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ANDRZEJ BATOR[a]

ZYGMUNT ZIEMBIŃSKI'S CONCEPT OF THE LEGAL NORM FROM A STRUCTURALIST PERSPECTIVE

ZYGMUNTA ZIEMBIŃSKIEGO KONCEPCJA NORMY PRAWNEJ Z PERSPEKTYWY STRUKTURALISTYCZNEJ

In the article I present the concept of the legal norm of conduct proposed by Zygmunt Ziembiński, situating it in the context of the structuralist research attitude – a methodological approach dominant in the Polish theory of law in the period when this key element of Ziembiński's theory of law was created and shaped (the 1970s and 1980s). I illustrate individual fragments of the presented concept with selected quotations that are representative of the structuralist research approach. In my view, structuralism makes it possible to understand both the overwhelming influence of Ziembiński's concept of the norm on the Polish legal theory of the second half of the twentieth century, as well as to explain the causes of the controversies that this concept provoked in some representatives of Polish jurisprudence. I also draw attention to the evolution of the concept in question, including the weakening of its structuralist overtones in the last years of the Professor's scientific work. An example that exemplifies this tendency is the concept of competence norm.

Keywords: Zygmunt Ziembiński's theory of the norm; structuralist research method; competence norm; conventional action rule; synchronic and diachronic perspectives

W artykule przedstawiam koncepcję prawnej normy postępowania Zygmunta Ziembińskiego, ukazując ją w kontekście strukturalistycznej postawy badawczej – podejścia metodologicznego dominującego w polskiej teorii prawa w okresie, w którym powstawał i kształtował się ten jeden z najważniejszych elementów teorii prawa Ziembińskiego (lata siedemdziesiąte i osiemdziesiąte XX w.). Poszczególne fragmenty prezentowanej koncepcji obrazuję wybranymi cytatami, reprezentatywnymi dla strukturalistycznego podejścia badawczego. W mojej ocenie strukturalizm pozwala zarówno zrozumieć przemożny wpływ koncepcji normy Ziembińskiego na polską teorię prawa drugiej połowy XX w., jak i wyjaśnić przyczyny kontrowersji, które koncepcja ta wywoływała u niektórych przedstawicieli polskiego prawoznawstwa. W artykule zwracam również uwagę na ewolucję omawianej koncepcji, w tym na osłabienie jej strukturalistycznego wydźwięku w ostatnich latach twórczości naukowej Profesora. Przykładem, na tle którego egzemplifikuję tę tendencję, jest pojęcie normy kompetencyjnej.

Słowa kluczowe: teoria normy Zygmunta Ziembińskiego; strukturalistyczna metoda badawcza; norma kompetencyjna; reguła czynności konwencjonalnej; perspektywa synchroniczna i diachroniczna

[a] University of Wrocław, Poland / Uniwersytet Wrocławski, Polska
andrzej.bator@uwr.edu.pl, https://orcid.org/0000-0003-4772-7920

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As early as the 1920s, Czesław Znamierowski wrote that 'the issue of the norm of conduct, the legal norm in particular, is an almost central issue for theory of law, or perhaps even the central issue in the strict sense'.[1] I have not found find such a firm declaration in Zygmunt Ziembiński's writing, yet the evident inspiration he draws from Znamierowski's thought and, above all, his body of work in the field of analytical theory of law, appears to corroborate the above position of the pioneer of the Poznań theory and philosophy of law. This concurrence leads to another coincidence, namely to the fact that the norm – as adopted by Ziembiński – is situated within the methodology of the legal sciences. Characterizing the research scope of the latter, Ziembiński stated that 'reconstructing the essential conceptual apparatus of legal language, the task typical of general jurisprudence, especially where analytical jurisprudence is involved, is ... by necessity a preliminary task of the theory of law.'[2] I believe that both Ziembiński and Znamierowski would have subscribed to Austin's well-known maxim that 'we are using a sharpened awareness of words to sharpen our perception of ... the phenomena.'

The priority of methodological challenges based on conceptual analysis over research on the real (social) dimension of law was an expression of Ziembiński's scholarly attitude. That attitude corresponded to his notion of science which, after Kazimierz Ajdukiewicz, meant the 'entirety of mental activities aimed at attaining adequate cognition of reality and systematization of the acquired knowledge'.[3] Next to justification, there was the requirement to order the propositions one formulates and the research problems with which one engages. The ordering function is pursued by constructing an appropriate set of fundamental concepts, in line with the recommendations of the reconstructionist mode of semiotic analysis.[4] The search for a systematics of research problems resulted in the already classic problem triad of jurisprudence (dogmatic, socio-technical and theoretical questions). Ziembiński was somewhat hesitant only when having to distinguish methodological issues; ultimately, he went no further than recognizing it as a 'second degree' theory, a superstructure on the theory of legal phenomena. Apparently, 'poor advancement of research' in this area was the reason behind his hesitation, as he found that the organizational autonomy of the methodology of legal studies would have been premature, albeit only to be expected in the future.[5]

By way of anticipating the latter, Ziembiński advocated developing multifaceted research into law, simultaneously noting the need for its juridical adaptation. In his opinion, 'in the study of law, as a peculiarly constructed

[1] Znamierowski (1934): 20.

[2] Ziembiński (1980): 15; see also Ziembiński (1974): 204. A similar position was adopted by Znamierowski. Czepita (1988: 23–27, 113) observed that 'Znamierowski's reflection focused on the basic concepts in legal sciences. The analysis of the concepts was to be the sole source of scientific knowledge, their application to reality.' Similarly, Lorini (2010): 22.

[3] Ziembiński (1974): 9.

[4] Ziembiński (1980): 92–93. Czepita (1988: 115) found that a similar style of analysis was employed in the writings of Znamierowski, referring to a 'reconstructionist-minded analysis of legal and juridical concepts'.

[5] Ziembiński (1974): 78–79.

system of norms, the legal sciences would be akin to the sciences concerned with other kinds of cultural products ... subject to apposite interpretation that is specific of the humanities.' The appositeness in question was associated with the capacity for explanation based on idealizational propositions.[6] The methodological project of humanistic interpretation caused, for instance, norms of conduct to be downgraded as concretized statements (the so-called specimen norms) and promoted recognizing the norm as a 'construct of the legal doctrine'[7] or – drawing directly on the concept advanced by Jerzy Kmita and Leszek Nowak – a 'theoretical construct of an idealizational nature.'[8] Once formulated in this fashion, the methodology of conceptual legal analysis would serve as the underpinning for the theory of law as a theory of action. This is because Ziembiński – after Tadeusz Kotarbiński – assumed that the methodology of sciences is a part of praxeology, whereas attaining knowledge of reality is a preliminary condition for effective action.[9]

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At the roots of Ziembiński's deliberations on legal norms one finds assumptions that are characteristic of the so-called structuralist approach (method) in research. This observation is not based on Ziembiński's own declarations, but I believe that such a notion may be inferred from his works on norms (and other issues) as well as from the general scientific 'climate' that accompanied Ziembiński's most influential achievements in the 1970s. In fact, the main theme of the following disquisition will consist in deciphering' the influence of structuralism on Ziembiński's views of how the legal norm should be construed. It is to be hoped that the structuralist research premises will make it possible to rationalize why the conception of the legal norm of conduct by the Poznań theorist provoked some turbulent response, even criticism, in Polish jurisprudence. One caveat, however, must be made. The concept of a structuralist approach (method) is multiaspectual, and the related commentaries and critiques are very extensive,[10] which is why it will not be discussed here, given the limited scope of the paper. Instead, I will only focus on selected, relatively uncontested (to some degree encyclopaedic') premises identified with this research method which, moreover, may be considered relevant from the standpoint of inquiry into legal norms of conduct.

The first premise is the ideal of knowledge asserted by the structuralists:

> [1] It opposes any view which contends either the specificity of the methods in humanistic research or the specificity of the results achieved in the humanities. … Structuralism strives to grant humanistic research the status of knowledge which is scientific and capable of being formalized.[11]

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[6] Ziembiński (1974): 81.
[7] Ziembiński (1980): 147.
[8] Zieliński, Ziembiński (1988): 79.
[9] Ziembiński (1974): 8.
[10] See Schaff (1983): 7–14.
[11] Rosner (1987): 687.

Practiced in an analytical manner, the theory of norms could thus be regarded as proof of the external integration of the legal sciences – chiefly with structuralist linguistics (e.g. Chomsky) – and with logic above all, with a view to providing a basis for a programme of developing jurisprudence that would rely on stable, uniform methodological foundations modelled on natural science, which at the time (the 1970s) was considered better developed than the humanities. The 'logic' one referred to at the time involved reasoning informed mainly by formal logic, which was remote from the later (i.e. from the 1980s onwards) legal adaptations oriented towards argumentation theory. It is already symptomatic that between the early 1970s and the mid-1990s, the research unit headed by Ziembiński was designated as Department of Legal Applications of Logic. While jurisprudence sought to align itself with the then influential naturalist trends (in the methodological sense), an original proposal was advanced as part of the humanistic methodology (Kmita's humanistic interpretation), which was adopted for legal science by one of Ziembiński's most prominent students (Nowak). Thus, the nascent 'Poznań school of legal theory' gained a firm footing in the local philosophical and methodological circles. The programme of external integration of jurisprudence was anchored in the 'local internal integration', whose impact in the 1970s and 1980s went far beyond the Adam Mickiewicz University. Those particular circumstances, in terms of setting and organization, meant that Ziembiński's 'conception of the norm' cannot be considered in isolation from the philosophical and methodological milieu of Poznań and the impact of his colleagues from the then Department of Legal Applications of Logic, although Ziembiński's own influence was undoubtedly essential.

In domestic jurisprudence, there was no shortage of opponents of such a direction of external integration of jurisprudence. Criticism came mainly from the circles of the practically oriented specialized sciences which inquired into dogmatic-legal issues. It was feared that the realignment to a methodological pattern borrowed from the environment of science (with model physics/mathematics at its core) and driven by the idea of the unity of science and universalization of its propositions would distort the unique scope of the legal sciences and undermine the tested methods of solving legal issues.[12] Critics perceived legal theory as ancillary to the sciences concerned with dogmatic-legal problems. It is worth noting that certain influential legal theorists – although they did so *ex post facto*, in more recent studies – emphasized the social importance of the existing idiom of legal science and juridical practice, affirmed the necessity of recognizing the paradigm of legal dogmatics and maintained that the claims of legal theory must be contingent on the needs of the specialized sciences.[13] Representatives of a legal science thus oriented could not have

[12] As an example, one could quote the unified (public and private law) approach to competence and the competence norm, as well as the feedback from administrative and civil law scholars; see Zieliński (1996), and e.g. Szpunar (1993): 19.

[13] See Aarnio (1984); Peczenik (2003): 10; Leszczyński (2010).

been interested in debating the external integration of jurisprudence and the search for a universal, exemplary structure of the legal norm of conduct.

The striving to accord the humanities the status of scientific knowledge that may be formulated in precise terms had consequences for the studies concerned with the theory of norms.

> [2] The study of a given structure was [in fact] intended to focus on 'detecting the relationships (i.e. oppositions and correlations) that differentiate them and simultaneously combine them into a coherent system.[14]

From the standpoint of Ziembiński's legal theory of the norm, the above statement may be commented on as follows: the norm is the fundamental element of the relationships arising within the system of law. The properties of particular baseline components (such as phoneme, meaning, sentence and, for the jurist, 'legal provision' above all else) 'are determined by its belonging to a given structure and by the relationships in which it is found with respect the other elements of that structure.' 'Detecting' a 'system of relationships' encapsulated as norms in legal texts, whereby those relationships occur as substantive correlations (congruence) and oppositions (incongruence), required that the legislator's utterances be formally categorized and the provisions be given a uniform form of norms that are finite in terms of scope and characterized as unequivocal. Only then could those correlations and oppositions be ascertained (recognized) conclusively and, subsequently, under the assumption of the lawmaker's rationality, corrected for the sake of internal coherence of the system. This opened the way for formulating suitable rules that would govern the logical inference of norms.[15] Consequently, it became possible to detect legal oppositions and correlations upon meeting the requirement to approach norms as outcomes of a normative act and to accept a specific linguistic shape (internal structure) of such an outcome, which is indispensable in order to identify (reconstruct) particular norms from the normative material: a norm 'construed in a model fashion' as Ziembiński called it. It was no accident that 'putting in order' (concepts, argumentation) was one of the phrases which most frequently featured in the titles of papers written by Ziembiński, while the suggested understanding of the norm – contrasted with the legal provision – was to serve as the basis of the conceptual order introduced in jurisprudence.

Using the language of structuralist analysis, the notion of the legal norm was to convey that which was 'correct and repeatable', while the 'detection' of particular norms with definite content was the province of the science of law or legal doctrine. A legal provision, on the other hand, was an *event* that belonged to the domain of (linguistic) 'facts': it was a product of a 'speech act' of the legislator that required to be put in order by means of reconstruction,

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[14] Rosner (1987): 689–690.

[15] See Ziembiński (1980): 201–203. Despite the numerous controversies surrounding the 'logic of norms' (ibid.: 197–200), the author employs the phrase 'norm N2 following logically from norm N1', with the reservation that he is referring to 'colloquial intuitions related to 'following'" (ibid.: 201).

a process which 'technically' (syntactically) consisted in the provision being appropriately 'inscribed' into the accepted linguistic paradigm of the norm. Thus, formulated in line with the adopted linguistic paradigms, one-off events which had situational relevance for legal practice (legal provisions with definite content) acquired the quality of repeatability and correctness that the structuralists argued for:

> [3] The structural understanding of the term 'system' becomes fully comprehensible only in opposition to the category of event. The domain of empirical facts, speech acts and, in later development of the structuralist method, artistic creations and cultural behaviours as well, is the realm of events ... of that which, being individual and random, is opposed to structure, to what is correct, repeatable and social.[16]

An incidental – though anything but trivial for a practice-oriented jurisprudent – consequence ensued when the quest for the 'correct and repeatable' became dominated by the theory of norms: Ziembiński's was evidently circumspect with regard to having norms exemplified as 'thoroughly developed' utterances by means of appropriate source material. He repeatedly drew attention to the difficulties of arriving at a full set of rules, as well as the goals which the legislator has not verbalized.[17] In a critical commentary on the issue, Józef Nowacki observed as follows: 'For the purposes of straightforward cases of expressing obligations in legal texts, the assertions concerning the linguistic shape of a legal norm, including the disputes on the relationship between the norm and legal provision, may simply prove irrelevant, as in such situations it may be sufficient to use the concept of the legal provision alone.'[18] Conversely, when more complex patterns of articulating legal obligations occur in provisions, exemplification is usually avoided and, instead, one finds 'speculative deliberations on constructing or reconstructing *developed* legal norms, deliberations which are utterly detached from any reality ... and their authors do not even attempt to cite any illustration.'[19]

The concepts of the norm which drew on the agenda of a universal scientific language underscored the general and the repeatable. Exemplification was considered a practical problem, which took second place given the proposed linguistic model of the norm. It was approached as a matter of satisfying the scope of the adopted theory, which could be resolved only through a concretization of the adopted model.[20] Since it aspired to be a universal and conclusive

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[16] Rosner (1987): 691.

[17] 'With the fully developed norm of conduct, its scope of application must take into account a number of caveats which are partly implicit, partly formulated e.g. as general provisions of the legal act in question, and partly a consequence of the assumption of the rationality of the legislator. ... Similarly, [this applies to] the determination of the normative scope' (Ziembiński 1980: 132–133).

[18] Nowacki (1988): Chapter II.

[19] Nowacki (1988): 88–89.

[20] 'Namely, one should commence by adopting a certain formal conceptual apparatus, with few subsidiary content elements, and subsequently demonstrate the nature of the discrepancies between the notions of competence among the representatives of the various fields of jurisprudence' (Ziembiński 1991: 15).

in terms of scope, the proposed linguistic structure of the norm had to presume the ability of the developed norms to express all possible events, situations, behaviours as well as to resolve in unequivocal terms about the latter. The division into difficult and easy cases would gradually lose relevance for the theory of norms. Each case under adjudication was an event that was either congruous with the regularity or not. A particular case may have represented a challenge to judicial practice precisely because it concerned the realm of linguistic (legal provision) or empirical factuality (evidentiary findings).

> [4] The notion of structure (a complex of relationships) rather than elements (components of that structure) became the primary concept in structural analysis. The properties of individual elements are secondary, deriving from the network of relationships that make up the structure and the position that such elements occupy within it.[21]

The difficulties involved in formulating a 'fully developed' legal norm (constructing a complete specimen *N*) also affected the issue of validity in law. After all, in terms of categories, a theoretical model of a given language (a system enabling speech and, correspondingly, its normative set of features that describes the attributive properties that a language has or should have: Saussurean *langue* or *language*) is quite distinct from the utterances in which this model is materialized (acts of performing such a language – the Saussurean *parole* – or its recorded outcomes). The latter are dependent on spatial and temporal circumstances, while the potential performances may have an infinite number of different manifestations (acts and their outcomes). Any simplifying, model linguistic structure (for instance the assertion that the norm is constituted by an utterance following the pattern of: 'Let each *A*, in the circumstances *W* act in the manner *Z*') is inherently deficient in substance, whereas what bears significantly on practice, namely continual substitution of the variables *A*, *W* and *Z* with specific content may give rise to a hypothetically infinite multiplicity of variants. The task which the jurists-structuralists were expected to accomplish, that is, supply complete substance to at least one of the norms N1, N2 or N3 (not to mention the system of law), is practically unfeasible but, for a legal theorist who pursues a structuralist approach in research it is also pointless and unnecessary, because it does not tally with the research agenda. Their task is not to prove the extent to which the accepted theory of norm is met by citing legal linguistic facts (provisions), but instead to explore the 'surface structure' of utterances (provisions with a specific linguistic content) which comply with the adopted paradigm – the template of the norm – to extract and highlight the 'deep structure' of law.[22]

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[21] Rosner (1987): 689.

[22] It may be noted that Ziembiński's use of 'theoretical construct' to denote legal norm coincided terminologically with Chomsky's description of the 'grammar of language' (i.e. 'intellectual construct', meaning the model of internal grammar used by the speakers of a given language) – Chomsky (2002): 49.

> [5] The observable level, for example specific wordings in language analysis or consecutive sentences in the analysis of a verbal narrative, is treated as the outermost, 'surface' level, i.e. structurally irrelevant. Identities or homologies between the structures whose empirical level differs are revealed in the analysis of more abstract levels, often referred to as deep levels.[23]

Zieliński argued that the efforts to establish norms based on legal provisions is a cognitive issue,[24] which corresponds to Ziembiński's view on the conventional character of the basic concepts in law'.[25] In the final sentences of the dissertation *Szkice z metodologii szczegółowych nauk prawnych* [On the Methodology of the Particular Legal Sciences], he put the matter even more explicitly, stating that 'the solution of the problem ... requires assumptions to be formulated at the outset, stating the purpose that a given division is to serve. It is the task of the methodologist to demonstrate how such tasks may be accomplished, how adopting a particular paradigm to systematize law bears on the ordering of the issues addressed in legal sciences.' Such a position seems to corroborate the structuralist premise according to which:

> [6] 'Structure is not understood as a particular arrangement of objects ...', it is 'imposed on the studied reality. ... It is ... a tool, a convenient research procedure employed to obtain data so as to justify the relevant claims that make up a given theory'. ... The studied reality ... is chaos that is not susceptible to scientific investigation at all. In order to accomplish the tasks of knowing, the researcher is obliged to have the ground work of their research in order. This is what the structural grid superimposed on the studied reality is designed to achieve.[26]

As for Nowacki's criticism of Ziembiński's theory of norms ('speculative deliberations', 'avoiding exemplification'), one can respond to those allegations as follows: indeed, conceptual tools of research – even if a concept is constructed from the standpoint of formulating a theory of legal norms – do not and cannot possess the attribute of validity. They may only be a more or less practicable means of obtaining knowledge and, correspondingly, a means of ordering the existing legal material (collections of provisions) which the detailed sciences and legal practice may use to their advantage. Thus, it is only in a specific theoretical-exploratory sense that one can speak of the 'validity' of such norm-concepts, but 'validity' in the traditional sense does not come into play, being reserved (see: legal dogmatics, case law) to legal provisions legitimized by the authority of the lawmaker. Usage of the phrase 'validity of norms' in the language of legal theory is reasonable insofar as it implies the inevitable (although Nowacki would have probably found it contingent) mediation of the adopted structure of the norm in the process of endowing legal provisions with the property of 'validity'. Hence, this is not an abuse on the part of legal theorists when they refer to the 'validity of norms', since legal norms of conduct represent the substantive result of the acts of the lawmaker,

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[23] Rosner (1987): 691.
[24] Zieliński (1979): 58.
[25] Ziembiński (1974): 275.
[26] Zgółka (1987): 684.

combined with the efforts of the jurisprudent which yield a particular linguistic shape of the norm.

Ziembiński was thoroughly aware of a certain ambiguity stemming from the fact that the norm is recognized as a theoretical (idealizational, doctrinal) construct. As he wrote, 'the misunderstanding arises from equating the norm of conduct with the norm of conduct in force (from one point of view or another), while the concept of the norm of conduct in force is confused with the concept of the norm of conduct in force in a given environment at a given time, although this is an evident error of a categorial shift. The norm of conduct is a particular type of utterance which, in keeping with the semantic rules of the language in question, is intended to perform a suggestive function with regard to certain behaviour of the entities to which it refers. Whether an utterance of the kind actually performs such a function ... is another matter.'[27] Franciszek Longchamps, an administrative scholar whose investigations were also concerned with issues of fundamental importance for legal theory, wrote in a similar vein: 'in the process of knowing, so complex and partly subject to arbitrariness, concepts-objects intertwine with concepts-tools. ... At times, a concept-tool, devised by science, is adopted in legal life, in case law, for example; thus, it imperceptibly becomes a concept-object for science'.[28] 'Let us [then] distinguish between two domains: the legal life, with its concept-objects, and theory with its concept-tools. In legal life, one observes the presence of semi-rigorous systems ... contingent on that social peculiarity which is the binding effect of a particular law. ... In theory, however, we call for rigorous systems. ... Well, a conceptual model constitutes precisely an ordered set of conceptual tools.[29]

In the light of the above remarks, Nowacki's criticism of the conception of norms put forward by Ziembiński may be contested, given that the assumptions on which it relied were alien to the criticized concept; as such, it resulted from a miscommunication or failure to understand the conception. In his argument, Nowacki presumes that the norm and the system of law are approached ontologically. With the relatively lucid ontology of legal provisions (an 'existing' utterance originating with the actual legislator[30]), the legal provisions which met such requirements became the 'prime con-

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[27] Ziembiński (1980): 110–111.

[28] Longchamps (1960): 14. Ziembiński was most likely familiar with the views which Longchamps formulated in the 1960s. It is symptomatic that Ziembiński's principal treatise, *Problemy podstawowe prawoznawstwa* [Fundamental Problems of Jurisprudence], opens (p. 7, second paragraph) with a statement about lawyers' practicist mindset, due to which 'a more general theoretical reflection on legal phenomena is relegated to the sidelines in the legal sciences'. Ziembiński's critical view of the professionalization of the legal sciences is supported by a reference to the monograph by Longchamps, entitled *Współczesne kierunki w nauce prawa administracyjnego na zachodzie Europy* [Modern Trends in the Study of Administrative Law in Western Europe] (Wrocław 1968).

[29] Longchamps (1960): 17–18.

[30] 'Legal provisions are indeed established by the legislators. ... They do originate with competent law-making bodies. The fact of issuing legal provisions of one kind or another (printed, for example, in a particular issue of the Journal of Laws) belongs to the class of empirically ascertainable facts'; Nowacki (1988): 72.

cept of jurisprudence' for Nowacki at the expense of the norm, which was regarded either as an utterance that duplicated the content of provisions, or an utterance which it is difficult – if at all possible – to fill in 'thoroughly' with the content of relevant provisions. The intuitiveness of Nowacki's approach and its direct association with the questions of validity were likely to be approved within legal decision-making practice, that is by Longchamps's 'legal life', with its interest in concept-objects and 'semi-rigorous' empirical systems informed by the 'social peculiarity which is the binding effect of a particular law.' And yet, this was not what Ziembiński had in mind, or at least it was not his primary concern.

In Ziembiński's theory of law, the norm and the relationships arising between norms (the system of law shaped by the rules of inference) are tools by means of which legal language may be conceptually known and ordered. Here, the provision is no more than normative material which provides baseline information – conveyed more or less clearly, and often even chaotically – about the content of particular norms (concept-object). On the other hand, by adopting such and not other doctrinal assertions about their shape (structure), norms become an important – perhaps even crucial – component of the 'structural grid superimposed on the studied reality' (concept-tool). This would make the provision a part of legal life (a semi-rigorous system), which is 'contingent on social peculiarity'. In contrast, the norm would be an essential element in scientific life (a rigorous system), which is contingent on the specificity of knowing. To use the structuralist idiom, the dispute between Nowacki and Ziembiński would be a dispute between a theorist whose investigations navigate the 'surface structure of jurisprudence' and a methodologist of the legal sciences who elevates jurisprudence above that level. Legal practice is important for both, but each views the tasks of legal theory differently. For Nowacki, it had an ancillary role, whereas Ziembiński saw it as a scientific pursuit *sui generis* and, given the needs of practice, a necessary phase preceding every legal decision-making process.

There is one more structuralist premise which deserves a more extensive reference, namely:

> [7] The contrast between synchronic and diachronic analysis, as two research approaches examining the same facts in a different context, has been – from de Saussure to the present day – an essential part of the shared methodological awareness among structuralists. ... Only synchronic research was inherently systemic: susceptible to structural analysis.[31]

The facts in question constitute 'the domain of empirical facts, speech acts and, in later development of the structuralist method, artistic creations and cultural behaviours as well, is the realm of events. Structural analysis of the relevant semiotic system is to ... enable arriving at the laws which govern the

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[31] Rosner (1987): 690. In his *Szkice o strukturalizmie* [Sketches on Structuralism], A. Schaff writes after J. Metallmann about 'laws whose ... object consists of permanent coexistences of qualities', adding further that this is where 'the theoretical heart of all structuralist currents beats.' – Schaff (1983): 22–23.

sphere of individual behaviour, laws obscured by the diversity at the level of empirical knowledge and history.'[32]

The broadly understood domain of facts (institutional facts) encompasses, among other things, conventional behaviour, including legally significant conventional acts (an equivalent of the Saussurean *parole*) and the specifically juridical, 'unique' cultural outcomes arising from the performance of such acts: content-variable legal provisions, 'valid' norms-specimens, inclusive of contracts and administrative acts. Such acts or their outcomes were presumed to form empirical systems contingent on 'social peculiarity' and historical fluctuation. In the synchronic approach, one orders and justifies such facts, showing them to be grounded in uniform knowledge which, supplied by the theory of the norm, eliminates empirical diversity. The synchronic attitude enables one to construct a conceptual tool for the description of language as a specific state of the system and – in the directival variant – a set of appropriate rules which define the correctness criteria for assessing acts of linguistic performance or the shape of outcomes of such acts.[33] Linguistic changes at the level of facts (a legal act of *parole* or its outcome) will not interfere with language as a structure or with the stability of the system, since they are merely its concretized, spatio-temporal manifestations. Let us briefly examine these distinct research contexts in the light of the conception of competence and the competence norm, one of Ziembiński's paramount scientific achievements.

Following synchronic analysis presented in the linguistic structure of the competence norm,[34] the possession and exercise of competence – including the rules which empowered the subject of competence to undertake certain legally significant actions and which determined their correct performance – was reduced to a component in the applicability scope of the competence norm. This is only a fragmentary reduction, since the rules in question usually undergo disjunction in a number of legal provisions which specify (i) 'who may perform a legally significant conventional act', (ii) 'how to perform the acts which are to be recognized as conventional acts of a given type', and (iii) what may be the admissible content of 'a declaration of intent or an act establishing a legal norm as a conventional act'.[35] In turn, the components within the normative scope of a competence norm include the performative effect of the correct ('valid') performance of an act based on a set of the above rules, that is, the establishment or actualization of a specific obligation on the part of another subject – the subject subordinated to the competence. Normally, this

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[32] Rosner (1987): 691.

[33] Ziembiński (1969: 24) referred to 'the adoption of one or another model structure of the legal norm, a structure that would serve as a model for ... reconstructive procedures.'

[34] Let us cite it as it was formulated in Ziembiński (1980: 169): 'If, in the circumstances W [having the competence granted to subject *A* by provision *P* – A.B.], subject *A* performs action *C* in a manner S as a conventional action *C*k [in accordance with the relevant performance rule *R* – A.B.], subject(s) *B* [the addressee of the competence norm – A.B.] should, in these circumstances, behave in a manner *C*m [in accordance with the injunction/prohibition norm established or actualized by *A* as a result of the correct performance of action *C* – A.B.].'

[35] Ziembiński (1980): 166–169.

is an obligation to undertake a non-norm-giving action or refrain from such (psychophysical action), as defined by the so-called substantive norm.

A diachronic analysis demonstrates the same elements to be factors involved in individualized and concretized 'action in time', deriving from the tethic links between the actions initiated by the subject of competence and the response thereto from the subordinate subject of competence (the addressee of the competence norm).[36] However, the relationship can also be reversed: the addressee of a competence norm may refuse to comply with an obligation to act or refrain from action that arises or is actualized on their part, if the subject of competence performs a conventional act in a manner which, to the subject of the obligation, does not comply with the requirements set by the relevant rule governing its performance. Such a refusal will also constitute an action, for example a declaration based on the relevant rule. That feedback action inverts the roles comprised in the competence norm: the potential addressee of the obligation becomes the actual subject of competence, whose properly taken action will situate the 'earlier' subject of competence in the position of the 'later' addressee of the obligation. As may be seen, the diachronic perspective reveals the social character of the relations which are schematically included in the structure of the competence norm, as it illustrates the formation, control and possible transformation of legal relationships as power relations. Also, the approach makes it possible to bring out what is concealed behind the imperative convention of presenting the norm of competence, namely the communicative (including adversarial) nature of the relationships between the subjects distinguished in the structure of this norm, a relationship founded on the constitutive rules shared by the parties to the dispute, which govern the performance and recognition of legally significant conventional acts.[37]

Thanks to the structuralist perspective, which yielded a presentation of the competence norm in which legal subjects are active, while their actions are informed by pragmatic assessment of the circumstances and geared towards achieving the intended goals, the theory of conventional acts and the theory of rules that govern them (the so-called constitutive rules) comes to the fore. One thus underscores their autonomous qualities, equivalent to the imperative style of statements formulated in legal language. The diachronic perspective reinforces the conviction that the rules of performing conventional acts do not have to be regarded as what Czepita – Ziembiński's disciple – termed 'specific norms of conduct' or 'expressions somehow reducible to norms. ... This aspect ... rather complicates the semiotic characterization of the constitutive rules

[36] 'Fully developed, an *empowering norm* (competence norm) is an utterance which enjoins one to act or prohibits one from acting in a certain manner in those cases where the subject duly specified in this norm performs an action which, by virtue of constitutive rules ... acquires the character of a conventional action' – Zieliński, Ziembiński (1988): 63.

[37] 'Constitutive rules prescribe that certain psychophysical actions be construed as conventional actions of a certain kind', which 'may be regarded as a peculiar form of nominal definition of a given kind' – Zieliński, Ziembiński (1992): 45–46. This enables the authors to refer to constitutive rules as 'constitutive competence norms.' See n. 41 below.

of conventional acts.'[38] Cautious as he was, Ziembiński admitted such a pragmatic adaptation of his theory of the competence norm quite early on, in *Problemy podstawowe prawoznawstwa* [Fundamental Problems of Jurisprudence] (1980).[39] In the last work which discussed norms comprehensively: *Dyrektywy i sposób ich wypowiadania* [Directives and How They Are Expressed] (1992), the rules which govern the performance of conventional acts are already a distinct research problem from imperative norms, in conceptual and organizational terms.[40] That evolution of thought is also noted by Zieliński in a study published in the year of Ziembiński's passing: 'as time went by, Ziembiński slightly altered his approach to the notion of the norm of competence and concentrated on the constitutive rules instead of the rules that governed the consequences following the performance of a conventional act'. Commenting on that observation, Zieliński added: 'bearing those changes in mind, one should – taking advantage of the findings by Stanisław Czepita ... – treat either as competence norms, assuming that competence is determined jointly by the constitutive competence norms and consequential competence norms'.[41] Those changes suggest that Ziembiński was not at all averse to having his theory modified, and that – as mentioned in the introduction – the methodology of reconstructing the juridical conceptual apparatus he had developed was indeed intended 'to serve as the foundation for a programme of constructing a theory of law as a theory of action.'

Finally, a brief reference to Znamierowski is in order. Characterizing the conception of the legal system (a constructive-coercive system) advanced by the precursor of the Poznań school of legal theory, Czepita noted that 'a legal system is … only such a system of norms which, next to imperative norms, also includes constructive norms ... that grant certain subjects the competence' exercised through the performance of conventional acts.[42] Although Znamierowski and Ziembiński differed in their approaches to the system/competence norm,[43] both shared a conviction that for a normative situation/legal system to be thoroughly regulated, conceptual independence and functional dependence must exist between the 'constitutive competence norm' and the 'consequential competence norm', to use Zieliński's terminology. Interestingly, in *Logiczne*

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[38] Czepita (1996): 131.

[39] As he wrote: 'it is usual for a competence norm to be broken editorially into two utterances. One is an utterance which specifies how a conventional act of a given kind should be performed. ... The other, however, is a norm which prescribes a particular response to properly performed conventional acts. ... If the first of these statements is treated as a norm of conduct, then ... the latter part of the competence norm drafted in this fashion is [already] a classical legal norm' – Ziembiński (1980): 169; similarly, Ziembiński (1969): 36.

[40] See Section 1.5, 'Reguły dotyczące dokonywania czynności konwencjonalnych' [Rules concerning the performance of conventional acts] – Zieliński, Ziembiński (1992): 46–57.

[41] Zieliński (1996): 584–585.

[42] Czepita (1988): 94.

[43] In Znamierowski, conventional act results from failure to perform the imperative norm, whereas in Ziembiński, the conventional act is an action by means of which the imperative norm is established/actualized. In the former, the act follows the breach of the imperative norm, in the latter it is the 'cause' which brings the imperative about. Thus, the relationship between the constructive (competence) norm and the imperative norm is reversed in each author.

podstawy prawoznawstwa [Logical Foundations of Jurisprudence], published in 1966, Ziembiński adopted a similar distinction, separating 'ordinary norms' that enjoined or prohibited 'certain psychophysical actions' from the 'rules indicating how certain actions should be performed in order for them to be *valid* as certain actions of a conventional nature.'[44] Clearly, the history of Ziembiński's approach to the conceptual structure of the norm came full circle. Perhaps, the impact of the structuralist approach in research should also be seen as an influence that echoed the times in which his theory of the norm was conceived and took its shape.

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[44] Ziembiński (1966): 77.

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