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Legal Narrative and Legal Disagreement[1]

1. Introduction

In this paper, we aim to problematise the relation between different legal theories and so-called "legal narratives". It is quite common in contemporary, especially analytical, jurisprudence to understand legal discourse as a kind of theoretical *agon*, a place for competition between rival theories that, although they develop in different (positivist, non-positivist, descriptive, normative, prescriptive) directions, rely on the same basic, platitudinous assumptions[2]. However, our view is that the purely theoretical discourse is just a part of a general discourse about law: a discourse in which not merely theories, but the whole of the legal narratives clash. The perspective of narratives, and not merely of theories of law, is a perspective that received significant attention after the so-called cultural turn[3], when the practical benefits of a narratologically literate approach were recognised. Occasionally, it has even been stressed that law cannot exist at all without narratology[4]. Nonetheless, we do not want to perceive legal narratives merely as subjective, actual modes of storytelling in the law that are oriented towards bringing up the total account of a given legal case by its particular (even professional) participant. Rather, we perceive narratives as the possible accounts, or, more accurately, the possible descriptions of a legal case in all its theoretical, practical, historical, social, ethical, and aesthetical aspects. If one perceives a legal narrative in such a way, one must accept the fact that part of every such description is the (explicitly or implicitly) accepted theory of law (the concept of law). Of course, one may define or explicate the concept of law in many different ways. These ways have different effects on the general description of a particular legal case, and it is not merely a matter of its practical results (because sometimes, judges, assuming quite different positivistic and non-positivistic accounts of law, are led to the same conclusions with respect to the proper resolution of the case).

[1] This paper, written as a result of research project no 2016/21/D/HS5/03839 financed by the Polish National Science Centre, is the extended version of the presentation given at the Law and Literature Conference held at Masaryk University in Brno from 31 May to 1 June 2017. We want to thank all the participants of our session for their helpful comments and questions.

[2] S. Shapiro, *Legality*, Cambridge (Mass.) 2011, p. 17.

[3] L.J. Moran, *Legal Studies after the Cultural Turn: A Case Study of Judicial Research*, in: S. Roseneil, S. Frosh (eds.), *Social Research after the Cultural Turn*, Basingstoke 2012, *passim*.

[4] P. Brooks, *Narrative in and of the Law*, in: J. Phelan, P.J. Rabinowitz (eds.), *A Companion to Narrative Theory*, Oxford 2008, p. 425.

To put it simply, we think that there are always many competing (background) stories to tell in each legal case.

Thus, we want to perceive legal discourse as a struggle between equally well developed and justified legal narratives, although from the socio-practical perspective, it would be accurate to discriminate between the "master narratives" and the "particular" or even "micro narratives"[5]. Moreover, because we are mostly interested in the relations between theories of law and legal narratives, the proper point of departure for us is the phenomenon of so-called "theoretical disagreement" and its further bearing on the bigger "narrative disagreement" in the law (and about the law).

2. The debate between different general legal theories (theoretical disagreement)

Ronald Dworkin's metaphor of chain-writing a novel is too well known to be continuously repeated. However, because it reveals something very important about law in general, we shall cite it once again. If we compare the law to a novel, Dworkin says, we will have to understand it as a special type of path-dependent enterprise:

> In this enterprise a group of novelists writes a novel seriatim; each novelist in the chain interprets the chapter he has been given in order to write a new chapter, which is then added to what the next novelist receives, and so on[6].

Now, it seems that each novelist is somewhat constrained by what was written before she got into the writing business, but she is also free to develop it further in order to make the story "integral" or "coherent" (as well as, for example, interesting for a reader). Such an account is deeply connected with Dworkin's basic methodological assumptions, which are pragmatic in character. In one of his books, *A Matter of Principle*, Dworkin wrote:

> [A judge] must read through what other judges in the past have written not only to discover what these judges have said, or their state of mind when they said it, but to reach an opinion about what these judges have collectively done, in the way that each of our [chain] novelists formed an opinion about the collective novel so far written … he must determine, according to his own judgment, what the earlier decisions come to, what the point or theme of the practice so far, taken as a whole, really is[7].

This inclination to see the law "taken as a whole" implies that we cannot think of legal theories and the legal facts they try to describe or postulate in any other way than as parts of the great "web of belief" about the law. The important point noticed by philosophers of pragmatism is, however, that in order to establish the relation between descriptive and normative beliefs in such a way, one has to adjust both kinds of beliefs to each other. In fact, this kind of approach is holistic[8] in character and strongly relies

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[5] R. Grunewald, *The Narrative of Innocence, or Lost Stories*, "Law & Literature" 2013/3, p. 382. Cf. B.S. Jackson, *Law, Fact and Narrative Coherence*, Merseyside 1988, *passim*.

[6] R. Dworkin, *Law's Empire*, Cambridge (Mass.) 1986, p. 229.

[7] R. Dworkin, *A Matter of Principle*, Cambridge (Mass.) 1985, p. 159.

[8] See: M.G. White, *Toward Reunion in Philosophy*, Cambridge (Mass.) 1956; *What Is and What Ought to Be Done: An Essay on Ethics and Epistemology*, New York–Oxford 1981, and M.G. White, *A Philosophy of Culture: The Scope of Holistic Pragmatism*, Princeton–Oxford 2002 for a relevant discussion of so-called "holistic pragmatism".

on the idea of so-called "reflective equilibrium". Dworkin explicitly adheres to this idea in *Justice in Robes*[9].

In this vein, another influential legal philosopher, Michael Moore, describes this overall methodological, holistic attitude as follows:

> We simply do not verify some factual beliefs "directly," that is, by a single perceptual experience. In fact we correct our perceptions all the time in light of our other beliefs. A stick looks bent in the water, but we believe it is straight because of our other, more general beliefs about the properties of sticks and of wood … While our retinal images may be unmediated reflections of reality, our beliefs about what we see are formed not only from retinal images but also from our more general beliefs[10].

This way of thinking determines all our conclusions, whether they are more "descriptive" (roughly speaking, beliefs about what is, especially – what is the law) or "normative" (roughly speaking, beliefs about what ought to be, especially – how the case at hand should be resolved)[11].

> [We] see that an action is wrong by applying the best moral theory we have about wrongfulness to the action before us … To judge an action as cruel is already to have made certain inferences from certain perceptions. To judge the act to be wrong involves but a further inference. Because we regularly make such inferences, one is entitled to say that there are causal relations between the qualities of wrongfulness and cruelty, on the one hand, and the corresponding beliefs, on the other[12].

The idea of writing a novel and the idea of pragmatic and holistic methodology are internally linked and influence each other. The novelist, like a theoretician, uses his "reflective" skills to develop a story about the case at hand, i.e. to combine the existing beliefs (about the historical facts, about the role of precedent, about other cases, about the social conditions, about the theoretical concepts of law, and about many other things) with beliefs about the new facts (of the case), the new circumstances of adjudication, the new theoretical developments, as well as the normative beliefs about what one should or ought to achieve by resolving the case. Note that in such circumstances, the "novelist", or someone we may call a "legal narrator", is trying to achieve a great equilibrium between all the descriptive and normative beliefs about the law and legal practice that she has (and which are relevant to or have some connection with the characteristics of the case at hand)[13]. Of course, there may be many narratives presented

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[9] R. Dworkin *Justice in Robes*, Cambridge (Mass.) – London 2006, p. 141.

[10] M. Moore, *Objectivity in Ethics and Law (Collected Essays in Law),* Burlington (VT) 2004, p. 51.

[11] We focus here on Dworkin's basic, pragmatic methodology. We do not want to answer questions about the relation between his methodology and his substantial claims about, e.g. the nature of moral values (and the realist view implied by them). We shall leave that problem for another occasion.

[12] M. Moore, *Objectivity…*, p. 52.

[13] In *Law's Empire*, Dworkin famously wrote: "General theories of law, like general theories of courtesy and justice, must be abstract because they aim to interpret the main point and structure of legal practice, not some particular part or department of it. But for all their abstraction, they are constructive interpretations: they try to show legal practice as a whole in its best light, to achieve equilibrium between legal practice as they find it and the best justification of that practice. So no firm line divides jurisprudence from adjudication or any other aspect of legal practice. Legal philosophers debate about the general part, the interpretive foundation any legal argument must have. We may turn the coin over. Any practical legal argument, no matter how detailed and limited, assumes the kind of abstract foundation jurisprudence offers, and when rival foundations compete, a legal argument assumes one and rejects others. So any judges opinion is itself a piece of legal philosophy, even when the philosophy is hidden and the visible argument is dominated by citation and lists of facts. Jurisprudence is the general part of adjudication, silent prologue to any decision at law" (R. Dworkin, *Law's…* , p. 90). The phrase "to achieve equilibrium between legal practice as

in each legal case. Narratives are, according to our formulation, built upon the descriptive and normative beliefs about the law that one can possibly have while thinking and trying to decide a particular legal case. In fact, from that perspective, we shall speak instead about the manifold narratives that are the general views about the case. That way of speaking reveals that, in fact, there is also a possibility of a great, vast disagreement between the narratives (which may possibly pertain to all of their characteristics).

It is quite significant that Dworkin himself speaks of a special type of disagreement that is a central phenomenon in legal practice as he perceives it (*pace* legal positivists), namely a "theoretical disagreement". This kind of disagreement is the disagreement over "the grounds of law", i.e. about the criteria which make certain legal propositions true[14]. These disagreements are about "whether statute books and judicial decisions exhaust the pertinent grounds of law"[15]. This implies that in the case of such a disagreement, the basic, conventionalist account (or concept) of the law is questioned, and the participants disagree over which account of the law (especially regarding the criteria that make legal propositions true) is the correct one. To put it briefly, for Dworkin – contrary to what the positivists say – an important feature of legal practice is not only that it is non-conventional, but moreover, that it is inherently agonistic, interpretive and, in a way, philosophical. We cannot avoid accepting Dworkin's general idea that "jurisprudence is the general part of adjudication, silent prologue to any decision at law"[16]. Further, once we do it, our theoretical disagreement appears to be a philosophical disagreement about the concept of the law itself.

As we would like to stress further, the idea of a theoretical disagreement construed as a disagreement between different theories of law is not coextensive with the idea of a disagreement between narratives, although such an identity may be suggested by the use of literary metaphors. In both cases, the "reflective" way of thinking is introduced, but in the first case (legal theories), as it appears, the set of "ingredients" is more specified and restricted. We will turn to this problem later, but now, we would like to elaborate a little more on the function that Dworkin ascribes to his idea of "theoretical disagreement".

Dworkin's idea places all conventional approaches in legal theorising at risk. Classically, our theories were a safe departure point for any further discussion. Now, Dworkin tells us that we must regard the disagreement between these theories as a phenomenon of primary importance. One must assume, of course, that she can discern between the genuine theories of law which are parties to such a theoretical disagreement (or at least – that could potentially become parties to such a disagreement in every legal case) and the quasi-theories of the law that are not invited to a disagreement so conceived (we will point to one important criterion in this matter below).

It seems obvious, however, that this departure point is not enough. For years, different positivists have argued that Dworkin's theory of law (and that which follows, i.e. the idea of theoretical disagreement) is over-inclusive. For example, Joseph Raz once wrote:

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they find it and the best justification of that practice" seems to be correct, but nonetheless too restrictive, which is why we shall consider all relevant "descriptive" and "normative" beliefs that constitute a certain "web of beliefs" on the basis of which each "legal narrative" is developed.

[14] R. Dworkin, *Law's*…, p. 5.

[15] R. Dworkin, *Law's*…, p. 5.

[16] R. Dworkin, *Law's*…, p. 5.

> […T]o understand what the law states, to understand the plain meaning of statutes and judicial decisions, requires a good deal of background information. To start with, it requires knowledge of English, or any other languages in which the law is stated. It also requires familiarity with the beliefs about the natural and social world common in the society concerned. Without such background knowledge, much of the legal source material would literally make no sense at all. The law itself, and not simply its social and economic consequences, would defy comprehension. But it does not follow that all that background information is part of the law. Neither English nor the rules of its grammar are part of English or American law. They are merely background information necessary for its comprehension[17].

For legal positivists like Raz, all the factors determining the solution of the case apart from the positivistically understood law are extra-legal and can (and should) be conceptually separated from the law itself. Dworkin thinks, on the other hand, that such a conceptual separation is not possible and that the resolution of the case is always a result of "reflective thinking", wherein, as pragmatist philosophers (such as John Rawls or Morton G. White, who were Dworkin's philosophical teachers at Harvard), every element of an actually constituted "web of belief", whether descriptive or normative, can be revised if there is a prevailing need to do so. For Dworkin, positivists are "scholastic" or "semantic" apriorists who think that the convention of calling something the law is, by itself, a justification for doing so[18].

Our view is that both accounts are too demanding and are partially wrong in their conclusions. First, the positivists may not be wrong in saying that the concept of law is fixed (somehow conceptually, naturally or socially – it makes no difference here). It may be so. But, secondly, and more importantly, they are wrong in thinking that such a concept is unrevisable (through the use of a reflective argument). Rather, the concept is revisable, but, of course, in order to revise it, one must have very compelling reasons. The concept of law is an important social concept, and it cannot be defined or developed into a theory of law arbitrarily; the same criterion pertains to its conceptual clarification, refinement or revision. But such a conclusion is far from agreeing with Dworkin that one cannot develop – if there is a certain need to do so – a profoundly descriptive account of the law (like the one developed by positivists). Both traditional and non-traditional ways of thinking about the law can be vindicated: One must only present certain reasons to include them in one's "web of belief" about the law. From a pragmatic point of view, every theory demands (normative) justification. The only problem is the "inclusiveness" of that "web": Dworkinian (and probably other non-positivist) legal theories are more "inclusive" than positivist ones.

So, one might think that, although it is plausible, or even "obvious" or "truistic" to think, as Raz does, that background information is not a part of the law, there may be many other truisms (or platitudes) about the law that may enter into reflective conflict with that very claim, supposedly for differing reasons. The result of such opposition would be the development of a different theory of law, which would, in some manner, define or explicate the concept of law by reference to at least some kind of background information. At that point, the major claim by Dworkin that there are "theoretical

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[17] J. Raz, *Dworkin: A New Link in the Chain,* "California Law Review" 1986/3, p. 1106.

[18] In connection to that point regarding Dworkin's famous "semantic sting argument", see for example, T. Endicott, *Herbert Hart and the Semantic Sting,* in: J. Coleman (ed.), *Hart's Postscript: Essays on the Postscript to 'The Concept of Law'*, Oxford 2000, pp. 39–58; M. Smith, *Theoretical Disagreement and the Semantic Sting*, "Oxford Journal of Legal Studies" 2010/4, pp. 635–661; T. Gizbert-Studnicki, *Semantic Sting and Legal Argumentation,* in: M. Araszkiewicz et al. (eds.), *Argumentation 2011*, Brno 2011, pp. 63–80.

disagreements" is vindicated, but without any bias towards his own theoretical position. One may call such a perspective "meta-theoretical". From our point of view, legal theories cease to be "truths about law", but rather become the very basic "tools" – both to think about and to make – the law.

Our point in this context is the following: If we take the meta-theoretical perspective of "theoretical disagreement" seriously, we can see how different legal theories clash. From this point of view, even Dworkin's own theory (with its all peculiarities, which we do not need to discuss here) is a theory whose scope can be compared with a positivistic one by a simple criterion of the "scope of the law", namely, the set of criteria that are relevant for making any proposition of law true. For the positivists, the traditional criteria of validity do suffice, but for Dworkin – they really do not. Dworkin's theory is supposed to include all of the background and contextual information. However, it would be arbitrary to say that any of these theories is better or worse, not to mention true or false. Each theory is a conceptual scaffolding in the context of which legal propositions are evaluated as true or false – and in this sense, these theories set the "grounds of law" differently. Formally, they are on a par, and the legal practice may be described as a practice between "epistemic peers" who, while presenting a legal argument, rely on different, but equal theoretical assumptions[19].

One may ask how it is possible that, notwithstanding such a profound disagreement, all the different theories are regarded as theories of the same subject. The answer is simple and was already partly suggested just a moment ago: Like different theories of the same physical or biological phenomenon, they all rely on (or: were developed upon) the same or comparable evidence, which is transformed into a theory by means of different methods of theorising (and organising data). However, unlike theories that are developed in the sciences, theories of law – like other theories of social artifacts – are developed on the basis of somewhat different kinds of evidence. In the case of the law, the bases for building a theory are truisms (platitudes) associated with the law, because the law is a social phenomenon that would never have existed if there had not been any people who would at least roughly associate some general ideas or intuitions with the concept in question[20]. One of the most pragmatic points with regard to the relation between truisms of law and theories of law is that theories are merely *under*-determined by commonly shared truisms about the law[21]. This means that one can rely

[19] Cf. A. Dyrda, *The Epistemology of Theoretical Disagreement,* in: P. Banaś, A. Dyrda, T. Gizbert-Studnicki (eds.), *Metaphilosophy of Law*, Oxford–Portland (Oregon) 2016, pp. 227–260.

[20] For more details regarding the relations between platitudes and theories, see: S. Shapiro, *Legality*, *passim*; T. Gizbert-Studnicki, A. Dyrda, A. Grabowski, *Metodologiczne dychotomie. Krytyka pozytywistycznych teorii prawa* [Eng. *Methodological dychotomies. The critique of positivistic legal theories*], Warszawa 2016, chapters 1–3; T. Spaak, *The Canberra Plan and the Nature of Law,* in: P. Banaś, A. Dyrda, T. Gizbert-Studnicki (eds.), *Metaphilosophy…*, pp. 81–119; and A. Dyrda, *Spory teoretyczne w prawoznawstwie. Perspektywa holistycznego pragmatyzmu* [Eng. *Theoretical disagreements in law. The perspective of holistic pragmatism*], Warszawa 2017, chapters 2 and 3.

[21] Scott Shapiro (S. Shapiro, *Legality*, p. 5) writes: "Conceptual analysis can easily be thought of as a kind of **detective work**. Imagine that someone is murdered. The detective will first look for evidence at the crime scene, collecting as many clues as she can. She will study those clues hoping that the evidence, coupled with her knowledge of the world and human psychology, will help eliminate many of the suspects and lead her to the identity of the killer. In conceptual analysis, the philosopher also collects clues and uses the process of elimination for a specific purpose, namely, to elucidate the identity of the entity that falls under the concept in question. The major difference between the philosopher and the police detective is that the evidence that the latter collects and analyzes concerns true states of affairs whereas the former is primarily interested in **truistic ones**. The philosophical clues, in other words, are not merely true, but self-evidently so. The key to conceptual analysis, then, is the gathering of **truisms** about a given entity. […]" And then, with regard to the law, he continues: "[…] In assembling a list of truisms about law, the legal philosopher must include truisms about **basic legal institutions** ("All legal systems have judges," "Courts interpret

on the same truisms and still develop a very different theory of law than another; and in cases in which different truisms explicitly contravene each other, where one has to make important choices about which truisms are to be excluded as a theoretical input at the beginning, the number of possible ways in which to theoretically order them expands enormously. If one can produce a great number of similar, yet different legal theories of law relying on the same platitudinous evidence, then the number of theories will grow if the set of truisms varies.

So far, we can say that legal theories are theoretical, rational developments of peoples' platitudes about what the law is. We have different theories that vary mainly in scope (the inclusion of what positivists call "background information") and character (descriptive, normative). The theoretical disagreement between these theories is a fact whose importance cannot be denied. Moreover, these theories are recognised as "theories of law" because they explicitly or implicitly rely on a set of common platitudes about the law.

The view presented above, however, does not suffice to characterise each legal case in detail. First, the different general legal theories vary in scope and may be differently applied and understood. Second, the participants in a legal debate are usually not aware of even the most important bearings that different legal theories have on their mode of thinking. Third, the practitioners, judges and parties to a legal dispute are usually more open to practical, ostensive arguments than to heavy theoretical constructions. For these reasons, all we can say is that usually, legal theories are implicated by a more general mode of speaking, describing, or – even – storytelling – in a legal case, than assumed. Now, we want to proceed to a more detailed account of the relation between platitudes, legal theories and legal narratives.

3. The relation between general legal theories and legal narratives

The different general theories of law which determine the most basic conceptual frameworks for legal thinking can be understood as the bases for legal narratives. However, although theories like the positivistic and nonpositivistic (e.g. Dworkinean) ones remain in the heart of legal discourse, they are not very often presented or referred to *explicitly* in these narratives. This is why we think it would be more proper to say that legal narratives imply legal theories rather than assume them. Moreover, it seems obvious that the concept of the narrative is more inclusive (vaster) than the concept of the theory (for this reason, one narrative may imply many different legal theories). On the other hand, some elements of narratives are general and "incompletely theorised" or simply "untheorised". For instance, one may try to describe the legal case at hand through the direct use of truisms about the law (it is even possible to use them and only them, but it would be a very crude description, such as the ones that are usually given

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the law," "One of the functions of courts is to resolve disputes," "Every legal system has institutions for changing the law"); **legal norms** ("Some laws are rules," "Some laws impose obligations," "Laws can apply to those who created them," "Laws are always members of legal systems"); **legal authority** ("Legal authority is conferred by legal rules," "Legal authorities have the power to obligate even when their judgments are wrong," "In every legal system, some person or institution has supreme authority to make certain laws"); **motivation** ("Simply knowing that the law requires one to act in a certain way does not motivate one to act in that way," "It is possible to obey the law even though one does not think that one is morally obligated to do so," "One can be a legal official even though one is alienated from one's job"); **objectivity** ("There are right answers to some legal questions," "Courts sometimes make mistakes when interpreting the law," "Some people know more about the law than others") and so on" (S. Shapiro, *Legality*, p. 5).

by non-professionals). Of course, legal narratives are, by definition, open to all aspects of the "background information" or "context" of resolving the case. For instance, legal narratives may, in part, be "historical narratives". In that case, they would share the characteristics typical of that kind of narrative. However, most of all, legal narratives will certainly be, at least in part, literary narratives.

Now, it seems obvious that in order to build a narrative, one must rely on the same set of truisms that is a departure point for a legal theorist. The collection of truisms is similar to the collection of facts in history (which, in the case of history, merely creates a "chronicle"). Truisms, as mentioned above, reflect general, common knowledge about legal institutions (and basically, the idea of the law itself; in this context, they play a performative function by contributing to the existence of "legal" and "institutional facts"). The fact that the narrative relies or includes such truisms makes the narrative understandable and meaningful as a "legal" narrative. One might say that the relation between truisms about the law and legal theories and legal narratives is like the relation between a historical chronicle (which comprises a set of statements about selected, important events about the object of our history) and more detailed "histories" (which are stories built by the use of certain theoretical and practical tools of history making). In that case, both legal theory and legal narrative would be built through the use of some tools, the use of which should be pragmatically justified (some reasons are needed to build legal theories or present legal narratives).

It is sometimes said that legal narratives are closer to literature than to history. However, we do not understand what "closer" is supposed to mean. It is a fact that every means of storytelling, in law, history, philosophy or even medicine, may and probably should be influenced by the literary tools that influence the literary style. One may make such a recommendation in every discipline in which people use language, but this does not make the discipline a literary one. Although that point may be obvious, the "closeness" of legal narratives and literary narratives probably lies in something else, namely their fictional character. If that is true, legal narratives are surely closer to literary than to historical narratives, because historical narratives rely on chronicles of facts that are not fictional (although it is a fact that one can build manifold differing narratives on the basis of one and the same chronicle[22]).

There are fictional theories of law and its institutions, and such theories may be of some support to fictionalism with respect to legal narratives. We do not want to resolve the apparent problem of arbitrary legal narratives, but for us, it seems clear that legal narratives are not purely fictional narratives (although they share much with literary narratives). Legal narratives are more like historical narratives, and like them, they refer to facts of some special kind or rely on some kind of social phenomena (widely shared truisms about the law), and thus, they are at least partly constituted by something very real: the apparent general social understanding of what the law is. Thus, just as historical narratives may implicate different particular theories of causation or biological change (some "covering laws"), legal narratives may implicate different legal theories that resolve, in great detail, problems in the metaphysical relations between social and legal phenomena (e.g. answering the question *in virtue* of which social facts the law exists[23]). In this context, legal narratives may be conceived like these "crime" (hi)stories in which,

[22] Cf. M.G. White, *Toward…*

[23] Cf. T. Gizbert-Studnicki, A. Dyrda, A. Grabowski, *Metodologiczne…*, chapter 1.

in addition to the relevant causal statements regarding the causal or historical laws (as in historical or fictional narratives), there are also the applied "laws" (implicit in truisms) governing legal institutions. Like a detective's investigation (which is focused on a particular crime), a narrative is typically focused on one subject: a country or person in a **historical narrative**, or one main institution (the law) in a **legal narrative** (although there may be more complicated "general" narratives as well…).

As mentioned above, there are many possible ways to construe a legal theory on the basis of truisms (which are commonly shared true general statements about the law and its institutions). In the process of theory-making, legal theorists are to resolve serious ontological, epistemological and ethical dilemmas that arise when one collects, combines and analyses truisms about the law and turns them into a theory. The legal theorist selects truisms as well: In certain interpretations, particular truisms collide with certain interpretations of other truisms, and in effect, some truisms are excluded (this makes the theory less abstract and non-trivial). This is why legal theories are controversial (they "choose" only some truisms and defy others). The same thing may be said about legal narratives, although they are much more open to background influences and do not necessarily care about a high-level coherence or consistency, as theories do. It seems that the crucial defining difference between legal narratives and legal theories is that theories usually seek consistency by establishing rigorous relations between the concepts employed in legal discourse. In that sense, legal theories are monistic and static. On the other hand, legal narratives are pluralistic and dynamic: They may implicate different legal theories at the same time, as well as very different major legal theories at different times. For one can easily imagine a story about a real criminal court judge who is a positivist regarding the merits of the case (and who thus excludes non-positivistic means of argumentation in connection to the content of the sentence), but simultaneously is a non-positivist (and probably also a non-formalist) with regard to the procedure that she is supposed to use in order to make a decree[24]. Such a situation, i.e. of simultaneously being a positivist and a non-positivist with respect to different aspects of the law and the legal process, cannot be reconciled under the aegis of any theory of law, but can easily be included in a story about the legal case the particular judge was aiming to settle.

At the end of our paper, we want to address a problem which regards the particular narrative's general acceptability. As we will show, the problem with narratives is strictly connected with something that may be called the "paradox of (legal) theorising".

4. The acceptability of legal narratives

As we stressed above, one can develop many competing theories of law on the basis of one set of truisms. However, the more detailed the theory is, the more it must focus on certain truisms and defy other truisms. The way one "reflectively thinks" about certain theoretical matters forces him to prefer some truisms over other ones. In such circumstances, the theoretical virtue of being coherent and nit-picking (with respect to certain theoretical details) makes a developed theory less truistic and more controversial. By conducting his/her theoretical enterprise, a theoretician moves farther and farther away from a generally shared (truistic) set of propositions about the law. By its very nature, every legal theory is controversial. This "paradox of (legal) theorising" is

[24] We want to thank prof. Jeanne Gaakeer for pointing out this possibility.

a theoretical analogue of the so-called "paradox of analysis" indicated 75 years ago by Cooper H. Langford. According to Langford, an analysis of a certain (supposedly analytical) sentence can be either correct or informative (but it cannot be both)[25]. We think that legal theories cannot be both trivial and informative, because if they are trivial, they do not develop, but merely repeat, all the truisms about the law, and if they are informative, they are inherently controversial (because they deem some of the truisms to be false, or, at least, reinterpret them in a nonstandard way).

One may ask whether the same paradox applies to legal narratives. We think that the answer is not straightforward (thereby indicating a second major difference between legal narratives and legal theories). Because narratives do not necessary explicitly rely on or refer to certain theoretical accounts, but necessary rely on different truisms about the law (as well as: history, causation, natural phenomena, etc.), the controversial character of narration is always a matter of degree. Further, the degree is determined by the degree of explicit reliance on different theories (conceptions) of law. So, there are basically two extremes between which each narrative falls:

1) The narrative may only refer to established truisms, and it may not refer to any legal theory explicitly, but then it becomes trivial; in that case, the scope of the implicated legal theories is very vast.
2) The narrative may explicitly refer to or implicitly rely on a particular concept of law (legal theory), but then it becomes controversial; in that case, the scope of the implicated legal theories is very narrow (and boils down to the set of theories that is not contradictory to the theory explicitly/implicitly assumed by a storyteller).

It seems plausible to think that the major, general narratives – understandable to the general public – are narratives of the first kind. For one thing, explicit references to theoretical assumptions that exclude certain truisms and restrict the scope of the narrative are characteristic of a more professional discourse. However, we are inclined to say that it is merely a matter of degree, and no significant discrimination between "general" or "ordinary" narratives and "particular" or "professional" narratives can be drawn. The most problematic are narratives of the second kind, which make strong theoretical commitments but do not address them explicitly, because for this reason, they may be perceived – by the general public – as narratives of the first kind (which opens much space for misunderstanding and manipulation).

However, for some conceptual clarity, it may be useful (for the sake of further discussions) to discriminate more generally between "**legal narratives**" (based on theories that are founded on selected truisms about the law which are precise and conceptually consistent; in this kind of narrative, the concept of law is established according to some, at least implicitly assumed, legal theory) and "**narratives about law**" (general narratives or – according to our view – possible sets of different, even conflicting, legal narratives and stories about legal cases, their outcomes, folk intuitions about the relations between the law and morality, and other institutions, etc.). This distinction is, however, just a proposal that surely demands further clarification.

Now, in the last section, we want to turn to the normative question about what one should do in the case of the clash or conflict between two equally well-developed legal narratives.

[25] See: C.H. Langford, *The Notion of Analysis in Moore's Philosophy,* in: P.A. Schilpp (ed.), *The Philosophy of G.E. Moore*, Evanston–Chicago 1942, pp. 321–342.

5. The disagreement between peer narratives

One of the major arguments presented above is that one can develop many theories of law on the basis of the commonly accepted set of truisms about the law. In this sense, legal theories are *underdetermined* by truisms. If this argument is plausible, the status of developed theories should be equal. In fact, we think that general legal theories that rely on the same or equal truisms, but which are differently organised or interpreted in a theoretical structure, remain in meta-theoretical *isostenia* (equilibrium)[26]. This thesis does not overlook the – merely empirical – fact that some legal theories are assumed to be the "ruling theories of law" in a certain culture or society at a particular moment in time (but this is a contingent matter). From a "meta-theoretical" point of view, there are many equally good theories that develop the concept of law.

We think that the same argument applies generally to legal narratives, with the reservation connected to our comments above, i.e. that narratives may be more or less "theory-oriented". This means that we can treat as equal (peers) narratives that are "theory-oriented" to the same or at least a similar degree. It would be unwise to compare professional, particular narratives with general narratives about the law. Having this in mind, although some legal theories and the legal narratives based on them remain in *istostenia*, **there may often be one leading (ruling) narrative** that is based on the theory conventionally considered to be theoretically superior. However, this will be a contingent matter as well.

The crucial point here is as follows. Because narratives (like theories) can be on a par, one cannot (by definition) present any substantial argument for or against the "objective" superiority of one of the narratives. The storytellers, like legal theoreticians, are in the position of – as it is usually called in the philosophical literature – "epistemic peers". Their claims are equally reliable. Moreover, although they may believe in the truthfulness of their own story or theory (or to put it in more technical language, they put great credence in it), they will be epistemically (and probably ethically as well) obliged to lower that credence if they face a peer who disagrees with them theoretically or simply tells a different story, while relying on the same or comparable evidence. The immediate effect of the disagreement on the parties would be a demand to lower the credence of their own theoretical beliefs. In such a case, the "meta-theoretical" perspective, described above, would be recommended for all participants (storytellers, theoreticians) who recognise that they disagree with their equals. Furthermore, such a recognition should lead all participants in the dispute to scepticism: They should suspend their beliefs. However, that result is certainly paralysing – in that case, no legal action could be ever conducted. The truth of our main argument must be, then, somehow limited –in the case of both legal theories and legal narratives, because they both play a practical role in legal discourse. That is why suspending belief is not an option here (as a mode of *philosophical* reflective thinking; but this does not mean that one should primarily reject this reflective and sceptical mode of thinking – rather, one should think reflectively on every possible occasion unless there is a practical need to do otherwise). The situation of a storyteller is similar to the situation of a traveller on an unexpected fork in the road, where the

[26] Cf. A. Dyrda, *The Epistemology*…, and A. Dyrda, *Spory*…

traveller has no other practical option than simply to intuitively choose one of the possible ways[27].

The argument that shall be given to justify the choice (of truisms, of legal theories, of narratives) is thus a fundamentally practical one. One of the factors in making that choice may of course be the factor of conventional acceptance ("what is better than what could be, since we have gotten used to it"), but the others may be, for example, the novelty of solutions and the literacy of style.

Because the role of a narrative is to explain and/or help us understand legal actions, situations etc., apart from the obvious differences between narratives and theories indicated above, narratives, like theories, may describe things in a practically better or worse way (from the point of view of the audience) or tell better or worse stories about the same object (the law).

The concept of a narrative is obviously more comprehensive than the concept of a theory. In the case of Dworkin's account cited at the beginning of this paper, the difference between narratives and theories with respect to their scope and comprehension is, however, smaller than in cases of more traditional approaches in jurisprudence. However, even a Dworkinian "reflective" theory of adjudication can be introduced or implied by a more comprehensive narrative regarding a particular legal case. Moreover, along these lines, the Dworkinian idea of "theoretical disagreement" can be extended to the idea of "narrative disagreement". The perspective of a "narrative disagreement" in the law seems to us to be one of the most interesting perspectives from which a legal scholar can ever approach the object of her precious study.

6. Conclusion

In the end, we want to give a voice to one of the biggest figures in the law and literature movement, James Boyd White, who conceived the legal process as a process of testing competitive narratives. In *Justice as Translation*, he wrote:

> The judicial process not only recognizes the individual but compels him to recognize others. For the litigant, the lawyer, and the observer alike, the central ethical and social meaning of the practice of the adversary hearing is its **perpetual lesson that there is always another side to the story**, that yours is not the only point of view (…). The multiplicity of readings that law permits is not its weakness, but its strength, for it is this that makes room for different voices, and gives a purchase by which culture may be modified in respond to the demands of circumstance[28].

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[27] Richard Feldman gives the following illuminating example: "Suppose that we are traveling together and we come to a fork in the road. The map shows no fork and we have no way to get more information about which way to go. We have to choose. You choose the left path and I choose the right path. Each of us may be entirely reasonable in choosing as we did. Of course, we would have been reasonable in choosing otherwise. We can each endorse the other's choice as a reasonable one. This is a useful case to consider, since it brings out a crucial difference between belief and action. As you go left and I go right, neither of us can reasonably believe that we've chosen the correct path. We should suspend judgement about which path is best, yet pick one since, we may assume, not taking either path would be the worst choice of all. In this case, there is no good behavioral analogue to suspending judgement" (R. Feldman, *Epistemological Puzzles about Disagreement*, in: S. Hetherington (ed.), *Epistemology Futures*, Oxford 2006, p. 229).

[28] J.B. White, *Justice as Translation: An Essay in Cultural and Legal Criticism*, Chicago 1990, p. 226.

Legal Narrative and Legal Disagreement

Abstract: What is the relationship between general legal theories and legal narratives? In this paper we aim to problematise this relationship in the context of different legal disagreements. As we see it, the Dworkinean category of "theoretical disagreement", which basically refers to the phenomenon of disagreement "about the grounds of law" (between different general legal theories) is not sufficient to cover all substantial disagreements that appear in legal practice. Thus, we propose a category of "narrative disagreement" which has a wider scope. Eventually, we discuss the thesis of a possible equality of legal theories, as well as legal narratives, which we understand as an inevitable consequence of the relationship between legal theories/narratives and a special type of evidence on which they both rely: truisms about the law that laymen and/or legal professionals generally share.

Keywords: general legal theories, legal disagreement, theoretical disagreement, narrative disagreement, legal narrative, legal truisms

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