

УДК 165.0

Paradigmatic Assumptions of Thinking in Law: Philosophy of Science and Methodology of Science Considerations

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Received 05.02.2013, received in revised form 04.06.2013, accepted 09.09.2013

The article considers what is meant by fact, concept, as well as logic and thinking within the contrast of objectivism and subjectivism, as well as their compromise in postmodernity.

Keywords: fact, concept, logic, thinking; objectivism, subjectivism.

Point:**The need for a change of paradigms**

The system of co-ordinates reflecting the potentialities of understanding brings up three blocks of thinking tradition. The first is called objectivism, the second subjectivism. The third block represents some rational search for compromise somewhere between the extreme values. This is the concept mainly spread on Anglo-American scientific areas, and is most justifiable from the perspective of so-called cognitive sciences.

All in all, as a consequence some initial suspicions came to be confirmed, suggesting that (1) there are no things but processes; (2) the ‘thing’ cannot be other than an aspect or snapshot abstraction of the process; hence (3) cognition is nothing but the function of naming; therefore (4) description has to be regarded more as intellectual modelling (or presentation) than ontological reflection (or reproduction) (Varga, 1999).

Objectivism can be summarily characterised as naive realism. Its opposite, subjectivism, rather means just negation, a counter-trend. They form a false alternative to one another. The so-called modern conception is an intermediate consideration. It is more based on interdisciplinarity drawing from experiential/experimental sources, reminiscent of natural sciences, which, for instance, cognitive sciences – psychology, linguistics, philosophy and biology, as applied to the topic – seek to form.

Example 1: What are facts?

According to acquired conceptual traditions, we are supposed to speak about ‘fact’ as congruent with “objective reality”.

This conceptual congruence implies that when speaking of “fact” we speak of reality proper. For it is presumed that the sole thing out of consideration is that it happened to be us to establish this fact, thus being somehow personally

involved as part of the process. A NIETZSCHEAN view, on the other hand, would suggest that facts as such are not to be found in reality at all. What we may still find there, considering them facts, are purely arbitrary human constructs at most. They are rather the extrapolations of our will aimed at power [*Willen zur Macht*], not more than some sort of artificial social constructs. From this perspective of the social process, at first, we invent something, then, as a result, we so to say populate the world with “facts”. Yet, this is extrapolation proper.

However, “objective reality” is not inherent in facts. Facts are ultimately nothing other than relational concepts, which are recording that in our personal existence we relate to certain aspects of reality in given ways. Thus, the process of “establishing facts” purports that we have selected some part – for practical reasons, e.g., to serve our so-called “cognition” – from some relative whole that we call “reality”. By this we concomitantly give expression to the realisation that we are somehow personally involved in the process of claiming something to be a fact. Accordingly, when we say “fact” we declare our cognitive approach to some aspects of reality selected from the total whole regarded as reality (Varga, 1995, ch. 2, 25-55).

According to the epistemological view that perceives the world as an aggregate of facts (this being the so-called naive realism), the world around us is composed of nothing but facts. Facts are simply present in our environment, being parts of nature. Thus, facts simply exist. They are given.

FRANK once made a startling remark: “For court purposes, what the court thinks about the facts is all that matters. For actual events ... happened in the past. They do not walk into the court.” (Frank, 1949, 15) What does this mean? Only an initiative to cognition can result in the establishment of some relationship with those

facts. It would be in vain to cry out: “Hey, people! Some fellows are killing each other here!” What could underlie such a cry can become a fact only through the process of cognition and through the naming done within cognition. Thus, “facts” in and of themselves are not parts of any trial, unless we – only provided that we are parties to a trial at all – take them there in the proper way and form.

FRANK’s expression also involves that facts do not “exist” in the sense that we might ascertain whether they prevail or not by simply observing their existence. Hence, facts do not “exist”. However, we can make statements about facts, in relation to facts, on their prevalence as facts, and so on. Therefore, from statements like “it has been established as a fact that...” we can definitely learn that (1) there is something with which we have entered a cognitive relationship, and (2) we have posited it as an element of cognition. The mere fact is that we make statements about states of affairs. More precisely, the fact lies exclusively in the way and by the force of which we establish this. So, facts are a result by the force of which we can establish that we have entered into a relationship with the existence of a thing, or with the accomplishment of an event – that is, with something the accomplishment of which is not in the least necessary.

This is a relational concept. Hence, to be able to talk about facts presupposes the existence and prevalence of our establishing a cognitive relationship with them. One of the further preconditions is to posit them as the subject of our cognition. Thus, when we speak of facts, we speak of something purely objective as well as of our subjective relationship to it. Properly speaking, establishing a relationship between the two actually leads to the stating of its prevalence as a fact.

What is the meaning of the extensive and intensive infinity of the world as termed by the philosophy of nature? The idea surveyed above

suggests the following option: the totality is one total entity. That is, the totality is totally interrelated and the separation of ‘construction’ from ‘operation’ within this totality can only be artificial, a purposefully invented purely mental construct. No such duality exists in “reality”, their discretely distinct qualities being merely human hypostases. Such a distinction can be made only on analytical grounds, for the sake and within the framework of our own explanation (Varga, 1995, 93, 113 & 152). In reality conceived like this, the number and configurations of aspects, relations and potentialities are infinite. And, as a matter of fact, material reality does not have any “aspects” whatsoever. “Things” of the world – objects – simply exist and prevail. It is merely an additional aspect that we humans eventually exist and occasionally establish some relationship with certain things. However, in order to establish a cognitive relationship with things, we must endow them with certain characteristics and aspects. We must pick out a characteristic only selected by us from the total context of the total whole, isolate it as an independent bearer of some feature(s), and then name it as such. In order to be able to “reasonably” relate to two items we must create some kind of “analogy” between them by means of abstraction. Seeking such analogies is not fictitious in the sense that the characteristics or aspects serving as bases to an analogy are indeed to be prevalent regardless of our actions. But it is man-made and artificial in the sense that the characteristic concerned is identified by a creative human initiative through isolating those objects from the total whole, shedding light on and naming them. The number of feasible relations between two stones the world is infinite, and so is the number of possibly relevant aspects.

Social conventions, presuppositions and paradigms undoubtedly play a role in the processes of appropriating reality. For example, let us take an elementary situation: what can a human do

to his partner? Within the European civilisation we believe that there is no magic any more, and even the description of nature can be achieved, to the extent possible, through its “own” terms (not presuming the direct intervention of God). The world becomes “reasonable” due to such – and not other – presuppositions and paradigms.

The primary consequence of this is that we at least feel comfortable somewhere and this is in our own culture. When in contact with another culture, we necessarily lose the thread of interpretation and the bases of understanding.¹ For example, in a culture of magic the actors must deal with entirely different conditions. In the once British Commonwealth former colonisers met plenty of situations in the tribal cultures ruled by the principles of English law, when the natives realised that an evil eye was cast upon them and they were bound to defend themselves. Since the evil eye is deadly, its threat must be just as deadly. So, it is not by mere chance that the defence wielded against these threats might cause the injury of those casting the evil eye, perhaps even (and justifiably) their death. However, the natives had to defend themselves because if they had not done so, they would have endangered not only their lives but the chances of their after-lives as well. The British regarded such similar considerations as blank superstition, which they considered to be against the minimum conditions of civilisation, and since it qualified as a threat to life it deserved unconditioned punishment (Seidman, 1966; Saltman, 1991). In sum, it is our cultural dependence that selects the conceivable aspects of fundamental human relations, thus, among other things, what “can” qualify as facts.

Inasmuch as the world is infinite both extensively and intensively, the total whole is also wholly correlated at any given time. Totality is totally one, that is, totally interrelated. Consequently, the way we explain the construction and operation of the world, and what elements we

can use and in what configuration within it, will, in principle, be of infinite variety. In any kind of representation and reproduction, the variability of elements as well as the sets of arrangements and the configurations thereof will also be infinite. It is our practical interests towards and our practical relationship to the world that will select what we elevate (isolate, identify and name) from among these.

The Greek concept of ‘truth’ involves precisely such a connection. *Tālethes* in the original sense means that we elevate, pick up and hold something to the light (Kendal, 1980, especially 2, 3, 12 & 21-22). This already presumes some relationship. We can only elevate, pick up and hold something to the light if leaving everything else in its environment in the shadow. By pronouncing *tālethes* we confess that there is an agent in operation, and this is us, subjects who want to cognise by elevating something and shedding light on it. This agent draws something into the range of its inquiry, but by doing so overshadows everything else. Thus, the classical Greek understanding of the truth already implies, at least on an intuitive level, the recognition that truth is based on selection. By declaring something to be the truth we deny the truth (taken in the same sense) of everything else. That is to say, numerous other considerations could also be regarded as truths, but we selected exactly the one we needed in the given context. Obviously, the story here is not at all about us being hopelessly subjective. Conversely, what it speaks about is that humans create their social world through their practice, and they do so in a manner continuously fed back by the results of the same practice. Or, “social scientific theories ... are based on pretheoretical suppositions. ... They are normative assumptions about the nature of man, the nature of society, and the relationship between man and society.” (Israel, 1978, 63)

In consequence, what we regard as self-evident in a given context also depends on our cultural presuppositions. We think that water is simply composed of two units of hydrogen and one unit of oxygen. Although, closer analysis may reveal that in practice we know as many kinds of water as there are various cultural uses for it. So ‘water’ does not depend on its concept and chemical composition, but on its practical uses and recognised human utility as sea-water, river-water, lake-water, brook-water, rain-water, the water from melted ice, or the humidity gained from collecting morning dew (etc.). In other words, it is the social interpretation of vital (geographical, meteorological, and further on) conditions that determines the types of water we distinguish and name in language. Some languages apply dozens of distinctions to specify what the clouds, rain, snow and ice are like, or what the water is like in a ditch or a brook. Hence, we can by no means state that ‘water’ just “exists”. For it is not the so-called ‘water’ that exists with such self-evident unambiguity, but the aggregate of culturally defined relations within the frameworks of which water is perceived by us, actors, who share its curses and blessings in our practice (Balekjian, 1984).

Example 2: What are notions?

The objectivist trend claims about notions that they (1) reflect reality; (2) have clear-cut boundaries; and (3) “objectively” correspond with reality, (4) providing a neutral, objective, and true perspective on reality. The subjectivist trend claims that notions (1) can only reflect themselves, (2) are arbitrary, (3) rely on historically incidental social conventionalisation, and (4) build on the continued actualisation of the respective social practice by re-conventionalising conventions.

Let us have a look at what the so-called naive realism says on the tenets of the objectivist trend.

Ad (1): Is the notion a reflection? For a naive realist, we have reality on the one hand, and our thinking capacity on the other, and we reflect the former on the latter, while mentally processing the former through the instrumentality of language. Needless to say, we make use of our thinking capacity through language in order to mentally reconstruct reality: we reflect it, or at least model it, even if somewhat transforming its form. Patterns, however, always differ from the patterned to some extent, but are still the same concerning certain relevant and determinant features. They are not mechanical or photographic mirrors, but something to which we have also contributed in the process of their selection and creation.

Ad (2): Do notions have clear-cut boundaries? For a naive realist, notions are reflections of reality with boundaries defined by nature. By means of rational reconstruction, science must strive to draw the boundaries of notions as accurately as possible. So, what we achieve through cognition is the reflection of what has already been inherent in the thing.

Ad (3): Do notions “objectively” correspond with reality? When cognising, we only pattern the construction, organisation and stratification of reality on a conceptual plane, and, accordingly, our notions on reality will be nothing other than the reflections of the structure of reality.

Ad (4): Do notions provide a neutral, objective and true perspective on reality? This assumption suggests we should apparently be able to cognise without having our existence (human and social perspectives) reflected in the process of cognition in one way or another.

What does subjectivism suggest from the opposite positions? And, how can the contradiction between the two extreme views be converged into one synthetic cognitive view?

Ad (1): In philosophy, NIETZSCHE started arguing that man – *nolens volens* – always speaks

of himself, projecting his own desires onto theses of cosmic dimensions even when engaged in theory-construction. Although we may be able to reveal some agreement-like congruencies between people, these still do not reflect reality but our most intimate desires at most.

This apparent extremism of subjectivism does not lack all truth, as far as its critical directions are concerned. LUKÁCS once used in his *Ontology of the Social Being* a rather appropriate expression when, assessing the ontological correspondences of cognitive images of reality, he referred to “tendential unity”.²

There is a school of language philosophy, which claims that language is of metaphorical origin and nature (Lakoff & Johnson, 1980). From among the pioneering opinions, VAIHINGER’s doctrine of fictions claimed that we always act in a way as if doing something else: for instance, when we refer to a norm we actually pattern the desirable order of reality (Vaihinger, 1911). Accordingly, we do not (and cannot) know what reality is, but we nevertheless make certain kind(s) of propositions(s) about it. It is plainly enough for us to make it conscious that we thereby merely give expression to our belief that it would be satisfactory if reality were like this, because it will be enough for the successful continuation of our practice to posit only this much about reality.

Hence, our system of concepts is by no means a mechanical mirror linked to certain aspects of reality either arbitrarily or exhaustively, but an image which is concomitantly an aspect and conceptual projection of our human relations upon reality.

Ad (2): Since notions cannot be found in reality, it is ourselves who treat the realm of notions as if they had (could have) any boundaries at all. “The ‘reality’ which we apprehend in perception and direct intuition presents itself to us as a whole in which there are no abrupt separations.” (Cassirer, 1961, 141)³

All of this by no means implies that our notions lack boundaries or limitations. It only means that when we debate and eventually misunderstand each other, one of the reasons for this may be that we use notions in different ways. In such a case, we must clarify with ourselves and between each other that we can only continue our debate reasonably insofar as we conceptually distinguish these differently understood notions.

For instance, equality of rights is violated by both positive and negative discrimination amongst ones supposed to be otherwise equal. The intervention of legal policy narrowing the equality of otherwise equal parties may in such cases weaken the principles of the legal order through its practical constraints, to fundamentalise it so as to become chaotic. That is, in such a practical case *tertium datur* on the final analysis. Since between the two extreme values – i.e., the conceptually divided and unconditional self-identifying affirmation, on the one hand, and the unconditional refusing negation (as, for instance, affirmative action and negative discrimination, standing for inclusion and exclusion, respectively) – both neutrality and well-intentioned indifference may be wedged in.

Our presupposition that usually follows such a clarification suggests that the boundaries of notions have now been truly set by definitions given this way or by some tacit means. So from now on it appears as if notions had boundaries indeed. Yet, the history of human discourse proves the exact opposite, and this is one decisive lesson of linguistic reconstruction: questions of boundaries arise again and again, the more unclear the notional relations which describe things, the more often. The final outcome is even more troublesome. As we may know from historical experience, social and moral issues cannot be settled once and for all. And this is so

not because humans cannot recall past events due to their feebleness or because being natural-born trouble-makers they even destroy their own past as if driven by bad instincts. On the contrary: it is a basic fact of socio-ontological importance that in historical dimensions and in an overall social context man never does anything in vain, and whatever he ends up doing he does because he feels that he must – on the basis of his usual deliberations, sober reflexion and responsible choice.

Let us elucidate the issue with an example from legal history. After completing his investigations on the driving forces of Roman legal development, the Scottish historian of private law WATSON launched another comparative inquiry (Watson, 1974). He proved that we can hardly speak of legal development proper. Man is one of the ugliest and laziest creatures on planet Earth: he does not create anything unless bare necessity forces him to. And if he finally ventures anything, he does it with minimum effort. So, if there is any chance, he follows beaten paths, works with ready tools, and always uses – by adapting – the ones at hand. Therefore, he invents something only when there is no idea or thing available in his environment to shape further or re-adapt. So necessity urges him to be creative, to consider making his own move, or even to invent something.

WATSON'S historical justification steps from a trivial example. Namely, on the territory of the Fertile Crescent (in ancient Mesopotamia), the goring of an ox proved to be a deadly danger. It happened very often, so the question of who was liable for the damage and what compensation was due had to be regulated by law. Well, in this civilisation extending over an immense territory, all the autochthonously evolving cultures used the same construct, the normative wording of which (although in different local languages) was even the same (Finkelstein, 1973; Jackson,

1974). Looking for further proof, WATSON found a similar example in JUSTINIAN'S codification. For the conceptual distinctions and classification applied in JUSTINIAN'S *Institutiones* – its structure and breaking down not being self-evident or even the sole alternative in the context of the late Roman historical development – have in fact become the standard pattern for internal systematisation especially of the civil law on the European continent. Accordingly, our entire legal culture seems to rely on inveterate conceptual incidentalities, random improvisations, findings, moreover, sometimes even gross errors and misunderstandings. For we are accustomed to taking every ready or half-ready tool and conceptual initiative from the treasury of the past and simply re-adapting it if we so need, often without any genuine critical reconsideration, unless some strange and rather exceptional reason forces us to act differently.

So, all phenomena, situations and events are of infinite variety. Human interest approaches them in various ways, differentiating and naming almost randomly selected correlations from among them as aspects, to build them back later into the phenomenon, situation or event in question in the course of their theoretical reconstruction. This is the reason why human cognition is claimed to be reflective and constructive at the same time.

In the final analysis, boundaries of notions are in function of the discourse (situation or context) to a certain extent. Every discourse questions and challenges these boundaries recurrently, because each discourse is in principle a new discourse: it differs from the previous one as it requests an answer for a situation somewhat modified since then in some of its aspects. In the same way, in English law, the hundreds, thousands or even millions of cases embodied in and by the body of precedents accumulated do not add up to an exhaustive system, for it is by far not necessary

that the new situations emerging at any given time require an answer along the same path taken once by a past individual decision. The judge may recourse to novation in any phase of the procedure, by presenting – with reference to equity, justice, or to other pleas and exceptions, as well as measures and steps to take – the decision he suggests as providing a relatively new answer to an entirely or partially new situation, or to newly conceptualised facts that may constitute a case in law, that is, a different answer reacting more sensitively and suitably to the issue, in followance from the deliberation of those principles that may come into account.

As a general theoretical conclusion, in principle, notions are open because their closure cannot be but casual: done artificially, exclusively in given direction(s) and context(s), with validity for the given discourse(s) only. The availability of a notion in and of itself, with boundaries marked within and for the given discourse, never anticipates future boundaries. Each discourse has to face a new situation with new contextual potentialities, therefore it has a chance to resolve or question any kind of earlier closure by modifying and re-actualising these notional boundaries (with the prospect of re-conventionalisation).

Ad (3): This is the framework within which the question of whether notions can “objectively correspond” with reality can be raised at all. Well, we usually prefer those sets of notions which display more potential in justifiability and less in falsifiability. We want to maximise justification and minimise falsification at the same time. We are also bound to realise that we can only justify or falsify a theory by means of another theory, since we do not have any direct media or instruments of control at our disposal.

Within a given world-view and set of underlying paradigms, one accepts that theory as true, proven or at least provable, which corresponds the most to given methodical

principles of the scientific methodology accepted by the relevant community at a given time. Only that theory must be accepted and preferred to other feasible alternatives, which displays the strongest explanatory force with the least exposition to attack.

Summary

The respective trends can be characterised as summed up in the table below (Lakoff, 1989):

The progress achieved within the last decades from the standing positions stabilised in the past century is striking (Varga, 2011).

	objectivism	subjectivism	modern conception
fact	'objective reality': the thing itself	arbitrary social construct	cognitive relationship selected by man and supported by his interest
system of concepts	reflection of reality	reflection of itself	covered by realistic features of reality, but concomitantly shaped by man's interests towards reality
	objectively corresponds with reality	relies on arbitrary social convention	its openness in a given direction can only be closed down artificially
	neutral and objective, providing true perspectives on reality	built upon the re- conventionalisation of conventions	never detachable from the prevailing world-view, tradition and cultural presuppositions
logic	the thing itself: the course, interconnection and sequence of things; aspects and necessity thereof	external web, applicable or non-applicable at discretion	the mathematics of descriptive propositions: claims that insofar as we make propositions within the same context and in the same time, and link these propositions conceptually, then, once a premise or conclusion is accepted as true or false, we thereby establish a deductive relationship between its truth or falsity
thinking	builds upon the paradigm of distinguishing between the essence and the phenomenon	everything is arbitrary	there is no metaphysics of things: only the practical relationship of man to things selects and names the things
	value-indifferent, objective, which relies on logical rules	builds upon personal conviction	
	progresses from the general to the concrete	its direction is arbitrary	

¹ For instance, under the conditions of the standardisation of health procedures globalised, the feasibility of a culture-specific interpretation has as well to appear as a scientific problem (Landy, ed., 1977; MacLeod & Milton, ed., 1988).

² "In one way or another, these subjects are from the beginning confronted (eventually: short of perishing) with the scope of action given to them in the total process at any time. Accordingly, a certain tendential unity will assert itself on every domain, without lending a kind of absolute unity to the process (in the sense of the old materialism or as a logical consequence following from HEGEL's logic)." (Lukács, 1971, 296)

³ As to the use of concepts all this notwithstanding, logic separates so-called class-concepts deciding on inclusion from so-called order-concepts suitable only for characterisation (Hempel & Oppenheim, 1936).

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**Парадигмальные предположения
мышления в праве: философия науки
и методология научного суждения**

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В статье рассматривается, что на самом деле означает концепция, а также логика и мышление в контрасте объективизма и субъективизма, а также их компромисс в постмодернизме.

Ключевые слова: факт, концепция, логика, мышление, объективизм, субъективизм.
