

## NORMS AND FACTS

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**Abstract:** *In this paper, I am going to deal with a logical relation between facts and norms. Humans both cognize some facts and take value attitudes to them. But what is a logical relation between these two activities of human thinking? I will focus on what it is for a fact to ground a norm. The normative beliefs that we ground on some facts ultimately always presuppose the acceptance of some normative principles that are no longer dependent on any facts. A full-blooded normativity is coming alive only from the position of participants in legal practice, and thus from within the practice. Ultimately, legal validity is not based on knowledge of a fact, whether normative or empirical. It is based on a practical stance of the acceptance of legal authority. Such an attitude is implicit in the day-to-day practice of human agents who use law without the need to thematise its normative grounds.*

**Keywords:** *natural law, legal positivism, Hume's thesis, moral realism, non-cognitivism, G. A. Cohen, equality*

In this paper, I am going to deal with a logical relation between facts and norms, including moral and legal norms. One thing is to determine what facts are morally significant. The other one is how well we are informed about them. It is similar to legal thinking. Ronald Dworkin distinguished two kinds of disagreement in a legal opinion.<sup>1</sup> A so-called empirical disagreement means that two lawyers have a different legal opinion because they are differently informed of what a positive law explicitly states. A so-called theoretical disagreement is more interesting because it always includes some value judgement. Two lawyers disagree in what facts are significant for knowledge of law. They agree with on a factual level as such, what they disagree about is the legal relevance of some facts. Human thinking has two dimensions, cognitive and evaluative one. Humans both cognize some facts and take value attitudes to them. But what is a logical relation between these two activities of human thinking? I will focus on what it is for a fact to ground a norm. Interestingly enough, some moral norms don't reflect facts, they are universally applicable or context-independent.

We believe that human rights are universal. This idea can be interpreted in a number of different ways.<sup>2</sup> But it is obvious that it somehow relates to an assumption that all humans have human rights. All humans have human rights regardless of their age, sex, race, etc. And why just *human* rights? To support a special moral status of the human being, it is usually argued that humans as a kind are special in something significant, especially in the fact that they have reason, at least as compared with

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<sup>1</sup> DWORKIN, R. *Law's Empire*. Harvard: 1986, p. 7.

<sup>2</sup> DONNELLY, J. *Universal Human Rights in Theory and Practice*. Cornell University Press: 2013, p. 93.

animals.<sup>3</sup> The central capacity which defines humanity is the rational capacity. This does not mean that every individual human being is rational. A person who suffers from a serious mental retardation is simply not rational. Even such an individual has human rights just because he is a human being. It seems that the universality of human rights is grounded on two theses: 1) All humans have human rights because the human species is rational. 2) Every individual human being has human rights regardless of whether he himself is rational. A human rights sceptic will raise a troublesome objection: Why should the fact that most of humans are rational support an opinion that all humans have human rights?<sup>4</sup> The answer can be that every human being has at least a potential to be rational. A child is irrational but one day it will grow up to be rational. What about a human being who was diagnosed with an incurable mental retardation? Even such a human being has a potential to be rational in such a trivial sense that if he was healthy, he would be rational because rationality is a perfect state of a human being. Even more importantly, the moral status of a human being is independent of morally accidental facts. The current state of medical science is an external luck for a disabled human being.<sup>5</sup>

Let me make an example of an absolutely immoral action. This is an action which is immoral under any circumstances or regardless of the context. What about an infanticide? This does seem to be a good candidate. However the anthropologists discovered a very interesting fact. While exploring the Inuit population in the beginning of 20<sup>th</sup> century they found the number of boys was significantly higher than girls'. It turned out this was a result of a selective infanticide. Practice like this is shocking for us but we can explain them. Inuits lived in the extreme natural conditions, permanently fighting for survival. Men with a high mortality level due to the hunting expeditions were the main breadwinners of the tribe. That is why the Inuits had to deflect the ratio of sex of their children in favour of boys. It was a collective strategy for survival forced by the environment.<sup>6</sup> I do not know if this was the only option how to survive in such hard conditions. But let's take it as a fact. Can we accept such an empirical fact as a justificatory reason for infanticide? Another example can be made by pointing out slavery. Let's assume that an ancient king quit an existing practice of killing the prisoners and replaced it with an enslavement.<sup>7</sup> We might not call it moral progress but it seems to be a change for the better. At least in the case the

<sup>3</sup> "Almost all secular, non-theistic proposals concerning the ground of human rights that are to be found in the literature are dignity-based accounts; and almost all of those, in turn, are what one might call capacity accounts; they suggest that the worth that grounds human rights supervenes on a certain capacity that human beings have. ... To the best of my knowledge, it is always either the capacity for rational agency in general or some specific form of that capacity ... ." See WOLTERSTOFF, N. *Understanding Liberal Democracy: Essays in Political Philosophy*. Oxford: Oxford University Press, 2012, p. 186.

<sup>4</sup> STAMOS, D. N. *Myth of Universal Human Rights*. New York: Routledge, 2016, p. 95.

<sup>5</sup> CAMOSY, CH. C. *Peter Singer and Christian ethics: beyond polarization*. Cambridge: Cambridge University Press, 2012, p. 38.

<sup>6</sup> SMITH E., SMITH A., ANDERSON J., MULDER M., BURCH E., DAMAS D., GRABURN N., REMIE C., ROTH E., WENZEL G. Inuit Sex-Ratio Variation. *Current Anthropology*. Vol. 35, No. 5, 1994, p. 595.

<sup>7</sup> "Slavery is routine when the victors in war cannot afford to feed or free their captives, so that the alternative to slavery is death." See POSNER, R. A. The Problematics of Moral and Legal Theory. *Harvard Law Review*. Vol. 111, No. 7, 1998, p. 1650.

prisoners prefer slavery than death. One can claim, regardless of any context, that enslaving the prisoners as such is simply immoral. Somebody else will, however, distinguish: from the moral point of view, enslaving the prisoners differs with regard to whether the previous practice was to kill them or relieve them.

### Validity and Binding Force

The conflict between legal positivism and natural law theory can be viewed as a controversy about the role of moral thinking in knowledge of law, i.e. in identification of sources of law and their interpretation.<sup>8</sup> Natural law theories are usually associated with so-called moral realism.<sup>9</sup> They can be defined by two theses, the first of which is the just mentioned *moral realism*: There are objective moral facts or truths. If we say that moral facts are objective, we usually mean that they are invariable and independent of human moral attitudes.<sup>10</sup> If something is morally right, then it is so irrespective of what people in a given society believe to be morally right, or what they recognize and apply in mutual agreement as morally right. Moral facts allegedly exist independently of the practice of moral agents, just as a landscape exists independently of a cartographer's work.<sup>11</sup> If something is morally right, then it is so not due to the fact that we consider it morally right. It is rather the other way around. We are supposed to think that it is morally right because it really is so. In consequence, it is not impossible for society as a whole to be wrong about what is truly morally right.

The second thesis of natural law theory is *the connection thesis*: Legal facts are necessarily co-determined by moral facts. It is crucial to realize that the second thesis is closely related to the first one. Natural law theorists (by the necessary dependence of law on morality) do not mean the dependence of law on social morality, i.e. the morality prevailing in a given society. The connection thesis does not take into consideration conventional morality but objective moral facts.<sup>12</sup> The prevailing morality is just a social

<sup>8</sup> BRINK, D. O. Legal Interpretation and Morality. In: Leiter B. (ed.). *Objectivity in Law and Morals*. Cambridge, 2007, p. 13.

<sup>9</sup> MOORE, M. S. Moral Reality Revisited. *Michigan Law Review*. 1992, Vol. 90, p. 2425. Compare: BRAYBROOK, D. *Natural Law Modernized*. University of Toronto Press, 2003, p. 125; BLACK, R. *Christian Moral Realism: Natural Law, Narrative, Virtue, and the Gospel*. Oxford, 2000, p. 58; TOLLEFSEN, CH. Natural Law and Modern Metaethics. In: Cherry M. J. (ed.). *Natural Law and the Possibility of a Global Ethics*. Springer, 2004, p. 48; HAAKONSEN, K. Natural Law Without Metaphysics. In: González A. M. (ed.). *Contemporary Perspectives on Natural Law: Natural Law as a Limiting Concept*. Routledge, 2016, p. 82; STOUT, J. Truth, Natural Law and Ethical Theory. In: George R. P. (ed.). *Natural Law Theory: Contemporary Essays*. Oxford, 1994, p. 87; BOYD, C. A. *A Shared Morality: A Narrative Defense of Natural Law Ethics*. Baker Books, 2007, chap. 5.9.; HILL, J. L. *After the Natural Law: How the Classical Worldview Supports our Modern Moral and Political Views*. Ignatius Press, 2016, p. 64; LISSKA, A. Natural Law and the Roman Catholic Tradition: The Importance of Philosophical Realism. *The American Journal of Economics and Sociology*. 2012, Vol. 71, No. 4, p. 782; DEMIRAY, M. R. Natural Law Theory, Legal Positivism, and the Normativity of Law. *The European Legacy*. 2015, Vol. 20, No. 8, p. 808.

<sup>10</sup> CUNEO, T. *Speech and Morality: On the Metaethical Implications of Speaking*. Oxford, 2014, p. 9.

<sup>11</sup> TARKIAN, T. *Moral, Normativität und Wahrheit*. Mentis Verlag, 2009, p. 21.

<sup>12</sup> "Natural law theory seeks to justify the norms for human behavior whose validity is considered independent of personal interests, actual legal regulations or prevailing morality. Such norms will be named as natural law, if their justification is grounded on human nature." See LEICHSENRING, J. *Ewiges Recht? Zur normativen Bedeutung gegenwärtiger Naturrechtsphilosophie*. Mohr Siebeck, 2013, p. 1.

fact and may be subjected to critical moral assessment.<sup>13</sup> Natural law theories aspire to what is truly moral and thus they are not satisfied with something so contingent as conventional morality.<sup>14</sup> But the assumption that objective moral truths exist is not self-evident. Indeed, it is an everlasting problem and the central theme of metaethics. Thus, there is no wonder that the moral realism is one of the reasons why natural law theories had, have and probably always will have, opponents.<sup>15</sup> It seems that the extent to which natural law theories are accepted depends considerably on the extent to which moral realism is accepted.<sup>16</sup> Even the natural law theorist must recognize as a methodological weakness that his theory relates, *ex definitione*, to a theory that is subject to intransigent disagreement in the other field.

The natural law connection thesis, just like the positivist separation thesis, is subject to many variants and modifications.<sup>17</sup> In the philosophical conflict between legal positivists and natural law theorists these theses are usually, but not exclusively, articulated as a conceptual relation between legal validity and moral rightness. The central issue is whether the descriptive legal judgements about what law is conceptually depend on the value judgements about what law ought to be.<sup>18</sup> We can understand it also as a question whether the concept of immoral law is inconsistent as such and thus necessarily empty in its scope. Legal positivists do not deny that law as a coercive order should be ethically justified.<sup>19</sup> At the same time, they willingly admit as an empirical fact that well-known legal systems are significantly influenced by morality.<sup>20</sup> They do not even deny the fact that an elementary moral rightness is a necessary pre-condition for the efficient functioning of law. The separation thesis can be understood in a way that the concept of immoral law, even extremely immoral law, is not a contradiction.<sup>21</sup> Immoral law is undesirable, of course, but it is possible in the trivial sense that the existence of immoral law is consistently conceivable.

<sup>13</sup> Legal positivist John Austin was using a term “positive morality” for rules recognized by the majority of society and whose violation arouses outrage or criticism from society. Positive morality is a social fact, just as is positive law. See AUSTIN, J. *Lectures on Jurisprudence. Vol. I*. London, 1885, p. 102, 171.

<sup>14</sup> “... if you maintain that there is a conceptual connection between law and morality, you will very likely maintain that morality is objective in the sense that moral truth or validity is independent of what people may do or think about moral questions ... .” See SPAAK, T. *A Critical Appraisal of Karl Olivecrona's Legal Philosophy*, Springer, 2014, p. 249.

<sup>15</sup> “A second problem [of natural law theory, TS] concerns the comparable difficulty of establishing sufficient and sufficiently uncontroversial claims to moral realism.” See WESTPHAL, K. R. *How Hume and Kant Reconstruct Natural Law: Justifying Strict Objectivity without Debating Moral Realism*. Oxford, 2016, p. 7.

<sup>16</sup> “This greater acceptance [of natural law theory, TS] is partly due to the increased acceptance of moral realism within philosophy. Since a natural lawyer about law is also (necessarily) a moral realist about morality, this greater acceptance of the moral metaphysics of natural law has removed some of ‘spookiness’ attitude toward natural law theories” See MOORE, M. S. *Law as a Functional Kind*. In: George R. P. (ed.). *Natural Law Theory: Contemporary Essays*. Oxford, 1994, p. 188.

<sup>17</sup> See e.g. VON DER PFORDTEN, D. *Rechtsethik*. C. H. Beck, 2011, chap. 4.1.

<sup>18</sup> MARMOR, A. *Positive Law and Objective Values*. Oxford, 2001, p. 70.

<sup>19</sup> HOERSTER, N. *Was ist Recht? Grundfragen der Rechtsphilosophie*. C. H. Beck, 2006, pp. 92–93.

<sup>20</sup> “Not only do law and morals share a vocabulary so that there are both legal and moral obligations, duties, and rights; but all municipal legal systems reproduce the substance of certain fundamental moral requirements.” See HART, H. L. A. *The Concept of Law*. 2<sup>nd</sup> edition. Oxford, 1994, p. 7.

<sup>21</sup> COLEMAN, J. *The Architecture of Jurisprudence*. *Yale Law Journal*. 2011, Vol. 121, No. 2, p. 9.

We need to understand the correlation between the validity and the binding force of law. “*What should be referred to as law determines what should stand as a binding state order.*”<sup>22</sup> Legal validity embodies the criteria of what law is. They are input conditions for something to become law. If we want to conceptually exclude immoral law, we need to include moral rightness among the criteria of legal validity. Validity and binding force are two sides of one equation. If we add morality to the left side of the equation, we need to add it to the right side too. Or alternatively: for moral quality to appear in the output of law (binding force), it needs to be already in its input (validity). Why? Because only morally right law may provide moral duties to its addressees. The statement that immoral law is not morally binding is true. But it is a tautology. It is silly when somebody pathetically claims that an immoral law is not binding and thinks of the morally binding force.

We can have doubts about the conceptual relation between legal validity and moral binding force. Nevertheless there is the strong conceptual connection between legal validity and legal binding force. Legal validity is a precondition of the legal binding force. If a natural law theorist talks about the binding force of law, he is already conceptually merging legal and the moral binding force. From a conceptual point of view, the natural law theorist understands legal duty as a kind of moral duties. He has put a moral burden to the binding force of law which he needs to compensate for by imputing a moral burden to the validity of law. Therefore, he implements moral rightness or justice as one of the criteria of the legal validity. Why does he need to compensate thus? If he burdened only the binding force of law and not its validity, it would mean that whatever is set by the legislator is morally binding. That is, however, obvious nonsense.

The legal positivist does not think legal duties have necessarily moral nature.<sup>23</sup> Therefore he is free to work with a morally neutral concept of legal validity.<sup>24</sup> It is definitely no coincidence that jurisprudence has split conceptually on this axis. These two approaches are analytically equivalent alternatives in the sense that both of them maintain harmony between the content of preconditions and their consequences.<sup>25</sup> If law is morally binding, then immoral law is logically excluded, and thus the validity criteria need to include moral correctness. It is a logical necessity. On the other hand, if law is only legally binding, then purely formal criteria of legal validity suffice.

Nevertheless even if we accept that legal obligations do not need to have the character of moral obligations, the fact remains that law has a normative content in the deontic sense.<sup>26</sup> Legal duty is a legally binding reason, from a legal perspective, for somebody to do something or refrain from doing something. The legal system authoritatively creates

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<sup>22</sup> MEYER, S. *Juristische Geltung als Verbindlichkeit*. Mohr Siebeck, 2011, p. 74.

<sup>23</sup> VERDROSS, A. Die systematische Verknüpfung von Recht und Moral (1950). In: *Die Wiener rechtstheoretische Schule. 1. Band*. Wien, 2010, p. 421.

<sup>24</sup> “Given the ordinary concept, it is an open question whether what the law directs us to do is something we ought to do and whether, if it is, we ought to do what the law demands because the law demands it. In other words, binding the conscience in any sense of the expression is no part of our ordinary concept of law; it is neither essential to the concept nor is it entailed by anything that is.” See COLEMAN, J. The Architecture of Jurisprudence. *Yale Law Journal*. 2011, Vol. 121, No. 2, p. 14.

<sup>25</sup> DUMMETT, M. *The Logical Basis of Metaphysics*. Harvard, 1991, p. 217.

<sup>26</sup> BERTEA, S. *Normative Claim of Law*. Hart Publishing, 2009, pp. 21–22.

for its addressees the reasons to act in a specific way.<sup>27</sup> In the light of such reasons, it is possible to justify an action as a lawful action, or, on the contrary, to condemn an action as unlawful. The normativity of law is grounded on the institutionalized social practice of giving and taking such normative reasons. Due to its authoritative nature, law demands the power to alter reasons for action in such a way that the addressee takes new reasons which he would not have otherwise (= without law).<sup>28</sup> But if we think of law from the purely descriptive point of view as a certain social practice, then a question arises: “How can merely descriptive facts about the actions of officials justify such a claim?”<sup>29</sup>

### The Social Fact Thesis

However, some recent legal positivists think that the so-called social fact thesis (rather than the separation thesis) is the central thesis of legal positivism.<sup>30</sup> The ground for this positivist thesis is a seemingly obvious belief that law is ultimately a human artefact or social construct.<sup>31</sup> It means that the existence and content of law are determined solely by human actions, i.e. the facts of what humans do, how they think or what value judgements they express by their actions.<sup>32</sup> Legal facts are simply a kind of social facts. At present, legal positivism, in its mainstream, is understood as a descriptive approach to jurisprudence.<sup>33</sup> “For positivists, the social mechanisms at the foundations of the law are explicated through descriptive facts: claims about the behaviors or mental states of judges, legislators, executives, or voters.”<sup>34</sup> The moral facts (that natural law theorists discuss) are objective facts with a normative content. By contrast, the social facts (that legal positivists are talking about) are descriptive facts about human action and thinking. It does not mean that the positivists lack any account of moral normativity. Human thinking comprises normative and value thinking, including moral thinking. However, empirical facts about the moral thinking of the actors of legal practice are not moral facts in the sense of moral realism. They are a kind of social facts. Thus, the social fact thesis includes these descriptive facts of social morality in the domain of possible determinants of the existence and content of law.

But the effort to explain the normativity of law within the conceptual frame of the social fact thesis seems to be a questionable matter. “The problem is to explain how facts about

<sup>27</sup> MARMOR, A. *Positive Law and Objective Values*. Oxford, 2001, p. 25.

<sup>28</sup> COLEMAN, J. *The Practice of Principle*. Oxford, 2001, p. 134; BERTEA, S. *Normative Claim of Law*. Hart Publishing, 2009, p. 62.

<sup>29</sup> EHRENBERG, K. M. *Functions of Law*. Oxford, 2016, p. 8.

<sup>30</sup> “Though the conventional view is that legal positivism is defined by the separability thesis, the more accurate view is that legal positivism is defined by its commitment to the social facts thesis.” See COLEMAN, J. Beyond the Separability Thesis: Moral Semantics and the Methodology of Jurisprudence. *Oxford Journal of Legal Studies*. 2007, Vol. 27, No. 4, p. 586.

<sup>31</sup> BERTEA, S. *Normative Claim of Law*. Hart Publishing, 2009, p. 13.

<sup>32</sup> See e.g. SHAPIRO, S. J. *Legality*. Harvard, 2011, p. 27, 31; TOH, K. An Argument Against the Social Fact Thesis (and Some Additional Preliminary Steps Towards a New Conception of Legal Positivism). *Law and Philosophy*. 2008, Vol. 27, Issue 5, p. 446.

<sup>33</sup> MARMOR, A. Legal Positivism: Still Descriptive and Morally Neutral. *Oxford Journal of Legal Studies*. 2006, Vol. 26, No. 4, pp. 683–704.

<sup>34</sup> HILL, A. Stability, Assurance, and the Concept of Legal Guidance. *Law and Philosophy*. 2015, Vol. 34, p. 142.



*behaviour, dispositions, and attitudes - social facts - can issue in content that is itself normative. How can social facts create reasons?*<sup>35</sup> This problem is reminiscent of the so-called Hume's thesis, according to which it is not possible to deductively derive a normative conclusion from purely factual premises. Or put another way, it is not possible to correctly deduce an ought-judgement from just is-judgements.<sup>36</sup> We can talk about law in two different ways. The first view is from an external perspective, i.e. from that of an observer. Someone, in the position of the investigative observer, simply claims that something is, due to a certain legal system, a legal fact. His statement is a descriptive or explanatory one. The alternative view is to talk about law from an internal perspective, or from the perspective of a participant in legal practice. If someone as a participant explicitly expresses a judgement that something is a legal fact, then he at the same time implicitly accepts the validity criteria of a given legal system.<sup>37</sup> It is similar to the rules of a game. If I play or referee football, I implicitly accept the rules of football as binding on me.<sup>38</sup> I may run around or kick the ball as I wish but if I do not accept the rules of football as limiting and defining factors of my actions, I am simply not playing football.

It seems, at least at first sight, that the problem of a logical gap between facticity and normativity does not burden the social fact thesis, if we consider law from the external perspective. It is because an observer does not deal with practical issues of what ought to be done. An observer, as was mentioned above, describes and explains certain social facts. He deals with the empirical question of what normative ideas *de facto* prevail in legal praxis of a given community.<sup>39</sup> He just finds out that a certain legal community recognizes and applies something as valid and binding. It is slightly more complicated from the internal perspective, because such statements about law lead to the normative conclusion that something is a legal obligation and that it is a reason why one should do it. However, the Humean objection is probably out of place even here because the stance of acceptance has a normative content. A legal agent as a participant of legal practice uses law and whereby implicitly accepts a given legal system. It means that he has a normative reason to adhere to something identified as a legal obligation given the validity criteria of such a legal system. The point is not that he would deduce a normative conclusion from certain normative facts. Rather, as a participant of legal practice he accepted the general criteria of legal validity as something that ought to be respected. Such an attitude of acceptance, if it is shared within the legal community, is normatively constitutive for legal practice. Its normative nature is becoming apparent in the possibility to formulate it as an imperative:

<sup>35</sup> COLEMAN, J. Beyond the Separability Thesis: Moral Semantics and the Methodology of Jurisprudence. *Oxford Journal of Legal Studies*. 2007, Vol. 27, No. 4, p. 586.

<sup>36</sup> HUME, D. A Treatise of Human Nature (1739–1740). In G. Sayre-McCord (ed.). *Moral Philosophy*. Hackett Publishing Company, 2006, p. 77.

<sup>37</sup> It is obviously more complicated. In literature, a role of an internal and external observer is distinguished, i.e. the role of the observer who participates in an observed legal practice (*participant observer*) is distinguished from the role of the observer who does not participate in the observed practice (*non-participant observer*). See TAMANAHA, B. *Realistic Socio-Legal Theory*. Oxford, 1997, p. 176.

<sup>38</sup> HART, H. L. A. *The Concept of Law*. 2<sup>nd</sup> edition. Oxford, 1994, p. 102.

<sup>39</sup> Normativists strictly distinguished between normativity and positivity of law. Positivity of law, i.e. the fact that law was created by an empirical legislator and it is applied in society, is a category of facticity. See WEYR, F. *Teorie práva*. Praha: Orbis, 1936, p. 85.

*“We ought to treat R as the ultimate criterion of legal validity in this legal system, on the assumption that others among us think (or will come to think) likewise!”<sup>40</sup>*

However, let us get back to the external perspective. Somebody from an observer’s perspective examines the legal practice of a certain community in an attempt to understand it in the best way possible. The issue is, though, that legal practice as a social fact cannot fully determine its own legal content. If an external observer wants to explain that certain descriptive facts about legal practice entirely determine the content of law, then he needs to evaluate these facts as legally relevant.<sup>41</sup> From the external point of view, even the value attitudes of the participants of legal practice are just another descriptive facts to which an observer needs to assign certain legal relevance and appropriate weight.<sup>42</sup> For example, in the context of the originalistic interpretation of the US Constitution, it is possible to assign a decisive significance to either the intents of the drafters of the Constitution (original intent) or to how an ordinary linguistically competent addressee could have understood the Constitution in the time of its publication (original public meaning).<sup>43</sup> Nevertheless, the assignment of legal relevance and certain weight is an evaluative judgement. The value attitude of the *observer* plays a co-determinant role, so that even he is ultimately not quite disengaged. It is possible to oppose that such interpretative issues are dealt with by legal practice alone in a way that certain interpretative methods or doctrines in this practice actually rule. But for the observer to reasonably conclude that something dominates in legal practice, he must firstly ascribe some legal relevance to it and give some weight to it. It is quite possible for observers to disagree with one another about what aspects of legal practice are relevant and thus decisive determinants of the content of law, or what relative significance they should ascribe to them.<sup>44</sup> Two observers will understand the same legal practice differently if they take a different value attitude to the varied elements of such a practice.<sup>45</sup>

Maybe the legal practice observer who tries to understand such a practice cannot succeed without making his own value judgements about what is the main purpose of law. Perhaps, without such a value judgement, neither he can assess what is significant in legal practice nor decide what is and what is not a part of legal practice. Also he cannot consider what is a central and what is just a marginal element of legal practice. Even if the observer will be justifying his value judgement by reflecting the social facts, he will need

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<sup>40</sup> TOH, K. An Argument Against the Social Fact Thesis (and Some Additional Preliminary Steps Towards a New Conception of Legal Positivism). *Law and Philosophy*. 2008, Vol. 27, Issue 5, p. 500.

<sup>41</sup> *“There must be reasons that explain why the relevant facts—for example, about decisions of legislatures and courts—have the effects on the law that they do.”* See GREENBERG, M. On Practices and Law. *Legal Theory*. 2006, Vol. 12, p. 117.

<sup>42</sup> GREENBERG, M. How Facts Make Law. *Legal Theory*. 2004, Vol. 10, p. 185.

<sup>43</sup> See e.g. MCGINNIS J. O., RAPPAPORT M. B. *Originalism and the Good Constitution*. Harvard, 2013, p. 121.

<sup>44</sup> These can be e.g. the opinions of the higher courts or the opinions of renowned legal academics, or the opinions that are the most common in the wider legal community, or the most reasoned legal opinions no matter who holds them.

<sup>45</sup> *“It is obvious, then, that the differences in description derive from differences of opinion, amongst the descriptive theorists, about what is important and significant in the field of data and experience with which they are all equally and thoroughly familiar.”* See FINNIS, J. *Natural Law and Natural Rights*. Oxford, 1980, p. 9.



to ground his justifying on some meta-norm which is already independent of such facts. It seems that this means some compromise of the social fact thesis as a central tenet of legal positivism. Even if the observer reflects legal practice from a distance as a certain set of social facts, his reflection cannot be ultimately reasonable if he makes no evaluative attitude to it.

Such a compromise does not necessarily mean an inclination to natural law theory. We do not talk here about the need to refer to objective value facts but rather about the need to take a value stance.<sup>46</sup> Finally, we are compelled only to admit that the content of law is not definitely fixed by a certain set of social facts but that a delimitation (and a legal meaning of the elements) of such a set is always dependent on further evaluation.<sup>47</sup> At the same time, we maintained something important for legal positivism. That is, that although such value judgement is something external to the assessed social facts, the case that it is again some human attitude remains. Any legal system has an open value-texture that cannot be completely closed by certain set of social facts. But everything which can reasonably supplement such a set, becomes, from a distance, just another social fact. It simply means, that some flesh-and-bone human beings (as interpreters) accept or deny something, or that they assess something somehow.

### Elusive Truth

The social fact thesis does not mean the validity and content of law are independent of morality. It simply means that if law should have some moral determinants, then such moral inputs must have the nature of social facts. If we understand morality descriptively as a social practice in which humans exercise their moral beliefs and attitudes, then we can regard morality as one of the determinants of law even from the perspective of legal positivism.<sup>48</sup> As mentioned previously, the natural law theorists (in the context of the connection thesis) do not talk about moral opinions or humans' attitudes but about moral facts that are independent of human moral thinking.

The moral realism has an advantage in ability to fix the content of law without falling into an infinite regression of value attitudes. The costs of such an approach are, however, not negligible. There are ontological costs since not everyone believes in something like objective moral facts. The ethical non-cognitivist thinks that they are just metaphysical

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<sup>46</sup> Compare HIMMA, K. E. How much a theory of law can tell us about the nature of morality: a response to Mark Greenberg's How facts make law. *Direito, Estado e Sociedade*. 2012, pp. 132–164; GREENBERG, M. How Facts Make Law and the nature of moral facts. *Direito, Estado e Sociedade*. 2012, pp. 165–174.

<sup>47</sup> "Many positivists have thought that since the relevant social practices are finite, and the law is fully grounded in facts about these social practices, then it can't be that the law itself is fully determinate across all possible cases. Hence, it must be that judges - who are often legally obligated to make a decision about a case - will be making new law as well as simply discovering existing law. To think otherwise is to buy into a formalist fantasy about there being fully determinate law, a fantasy that, so the thought goes, any right-minded positivist should forcefully reject." PLUNKETT D., SUNDELL T., *Antipositivist Arguments from Legal Thought and Talk The Metalinguistic Response*. In: Hubbs G., Lind D. (eds.). *Pragmatism, Law, and Language*. Routledge, 2014, p. 57.

<sup>48</sup> PLUNKETT, D. A Positivist Route For Explaining How Facts Make Law. *Legal Theory*. 2012, Vol. 18, p. 147.

fantasies. Nevertheless the most serious weakness of moral realism is moral epistemology.<sup>49</sup> Some critics of legal positivism limit their project to metaphysical questions, whether moral facts objectively co-determine the content of law. They do not ask an important epistemic question, i.e. as to how the interpreters of legal practice may reliably find out such moral facts.<sup>50</sup> However, such a purely metaphysical approach is not much use to the jurisprudence. Moral facts which we cannot reliably identify are irrelevant for our knowledge of law.<sup>51</sup> The legal positivist can think that the content of law is co-determined by the moral beliefs of the participants of legal practice regardless of their objective truth value. Thus, he is avoiding a mentioned issue of moral epistemology.<sup>52</sup> However, it is necessary to consider what is the primary goal of a certain project of jurisprudence. From the point of view of a descriptive approach, i.e. an effort to understand why legal practice is as it is, the moral opinions of participants of legal practice may play the role of explanatory factors. But from the point of view of a critical approach, even the moral opinions of the participants of legal practice are subject to evaluation. For instance the racist beliefs of Nazi judges may explain their extremely unjust decisions but they cannot justify them.

In the history of moral, political, theological, economic and even legal thinking, it is possible to observe the rivalry among two approaches of the justification of normative belief. The first is grounded on a rational cognition of objective value truths. The other reflects the fact that somebody has decided in some way or has taken a certain stance on something. As one of the arguments against natural law theories we have already mentioned the non-cognitive objection, that there is nothing like objective normative truths.<sup>53</sup> The essence of the objection is that opinions of what ought to be are eventually grounded on some non-cognitive components of human thinking. Typically, on humans'

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<sup>49</sup> "... as a group, moral realists disagree fundamentally about what are, *co to speak*, the real moral facts, and no one has developed an adequate account of moral knowledge or moral justification to distinguish between true and false, or between better or worse justified, claims about those alleged, supposedly mind-independent real moral facts." See WESTPHAL, K. R. *How Hume and Kant Reconstruct Natural Law: Justifying Strict Objectivity without Debating Moral Realism*. Oxford, 2016, p. 18.

<sup>50</sup> E.g. Mark Greenberg sophistically argues against legal positivism that legal facts cannot be determined only by social facts but they must be co-determined by value facts. However, Greenberg makes no attempt to state what moral facts are constitutive for law and how such facts may be reliably identified. The importance of his theory for jurisprudence is thus quite limited. See GREENBERG, M. *How Facts Make Law. Legal Theory*. 2004, Vol. 10, p. 158.

<sup>51</sup> WALDRON, J. *Law and Disagreement*. Oxford, 1999, pp. 185–187. One thing is whether moral facts are in their existence and in their content independent of humans opinions. Quite another is, however, that if moral facts were in principle non-cognizable, then morality could not play its regulative function. See KRAMER, M. *Moral Realism as a Moral Doctrine*. Willey-Blackwell, 2009, p. 85.

<sup>52</sup> Ronald Dworkin defines the social fact thesis slightly more narrowly: "*Legal positivism has many different forms, but they all have in common the idea that law exists only in virtue of some human act or decision.*" But such a narrowing makes a significant shift. It excludes the moral beliefs from the set of possible positivist determinants of law. The social fact thesis, in its standard version, however, does not exclude any human beliefs. It only excludes objective moral facts as such. See DWORKIN, R. *A Matter of Principle*. Oxford, 1985, p. 131.

<sup>53</sup> We significantly simplify here since even natural law theories can be divided into intellectualism (reason) and voluntarism (will). See e.g. BIX, B. *Will Versus Reason: Truth in Natural Law, Positive Law, and Legal Theory*. In: Pritzl K. (ed.). *Truth: Studies of the Robust Presence*. Catholic University of American Press, 2010, pp. 211–212.

wills, desires or emotions.<sup>54</sup> This objection was raised by some legal positivists, for example Hans Kelsen<sup>55</sup> and Ota Weinberger.<sup>56</sup> Norbert Hoerster, another legal positivist, claims that the ethical non-cognitivism, or subjectivism, is a widespread opinion among legal positivists.<sup>57</sup> This is quite possible. Historically it applies to those legal positivists who were thinking of value judgements under the influence of so called logical positivism.<sup>58</sup> But no necessary connection exists between legal positivism and ethical non-cognitivism. A legal positivist may but does not need to hold such a stance on the nature of moral judgements.<sup>59</sup>

Many legal positivists have systematically dealt with ethics, some of them (such as Jeremy Bentham) leaving a significant mark on the history of ethics. However, legal positivism as such is just a theory of law, not a theory of morality. It does not commit its supporters to any particular theory of the nature of morality. One of the significant features of legal positivism is its ethical openness. Legal positivism is compatible with the diverse theories of ethics, both normative ethics and metaethics. As it was said before, natural law theorists are moral realists (or an objectivists) by definition. As opposed to that, the legal positivist may but does not need to adhere to moral realism. For example, the legal positivist Matthew Kramer holds a very similar ethical theory to that of Ronald Dworkin, a famous critic of legal positivism. Both of them adhere to the so-called substantive moral objectivism.<sup>60</sup> However, Kramer may remain a legal positivist even if he gives up moral objectivism. As opposed to that, Dworkin does not have such room to manoeuvre because his moral objectivism is a principal pillar of his non-positivist theory of law.

Legal positivists are distrustful of engaging metaphysics in the legal theory.<sup>61</sup> It does not mean they should abandon any value jurisprudence. It rather means that a legal positivist in his theory of law considers values as tied to human value thinking. He can be distrustful of value metaphysics but must take into account the value psychology which is actually applied in legal practice. It means, from the methodological point of view, that a legal positivist (in the process of legal cognition) has good reason to take into account the moral opinions of the judges, since such opinions may be one of the significant factors in how the judges interpret or construct law in their decision making. A natural law theorist in

<sup>54</sup> GRABOWSKI, A. *Juristic Concept of the Validity of Statutory Law: A Critique of Contemporary Legal Nonpositivism*. Kiełtyka M. (transl.). Springer, 2013, p. 84.

<sup>55</sup> "Human reason can understand and describe, it cannot prescribe, To find norms for human behaviour in reason is the same illusion as that of extracting such norms from nature." See KELSEN, H. What is Justice? In: Weinberger O. (ed.). *Essays in Legal and Moral Philosophy*. Dordrecht, 1973, p. 21.

<sup>56</sup> "There is no purely cognitive and decision-free justification of values, ends and norms. This thesis is termed non-cognitivism in practical philosophy." See WEINBERGER, O. *Alternative Action Theory*. Zwart J. (transl.). Springer, 1998, p. 59.

<sup>57</sup> HOERSTER, N. *Was ist Recht? Grundfragen der Rechtsphilosophie*. C. H. Beck, 2006, p. 75.

<sup>58</sup> But the Swedish legal theorist Axel Hägerström has formulated the basic theses of the ethical non-cognitivism, the emotivism in particular, 15 years before the analytical philosophers Alfred Ayer and Charles Stevenson did.

<sup>59</sup> MEYERSON, D. *Understanding Jurisprudence*. Routledge, 2007, p. 45.

<sup>60</sup> I call it *material* moral objectivism because both Kramer and Dworkin defend moral objectivism from the position of normative ethics rather than position of metaethics. It is even possible to call it an anti-metaethical approach. See KRAMER, M. *Moral Realism as a Moral Doctrine*. Wiley-Blackwell, 2009; DWORKIN, R. *Justice for Hedgehogs*. Harvard, 2011.

<sup>61</sup> OTT, W. *Rechtspositivismus*. Duncker & Humblot, 1992, p. 102.

his jurisprudential project does not investigate the moral opinions of the judges but he tries to apply an ethical theory that is objectively true.<sup>62</sup> A legal positivist will, with a clear burst of irony, object that a natural law theorist does not bring moral truths into the process of cognition of law. A natural law theorist can give only what he truly has and it is his own moral belief.<sup>63</sup>

Very often ethical discourse does not converge to a reasonable agreement of opinions but rather diverges to a reasonable disagreement. It is a situation where both parties in the ethical discussion argue in good faith, reasonably and in an informed manner but nevertheless do not agree on the right solution.<sup>64</sup> From the descriptive positions of legal positivism, legal practice is sometimes in the state of moral disagreement. However such an approach is unsatisfactory for a natural law theorist. He will tend to ponder which of the conflicted moral opinions is the true one. Nevertheless, in doing this, he only takes part in one of the positions of reasonable disagreement. He will have some arguments but so will others who have already participated in such a discussion. By the way, some moral philosophers think that the primary purpose of ethics is not finding the one single correct solution to a moral dilemma, but rather an effort to understand the reasons why a certain question actually is a moral dilemma. *“Thus an ethical theory that places first priority on ‘getting the right answer’ is not looking at its most important tasks in the right way.”*<sup>65</sup>

Alasdair MacIntyre asks a question heading directly to the Achilles’ heel of natural law theory: If the principles of natural law are objective and universally valid norms grounded on reason and recognizable by reason, how is it possible that even reasonable and well-informed humans cannot agree on their content? But in fact such ethical disagreements appear to be intransigent and they persist even in a situation of an in-depth argumentation.<sup>66</sup> If we do not have the effective means for the intersubjectively reviewable knowledge of what is true, then the moral objectivism in legal practice is being transformed into something that is difficult to distinguish superficially from subjectivism. The real result is that different lawyers engage different personal beliefs about what is moral truth. *“Each Judge must (by himself and therefore subjectively) decide upon that (allegedly) objective morality.”*<sup>67</sup> Indeed, moral beliefs are promoted in legal practice not on the basis of their truth but on the institutional power and influence of their holders, in particular of the judges.

The reasonableness is something different from the persuasiveness. The first one is a normative category relating to the correctness of argument. The second one belongs to the

<sup>62</sup> Compare SHAPIRO, S. J. *Legality*. Harvard, 2011, p. 29.

<sup>63</sup> Not only the subjectivity problem is discussed in this regard but also the opportunism problem. For example Johann J. Moser in 1764 noted on natural law theory: *“The basics of this doctrine are very inconsistent, everyone likes to exhibit or modify them so that they meet in each specific case his own or a partial private interest and intent.”* Cf LEICHSENRING, J. *Ewiges Recht? Zur normativen Bedeutsamkeit gegenwärtiger aturrechtsphilosophie*. Mohr Siebeck, 2013, p. 7.

<sup>64</sup> BESSON, S. *The Morality of Conflict – Reasonable Disagreement And The Law*. Oxford, 2005; MCMAHON, CH. *Reasonable Disagreement. A Theory of Political Morality*. Cambridge, 2009.

<sup>65</sup> WOOD, A. W. *Kantian Ethics*. Cambridge, 2008, p. 49.

<sup>66</sup> MACINTYRE, A. *Intractable Disputes about the Natural Law: Alasdair MacIntyre and Critics*. University of Notre Dame Press, 2009, chap. 1.

<sup>67</sup> ALLAN, J. Legal Interpretation and the Separation of Law and Morality: A Moral Sceptic’s Attack on Dworkin. *Anglo-American Law Review*. 1997, Vol. 26, p. 427.

sphere of facticity, relating to the actual ability to change someone's belief. The moral disagreement weakens or limits the general persuasiveness of such theories of law which are explicitly or implicitly related to a particular ethical theory. This is case especially for those ethical theories that irritate a significant part of society. For example, on the one side, we can observe how some liberals criticize Finnis' so called new natural law theory because it adjusts value concepts to the moralistic enforcement of his conservative opinions. It relates especially to opinions about a traditional family and sexual morality that (according to critics) are not reasonably grounded truths but rather patriarchal and even homophobic biases.<sup>68</sup> On the other side of the political spectrum we see how the conservative philosopher Roger Scruton criticizes Dworkin's liberal theory of law as being only a smoke screen for the enforcement of a left-wing politics. This is allegedly the politics of expanding constitutional rights which is being achieved through judicial activism. Scruton points out that Dworkin's jurisprudence supports a certain ideology which most of US society does not identify with.<sup>69</sup>

### Making It Explicit

The advantage of the social fact thesis is very well capturing the mainstream of current legal positivism, following Hart's theory of law. On the other hand, its disadvantage is that it is not historically adequate. Yet because Hans Kelsen, who is considered to be a textbook case of a legal positivist, was systematically denying the social fact thesis.<sup>70</sup> Kelsen argued that the normative dimension of law cannot be explained by referring to social facts.<sup>71</sup> He based this opinion on Hume's thesis. "... *the question why some norm is valid and why humans ought to behave in some way cannot be answered by the finding of some fact about being [Seinsatsache], the reason of the validity of the norm cannot be such a fact. The ought-fact cannot follow from the is-fact; just as the is-fact cannot follow from the ought-fact. The reason of the validity of norm can only be the validity of another norm.*"<sup>72</sup> Kelsen illustrated his theory with the Ten Commandments. The fact that God commanded something was not itself a sufficient precondition for obligations to arise. If we derive obligations from such a commandment, we presuppose the validity of the norm that God's commandments should be obeyed.

<sup>68</sup> BAMFORTH, N., RICHARDS, D. A. J. *Patriarchal Religion, Sexuality, and Gender: A Critique of New Natural Law*. Cambridge, 2007, p. 370.

<sup>69</sup> SCRUTON, R. *Fools, Frauds and Firebrands: Thinkers of the New Left*. Bloomsbury, 2015, chap. 3.

<sup>70</sup> PAULSON, S. On the Puzzle Surrounding Hans Kelsen's Basic Norm. *Ratio Juris*. Vol. 13 No. 3, p. 282. Joseph Raz specifies this. Kelsen approves the social fact thesis in relation to the factual existence of law but he does not approve it in relation to the normative existence of law, thus in relation to the validity and binding force of law. See RAZ, J. *The Authority of Law*. 2<sup>nd</sup> edition. Oxford, 2009, pp. 296–297.

<sup>71</sup> "Kelsen thus rejects any kind of fact-based positivism, the most prominent example being Hart's theory, which seeks to explain legal normativity by reference to social facts ... ." See DELACROIX, S. *Legal Norms and Normativity*. Oxford, 2006, p. 32.

<sup>72</sup> KELSEN, H. *Reine Rechtslehre*. Wien, 1960, p. 196. The ideological link to Hume's thesis in the methodology of social science of the 20<sup>th</sup> century has developed since Max Weber who wrote in 1905: "We are of the opinion that it can never be the task of a science of empirical experience to determine binding norms and ideals from which practical prescriptions may then be deduced." See WEBER, M. The "objectivity" of knowledge in social science and social policy (1904) In: Bruun H. H., Whimster (ed.). *Max Weber: Collected methodological writings*. Routledge, 2012, M. p. 102.

The facts themselves cannot determine the normative content. If we think about a fact as a normatively significant fact, we implicitly refer to a norm.<sup>73</sup> A norm is normatively valid because it was set on the ground of a higher legal norm which again is legally valid because it was set on the ground of a yet higher legal norm. But this chain has to have its end. It has to end with a norm whose validity is neither being questioned nor being proved. The validity of such basic norm is just presupposed.<sup>74</sup> Of course, Kelsen's model is logical, not sociological one. Also Kelsen's theory does not aim to ethically justify law. It rather aims to understand the logical preconditions and the boundary of **legal** reasoning.<sup>75</sup> But the logical constraint on the legal reasoning should be somehow externally manifested in legal practice. Maybe, the logical boundary disclose itself only in a negative way. After all how would an ordinary participant of legal practice react on a repeated question about another and another ground for the legal validity? At some point of the discussion he would simply reject it. The participants of legal practice are not willing to wrestle with the question of legal validity indefinitely. This rejection is exemplified by the irritated response: „It simply is valid. Full stop.”<sup>76</sup>

Hume's thesis of the non-derivability of norms from facts alone is sometimes used as an objection against the natural law theory.<sup>77</sup> It seems that at least some of the followers of Thomas Aquinas were systematically deriving moral judgements from the factual judgements about human nature. Nevertheless, this so called derivationism is not the only possible epistemic approach for the natural law theorists. The alternative approach is the so-called inclinationism. It means that the fundamental principles of the natural law theory are not derived but they are immediately recognized (*per se nota*, self-evident) truths.<sup>78</sup> These first principles, specifying the basic forms of good and evil, are not provable. They are neither derived from facts nor from human nature and also nor from anything else.<sup>79</sup> They simply are their own inception. Their acceptance is an act of practical reason. These first principles provide humans with an understanding and insight into

<sup>73</sup> TURNER, S. P. *Explaining The Normative*. Polity, 2010, p. 87.

<sup>74</sup> KELSEN, H. *General Theory of Law & State*. Transaction Publishers, 2006, p. 116.

<sup>75</sup> “Kelsen did not solve the problem of the profound justification of law. He did not even attempt to answer the question whether there are moral reasons to follow the law, but merely pointed out that the problem is not a legal one.” See PECZENIK, A. *Scientia Juris: Legal Doctrine as Knowledge of Law and as a Source of Law*. Springer, 2005, p. 90.

<sup>76</sup> “A father ordered his child to go to school. The child answers: Why should I go to school? The reply may be: Because the father so ordered and because a child is supposed to obey a father's commands. If the child continues asking: Why I should obey a father's commands, the answer may be: Because God has commanded us to obey our parents and because God's commands should be obeyed. If the child continues asking why it should obey God's commands, and thus questions the validity of such a norm, then the answer is that the validity of this norm cannot be questioned, that the reason of its validity must not be sought, the norm has to be presupposed.” See KELSEN, H. *Reine Rechtslehre*. Wien, 1960, p. 199.

<sup>77</sup> “In contrast to Hume, traditional natural law presents a factual, empirical, natural world full of moral information, the relevance of which is to be discoverable by reason. So, Hume's claim that without explanation an ‘ought’ cannot be derived from an ‘is’, may be viewed as a fundamental challenge to traditional natural law.” See DONNELLY, B. *A Natural Law Approach to Normativity*. Ashgate, 2007, p. 7.

<sup>78</sup> There are many interpretations of Hume's ethics in relation to Hume's thesis. One of which is that moral knowledge is not grounded on inference but on the immediate experience. See CAPALDI, N. Hume's Rejection of “Ought” as a Moral Category. *The Journal of Philosophy*. 1966, Vol. 63, No. 5, p. 130.

<sup>79</sup> FINNIS, J. *Natural Law and Natural Rights*. Oxford, 1980, p. 33.



what they already intuitively do in their lives. Humans are able to explicitly recognize basic good because they naturally incline to good. These natural inclinations focus the attention of human intellect onto what practical reason is already doing.<sup>80</sup> *“The inclinationist does not see the method being so much a way of unearthing fresh, new information about what makes action intelligible as it is a way to move from implicit knowledge of the good to fully explicit knowledge of the good. All of us, on this view, have some implicit knowledge of what the basic goods are, and this implicit knowledge is manifested in our tendency to pursue certain objects.”*<sup>81</sup> We can name a long list of significant differences between Kelsen’s theory and natural law inclinationism. Nevertheless, there is a small but interesting similarity. Both these projects try to articulate explicitly the meaningfulness preconditions of what we already do.

### Norms without Facts

One thing is the existence of facts (of one kind or another) and the other is their cognition. The empirical facts in our surrounding may cause and at the same time explain our beliefs. For example, the fact that there is a chair in front of me may cause and at the same time explain my belief that there is a chair in front of me. However, we think differently in the case of moral facts. If I see that somebody punched someone else, I see some sort of human action which I will assess somehow from the moral point of view, probably in a negative way. I do not see the moral fact as such that somebody behaved wrongly. I only see the physical event. The moral judgement that somebody behaved wrongly to someone else is only a result of the moral assessment.<sup>82</sup> If I subsequently found out that the punch was actually self-defence, I would possibly reconsider my moral opinion. How could it be, after all, empirically possible to test the hypothesis that moral facts causally bring about our moral opinions? The changes of moral beliefs that follow changes of empirical facts are ultimately the only observable thing.<sup>83</sup> Morality differs from science in that it is not primarily a matter of empirical evidence and causal explanation. It is rather a matter of argumentation relating to the good reasons for an action, especially the obligations to help or at least not to harm others.

We can ask why somebody ascribes a certain normative meaning to certain descriptive facts. If we turn the coin over, we can ask an almost complementary question what role the facts actually play when defending a certain normative opinion. Gerald A. Cohen brought an in-depth insight to this problem.<sup>84</sup> For example let us consider that somebody defends the normative belief that we should keep our

<sup>80</sup> JENSEN, S. *Knowing the natural law: from precepts and inclinations to deriving oughts*. The Catholic University of America Press, 2015, p. 17. The natural law theorist Steven Jensen has a specific opinion about Hume’s thesis. He claims that the normative judgements have a descriptive content and thus they are a kind of factual judgement. And thus Jensen rejects the Humean is-ought problem as a pseudoproblem. *Ibid.*, p. 149.

<sup>81</sup> MURPHY, M. C. *Natural Law and Practical Rationality*. Cambridge, 2001, p. 12.

<sup>82</sup> Compare AUDI, R. *Moral Perception*. Princeton, 2013, p. 48.

<sup>83</sup> Ronald Dworkin formulates this idea quite persuasively. See DWORKIN, R. *Justice for Hedgehogs*. Harvard, 2011, p. 73.

<sup>84</sup> COHEN, G. A. *Rescuing justice and equality*. Harvard, 2008, p. 229.

promises. And let us also consider that he argues with the fact that the addressees of the promise may successfully realize their plans only if the promises are kept. But why is this normative belief supported by such a fact? Apparently, the acceptance of the normative principle that we should help the others with realizing their plans is presupposed. The normative opinion that we should keep our promises is in such argumentation dependent on the fact  $F_1$  that the addressees of the promise may successfully realize their plans only if the promises are kept. But the acceptance of the principle  $P_1$  that we should help others to realize their plans is no longer dependent on the fact  $F_1$  that the addressees of the promise may successfully realize their plans only if the promises are kept.<sup>85</sup> Perhaps it is possible to continue in such reasoning. The acceptance of the principle  $P_1$  might be dependent on another fact. For instance it is possible to argue with the fact  $F_2$  that humans are happy only if we help them realize their plans. But this reasoning presumes that we accept some further principle. It is probably the principle  $P_2$  that we should help others to be happy. And again, acceptance of the principle  $P_2$  that we should help others to be happy is no longer dependent on the fact  $F_2$  that humans are happy only if we help them realize their plans. We can now generalize the logical structure of reasoning. The normative beliefs that we ground on some facts ultimately always presuppose the acceptance of some normative principles that are no longer dependent on any facts.<sup>86</sup> This analysis thus leads to the conclusion that the facts cannot provide the final justification for a normative belief.<sup>87</sup>

It seems that even Cohen's reflection is ultimately grounded on Hume's thesis. However, let us try to look more closely at the perspective of those who oppose Hume. The rejection of Hume's thesis means that we admit a deductive validity of some inferences from the facts to the norms. In the simplest case, these arguments take the form of: 'A, therefore B ought to be.' If someone says that the argument 'A, therefore B ought to be.' is deductively valid, he says in other words that a normative belief 'If A, then B ought to be.' is necessarily true. It means that it is true under all logically thinkable circumstances.<sup>88</sup> Let us consider that an opponent of Hume's thesis argues: 'Petr suffers pain and thus he should be helped.' He would defend the deductive validity of his argument referring to the alleged relation between the concept of *suffering* and the concept of *obligation to help*. Simply that the second concept is somehow implicitly entailed by the first one.<sup>89</sup> If there is such a conceptual relation then it is a necessary relation. Thus, it is a relation with some normative content which holds up regardless of any circumstances. And so it would mean

<sup>85</sup> Even if we came to the conclusion that the addressees of the promise may successfully realize their plans even if the promises are not kept, it would not be in itself a reason to deny the principle that we should help the others to realize their plans.

<sup>86</sup> COHEN, G. A. Facts and Principles. *Philosophy and Public Affairs*. 2003, Vol. 31, No. 3, p. 211–245.

<sup>87</sup> SAADE, E. *The Concept of Justice and Equality: On the Dispute between John Rawls and Gerald Cohen*. De Gruyter, 2015, p. 53.

<sup>88</sup> "But if this anti-Humean is right, then his principle, if  $X$  is in pain, then  $X$  ought to be assisted, is insensitive to fact, since it is an entailment, and entailments, being a priori, are insensitive to fact." See COHEN, G. A. *Rescuing justice and equality*. Harvard, 2008, p. 249.

<sup>89</sup> The real trouble is, however, that if the normative concept of the *obligation to help* is already entailed by the concept of suffering, then the premise 'Petr suffers pain.' is not purely factual and thus the argument 'Petr suffers pain, therefore he should be provided with assistance.' cannot be a counter-example to Hume's thesis.

that even an opponent of Hume's thesis must admit that normative beliefs that are grounded on some facts ultimately presume the acceptance of some norms that are no longer dependent on the facts.

Cohen's reflection pursues a logical, not an epistemic aim.<sup>90</sup> It does not relate to the task of how to cognize the right normative principles, or what the epistemic reasons are that entitle us to accept them. Rather it relates to what further normative principles we logically assume by accepting certain principles.<sup>91</sup> Using deductive logic, we can push a speaker to formulate explicitly the normative assumptions of his moral thinking. The task is to uncover those principles already implicitly used in his thinking. Let us illustrate this with Cohen's example. Utilitarian ethics is traditionally criticized for its willingness to accept anything that maximises social welfare, including such morally problematic policies as slavery or punishing the innocents. An utilitarian may answer that the situations in which those horrible policies maximize social welfare are logically conceivable but at the same time unreal because they simply do not happen in our world. It seems that this utilitarian does not regard the principle of utility as a moral principle valid under any possible circumstances but rather as valid relative to the facts of our world.<sup>92</sup> Beside favorizing the principle of utility he implicitly accepts some other moral principles independent of utilitarianism which regard slavery and punishing the innocents as wrong.<sup>93</sup> It seems that he restricted the validity of the principle of utility for the purpose of our world so that it does not clash with other moral principles. The utilitarian will probably oppose such (perhaps uncharitable) interpretation simply by claiming that the aim of our moral principles is to solve problems in the real world and not hypothetical problems in fantasy worlds.<sup>94</sup>

On the other hand, our utilitarian can easily be caught in his own trap. Utilitarian ethics is grounded on the so-called principle of impartiality which means that the utility of any one individual is equally important.<sup>95</sup> This principle requires extreme moral demands on people. The impartiality principle implies a requirement that we should ascribe an equal value both the utility that we cause to ourselves (or to those close to us such as our mother) and the utility that we cause to a stranger. Such a requirement will be rejected by most people as grossly contra-intuitive.<sup>96</sup> Utilitarianism thus faces the objection that such a requirement for impartiality goes against human nature. And what is the answer we can expect from an utilitarian? He will probably claim the principle of impartiality is a highly ethical ideal that is independent of the regrettable facts about human nature. The question then arises to what extent

<sup>90</sup> COHEN, G. A. *Rescuing justice and equality*. Harvard, 2008, p. 247.

<sup>91</sup> Robert Jubb reproaches Cohen that he is not consistent in the distinguishing the logical and epistemic conception. See JUBB, R. Logical and Epistemic Foundationalism About Grounding: The Triviality of Facts and Principles. *Res Publica*. 2009, Vol. 15, p. 337–353.

<sup>92</sup> A pure utilitarian should regard the principle of utility as valid under any circumstances. Even if it required slavery or punishing the innocents.

<sup>93</sup> COHEN, G. A. *Rescuing justice and equality*. Harvard, 2008, p. 264.

<sup>94</sup> POGGE, T. Cohen to the Rescue! *Ratio*. 2008, Vol. 21, No. 4, p. 468.

<sup>95</sup> See for example HOOKER, B. Egoism, Partiality and Impartiality. In: R. Crisp (ed.). *The Oxford Handbook of the History of Ethics*. Oxford, 2013, p. 723.

<sup>96</sup> TIMMONS, M. *Moral Theory: An Introduction*. Lanham: Rowman & Littlefield Publishers, 2012, p. 114.

moral principles need to be tailored to human beings. On the one side we can claim the purpose of moral principles is to formulate requirements for humans not for angels. The human theories of justice are the theories of human justice. But on the other side, it is doubtful that moral judgements should also be tailored to the dark sides of human nature. Even human nature is something which may be meaningfully criticized from moral positions. If it is a fact about human nature that humans incline to cruelty, should we accept such a fact as a limitation of what moral principles may justly require from humans? Apparently not.<sup>97</sup>

Cohen focused his argumentation primarily against the constructivist methodology which he illustrates in the theory of justice of John Rawls. The constructivist approach, as opposed to moral realism, is agnostic about moral facts understood as independent of human mind.<sup>98</sup> This approach justifies the validity of the principles of political morality by the fact that they are construed rationally and regardless of whether they correspond to moral facts. But Cohen criticizes constructivism because it takes into account only those principles that are dependent on some facts.<sup>99</sup> Constructivists suppose that even fundamental moral principles must reflect certain basic facts about human nature, the character of social institutions and the conditions of human life.<sup>100</sup> (For example the facts that humans are vulnerable; they have common but also competing interests; they live in conditions of limited resources; they are limitedly altruistic and limitedly rational;<sup>101</sup> their value opinions are in a reasonable disagreement and their societies must solve the problems of collective actions.<sup>102</sup>) Let's note that we do not talk here about moral facts in the sense of moral realism but about descriptive facts of human nature and human situation.<sup>103</sup>

However, a constructivist may accept Cohen's conclusion that fundamental moral principles are not dependent on such descriptive facts. Let's assume as a starting moral principle that humans are equal. For a moral realist, it is a substantive moral principle that is true because humans indeed are equal. A constructivist, instead of referring to the alleged moral facts, asks, what moral principle may be reasonably acceptable for

<sup>97</sup> ESTLUND, D. Human Nature and the Limits (If Any) of Political Philosophy. *Philosophy & Public Affairs*. 2011, Vol. 39, No. 3, p. 224.

<sup>98</sup> "Since it seems impossible to achieve an epistemically justified answer as to which substantive values are true, constructivists claim that we can never be sure that normative answers based on our own convictions are superior to those endorsed by others. Constructivism, therefore, relies on a form of ontological agnosticism: it claims that we do not know whether mind-independent moral truths exist." See RONZONI M., VALENTINI L. On the metaethical status of constructivism: reflections on G. A. Cohen's 'Facts and Principles'. *Politics, Philosophy & Economics*. 2008, Vol. 7, Issue 4, p. 416.

<sup>99</sup> COHEN, G. A. *Rescuing justice and equality*. Harvard, 2008, p. 231.

<sup>100</sup> RAWLS, J. A. *Theory of Justice*. Harvard, 1999, p. 138.

<sup>101</sup> HART, H. L. A. *The Concept of Law*. 2<sup>nd</sup> edition. Oxford, 1994, p. 93.

<sup>102</sup> According to Cohen, these descriptive facts contaminate the Rawls's theory of justice even with the facts that do not relate to justice as such. See SAADÉ, E. *The Concept of Justice and Equality: On the Dispute between John Rawls and Gerald Cohen*. De Gruyter, 2015, pp. 171–172.

<sup>103</sup> "What is assumed by Rawls(ians) is that the justice of social and political institutions is to some extent dependent on what human beings are, whether biologically or psychologically." See DE MAAGT, S. In defence of factdependency. *Canadian Journal of Philosophy*. 2014, Vol. 44, No. 3-4, p. 445.

everyone.<sup>104</sup> The principle that humans are equal may be a suitable methodological basis for construction of a system of principles of political morality. It is suitable if only because nobody honestly looking for principles of common life that are also reasonably acceptable to others can reasonably reject such a neutral basis.<sup>105</sup> It is not about whether the fact that people are equal is a discovered moral fact. Just the ethical project of looking for principles of common life that are reasonably acceptable to others as such includes a presumption that we accept equality among humans. Anyone not accepting this equality can only pretend to his participation in such a project. And let us notice one more important thing. We accept a moral principle that humans are equal not on the grounds of descriptive facts about humans but rather despite such facts. From a descriptive perspective, humans differ in many aspects, for example in being differently talented or capable in different activities. And despite that, from a moral perspective, we accept their equality. It seems that equality of human beings may be reasonably accepted regardless of the knowledgeability of moral facts and also regardless of descriptive facts about humans.

## CONCLUSION

A full-blooded normativity is coming alive only from the position of participants in legal practice, and thus from within the practice. Ultimately, legal validity is not based on a knowledge of a fact, whether normative or empirical. It is based on a practical stance of the acceptance of the authority of law. Such attitude is implicit in the day-to-day practice of human agents who use law without any need to thematise its normative grounds. Legal validity is not proved by the fact that the participant in legal practice can answer a question of what an objective basis of validity is. It is rather proved by the fact that they reject such questions as pointless. Logic plays a limited role here. It requires a maintenance of balance between the validity and the binding force of law. We have a choice. Law can be binding only legally or it can be binding both legally and morally. But if we choose the second option, the legal validity must then even include the criterion of moral rightness because immoral law cannot be morally binding.

Not even the moral binding force is grounded on a knowledge of a fact, whether normative or empirical. A moral stance is a practical attitude by which we recognize the moral status of other persons. The question as to why I should take care of other people can be asked from an egoistic perspective but it is a nonsense from the moral perspective. A moral stance is not a descriptive belief, but it is a practical stance of inclusive regardfulness. If someone asks from what facts we can derive the belief that humans are equal, he just asks the wrong question. He requires a proof instead of taking a practical stance. The moral belief that humans are equal is independent of the empirical facts about humans. Humans are equal no matter what they are like.

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<sup>104</sup> "In other words, freedom and equality (or 'equal concern') articulate the rational requirement that, in the absence of authoritative premises (as when no moral truths are available), we must resort to intersubjective justification."

See RONZONI M., VALENTINI L. On the meta-ethical status of constructivism: reflections on G. A. Cohen's 'Facts and Principles'. *Politics, Philosophy & Economics*. 2008, Vol. 7, Issue 4, p. 411.

<sup>105</sup> Compare SCANLON, T. *What We Owe to Each Other*. Harvard, 1998, p. 106.

If I try to explain to someone that a inferential rule is deductively valid, I will have to use logic, and even logic will have to be explained logically. For example, it is typical that we implicitly use the rule *modus ponens* when explaining this logical rule.<sup>106</sup> An objective logical fact that something is a deductively valid rule may not be proved without engaging a practical ability to make a deductive inference. I do not deny the objective moral fact that humans are equal. I just claim that such a fact cannot be cognized without engaging the practical moral stance. The understanding of moral rightness, just as the understanding of logical validity, presupposes engagement of our own practical abilities. Looking for principles of common life which are also reasonably acceptable for others embodies a certain idea of equality at the same time. It embodies the idea that only those principles that take into account without bias the interests of all persons involved are generally acceptable. A statement that human beings are equal and that this is an objective moral fact, is, in itself, not so interesting. We can fully understand the principle of equality in legal practice only when dealing with the problem of how to take into account without bias the interests of such different persons. I prefer the conceptual framework of moral stances to the framework of moral facts not because I would like to support moral subjectivism. I prefer this approach because it better captures the practical nature of morality and also of law.

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<sup>106</sup> BOGHOSSIAN, P. Knowledge of Logic. In: Boghossian P., Peacocke C. (eds.). *New Essays on the A Priori*. Oxford, 2000, p. 231.