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SOME REMARKS ON THE ANALYSIS OF LEGAL CONCEPTS


§ 1. INTRODUCTION

The nature of legal studies seems to endorse the view that by design law is a linguistic phenomenon. Indeed, language is the basic substance and essential tool used in legal practice. To quote Zygmunt Ziembinski: "One would expect legal professionals to be especially sensitive to the issues debated in philological or logical semiotics. But one gets the impression that jurisprudence approaches linguistic studies with certain dislike or mistrust" (Ziembinski 1985: 340). This seems particularly striking at the University of Warsaw, after all, an heir to the Lvov-Warsaw School with its trademark focus on language. Puzzling indeed, considering that the tradition at hand is not likely to become obsolete, as philosophers subscribing to it not so much share views on fundamental philosophical issues, but rather attitudes towards philosophy, the scope of its problems and methodological convictions (Woleński 1985). Long story short, close to all exponents of the school sided with an analytical approach and a skepticism towards holistic philosophical systems, while striving for an exactness and clarity of opinions they had to offer.

It is not that the accomplishments of the Lvov-Warsaw School failed to have any impact on developments and shape of Polish jurisprudence. An accurate although maybe not comprehensive account thereof is provided by Jan Woleński in his paper on both personal and substantial influences of the School on jurisprudential milieu (Woleński 1985: 287-300). Woleński argues that reism proposed by Kotarbiński was debated by Vilnius-based
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lawyers, among others, civilist Jerzy Zajkowski. A somewhat weaker version of reism, assuming that there are not only things but also processes (such as law), inspired some concepts of Wiesław Lang. Directival theory of meaning proposed by Kazimierz Ajdukiewicz was even more popular and was applied directly by S. Frydman, B. Wróblewski and F. Studnicki. The majority of it was, however, made by Jerzy Wróblewski who employed it to develop his ideas regarding legal interpretation and put it in the core of his theory of normative directives.

There is, however, much unexplored ground in this field. This paper is not, of course, aspiring to cover it all or even name everything that is left to investigate. Its primary goal is to answer the question of whether certain concepts forged in the Lvov-Warsaw School, specifically by Tadeusz Kotarbiński, can be applicable in legal studies; and if yes, what place do they occupy on the imaginative map of legal methods. Already from the outset one must make reservations that these findings should be treated with utmost caution, and it is almost certain that they should never be used to draw conclusions of axiological or ontological character. For, as Jan Wolenski remarked in the aforementioned essay, it is impossible to know whether using the concept defined by the philosopher must necessarily entail that the individual applying it is aware or accepts philosophical background of the explanation provided (Woleński 1985: 288).

Since the paper focuses on language, one should first clarify what kind of language one has in mind.

§ 2. LEGAL LANGUAGE, LANGUAGE OF LAW, ETHNIC LANGUAGE

At the very least, a lawyer recognises certain linguistic specificity in the following kind of texts:

- texts of normative acts
- texts of court’s rulings and administrative decisions
- texts produced by legal doctrine
- texts executed while completing broadly conceived legal transactions.

All those are expressed in the language of law. It is therefore a sensu largo term, encompassing all law-related texts. This understanding of the term "language of law" would require some kind of clarification, namely...
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where it stands in relation to ethnic language. It appears to me that there
are two levels of generality, on which one can approach this problem. First,
one may seek to explore relation between the specific language of law and
specific ethnic language — for instance, between the 1964 Civil Code and
the Polish language. Second, one may study general features of languages,
in which one formulates any given text within any legal system, and look
how they relate to general features of ethnic languages. This paper examines
only the first, more specific level.

The first possible take on the issue plays on the opposition of natural
language and artificial language. By "artificial language" one means usually
a technical language created at a certain moment in time by a group or an
individual to achieve some ends. From this point of view the language of law
is a mixed one — suffice to say that countless rulings of higher and lower
courts resort to Polish dictionaries when deciding cases. It is therefore safe to
say that the language of law is dominated by the elements of ethnic language
co-existing with elements of artificial origin, constructed consciously by the
lawmaker or legal theory. Among those artificial elements are, for example,
special semantic rules established by the lawmaker, arbitrary definitions of
certain words or, interestingly enough, some predetermined syntactic rules
that set apart the syntax of the language of law from syntactic rules of
natural language. Consider for example the first sentence of art. 24 of the
Civil Code: "A person whose personal rights are at risk of infringement by a
third party may seek an injunction, unless the activity complained of is not
unlawful." This peculiar, if judged in terms of natural language, sentence
means that any person, whose personal right, e.g. good name, respect or
health, was risked by other peoples' actions is entitled to request this action
to be stopped. However, she is not right to do this if the infringing person
acts pursuant to the rule of law. The policeman apprehending the criminal
undoubtedly violates such a personal right as freedom, but acts lawfully. It
seems that, if one views things from the perspective of natural language,
would be clearer and more reasonable to phrase the first sentence of art.
24 of Civil Code as follows: "A person whose personal rights are infringed
unlawfully may seek an injunction." Ethnic language, it seems, ascribes the
same logical sense to both of these sentences. But it is not the case with
the language of law, which by employing the phrase "unless the activity
complained of is not unlawful" shifts the burden of proof from the violated
party to the infringing party. It is an exception from the general principle of
the burden of proof enshrined in art. 6 of Civil Code that states that the
burden of proof rests on the person who deduces legal consequences from

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the facts to be established. The first take on the presented relation requires one more annotation: degree, to which the language of law is saturated with artificial elements, it is varied and prone to change when comparing various legal systems, similarly it regards various branches of law existing under the single system (compare art. 10 of the Civil Code and art. 10 of the Penal Code — each sets a different threshold for adulthood).

The second possible approach to the issue regards the language of law as an individual language of the lawmaker. For this reason, lawyers should take into account particular qualities of the lawmaker that separate them from other users of ethnic language and modify their linguistic behaviour — as any other user of language, the lawmaker has some inherent features. Specifically, he possesses certain knowledge and has some predetermined preferences (needless to say, we do not mean here any specific individual taking part in the legislation process, but the lawmaker as such). It is by including these that the wording of legal texts is often assigned meaning that could only be understood differently if those idiosyncrasies were not factored in its interpretation.

The third, and last approach, treats the language of law as a type of ethnic language. Here, one assumes that ethnic language is not a seamless and solid whole, but rather a conglomerate of various types of ethnic languages that, if at all, may be contained in a typology, but never in a classification.

In Polish legal studies, the relationship between the language of law and legal language was unpacked by Bronisław Wróblewski in his seminal 1948 paper where he applied a linguistic approach. Language of law is defined as the language of the lawmaker, it is therefore a language of normative acts. Legal language may be defined as the language of lawyers — theorists and practitioners speaking or writing about law. Legal language is thus employed to frame doctrinal debates or produce court rulings. It may be said that by making the above distinction one positions the language of law as the primary language, with legal language being a metalanguage — a language about the language of law. Finally, the ”language of law sensu largo,” hinted on above, would be a term covering both. It may be of use to take a closer look at similar structures of other ethnic languages. In French, the proposed distinction is clear right from the outset as one uses a nominal structure with the preposition ”de” in the first, and adjectival structure in the second case. Hence, the terms are la langage du droit and le langage juridique for language of law and legal language, respectively. German theory, in turn, which alongside French legal thought has had the greatest impact on the Polish legal system, largely departs from this model. The prevailing
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terms used there are juristische Sprache or juristische Fachsprache, but Rechtssprache and Gesetzsprache also enjoy some popularity. Denotation of these words does not overlap with the above-outlined Polish or French meaning of the terms. For instance, juristische Sprache corresponds with the "language of law sensu largo" rather than with "legal language," since it includes both texts of legal acts and any other legal texts. Gesetzsprache would be the equivalent of "language of law," while Rechtssprache has no unambiguous meaning. In Anglo-Saxon common law, one speaks of the language of law, or, at times, of legal language or juristic language but one attaches little importance to those distinctions.

One more remark. As presented above, such terminology ignores the non-written laws, such as custom, which particularly in international law remains a significant source of law. This objection holds. But such is the price to be paid for clear and precise terminology.

§ 3. METHOD

To assess the applicability of the conceptual analysis made by Kotarbiński, one has to first consider where to put it, if only in an experimental vein, on the map of legal methods. But before embarking on this task one needs to provide at least some typology of this field. The topic is a vast and complex one, but legal theory, for example Methods of Legal Reasoning (Stelmach and Brożek 2006), has managed to clarify three basic positions on the issue in question.

To begin with, one may assert that jurisprudence and other branches of legal thought are unable to develop any scientific method, nor do they need such. This was first expressed explicitly in the article Die Wertlosigkeit der Jurisprudenz als Wissenschaft [The Worthlessness of Jurisprudence as Science], published in 1847 by Julius Hermann von Kirchmann. Abandon all methods, says Kirchmann, and give priority to intuition, it cannot be taught or learned, but eventually sorts mediocre lawyers from the good ones. To achieve this, one should first and foremost do away with argumentative methods.

The second, less radical approach is based on the assumption that jurisprudence can be treated as science, provided it applies methods employed in other fields, e.g. mathematics, logic, physics, semiotics, linguistics, etc. This point of view has been shared by analytical schools (mathematical and logical analysis, linguistic analysis, law & economics), exponents of American legal realism who insisted that legal theory must study what is real — law in
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*action* as opposed to *law in books*, and, finally, free law school that adopted methods pursued in sociology and social psychology.

According to the third, and last, belief, jurisprudence is fully autonomous, it should not import a methodology of sciences, but rather develop one of its own. This methodological independence was usually underpinned by the ontological argument (Savigny wrote that its independence is derived from the role that law has to fulfil). This, precisely, was the methodological assumption followed by the "historical school", arguably the most popular theory in the history of the field.

It seems self-evident to say that only by adhering to the second of the above-sketched views one can benefit from concepts developed in other fields of science. This position holds that legal methods are of a pluralistic and heteronymous nature:

- pluralistic, since there is no single and proper legal method
- heteronymous, since there is no such thing as an exclusively (autonomous) legal method.

Let us briefly return to the preliminary point, where we provided a distinction of levels of language used in law. If we were to imagine the language of law *sensu largo* designed to formulate propositions regarding legal language, it would be a meta-metalanguage. If one wished to exercise utmost accuracy and demanded further clarity, one would come to the conclusion that part of those methods consider law only as it presents itself on one of those levels. For example, those who espouse the first approach and forsake the method entirely think of law only in terms of the language of law, whereas those subscribing to the third perspective barely touch this ground. One would be therefore right to ask whether those positions must be mutually exclusive.

§ 4. *LOCUS OF THE ANALYSIS*

We can now begin to see where on the "legal map" is the place for linguistic, preferably semiotic, analysis derived from other fields of science. Similarly to linguistic and economic analyses, the one we wish to discuss will be of a metalinguistic nature. Taking note of methodological semalance with linguistic analysis, stemming, however, from completely different traditions. Logically valid classifications of those two methods is rather impossible because they tend to overlap in certain points. For this reason, one first needs to shed some light on the linguistic analysis.
§ 5. LINGUISTIC ANALYSIS

I shall start with an account of themes explored by Herbert Hart in the *Concept of Law*, his *magnum opus* and peak achievement of the school of linguistic analysis. Concepts are open by nature. This means that each concept has a "core of determinate meaning" and "penumbra of determinacy," or semantic shadow. If so, there may arise doubts whether some objects fall under the given concept or not. In such cases it is futile to attempt to provide its definition — understood in a classical vein as indication of the properties sufficient for ascribing certain names to the object — since it must lead to a "sharpening" of the defined concept, followed by a false depiction of the manner in which the concept is used in ordinary language.

This anti-definitionism does not mean, says Hart, that we must necessarily be ignorant when it comes to concepts embedded in ordinary language. To the contrary, primacy of the ordinary language allows for highly refined analyses of concepts and their mutual relations; the end result cannot be a simple, straightforward definition. In *The Concept of Law*, Hart explicitly states: "This book is offered as an elucidation of the concept of law, rather than a definition of ‘law’ which might naturally be expected to provide a rule or rules for the use of these expressions” (Hart 1994: 213).

Hart’s point of departure is a criticism of the definition of law given by the nineteenth-century English philosopher John Austin,¹ often simplified to the following slogan: "law is a command backed by threat." This paper does not purport to discuss Hart’s ideas at length, but to advance with our study we shall need to present Hart’s linguistic method in action, as he refutes the above-quoted definition. Pondering on situations when it seems fit to use the word "imperative", Hart writes:

It is that illustrated by the case of the gunman who says to the bank clerk, ‘Hand over the money or I will shoot.’ Its distinctive feature which leads us to speak of the gunman ordering not merely asking, still less pleading with the clerk to hand over the money, is that, to secure compliance with his expressed wishes, the speaker threatens to do something which a normal man would regard as harmful or unpleasant, and renders keeping the money a substantially less eligible course of conduct for the clerk. If the gunman succeeds, we would describe him as having coerced the clerk, and the clerk as in

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¹John Austin (1790-1859) — English lawyer and philosopher, disciple of John Stuart Mill; professor of jurisprudence at the University College, London; one of the founders of legal positivism; considered father of modern jurisprudence; author of *The Province of Jurisprudence Determined* (1832), *Lectures on Jurisprudence or the Philosophy of Positive Law* (1863).
that sense being in the gunman’s power. Many nice linguistic questions may arise over such cases: we might properly say that the gunman ordered the clerk to hand over the money and that the clerk obeyed, but it would be somewhat misleading to say that the gunman gave an order to the clerk to hand it over, since this rather military-sounding phrase suggests some right or authority to give orders not present in our case. It would, however, be quite natural to say that the gunman gave an order to his henchmen to guard the door (Hart 1994: 19).

This fragment is a classic example of reasoning that proponent of linguistic analysis in law would provide. It produces a simple counter-example to the Austinian definition. When the gunman says “Hand over the money or I will shoot,” his utterance can certainly be described as a command backed by threat but we would be reluctant to call it an ”order,” much less the ”law.” In this fashion, by evoking the heterogeneity of language, Hart shows that the definition prevailing in positive law oversimplifies the word ”law” as it is pictured in ordinary language.

Another example of practical application of linguistic analysis also centres on the critique of the Austinian definition, but targets its other part, namely the ”threat.” In the Polish Civil Code, the concept of will is introduced by arts. 941 and 942, which are in any case perceived as legal norms. Since we do not hesitate to treat them so — and as such they have nothing in common with general and universally obeyed commands backed by threats — we arrive at another example in how to falsify Austinian definition by the means of ordinary language. Let us supply Hart’s observation with one comment, namely that such analysis can be successfully applied to any power-conferring rule.

These, of course, are only examples. Hart never settles with exposing Austin’s flaws, but further investigates the concept of law by clarifying such distinctions. This, however, goes beyond the topic we wish to pursue in this paper.

To summarise, one may state that Hart’s primary linguistic method (standard case reasoning and the method of presupposition were omitted here) is informed by the broad guiding principle that goes like this: make hypotheses regarding the problem you are absorbed with, and test them against examples inspired by how expressions intuitively function in the ordinary linguistic practice.

§ 6. CONCEPTUAL CONSIDERATIONS DEVELOPED IN OTHER FIELDS VS. THE ANALYSIS OF LEGAL

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LANGUAGE — BASED ON THE WORKS OF TADEUSZ KOTARBIŃSKI

One handy academic principle has it that theory without examples resembles religion without acts of piety. Happy to oblige, I shall start this paragraph with an analysis of the word "act" by comparing its understanding in the theory of criminal law with the meaning of the term provided in the writings of Tadeusz Kotarbiński, most notably in the *Praxiology. An introduction to the science of efficient action*. We shall conclude the essay with a vocabulary of concepts developed by the author of *Gnosiology* that also lawyers may find useful in their practice.

The first issue that begs resolving is as follows: is really the definition of the word "act" provided in penal code (language of law) and explored in legal theory (legal language) of critical importance?

Analysis of the statutory use of the word should start with retrieving the art. 1 § 1 of the penal code that provides the general definition of crime. It is phrased in a way suggesting that establishing the meaning of the word "act" is important for penal liability. By definition, what is not an "act," cannot be a crime. In this view, act, on par with guilt, unlawfulness and social consequences, also laid down in this article, is treated as an actual and independent premise for ascribing penal liability. Note that it is also the most fundamental premise of all, since one must first consider whether the factual circumstances contain any acts at all. It is only after this that one can discuss its unlawfulness and ascribe guilt.

One can tackle the issue from yet another angle (in our tripartite classification of methodological perspectives, this approach follows the first one): if one defines "act" so broadly that it effectively includes any human action and inactivity, or one drops the definition altogether, the word is transformed into some sort of a picklock, put in the article for no other reason, but stylistic. This conclusion could be supported by the purely grammatical argument, since art. 1 of the penal code is phrased in an indicative form: "Penal liability shall be incurred only by a person who commits an act . . . .” Here, "act" is merely an object of the sentence. Since one used that verb "commit,” one needs to provide an object to satisfy the requirements of Polish grammar. If we were to follow this interpretation, this provision would mean: "penal liability shall be incurred only by a person committing anything that poses a risk to society”, and could have precisely this, or equivalent, wording. It would be even clearer if the word "act" was replaced — as proposed by professor Cieślak, among others — with an expression "occurrence of factual
circumstances having features of a prohibited act” (Konieczniak 2002: 14). When deciding whether the "occurrence" took place, one would each time simply cite the specific statutory type of a prohibited act — but the latter would not have to refer to any voluntary activity, not to mention human activity.

For this reason, the word "act" is usually understood as an activity meeting some other additional criteria introduced to grasp the meaning of the concept. For instance, there exists a requirement that the activity in question satisfied certain mental aspects, namely that it was undertaken when it could have been abandoned or different.

Reading of the commentaries on the legal order in force (1997 Penal Code) may result in the conviction that an act is only perceived as human movement (or lack thereof) originating in the wake of some internal impulse. Someone whose movements are beyond one’s control, even if one’s consciousness functions properly (e.g. when thrown by force through the window), manifests one’s impulses to the degree of a falling stone, hence in this respect we cannot speak of an act. Note that it can by no means be tantamount to a situation where the activity arose due to some mental state, which however is abnormal and gives no basis for accusation (e.g. the perpetrator is mentally ill). One should therefore differentiate between those concepts, contrary to some authors (professor Kubicki, for example) who would like to remove "act" from the conceptual framework of criminal law. Bearing this in mind, it is worth taking a leaf from professor Zoll’s book. There is no doubt that he means "act" as a theoretical concept when he writes: "the concept of act plays a crucial role in constraining lawmaker’s powers. It effectively prevents certain types of crimes from being included in the legislative acts unless they fall under the concept of act” (Konieczniak 2002: 19).

Let us now reconstruct the concept of "act" found in the writings of Tadeusz Kotarbiński (most notably in the Praxiology. An introduction to the science of efficient action). In his view, the main task of praxiology is to "formulate the most general and most efficient norms” (Kotarbiński 1975: 15). For this reason, determining meanings of concepts was for him extremely important. He addressed the criticism accusing praxeology of being truistic and trivial by underscoring substantial benefits to be derived from the construction of such vocabulary: "What is the use of such vocabulary? It can contribute to the reduction of ambiguity and misunderstandings that may arise from it […] One cannot forget that language not only assists but guides us, and we need to watch over it, since it sometimes tends to
lead us astray” (Kotarbiński 1975: 155-160) In Praxiology…, Kotarbiński, after a great deal of meticulous reasoning backed by multiple examples, delivers the following definition: "To act — or at least act on reflection — means to change reality in more or less a conscious manner; to strive for a definite goal under given conditions by appropriate means in order to pass from existing conditions to conditions corresponding with the adopted goal” (Kotarbiński 1965: 10). It follows that in order to be considered an agent, one must act on a voluntary impulse being the cause of the given act. Due to some persistent regularity of the sequence of events, the cause is by necessity a certain change that is an essential element of the sufficient condition of the given act. And an essential element of the sufficient condition is an element that, if missing, would render the system of remaining component events unable to function as the sufficient condition (Kotarbiński 1965: 14-15).

In any case, the end result of those two necessarily superficial, because only illustrative, analyses is identical. In other words, both definitions, whether provided by Kotarbiński or contemporary theory of criminal law, offer the same meaning of the term "act". This, however, is not of prime concern, since it is the method that interests us most. I am not entirely sure if it can be regarded as some sort of semantic analysis, or whether even it is any method at all. This is because it largely consists of the systematisation of legal language, an operation much opposed to the undertakings of the Oxford school represented by Hart. Linguistic analysis examined different contexts of meaning to develop the so-called social theory of law (grounded in the conviction that various social institutions are established through performative function of law). Meanwhile, the analysis proposed here would start with a comparison of various meanings of legal terms, and arrive at definitions systematising those meanings. This process produces concepts that form conceptual frameworks of jurisprudence.

The writings of Tadeusz Kotarbiński contain many other conceptual considerations that lawyers should reflect on. To name but a few:

- **AGENT OF THE GIVEN ACT** — one whose free (i.e. voluntary-dependent) impulse is the cause of the given act.

- **VOLUNTARITY** is a specific feature of the intentional activity, not some indeterministic freedom of choice understood as independence from causes.

- **CAUSE** — a change that is an essential element of the sufficient condition of the given act originating due to some natural regularity.
in the sequence of events.

- ESSENTIAL ELEMENT OF THE SUFFICIENT CONDITION is an element that, if missing, would render the system of remaining component events unable to function as the sufficient condition.

- SUFFICIENT CONDITION is a system of earlier events of some later event, with respect to a given law of a sequence of events, and with respect to the time segment filled simultaneously by all the component events of that system.

- EFFECT — the event $B$ is an effect of the earlier change $A$, that filled the moment $t$; and the change $A$ is the cause of the sufficient condition of the event $B$ with respect to the moment $t$, and with respect to some natural regularity in the sequence of events.

- RESULT — any effect.

- GOAL — the given event is a goal of the agent acting on a voluntary impulse if, and only if, the effort was made to cause this event.

- POSSIBILITY — ability to act, may be divided into
  - INTERNAL POSSIBILITY, i.e. dispositional
  - EXTERNAL POSSIBILITY, i.e. situational.

- MUST — in a logical sense it means that negation of such and such would not be in line with the assumptions made (for example, if I assume that if $X$ does something, he acts, and if $X$ does not do anything, he acts as well, therefore $X$ MUST act in a logical sense).

§ 7. CONCLUSION

In conclusion, it seems right to ask what the odds are for spreading the proposed analysis throughout legal practice. One is prone to the suspicion that, however useful it may be for the individuals practicing it, it will nevertheless fail to find broader application. Owing to an increasing specialization of law, it is difficult to fix the meaning of a concept that all specific fields of law would agree upon. Most frequently, one would come to the conclusion that such and such jurisprudential concepts function in a variety of meanings, with no perspective for leaving this conceptual quagmire anytime soon. Or
that a dozen of respected authors perceive certain legal concepts differently, but all share one vaguely occurring thread. No wonder that jurisprudence displays little enthusiasm for such a state of affairs (Ziemiński 1985: 337). It appears that among those who will be better off with it will be those who practice law themselves.

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In most economic analyses of law, the situation is more complex. The agent has preferences over some set of consequences—her income or wealth, her state of health, etc.—and she chooses some action that in part determines which consequence is realized. Typically, her domain of preference differs from her domain of choice, often because she chooses a strategy that, in conjunction with the strategy choices of other agents, jointly determines the consequence. Policy analysis generally focuses on the analysis of the effects of legal rules and institutions on outcomes. An outcome usually consists of the objective effects of the rule or institution on the behavior of private individuals. Analyses and techniques are applied with higher legal standards. (iii) When the average investigation costs are sufficiently convex, with respect to the amount of economic analysis used, relative to the increase in the probability of decision annulment when a (wrong) lower standard is used. Section 4 provides concluding remarks, offers some recommendations and discusses opportunities for future research. 1.2 Brief literature review on legal and substantive standards. While, however, these concepts are well understood and widely applied in common law systems, in other jurisdictions, particularly in (EU) continental legal systems, such probabilistic standards of proof generally do not exist. 3 Some Remarks on Normative Ontology. As I have mentioned already, the discussion about validity is muddled not only by terminological differences, but also by some deeper conflicts pertaining to the metaphysical nature of norms that are not always brought to the surface of the discussion. The puzzling metaphysical nature of norms has become relevant again in legal theory since the introduction of linguistic and conceptual analysis and of the key distinction between norms and norm formulations (Narváez Mora 2015). Once it was clarified that norms cannot be the norm formulations through which they are expressed for norm formulations almost always underdetermine norms as their meanings.