CORE
Metadata, citation and similar papers at core.ac.uk
Provided by Jagiellonian Univeristy Repository

Revus
Journal for Constitutional Theory and Philosophy of Law / Revija za ustavno teorijo in filozofijo prava

27 | 2015
Emergence, Coherence, and Interpretation of Law

On *tû-tû*

Bartosz Brożek

Publisher
Klub Revus

Electronic version
URL: http://revus.revues.org/3426
ISSN: 1855-7112

Printed version
Date of publication: 11 décembre 2015
Number of pages: 15–23
ISSN: 1581-7652

Electronic reference
Bartosz Brożek, « On *tû-tû* », *Revus* [Online], 27 | 2015, Online since 29 January 2016, connection on 14 December 2016. URL : http://revus.revues.org/3426

The text is a facsimile of the print edition.

All rights reserved

On *tû-tû*

My goal in this short paper is to argue that so-called intermediary concepts play an essential role in organizing and generating legal knowledge. My point of departure is a reconstruction and a critique of Alf Ross's analysis of such concepts. His goal was to argue that there exist concepts in the law which have no semantic reference, yet it is reasonable to use them as they perform some useful function regarding the presentation of legal rules. I believe that Ross is wrong on both counts: his argument to the effect that intermediary concepts have no reference is flawed, and his characterization of the functions such concepts play in the law is too limiting.

1 ROSS'S ARGUMENT

In his famous paper of 1951 Alf Ross takes us to the imaginary Noîsulli Islands in the South Pacific to meet the Noît-cif tribe.[1] In the language of Noît-cif there exits the concept of '*tû-tû*'. Whoever encounters his mother-in-law, or kills a totem animal or has eaten the food prepared for the chief, becomes *tû-tû*. Whoever is *tû-tû*, is subject to a ceremony of purification. Thus, Ross observes that the following statements are true in the language of Noît-cif:

(1) If a person *x* has encountered their mother in law, *x* is *tû-tû*.

(2) If a person *x* has killed a totem animal, *x* is *tû-tû*.

(3) If a person *x* has eaten the food prepared for the chief, *x* is *tû-tû*.

(4) If a person *x* is *tû-tû*, *x* is subject to the ceremony of purification.

Ross further asks, what is *tû-tû*. And he replies that, it is "of course nothing at all, a word devoid of any meaning whatever. (…) The talk about *tû-tû* is pure nonsense."[2] The word has no semantic reference, although the expressions in which it appears are meaningful. In order to show that it is so, Ross observes that[3]

> the pronouncement of the assertion '*x* is *tû-tû*' clearly occurs in definite semantic connection with a complex situation of which two parts can be distinguished:

1 The paper appeared first in Danish. Below, I quote the English version, Ross 1957.

2 Ross 1957: 812.

3 Ross 1957: 814.

(i) The state of affairs in which *x* has either eaten of the chief's food or has killed a totem animal or has encountered his mother-in-law, etc. This state of affairs will hereinafter be referred to as *affairs*$_1$.

(ii) The state of affairs in which the valid norm which requires ceremonial purification is applicable to *x*, more precisely stated as the state of affairs in which if *x* does not submit himself to the ceremony he will in all probability be exposed to a given reaction on the part of the community. This state of affairs will hereinafter be referred to as *affairs*$_2$.

In order to show that '*tû-tû*' has no semantic reference, Ross considers the propositions (3) and (4):

(3) If a person *x* has eaten the food prepared for the chief, *x* is *tû-tû*.

(4) If a person *x* is *tû-tû*, *x* is subject to the ceremony of purification.

There are two ways of pinpointing the semantic reference of '*tû-tû*' – it may either be identified with *affairs*$_1$ or *affairs*$_2$. The natural move would be to substitute '*tû-tû*' with *affairs*$_2$ in the proposition (3), and with *affairs*$_1$ in the proposition (4). But this solution is unsatisfactory, since in such a case '*tû-tû*' would have two different meanings, and the argument based on (3) and (4) to the effect that a person who has eaten the food prepared for the chief is subject to the ceremony of purification would not be logically valid due to the fallacy of *quattuor terminorum*. The second option is to understand '*tû-tû*' as referring uniquely to *affairs*$_1$; this, however, will not do, since it would make the proposition (3) analytically void:

(3)* If a person *x* has eaten the food prepared for the chief, the state of affairs exists where *x* has either eaten of the chief's food or has killed a totem animal or has encountered his mother-in-law, etc.

Similarly, if one claimed that the meaning of '*tû-tû*' is *affairs*$_2$, the proposition (4) would become analytically void. Therefore, Ross concludes, '*tû-tû*' has no semantic reference.

At the same time, Ross claims that the use of such semantically empty concepts may be useful as an efficient method of the presentation of (legal) rules. Let us assume that in the culture of Noît-cif being '*tû-tû*' not only requires to undergo the process of purification, but also makes the person unfit for combat as well as for hunting. Thus, in addition to the proposition (1) – (4), the following two rules are valid:

(5) If a person *x* is *tû-tû*, *x* is unfit for combat.

(6) If a person *x* is *tû-tû*, *x* is unfit for hunting.

Now, the absence of the concept of '*tû-tû*' would make (the relevant part of) the Noît-cif legal system more complex, since the contents of the propositions (1)–(6) would become:

(1)[a] If a person *x* has encountered their mother in law, *x* is s subject to the ceremony of purification.

(1)[b] If a person *x* has encountered their mother in law, *x* is unfit for combat.

(1)[c] If a person *x* has encountered their mother in law, *x* is unfit for hunting.

(2)[a] If a person *x* has killed a totem animal, *x* is s subject to the ceremony of purification.

(2)[b] If a person *x* has killed a totem animal, *x* is unfit for combat.

(2)[c] If a person *x* has killed a totem animal, *x* is unfit for hunting.

(3)[a] If a person *x* has eaten the food prepared for the chief, *x* is s subject to the ceremony of purification.

(3)[b] If a person *x* has eaten the food prepared for the chief, *x* is unfit for combat.

(3)[c] If a person *x* has eaten the food prepared for the chief, *x* is unfit for hunting.

In this way, six proposition become nine different propositions. In the actual, more complex legal systems, the utilization of such 'semantically empty' concepts as '*tû-tû*' may be even more advantageous. For example, Ross considers the concept of ownership. In any legal system there are many ways of acquiring ownership (purchase, inheritance, prescription, execution, winning a bet, exchange, earning, etc.) as well as many consequences of being an owner (the right to use, sell, consume, alter, share, exchange, transfer, give away, destroy, etc.). The concept of ownership – or any other such intermediate link between different states of affairs – is simply an efficient way of structuring and presenting legal norms. However, it changes little when it comes to identifying the semantic reference of the term 'ownership' – it is "a word devoid of any meaning whatever" just like '*tû-tû*', 'right', 'duty' or 'claim'.

2 EVERY CONCEPT IS *TÛ-TÛESQUE*

I would like to argue in this section that Ross's argument to the effect that '*tû-tû*' is semantically void, is flawed. Let us consider one of the concepts Ross thinks to have semantic reference, e.g. 'totem animal'. Let us further assume that – in the culture of Noît-cif – the following propositions are true:

(7) If *x* is a lion, then *x* is a totem animal.

(8) If *x* is a tiger, then *x* is a totem animal.

(9) If *x* is an albino animal, then *x* is a totem animal.

(10) If *x* is a totem animal, then *x* should be worshiped by sacrifice.

Now, Ross's strategy for establishing the 'semantic emptiness' of '*tû-tû*' may be used to argue for the lack of semantic reference of the term 'totem animal'. It is enough to assume that *affairs*$_3$ stands for the state of affairs in which *x* is a lion, or a tiger, or an albino animal, and *affairs*$_4$ for the state of affairs in which worship by sacrifice is required towards *x*. Now, if one claims that the term 'totem animal' should be understood as referring to *affairs*$_4$ in the propositions (7)–(9), and as referring to *affairs*$_3$ in the proposition (10), one would never be able to arrive at a conclusion that a particular lion, tiger, or an albino animal should be worshiped by sacrifice (due, of course, to the fallacy of *quattuor terminorum*); if, on the other hand, the semantic reference of 'totem animal' would be fixed as *affairs*$_3$, the propositions (7)–(9) would become 'analytically void'; and if the reference was *affairs*$_4$, the proposition (10) would be 'analytically void'.

This line of argument can be extended so as to include *any* predicate (and also a proper name, if one applies Quine's procedure of translating proper names into predicates).[4] Let us observe that Ross's demonstration that a given concept has no semantic reference is made possible by simultaneously accepting two claims:

(a) a (partial) meaning postulate, such as "If a person *x* has eaten the food prepared for the chief, *x* is *tû-tû*";

(b) a norm in which the term under consideration appears in the description of a state of affairs that triggers the application of the norm, as in "If a person *x* is *tû-tû*, *x* is subject to the ceremony of purification."

Assuming that one can always identify a (partial) meaning postulate for any term, the possibility of carrying out Ross's argument to the effect that the term has no semantic reference hangs together with there being a norm in which the term appears in the description of a state of affairs that triggers the application of the norm. This is true also for the concepts, which – unlike '*tû-tû*' or 'totem animal' – are used also in extra-legal, extra-moral and extra-religious contexts. Let us consider the term 'food'; a partial meaning postulate for the term is, for example, "If *x* is a mango, then *x* is food". Now, it suffices that there exists a social nom such as "If *x* is food, then *x* should be shared among the members of the community", to arrive at a conclusion that 'food' has no semantic reference.

(A note at the margin: the confusion inherent in Ross's argument is clearly visible when one considers the epistemic status of the two kinds of propositions he contemplates in the '*tû-tû*' example. Meaning postulates, such as "If a person *x* has eaten the food prepared for the chief, *x* is *tû-tû*", are analytic statements in the sense that they are true in all possible worlds. Norms, on the other hand, such as "If a person *x* is *tû-tû*, *x* is subject to the ceremony of purification", are

4 Cf. Quine 1948: 21–38.

contingent, i.e. they hold only in some possible worlds. Due to space limitations I will not follow this line of critique; it seems, however, that Ross's mistake lies in confusing the intension of a term with its extension).

Our considerations so far reveal that there is no *logical* difference between '*tû-tû*' and, potentially at least, any other predicate. Thus, Ross's conclusion that such concepts as '*tû-tû*', 'obligation', 'ownership' or 'right' lack semantic reference can easily be applied to *any term*. This is, of course, highly paradoxical. Ross nowhere suggests that his analysis undermines the concept of semantic reference altogether. To the contrary – he tries to show that while some terms (such as 'chief', 'food' or 'ceremony of purification') have perfectly well defined referents, other concepts – '*tû-tû*', 'ownership', etc. – are mere presentation devices: they simplify the structure of the legal system, but carry no ontological baggage.

This, ultimately, is Ross's goal: he tries to establish a metaphysical claim to the effect that some legal concepts ('ownership', 'right' or 'obligation') do not refer to any existing entities. However, as we have seen, this cannot be done through mere logical means, since it is possible to show – in the same way – that any concept, which fulfills certain criteria (i.e., features in the description of a state of affairs which triggers the application of a legal norm), refers to no existing entity. In other words, the claim that some concepts have no semantic reference while others do, is *pre-logical*: it is determined by the chosen ontology. For example, Ross seems to assume that such concepts as 'chief', 'food', 'totem animal' or 'the ceremony of purification' refer to something, while '*tû-tû*' or 'obligation' do not. In light of this I believe that the best way to reconstruct Ross's argument is to say that it aims at *defending* a certain ontological stance and runs roughly as follows: if you are an adherent of a purely naturalistic view of the law, you face a difficulty when considering some legal concepts such as 'ownership', 'obligation' or 'right', since the way they are used in the legal discourse suggests that they refer to some existing phenomena. Ross's analysis shows that one can avoid this unwanted conclusion – it is logically consistent to treat the aforementioned concepts as devoid of semantic reference, while insisting on their usefulness in the structure of any legal system. Viewed from this angle, Ross's argument is a *defense* of a certain metaphysical view of the law; it aims to show that such a metaphysics is possible, and not that it is the necessary way of looking at legal phenomena.

3 WHAT *TÛ-TÛ* CAN DO?

Ross admits that intermediate concepts – such as '*tû-tû*' or 'ownership' – play a positive role in any legal system, since they enable a more efficient technique of the presentation of legal rules. I believe it is an understatement. Below,

I would like to show that Ross underestimates what *tû-tû* can do; I would even go as far as saying that it would be difficult to imagine a functional legal system without any intermediate concepts.

The first function of intermediate concepts is to *increase coherence* in the legal system. But what is coherence of a set of propositions? The measure in question is determined by taking into account: (a) whether the set is consistent; (b) what is the level of inferential connections between the members of the set; and (c) what is the degree of the unification of the set.[5] A set of proposition which is inconsistent is also incoherent. For any consistent set of propositions, its degree of coherence increases with the increase of the inferential connections between the propositions it contains and its level of unification. There exist inferential connections between propositions belonging to a given set if they can serve together as premises in logically valid schemes of inference. In turn, a given set of propositions is unified if it cannot be divided into two subsets without a substantial loss of information. It is important to stress that the concept of logical coherence is not a binary one; coherence is rather a matter of degree.

Let us come back now to our initial example. The set of propositions:

(1) If a person *x* has encountered their mother in law, *x* is *tû-tû*.

(2) If a person *x* has killed a totem animal, *x* is *tû-tû*.

(3) If a person *x* has eaten the food prepared for the chief, *x* is *tû-tû*.

(4) If a person *x* is *tû-tû*, *x* is subject to the ceremony of purification.

is coherent, since it is consistent. The degree of its coherence is determined by the fact that there exist inferential connections between its elements. (1) and (4), (2) and (4), as well as (3) and (4) may be used to derive three new propositions: "If a person *x* has encountered their mother in law, *x* is subject to the ceremony of purification", "If a person *x* has killed a totem animal, *x* is subject to the ceremony of purification", and "If a person *x* has eaten the food prepared for the chief, *x* is subject to the ceremony of purification". The set is also unified: if one divided it in any way (say, into two sets – {(1), (2)} and {(3), (4)}), one would lose some substantial information (i.e., it would no longer be possible to derive "If a person *x* has killed a totem animal, *x* is subject to the ceremony of purification", and "If a person *x* has eaten the food prepared for the chief, *x* is subject to the ceremony of purification").

Let us now compare our initial set with the following alternative, where the concept '*tû-tû*' is eliminated:

(1)[a] If a person *x* has encountered their mother in law, *x* is s subject to the ceremony of purification.

5 Cf. Bonjour 1985, Brożek 2013.

(2)[a] If a person x has killed a totem animal, x is s subject to the ceremony of purification.

(3)[a] If a person x has eaten the food prepared for the chief, x is s subject to the ceremony of purification.

The resulting set of propositions, even if smaller than the original one, is much less coherent. It is consistent, but there exist no inferential connections between its elements, and it is not unified – one can divide the set in a number of ways way without any loss of information.

But why coherence matters? An in-depth analysis of this problem exceeds the scope of this short note. However, it seems that the degree of coherence is closely correlated with a number of cognitive factors. Arguably, high degree of coherence enables us to better comprehend, learn and remember the given set of rules, and apply them in a more efficient way. A legal system which would be coherent only to a small degree would be dysfunctional, as illustrated by those historical legal systems which were highly casuistic.

The second role played by intermediate concepts is *heuristic*, and it may help increase the completeness of a legal system.[6] Let us imagine that the council of elders of the Noît-cif tribe has to decide the fate of an individual who has killed an animal. It was not a totem animal, but a beast killed only once a year during a special ceremony and the only source of meat for the chief's diet. If the Noît-cif primitive legal system did not contain the intermediary concept of '*tû-tû*', the council of elders would have to devise a completely new legal rule governing the case at hand; however, given the pivotal role of the concept of '*tû-tû*' in the cases of killing a totem animal and eating the food prepared for the chief, the council would have some guidance in deciding the novel case and would probably arrive at the conclusion that the individual who committed the killing should be subject to the ceremony of purification.

Let us consider another example. According to Ross, ownership is only an intermediary concept, a link between some states of affairs and their legal consequences. Let us assume that in some legal system there exist only rules pertaining to the ownership of movable and immovable things, and the legislator must consider the introduction of a new set of rules regulating intellectual property. It is clear that the existing concept of ownership is useful in such an endeavor. The legislator does not have to devise a completely new system of norms for intellectual property, but instead works within the framework of the existing model of ownership, only adapting it to the peculiar character of the problem under consideration. In other words, introducing intellectual property into the existing framework of rules governing ownership is different than designing a completely new legal institution. In the former case, the process may

6 Cf. Lindahl 2003: 185–200, Ashley & Brüninghaus 2003: 153–162.

be called adaptation – one takes advantage of existing solutions, justifications, and the entire body of legal knowledge that surrounds the concept of ownership; in the latter case, however, intellectual property would be an institution built from scratch, an essentially novel set of rules with no background knowledge to guide the legislator in their endeavor.

It should be clear from the above examples that intermediate legal concepts have more to offer than a helpful 'form of presentation' of legal rules – they perform an important heuristic function. Whenever one decides a hard case or considers regulating an as-yet unregulated sphere of social interactions, one is better off with '*tû-tû*'-like concepts than without them.[7]

* * *

I believe that the above considerations support the conclusion that the picture of '*tû-tû*' and other intermediary legal concepts as painted by Ross is a bad caricature. Such concepts are more useful than Ross imagines – they not only generate much coherence in a legal system, but can also serve as a heuristic tool whenever one faces a novel situation or a hard case. '*Tû-tû*' and similar concepts are powerful tools which shape our legal systems.

—***Acknowledgement.***— This contribution was made possible through the research grant 'Naturalizacja prawa' sponsored by the National Science Center. It first appeared in English in *Revista Utopía y Praxis Latinoamericana* 20 (2015) 71.

Bartosz Brożek
Professor of Law and Philosophy,
Jagiellonian University, Krakow and
Copernicus Center for Interdisciplinary Studies, Krakow

7 See also insightful comments in Sartor 2008.

Bibliography

Kevin D. ASHLEY & Stefanie BRÜNINGHAUS, 2003: A Predictive Role for Intermediate Legal Concepts. *Proceedings of the Sixteenth Annual Conference on Legal Knowledge and Information Systems (Jurix 2003)*. Ed. Danièle Bourcier. Amsterdam: IOS Press. 153–162.

Laurence BONJOUR, 1985: *The Structure of Empirical Knowledge*. Cambridge (Ma): Harvard University Press.

Bartosz BROŻEK, 2013: Legal interpretation and coherence. *Coherence: Insights from Philosophy, Jurisprudence and Artificial Intelligence*. Eds. Michał Araszkiewicz & Jaromí Savelka. Dordrecht: Springer.

Lars LINDAHL, 2003: Operative and Justificatory Grounds in Legal Argumentation. *Associations* 7 (2003) 1. 185–200.

W. V. O. QUINE, 1948: On What There Is. *Review of Metaphysics* 2 (1948). 21–38.

Alf ROSS, 1957: Tû-Tû. *Harvard Law Review* 70 (1957) 5. 812–825.

Giovanni SARTOR, 2008: Legal Concepts: An Inferential Approach. *EUI Working Papers* LAW 2008/3. URL:www.eui.eu.