the behaviour of other humans let them survive in the society, and let survive the social order at all, which itself is a tool of our evolutionary fitness. This an important ontological shift. Rules are the part of the same reality as the prudential instructions regarding our health or scientific theories. When one say: "take a scarf otherwise you'll get a cold", the ontic status of that instruction is the same as: "don't steal this necklace if you don't want to be punished". The Scandinavian realism should be envisaged as the further development of this approach, mainly from the epistemological point of view. If we agree that the law is a strictly social phenomenon, the social, statistical methods seem to be the most appropriate for its cognition. The things look different in case of psychologism. Petrażycki, one of the most famous Polish theorists of law, focused itself on the emotions and internal experience, neglecting the significance of the social interactions. According to his proposal, law has a different ontological status, and distinguishes itself clearly from other rules (emotions which constitutes law are of attributive character).[13] Moreover I entirely share Brożek's critic that one of the cause that the theory failed is the deployment of anachronistic psychology. Maybe the contemporary researches which try to indentify the part of human brain active while moral and legal judgments are conveyed could be the development of that theory but with the use of the comprehensive, updated knowledge on our neural order and its relation to revealed behaviour.

What constitute the objective reason for action in realistic accounts? The lack of distinct objectivity in those theories is one of the most important and most often indicated their weakness. There seems to be no reality, no space for discourse, which can be referred to, in order to trace that crucial feature of normativity. Crucial, at least according to Wittgenstein and Brożek. I will try to tackle this alleged fault at the end of the essay, and try to defend the realistic account against some weighty arguments. Yet, now it should suffice to say, that there are there are a couple of possible fields where the normativity *sensu stricto* can be searched in.

[13] Petrażycki, Brożek

Firstly, Brożek rightly rises, that, at least some of the attempts to eliminate the normativity are ineffective. Instead of pure theory, liberalized from the metaphysical flaws, the proponents of legal realism are trying to hide, more or less consciously, the normativity in a kind of presupposed rationality. Quite often it is divulged while coping with the teleological question. Any constructed postulates and directives for legislators, by default have to refer to the objectives which are beyond the realistic account. Psychological and sociological theories are necessarily entangled in a social engineering. Thus they cannot avoid the following problem: Even if we, humans have sufficient knowledge which allows us to draft and introduce effectively the law, whereby the presumed aims can be achieved, who should be responsible for pointing the aims and what directives should be deployed in determination of those aims? If the problem is directly dealt with by the proposed theory, the answer is most often assumed on the higher level, and that rule (as the answer is a kind of rule) seems to be of a different ontological status that all of the other rules in the realistic account.

Secondly, if the theory is biologically grounded, they may claim that at least some of the most basic rules, are determined by the biological construction of our organism and especially cognitive system. Although we may have an impression that we may construct any law, as a matter of fact we are strongly attached to our physical basis and we are never able to transcendent it. That physical basis itself is a direct product of evolution. As a result, the most foundational rules are subordinated to species survival. The issue which remains however still unsolved is thus the teleological question.

Thirdly, one of the most significant and counterintuitive consequence of realistic account is the vague concept of the rule bindingness. It is gradable. Rule understood as the internal experience or predicted consequences, can be less or more binding, depending on the strength of the feeling. In social accounts the strength of the rule bindingness depends on the level of its acceptance in the society.

The motivational aspect of normativity can also vary between the realistic theories. Holmes seemed to point on the expected negative reaction (punishment) and respectively the fear of an agent as the most decisive factor. In Petrażycki's proposal, one may notice that the normativity itself is reduced to motivational aspect. We have almost no objective reasons for action, we have only the emotions of certain kinds. Modern realistic conceptions shall be more cautious, and quite often they retreat against the psychological question. If the law is

considered to be strictly social phenomenon, the internal experiences of an agent are of no relevance.

Epistemologically rules shall be investigated by methods related to the particular account, either psychological or sociological or last but not least biological. It is worth to be mentioned that the realistic theories gave rise to the development of the court psychology mainly in the USA. Those are numerous researches, conducted according to the methods applied in experimental and behavioural psychology, which are aimed at identifying the most important features of the "law in action". The significance of those researches should not be undervalued.

Normativity according to Hayek

In a traditional approach to the theories of law Hayek's account has never been placed within any established school. His concept of law, legislation and normative order was so original that it exceeded any known proposals. It is only due to the recent emergence of the evolutionary theories of law, that he was noticed and commented. Undoubtedly his thoughts on law can be included into the evolutionary current, and from this point of view he should be seen as the absolute precursor of this current. It is my purpose also to argue for his realistic approach, at least in terms of legal realism, as presented above.

Hayek is a legal evolutionist, as for him rules and law are the product of biological and subsequently cultural evolution and should be analyzed and interpreted solely as such. Evolutionary mechanisms can say us much more about the ontology and sources of rules and about their meaning for the society than any other philosophical account. Mechanisms of biological evolution are commonly known. Cultural evolution however remains partially a puzzle. According to Hayek we may point out at least one difference between them. Whilst biological succession are due to the relative stability of genes, which are the carrier of information, and biological changes and fitness are due to the process of random mutations which occurs in genes, none of such carrier has been discovered in culture.[14] Hayek shall say that the cultural evolution is of Lamarckian character and not Darwinian. As there is no

[14] Reference to the conception of memes by ….. and developed by Dawkins.

identifiable carrier of cultural information, the inheritance is an effect of mimetic propensity of humans.[15] That *mimesis* plays a significant role in a legal theory too.

The important distinction in Hayek's theory of norms is that, their sources of normativity are exactly the same regardless of what sorts of norms are being considered. Legal rules are in no way peculiar. They participate in the construction of social order equally to the grammar rules of language, mores, moral rules or to the rules of conduct derived out of the scientific theories. They can only be formally distinguished and only in that part which originates from the so called "rules of organization", or "purpose dependent rules" and can at present be named "legislations".

Rules in ancestral societies were placed in the same category as the factual knowledge. By Hayek a knowledge, at least in a very early stage of its development, is not a knowledge about facts (*know what*) but mainly hypothetical knowledge on the expected consequences of agent's undertaken actions (*know how*), and expressed in a conditional term. *If you want to achieve the state X, proceed according to the instruction Y because usually when a man follow the instruction Y, he achieves the state X*. Such a way of grasping the notion of a knowledge applies equally to methods of, how to set a fire, how to plant a crop, how to protect themselves against cold as well as to the way of communication with the community members or to a co-operation with them.

> *There is in the beginning no distinction between the practices one must observe in order to achieve a particular result and the practices one ought to observe. There is only one established manner of doing things, and knowledge of cause and effect and knowledge of the appropriate or permissible form of action are not distinct. Knowledge of the world is knowledge of what one must do or not do in certain kinds of circumstances. And in avoiding danger it is as important to know what one must never do as to know what one must do to achieve a particular results.*[16]

If factual knowledge is understood in such a way, one could hardly distinguish between two non-overlapping ontological spheres: the one of facts (*is*) and the second of duties (*ought*). It does not make any sense. However on the contrary to some naturalists, at this account the reduction is possible because everything is, at least by its origin, an *ought*. If we

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[16] s. 18

find such a reduction troublesome, it is merely the problem of our language and the way we express the propositions referred to facts and duties.

> *It seems that the specific character usually ascribed to 'norms' which make them belong to a different realm of discourse from statements of facts belongs only to articulated rules, and even there only once the question is raised as to whether we ought to obey them or not. So long as such rules are merely obeyed in fact (either always or at least in most instances), and their observance is ascertainable only from actual behaviour, they do not differ from descriptive rules.(…) This off course does not alter the circumstance that our language is so made that no valid inference can lead from a statement containing only a description of facts to a statement of what ought to be.* [17]

If we relate the quotation above to the problem raised for the first time by Hume, developed by Kant and strengthen by Moore i.e. inability of reduction the *ought*-statements to *is*-statements, and if we compare it with naturalistic counter-argument raised by Pigden[18], it seems clear that Hayek, without addressing the problem directly supports the Pigden's idea, according to which, the seeming ban on reduction is sustainable only as a logical or semantic ban, but an ontological one.

Instructions, which come from the factual knowledge, are created on the basis of numerous trials and errors. Some of them happen to be supportive for biological survival, some of them not. Although in case of instructions referred to the natural environment is seems intuitionally obvious, in case of social rules it is not graspable so easy. The principle is however the same. Tribes in which various normative orders have evolved, shall have various ability to survive in given conditions. Hayek describes it in the following way:

> *…rules have evolved because it led to the formation of an order of the activities of a group as a whole which, although they are the results of the regularities of the actions of the individuals, must be clearly distinguished from them, since it is the efficiency of the resulting order of actions which will determine whether groups whose members observe certain rules of conduct will prevail.*[19]

[17] s. 79

[18] Pigden

[19] s. 74

Unfortunately what we read here seems to be based on the theory of group selection, which, although recently have had some comebacks in several papers, is still arguable between the evolutionary biologists.[20]

Assuming such a picture of the origin of rules and norms, what is in fact rule according to Hayek? One quotation is very often referred to:

> *Rule in this context means simply **a propensity or disposition to act or not to act in a certain manner**, which will manifest itself in what we call a practice or custom. As such it will be one of the determinants of action, which however, need not show itself in every single action but may only prevail in most instances. Any such rule will always operate in combination and often in competition with other rules or dispositions and with particular impulses; and whether the rule will prevail in a particular case will depend on the strength of the propensity it describes and of the of the other dispositions or impulses operating at the same time.*[21]

The given definition reveals certain important features of Hayek's view on norms, which let us answer the ontological question. As one can see, rule has been reduced to the psycho-social phenomenon. There is no reference to any statutory or natural law, which is obvious in light of the previous remarks. The said propensity to act, is an agent's individual trait. The trait is biologically determined and is an effect of species evolution. This would be too simple and too close to Petrażycki's psychologism. To understand Hayek's account one have to thoroughly study not only his political philosophy, but first and foremost his philosophy of mind where the sources of his ideas lie. If something is biologically determined it does not mean that the patterns are entirely encoded in genes and, how an agent behave himself in his pace of life is predefined in advance. It is not so. One of the important factor is our neural order, which constitute the basis for our cognition system. The sensitivity of neurons to outer impulses are to the certain extend predefined. But because neurons and their system as a whole is flexible and susceptible to changes, this sensitivity fluctuates during the individual existence respectively to the impulses coming from an outer environment and thus the system fits itself constantly. The evolutionary credo, "the survival of the fittest' act not

[20] Momoko Price and Nicholas S. Thompson

[21] s. 76

only on the level of species or individuals but also on the level of individual organism.[22] On the basis of neuronal order (which is strictly biological) the sensory order is created. One may say generally that the latter constitutes a model of the outer environment in which an agent is to act. This model reflects our 'knowledge'. But if knowledge is presented as the imperfect model of the world, and if one reminds itself what is model in mathematics or logic, it becomes clear, that it is 'knowledge in action' – 'knowledge how' or to put it in other words, knowledge which is reduced exclusively to rules. The biological correlate of the rules lies in the network of neurons. Each neuron, from the cognitive point of view is nothing more than a 'rule' or an 'instruction'. On the basis of those instructions the incoming impulses are being discriminated, some of them causing a neural reaction and some remains 'unnoticed'. However the reduction of rules to the neural order would be a misconception. As it has been hinted above the system is flexible and susceptible to changes. The basic changes are evoked by the natural environment. But as the formation of societies gave humans such an evolutionary prevalence over other species, it seems justified that the most important adjustments in the system of agent's neural rules are subordinated to the social life. As the sensory order formed in an agent's mind during his life cannot be carried forward by genes, the societies overtook this burden and started to be an abstract carrier. Therefore probably, the species propensity to mimic other individuals became one of the decisive biological traits enhancing the development of social order, and that is why the cultural evolution is of Lamarckian character. That is also why Hayek says that the rule '*manifest itself in what we call a practice or custom*'. This give rise to an answer for epistemological question. It doesn't make any sense to investigate norms by inspecting one's mind, as could be proposed by Petrażycki, at least for two reasons. Firstly, according to Hayek's theory, mind or more precisely the model which is formed on the basis of neural order in incognizable.[23] Secondly, even if it were cognizable, the individual system of rules would be of no relevance. Norms acquire certain level of their 'validity' only in societies, wherein we can identify them in action and eventually judge whether the particular '*practice or custom*' prevailed. Rules compete with each other, and the temporary result of that competition gives us some knowledge about the system of norms in force in a particular tribe. Therefore the only appropriate epistemological methods are the historical and social studies, and although Hayek

[22] The sensory order and Hebbs synapses.

[23] The sensory order

used to be very skeptic and suspicious towards the application of statistics in sociology and economics, this seems to be the most useful.

As it has been stated several times above, rules form an order, which by their merits is analogous to the sensory order formed in agent's mind.

> *By 'order' we shall thoughout describe the state of affairs in which multiplicity of elements of various kinds are so related to each other that we may learn from our acquaintance with some spatial or temporal part of the whole to form correct expectation concerning the rest, or at least expectations which have a good chance of proving correct.*[24]

The thorough reader shall immediately notice how likely is that definition to the concept of law presented by Holmes. Legal norm is reducible to the prediction of what shall court of law do. The same can be referred to the Hayek's normative order. Although, by its ontic status the norm is reduced to the 'propensity' of an individual, the norm which is 'binding' in a society can be grasped by the notion of prediction, as predictions or 'expectations' are one of the most characteristic features of an order. In my opinion this part of Hayek's account decides about the realistic approach and let us attribute him to this current of jurisprudence.

The order reveals two more qualities. Firstly, one may observe that the bindingness of the orderly rules is gradable. We can never say that certain norm is in force or not. The justified statement should be that the norm 'prevails' or not in a certain society. Secondly, the order is not of a human purposeful design but is spontaneous. The possible, effective human intervention into the order is highly limited.

> *The grown order which we have already referred to as a self generating or endogenous order, is in English most conveniently described as spontaneous order. (…) It would be no exaggeration to say that social theory begins with – and has an object only because of – the discovery* ***that there exists orderly structures which are the product of the action of many men but are not the result of human design***.[25]

If we agree that the system of spontaneously formed rules can be identified by the historical and sociological methods, we should also agree that the purpose of the 'legislator'

[24] s. 36

[25] s. 37

should be put differently. It should be responsible not for the establishment of law (understood as creation of new rules) but rather for their proper recognition, identification and eventually codification. This last undertaking is not even necessary. In orderly societies the custody of the rules identification and their application was entrusted to judges and lawyers. Nevertheless it has to be noted, that in the history of law, the first and the most eminent statutes used not to be the unrestricted expression of sovereign's will, but on the contrary, the sovereign used its power to codify the mores and practices already observed in the society, due to strengthen their observance and thus strengthen the existing normative order and not to introduce the new order which would have demolished the old one. The said tradition refers however only to spontaneous order. Hayek names it simply 'law' or '*nomos*' or '*kosmos*' and clearly distinguish from the designed order which is referred to as 'legislation', '*thesis*' or '*taxis*'.[26] It means that he noticed in the societies the designed order too. The sources of it are different. From the very beginning there appeared in societies groups of people, which intended to collectively served certain predefined aims. To achieve those aims, their members had to agree certain instructions to be followed or had to subordinate themselves to the instructions or commands of a man, whose aims had to be achieved. Those social and hierarchical organizations gave rise of a different types of rules, which did not emerge spontaneously, but were in fact of human design. Those rules effectively mimics *nomos* and are often formulate in an abstract way. They always serve certain purposes and therefore are called by Hayek 'purpose dependent rules'. They play minor role in formation and sustaining of the social order. Moreover, whenever the sovereign tried to replace, even partially, the established, spontaneous order by that 'purpose dependent' order, it led rather to social disorder. This is, and used to be due to the human inability for entire recognition of all of the possible implication of an order or of its possible reconstruction. The order itself is 'wiser' than any man and much more complex than any man could be able to cognize. Although the system of rules forms the kind of a model, similar to that existing in human's mind, neither the former nor the latter are complete and consistent. Therefore both require special 'guardians' which would permanently test the system for its completeness and consistency, and eventually 'patch' it if found flawed or even restructure it. In a contemporary social normative order this is the function mainly entrusted to lawyers and especially judges. Although their main task is to identify the regular patterns of human behaviour and formulate

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them in abstract terms, they are also responsible for revealing the loopholes, and if revealed, to propose the appropriate modifications of a rule. In a more biological terms we might say, that lawyers and judges introduce the necessary 'mutations' to the system. Whether they survive or not shall be the matter of whether they are accepted by the society and whether they occur to be more or less adaptive for the society as a whole. In light of what has been said above, lawyers and judges will never be 'a mouth of a statutory law'. Their role is creative. They are important co-creators of a system, although equally unaware of its aims and consequences.

Critique of realistic conceptions and trial of their defence.

Realistic approach to jurisprudence is not very popular among lawyers and philosophers, at least among those rooted in a continental tradition. The former clearly prefer legal positivism and normativism, even if they do not entirely reflect their own ontological pre-judgments. Some of the realistic consequences are so much counterintuitive and contradicts the daily legal practice, that they are more or less consciously denied. Especially myths of normativism pointed above are still often lectured at law faculties as an established knowledge and are thus strongly sustained in lawyers' societies. On the other hand philosophers seem to be entangled in a seemingly unsolvable dispute on the ontological status of norms and their possible distinction from facts. The discussion around Moore's anti-reduction argument is still vivid. In such a scholarly environment, advocating legal realism requires an advocate to tackle the critique. And this is in fact an intention of the last part of this paper.

Among many various thinkers and their arguments against legal realism I again choose to refer to Brożek's account. His monograph on ontology of law seems to be nowadays one of the most comprehensive one and collects and presents the most eminent opinions deriving from different schools. What are those opinions which could possibly undermine Hayek's account?

1. In most of the realistic proposals the normativity *sensu stricto* is gradable. Regardless of whether we reduce the norm to be the special kind of emotion or whether we look for it within the regular patterns revealed in societies, one cannot determine the bindingness of the rule in 0/1 (or true / false) terms. Norm can be more or less binding depending on the

strength of the emotion or on the revealed commonness of its observance. At Brożek we read:

> *Normativity sensu stricto cannot be gradable. Bindingness or not of a particular rule should be decidable. Otherwise the doubt arises whether we deal with rule in principle. For example, the fact that most of the people steal should not be the basis for a statement that the ban on theft is not in force. In other words the regularity of the behavioural patterns cannot be the defining element of a norm, because it leads to undecidability of the issue of its bindingness.*[27]

The objection is not sound. It is based on the foundational, zero-one (or true – false) understanding of the category of bindingness. Such an approach is justified if the consistency of the normative system is an important assumption. However it needs not to be such. The category itself can be vague and the system can be inconsistent or paraconsistent. In Hayek's proposal it is exactly so. He permits the normative order to be locally incomplete or inconsistent, which is envisaged as a standard feature of the biological system and he respectively reveals the tools of its permanent testing and completing. It does not mean that the category of bindingness is undecidable at all. It is decidable (or rather from the epistemic point of view 'approximateable') however one has to agree then, that it may lead the investigator to the counterintuitive conclusions. In case of the example with common theft we would have to accept that in the given societies the rule 'don't steal' is not binding.

2. Following the conception of Wittgenstein, Brożek claims that one of the constituting element of a rule is its ability to be 'projected to future'. Although we don't realize all of the possible factual states to which rule can be applied in future, it is applicable nevertheless. Brożek writes:

> *Regularities in behavioural patterns do not meet the condition of "projection to future" – on their basis one may merely predict, how people will behave themselves.*[28]

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[27] *Normatywność sensu stricto nie może być stopniowalna. Obowiązywanie lub nie określonej reguły powinno być rozstrzygalne. W przeciwnym wypadku powstaje wątpliwość, czy w ogóle mamy do czynienia z regułą. Np. fakt, że większość ludzi kradnie nie powinien być przesłanką do stwierdzenia, że nie obowiązuje zakaz kradzieży. Innymi słowy sama regularność zachowań nie może być definicyjnym elementem normy, bo to prowadzi do nierozstrzygalności kwestii jej obowiązywania.*

[28] *Regularności w zachowaniach nie spełniają warunku „rzutowania w przyszłość" – na ich podstawie można co najwyżej prognozować, w jaki sposób ludzie będą się zachowywali.*

The objection is not sound. This 'projection to future' should be understood as such a functioning of a rule that it can have an impact on the future agents' behaviour. If we reduce the rule to the observable patterns of behaviour, seemingly we give up this condition. How could it be possible that facts occurring at present may have the special power of regulating the future facts? However if one replaced the word 'regulating' with the word 'causing' it would not sound so strange. If we moreover realize that those presently observed patterns are the results of agent's sensory order activity, this order which stores our 'knowledge', this knowledge which is in principle understood as a system of rules, we may conclude that the condition is met. The repeating patterns of behaviour, perceived by an agent constitute the basis of its predictions about the future expected behaviour of other agents and let them adapt its own system of rules respectively. The most stable adaptation, although not necessarily the only one possible, is to mimic those patterns.

3. The realistic account leads to one more counterintuitive judgment. If the rule (which is intuitively perceived as a rule) is not observed commonly or at least in a prevailing occurrences, should not be called a rule. Brożek states clearly:

> *Norm which is not observed does not deserve to be named a norm. The ethical or legal system, with which no one agree, and which no one accepts, is at most certain fiction.*[29]

The remark is accurate. Anyway, if we shared the realistic understanding of a norm, we should consequently accept that we would have to deal with at least two levels of discourse: The level of observable regularities which allows to formulate some empirical conclusions as regards the binding patterns in society and thus the accurate prediction for future, and the level of postulates as regards what new patterns should be introduced and become binding. That 'fictitious' legal or ethical system may constitute such a postulate, or the set of postulates. The same refers to the statutory law. According to the realistic account we have to definitely reject the idea that the statutory law becomes binding once being resolved (or otherwise decided) and properly promulgated. Bindingness is the social and not legal category. The statutory law may at most be understood as such a 'postulate', although very strong one. The postulate is strong, because behind it stands the oppressive power of sovereign, which can be possibly used against those reluctant to adopt the newly proposed

[29] *Norma, która jest nieprzestrzegana nie zasługuje na miano normy. System etyczny i prawny, z którym nikt się nie zgadza i którego nikt nie akceptuje, stanowi co najwyżej pewną fikcję.*

patterns. It does not automatically mean that the proposed patterns shall be adopted. The practitioners of law know very well that there is a lot of resolved and formally promulgated statutes, which have never been accepted, adopted and thus have never led to the creation of expected patterns of citizens behavior. Moreover those among the governmental officers who endure the subsequent reforms, know very well, that the new law, which has been intended to reform certain branches of the administration is practically applied long after it is formally announced as being in force.

4. Another objection which is often raised states that the realistic account requires to be completed by the normativity *sui generis*. The proponents of this kind of conceptions may pretend that they are self-sufficient, but proper and thorough inspection leads to contradictory conclusions.

> *Realistic accounts cannot avoid being entangled in a normativity 'sui generis', what can be noticed even in the following example. Postulates as regards, what rule 'should be binding' or what law ought to be introduced, have to refer to a normativity / rationality which is beyond the factual states. Inevitably it creates a super-lawgiver, who postulates – introduces rules disregarding the regularities in behaviours observed in society.*[30]

The objection is not sound. First and foremost, as it has been noted above, one cannot confuse the rule which is already prevailing in society and thus is perceived as binding, with the rule which is in the state of being postulated, or in other words, being introduced. The so called 'super-lawgiver' may appear only as a 'super-postulator'. No law can be given by anyone. The fact that certain rules are accepted in major occurrences and respectively observed, is a social fact and is not directly dependent on anyone giving law. On the other hand a 'super-postulator" or simply a postulator can be anyone. Anyone may propose new patterns of behaviour. The only difference is that some of the society members have stronger impact on the others and impact of others is weaker. This can partially depend upon the political power, but not necessarily. The so called 'style of life' which doubtless has a

[30] *Koncepcje realistyczne nie mogą uniknąć uwikłania się w normatywność sui generis, co może być zauważone nawet w powyższym przykładzie. Postulaty co do tego jaka reguła „powinna obowiązywać" tudzież jakie prawo należy wprowadzić, muszą odwołać się do jakiejś normatywności / racjonalności ponad faktualnej. Siłą rzeczy kreuje to jakiegoś nad-prawodawcę, który postuluje – wprowadza jakieś reguły zupełnie niezależnie od regularności zachowań obserwowalnych w społeczeństwie.*

tremendous influence on the society development cannot be resolved by the legislator. The another problem may occur, if we look for the rationality of the postulated patterns, or, in other words, for its proper justification. From the evolutionary perspective however any justification is admitted and, as matter of fact, is of no relevance. It leads us inevitably to the teleological-axiological question. Whether such an approach let us formulate an original (non trivial) answer for such a question seems to be another issue. According to Załuski and Hayek, it does.

The Puzzle of Normativity – Solution proposed by Hayekian realism.

As a kind of summary, let us check again if the Hayekian proposal soundly responds to all of the questions proposed by Brożek and Załuski, and what kind of responds can it offer.

As regards the ontological question, the rules are reduced to the certain propensities or dispositions of the society members, which reveals themselves by the prevailing regular patterns of behaviour. In a wider sense, they are to be the elements of the biological human construction. In Hayekian terms however, the flexible and susceptible sensory order is also an element of the biological construction, although it can cause our picture of an outer world to be changed during the lifetime and thus significantly affect the said propensities to behave in a given way. Evolutionary biologists are much more cautious in their judgments about the cultural evolution and its possible impact on the revealed patterns of behaviours. They tend to envisage the biological foundation of the human mental states to be much more stable and less malleable for any outer and especially social leverage. This seems to be also the position of Załuski.[31]

The answer for epistemological question is derivative of the ontic status of rule. Rules are cognizable with the use of all the scientific methods usually applied in psychology, sociology, cultural studies and history. The investigator should look mainly for the repeating patterns of behaviour in a given society.

The issue of *sensu stricto* normativity, so the question about the objective reason for action is the most troublesome. Hayek's realism do not give a straightforward answer. In the

[31] Załuski + http://www.scq.ubc.ca/the-controversy-of-group-selection-theory/ + Thompson, N.S. (2000). Shifting the natural selection metaphor to the group level. Behavior and Philosophy, 28, 83-101.

section devoted to the general review of the realistic accounts, three possible fields has been proposed where that normativity can be searched in. Those are:

a. Social engineering i.e. the question whether in realistic accounts we have any reasons to formulate any postulates for the new law creation. If the answer were positive, we would have to cope with the ontological status of those postulates, as they must have been rules *sui generis,* which avoid the realistic definition of the rules. This problem has already been addressed above. The problem of social engineering shall be addressed below at the teleological question.

b. Biological foundation of certain (if not all) of human propensities and dispositions to behave in a particular way. Such an approach however gives an answer for the question why we behave in a specific way, but cannot provide us with the correct reference to the objective reasons for action in terms of Wittgenstein and Brożek.

c. The concept of bindingness in realistic accounts, which has already been addressed above.

It is my opinion that in none of those fields can objective normativity be found. We have to conclude that in Hayekian realism this concept is useless. Any quest for the objective reasons for action will be led in vain. It does not mean that metaphysically there is none, but it simply means that it is beyond the scope of the theory and within the terms of the theory this idea is incognizable. Similarly we could formulate the question about the 'objective reason for survival' or 'objective reason for procreation' or more broadly for the ontological sense of biological evolution or its *telos*. If there is any, it lies beyond the theory of rules.

The psychological question is the most obvious. Internal motivation becomes a defining element of a rule. Human propensities and dispositions to certain behaviours inevitably refers to the internal, psychological mechanisms. All of them are the effects of biological and cultural evolution and are subordinated to the survival of an agent, group or species.

The most interesting however seems to be the teleological-axiological question. As it has already been stated above, according to Brożek (who by the way does not deal at all with the teleological issue), due to formulate any postulates regarding the possible directions in the development of law, one needs a super-rule, which determines the

rationality of the lawgiver. This super-rule cannot be defined in terms of realistic accounts. It cannot be the observed regularity in agents behaviour or revealed propensity to the certain actions. It is also not derived from the predictability of peoples' behaviour. In order to introduce it to the system, one needs to refer to the different concept of normativity, different then realistic. If that super-rule is based on the general postulate for maximization of the society well-being, we have the straightforward reference to the utilitarian axiology. This remark is generally correct. Analyzing the psychological theory of Petrażycki one does in fact notice that inconsistency. However what is accurately identified as a flaw of some realistic theories does not need to be the general feature. I would argue that in case of Hayek's account it does need to be so. We don't need to grasp for that super-norm. The main task for the legislator is not to resolve upon the new law and its eventual 'introduction' but merely the proper identification of the rules already observed in society and its eventual codification. I does not exclude the instrumental intervention of the sovereign. In case it wishes to achieve certain aims, which it determines due to its role in a social order, it is relatively free to pick out any tools which seemed to him adequate for the given aims. It is relatively free, at least within the constraints which its biological construction and background social order impose on him. What kind of purposes will be indicated and what tools will be picked out, depends mainly on those constraints, so on the level of the society development and the natural environment. Both the aims and tools will be subordinated to the natural selection, and if the intended tools / rules eventually transform themselves into the observed practices and if the intended aims are achieved and survive, depends entirely on whether they occur to be adaptive for the group or not. Neither legislator can however control the whole process as neither can posses a complete knowledge which would let them postulate and introduce the rules which were both effective in achievement the intended purposes and adaptive for the society.

What about the axiology? Even if the proposed account were correct would it let us formulate some practical indications for the contemporary sovereigns? According to Hayek who was foremost the political thinker, it would and it did. If the system of a natural selection of behavioural patterns is to act effectively (so that it would be the most efficient in terms of society survival), the minimum requirement is to protect as much freedom for the agents in relation to the other agents as it is practicably possible. If agents

are free to postulate new behavioural patterns (in a public discourse or by straightforward practice), the society will have a huge number of patterns to pick it out from within, and eventually the chances increase that among them, those the most adaptive will occur too. The relatively stable social system is possible to be constructed exclusively by the gradually introduction of the new behavioural patterns, which originate from the constant adjustment of the various expectations of the society members. Hayekian postulate of the political freedom is the expression of his distrust to human knowledge and general trust in evolutionary mechanisms.