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## OBJECTIVITY OF LEGAL FACTS FROM SEMANTIC POINT OF VIEW

The main aims of this article is to find out how legal facts can be objective,<sup>1</sup> to determine exactly what it means for legal facts to be objective, and to discover when and under what conditions it is justified to call them “objective”. I shall introduce first the different conceptions of legal facts and then examine the relation between legal facts and statements about legal facts. My enquiry is on two levels: the semantic and the semantic-pragmatic. The first is based on the typology of legal facts by J. Wroblewski, which represents an analytical approach. From this, I will analyze how legal facts (or more strictly the statements identified by legal facts) could be objective on a semantic level. Using Wittgenstein, and Kripke’s interpretation of Wittgenstein’s theory, I will further explore whether the meanings of statements about legal facts could be objective. The semantic-pragmatic approach is based on the conception of institutional legal facts in a narrative and normative context developed by N. MacCormick. I will

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<sup>1</sup> The jurisprudential literature, says about strong, modest and minimal objectivity. Strong objectivity as completely independent from a subject is characterized as pure objective entity. Strong objectivity is the representation of the theory of realism, which rejects the subject’s dependence in regards to existence and perception. For example, a stone which exists completely independently from the subject or any of their activity, no matter whether the subject perceives it or not. The other two approaches of objectivity are connected with the activity of the subject, which is necessary and not possible to eliminate. The modest version of objectivity is characterized in regards to subject, determined by the ideal epistemological conditions. These conditions have to be fulfilled to make it possible to think about objectivity as in some way independent of the subject. In this sense, for example, the activity of measuring could be objective. Effects of measuring would be the same for everybody who is doing it under the same conditions. One can observe that within the same group of notions it is possible to find different extensions of the subject’s indeterminacy. The minimal version of objectivity is based on the acceptance of the majority in a certain group. Take fashion as an example. What is fashionable in a certain society or group is accepted by the majority of that group. See more, Connie S. Rrossati, *Some puzzles about objectivity of law*, In: Law and Philosophy, No. 23, 2004, p. 275.

also question how institutional facts could be objective on the grounds of this theory. Also in this article, I examine examples from Polish courts to illuminate the differences between legal theory and legal practice.

There is a lot written about legal facts in the literature and there have been many attempts to categorize them. To make things clearer, I will very briefly review the different conceptions and definitions of facts and the ways in which they are interpreted. This will help us move further in answering the question about their objectivity.

It is not possible to give one general answer for the question about objectivity of legal statements, mainly because of the diversity of types of statements in law.

Some authors, who consider legal facts to be objective, define them with the following kind of statements: “a true proposition about the law<sup>2</sup>”; “any statement of what the law requires on some point.<sup>3</sup>” The first definition seems to be controversial because of the questionable status of a true statement in law. The second one could be taken as the starting point, but it is necessary to make the meaning of “what the law requires” more precise to avoid potential controversies. Although it’s not possible to give one general answer, mainly because of diversity of types of statement in law, it is meaningful to go deeper into the types of statements that express what the law requires and say which of them could be objective and which could not. So, what should we take into account when interpreting legal facts? What are the necessary elements for the category of legal facts? The answer to these questions depends strongly on whether we consider them on a semantic level, where law is identified as a linguistic phenomenon, or take a broader view, taking law in a semantic-pragmatic context?

## The definitions and various types of legal facts

Taking the first assumption that considerations about facts are made on the level of language, I will carry out further analyses on the semantic level to see if this can yield any answers to the question about the objective meaning of legal facts. Let’s consider a typology of legal facts in relation to the types of statements in which they are represented in order to state which ones could be objective. I will start by presenting the defi-

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<sup>2</sup> See, C. S. Roasati, *Some puzzles about objectivity of law*, In: *Law and Philosophy* 23, 2004, p. 276.

<sup>3</sup> See, Coleman, Leiter, *Determinacy, Objectivity...*, p. 598.

inition of legal facts proposed by J. Wróblewski. He defines a legal fact as a fact worded in legal language; its existence is based on legal norms and it is the subject of argumentation in the process of application of law.<sup>4</sup> This definition leads us to the conclusion that certain types of legal facts are dependent on the richness of the legal language. It is important to mention here that both procedural and substantive norms have an influence on the choice of facts that will be the subject of investigation by the court. The facts have to be important facts appropriate to the nature of the case; that is, facts described by the hypothesis of a norm. The norm then is the basis of the decision in the case. In other words, legal facts are extracted from legal norms, thus being normative facts. It is also possible to say that the way of looking at the facts is through the notions that are contained in legal norms. Legal facts could not exist apart from this relationship because of their connection with legal language. That is why there are such types of facts as follows:<sup>5</sup> facts determined descriptively are designated by terms in the legal language. They are proven in a way that correlates with their description. They are verified like every existential statement in a particular domain. For example, “employer”, “vehicle”, “contract”, “marriage”, “commissioner”, “legal capacity”, and “tree”. The quantity of these facts depends on the vocabulary of legal language.<sup>6</sup> There is also a difference when descriptive legal facts depend on whether they are determined in a simple or in a relational way. A descriptively determined fact is a simple fact when it is simply an existential statement. For a relational fact, it is necessary to assess its consistency with a defined rule, as with “valid act”, “observation of rules”, and “act contrary to the statute”. Relational facts are complex, composed of the conjunction of relational statements, “x is consistent with rule R” and the existential statement “x exists in spatiotemporal dimension.”<sup>7</sup> Another way of classifying descriptive legal facts is as events, processes, and subjects of law. Facts determined by evaluation, extracted by judgments, have their sources in those parts of legal norms which are based on evaluation, For example, statements like “justified interest”, “moral jury”, “right reason,<sup>8</sup> “fair interest of tax-payer”,

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<sup>4</sup> See, J. Wróblewski, *Sądowe stosowanie prawa*, Łódź, p. 172, also J. Wróblewski, *The Judicial Application of Law*, ed. by Z. Bankowski and N. MacCormick, Dordrecht, The Netherlands, Kluwer Academic Publisher, 1992.

<sup>5</sup> See, J. Wróblewski, *The Judicial Application...*, p. 137–149.

<sup>6</sup> See, J. Wróblewski, *The Judicial Application...*, p. 137.

<sup>7</sup> See, J. Wróblewski, *The Judicial Application...*, p. 143.

<sup>8</sup> See, J. Wróblewski, *The Judicial Application...*, p. 138.

“acting in good faith”, and “well-being of the child”. In all these examples, a positive or a negative evaluation has to be made. There is a process of prescribing values to the objects that are not intrinsically good or evil. In order to recognize the point of reference it is useful to distinguish between “simple” and “instrumental” evaluations. The former is based on assigning values on a positive to negative scale. In practice, it is just imposing a set of beliefs about good or evil. This process just refers to “pure” values. This simple kind of evaluation is based just on psychological experience. The instrumental evaluation is subordinate to the aim served by the evaluation as a whole. It doesn’t mean that this process has lost its evaluative character; the evaluation is just moved to the higher level – to the level at which values are realized.

So the evaluation is based on relativization with regard to another hierarchy of values. For example, “fair interest of tax the payer according to a rational legislator” is considered with regard to the rational legislator’s hierarchy of values. So, even when the process of evaluation is based on external criteria, it is still not free of values. They are simply on one level higher, because they refer to the hierarchy of values composed or represented by the rational legislator.<sup>9</sup> The features of facts determined by evaluation are also complicated because of the problematic character of values. It seems to me that it is first necessary to consider whether they are based on assumptions related to either the cognitivist or the non-cognitivist approach to values.

Wroblewski assumes a non-cognitivist position and this influences his consideration about facts.<sup>10</sup> This makes it impossible to consider facts in terms of true and false. Only descriptive facts are proven descriptively; evaluative facts are dependent on defining their values and characteristics. Wroblewski claims that evaluative facts should be treated as highly controversial linguistic statements: one states the existence of the object of evaluation and defines this object as “having a value”. For example: “important reason” and “behavior under strong emotion justified by circumstances.” There are also terms which are not clear and are hard to qualify according to any one criterion because sometimes they are treated as descriptive, sometimes as evaluative. The expression “strong affection<sup>11</sup>” is one such example. Facts

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<sup>9</sup> See, J. Nowacki, *Domniemanie dobrej wiary*, (Presumption of Good Faith), *Studia Iuridica Silesiana*, Ed. M. Pazdan, Katowice 1979, p. 123.

<sup>10</sup> See J. Wroblewski, *Judicial...*, p. 139.

<sup>11</sup> See, J. Wróblewski, *Judicial...*, p. 139.

like ‘right’ have no semantic reference.<sup>12</sup> They are sometimes described in jurisprudential literature as pure institutional facts.<sup>13</sup> Other examples of facts with no semantic.

The term “fact” is troublesome enough in common language but, as the jurisprudential literature shows, getting to grip with facts and legal facts in law is even more problematic and faces many controversies. At one extreme, there is the conception that a “fact is something which goes without saying<sup>14</sup>”. This manifests itself in common language expressions like “everyone knows what a horse is”, “facts need no deliberation”, and “facts say everything about themselves”. At the other extreme, facts are treated as ambiguous expressions of reality that are dependent on the paradigm of interpretation of reality.<sup>15</sup>

The first approach expresses the realists’ vision of reality, albeit in quite a naive version, based on the assumption that what we perceive is “true” reality. In other words, what we observe or perceive is identified with something that is empirically real. However, this in itself is a paradigm of interpretation of reality. It says that we don’t need any special notions to act as intermediaries between perception and reality in order to grasp it, because what we perceive is already true reality. Hence, we could say that there are not two different types of theories that try to explain what facts are, but one single approach based on the assumption that we need a paradigm of interpretation to understand facts.

The theory maintains that the paradigm of interpretation of reality dictates, or is interrelated with, the paradigm of facts. In the legal world, we have legal rules and principles that constitute the paradigm of interpretation, which in turn indicates how to interpret brute facts according to their institutional network or how to create new constitutional facts.

Before going deeper, a general ontological assessment needs to be made. First of all, one could say there are two types of facts that can be distinguished in the world: brute facts and institutional facts. This typology is based on John Searle’s distinction between brute facts and institutional facts in his theory of institutional rules.<sup>16</sup> The next important step is guided by

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<sup>12</sup> See, K. Olivecrona, *Law as fact*, London 1997, p. 246.

<sup>13</sup> See, T. Gizbert-Studnicki, *Przedmiot ustaleń sądu w procesie cywilnym* (Object of court findings in civil procedure), In: *Krakowskie Studia Prawnicze*, VII/1974, p. 154.

<sup>14</sup> See, P. Nerhot, *Introduction*, In: *Law, interpretation, and reality: essays in epistemology, hermeneutics and jurisprudence*, Ed. by P. Nerhot, Dordrecht, The Netherlands, Kluwer Academic Publisher, 1990, p. 2.

<sup>15</sup> See, *Ibidem*, p. 2.

<sup>16</sup> John R. Searle, *Speech Acts*, Cambridge, Cambridge University Press 1969, p. 50–53.

Ascombe's work. She illustrates the distinction between institutional and brute facts with the following example: the event of going to the grocer and buying something implies that the client will be given a bill. "The set of events is the ordering and supplying of potatoes; something is a bill, only in the context of our institutions.<sup>17</sup>" This is the way she explains the core of institutional facts, which exist only in certain contexts. So, the bill, as an institutional fact, would lose its meaning outside the grocery shop. This is the same framework of concepts that make up the foundation of the institutional theory of law by N. MacCormick and Ota Weinberger, which I will adopt in my analysis of objectivity of institutional legal facts.

Reality that exists in time and space is built with empirical facts; we can say these are brute facts or even strong facts. These types of facts are entirely independent from human minds or human activity.

Institutional facts exist but, unlike brute facts, cannot be perceived solely on a physical or psychological dimension. Facts such as contract, marriage, money, culture, knowledge, literature, parliament, sports, and games exist but they need special rules in order to institutionalize them. These rules give the meaning to institutional facts. The existence of institutional facts depends partly on brute facts, empirical events or behaviors, and partly on rules. That is why according to MacCormick such facts are dependent on human activity.<sup>18</sup>

The next important feature of institutional facts is that they cannot be grasped or framed descriptively; they must always have a normative element. From the words alone, we could not understand what it means for people to get married, greet each other, or play chess.<sup>19</sup> We also need to know the normative element to grasp the meaning.

On this basis, it is already possible to indicate two arguments against the claimed objectivity of institutional facts. First of all they are depended on human activity, because people create them, design them and decide about their meaning. Secondly they are not descriptive, because they are mainly composed of normative and ascriptive elements.

This is why two types of statements have to be formulated: descriptive ones, which describe and explain relations; and normative ones, which are formulated on the basis of values, preferences, and aims or goals. The main

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<sup>17</sup> G. E. M. Ascombe, *On Brute Facts*, In: *Ethic, Religion and Politics, The collected Philosophical Papers of G. E. M. Ascombe*, Vol. 13, Oxford, Basil Blackwell, 1981, p. 23.

<sup>18</sup> N. MacCormick, O. Weinberger, *An Institutional Theory of Law. New Approaches to Legal Positivism*, Dordrecht, The Netherlands, Kluwer Academic Publisher, 1986, p. 24.

<sup>19</sup> N. MacCormick, O. Weinberger, *An Institutional Theory...*, p. 24.

difference between these two types of facts is that brute facts are descriptive and exist in a particular space and time, while institutional facts as abstract concepts are potential and not directly related to a particular time and space. Institutional facts are a kind of ideal entity; they exist as abstract notions. To make institutional facts real, institutional rules and brute facts are needed.<sup>20</sup>

### **The relation between facts and the paradigm of interpretation**

What is the relation of dependency between facts and their meaning; between their ontology and epistemology? Or, in other words, between ontology and semantics, because semantics plays the role of epistemology when dealing with facts on the level of language in determining how their meaning or interpretation is fixed. It is possible to assume that, on the level of language, the role of epistemology is to discover and/or establish meaning. Wittgenstein said that there are no facts that determine meaning, so he breaks the relation between ontology and semantics, giving the priority to the process of setting meaning: the epistemology. So, if facts have no influence on the way of setting or establishing meaning, there is no difference between brute, descriptive, and evaluative facts from Wittgenstein's point of view. Does this mean that all facts are created and that we could easily forget about objectivity? Taking the line of thinking offered by Wittgenstein, it could be as follows:

For Wittgenstein, meaning is treated as the core of the notion that could be objective; interpretation is the next level, which is dependent on individual elements and so the product of interpretation could be changeable in different cases. Meaning is a necessary introduction to interpretation and, only in this sense, could facts be objective in a stronger sense. Following this idea, meaning appears as something that has a firm core, which gives the possibility for interpretation, because without understanding there is no place for interpretation at all. The next important question is what makes certain interpretations objective? What kind of justification gives the right to claim that an interpretation is objective?

One answer proposed by the antirealists is that common acceptance of a certain community gives the justification for treating an interpretation as objectively valid.

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<sup>20</sup> N. MacCormick, O. Weinberger, *An Institutional Theory...*, p. 24.

Wittgenstein's thoughts represent the skeptical position, but it is not necessary to reject the possibility of objectivity in a stronger sense. Meanings of terms are not determined by facts, but this does not exclude the possibility of making claims about objectivity or make it necessary to consider it only in a minimal sense (a meaning that is applied and accepted by the majority of an interpreting community).

Considering the problem of dependency between facts and interpretation, one conclusion is that the meaning of facts is determined by a paradigm of interpretation and the conditions that are formulated by this paradigm. So the next problem that has to be considered is how this meaning is determined, and how the meaning of legal facts is settled in the context of normative legal reality, because the theory that determines meaning is also the part of the assumed paradigm.

As argued before, there is only one world that includes both facts and law. Setting legal facts could be a matter of grasping the meaning or the process of interpretation. It could be perceived as looking through the paradigm of interpretation or through the process of institutionalization, which makes legal facts what they are. So, further consideration about legal facts will be on the level of language, the semantic field. This enables us to reformulate the question about objectivity of legal facts into questions about the objectivity of meaning and objectivity of interpretation. Further consideration has to be directed on how the meaning is determined. If the meaning were to be fully determined, we would be able to talk about objectivity of legal facts in a strong sense; this is exactly how strong realists approach the theory of meaning. But this is only one of several possible controversial answers to this question. At the other extreme, the subjectivists challenge the determinacy of linguistic meaning, with the view that meaning is located in the individual subject. I would like to take a middle way and consider to what degree the meaning of words can be determined.

So, what kind of legal facts are determined and to what degree? If there are different kinds of legal facts, do they have different extents of determination in fixing or discovering their meaning? Or maybe, in the sphere of language, the type of legal fact is not important in this respect.

First, it is important to make a distinction between critical semantic theory and interpretative semantic theory. Generally speaking, semantic theories offer an explanation of what links a word with the object to which it applies. Critical semantic theories, as represented by Kripke and Putnam, claim that the basic link is an uncontroversial test of sharing by speakers. Interpretative semantic theories, as represented Roland Dworkin, claim that

the necessary link is a theory or interpretation.<sup>21</sup> The next assumption that needs to be explained is what I mean by meaning.

## Meaning

The key to further explanations is to make clear the difference between meaning and interpretation or application. It is not possible to discuss all the problems within this thesis, so, in what follows, I only aim to show what I understand by meaning and interpretation.

By meaning, I refer to the relation between empirical objects and the sense of words. It is important to stress that “the meaning of words” and “the meaning of words in their correct application” are not equal. The first is what speakers of a language generally share but correct application could be the matter of controversy.<sup>22</sup> This in turn raises the question of what are the sources of interpretative authority<sup>23</sup> that says which interpretation is correct or incorrect? What are the instances that allow decisions to be taken about meanings?

If meaning is what speakers of a certain language generally share, what could be said about the objectivity of meaning of legal facts bearing in mind their diverse character? According to the analytical approach, legal facts have to be at least objective in the minimal sense because they are shared by the majority.

Let’s consider this problem separately in regards to descriptive facts and evaluative facts. It seems to me that the same couldn’t be said about evaluative facts and descriptive facts, because when evaluative ones are treated like an order to make an individual judgment or evaluation, it does not fulfill the test based on shared acceptance by all speakers. This is due to the complicated status of values.<sup>24</sup> In justifications by Polish judges, there are no references to acts of individual moral choice. Nevertheless, judges do make individual moral choices in order to achieve a suitable justification. There

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<sup>21</sup> See, T. O. Endicott, *Review of Objectivity in Law*, N. Stavropoulos, In: *Law Quarterly Review* 113, 1997, p. 508–512.

<sup>22</sup> See, T. O. Endicott, *Review of Objectivity in Law*, N. Stavropoulos, In: *Law Quarterly Review* 113, 1997, p. 510.

<sup>23</sup> See, S. Fish, *Praca w lancuchu*, In: *Interpretacja, Retoryka, Polityka*, Universitas, Kraków, 2002. p. 227, See also: *Working In the Chain Gang, interpretation in the law and in literary criticisms*, *Critical Inquiry* 9, 1982–3.

<sup>24</sup> Only objectivists could claim an objective status for evaluative statements about values.

are fragments of justifications where judges were trying to base their choice of morality on the common acceptance test, like in the case of descriptive facts. Very often this process has just a robe of descriptive morality, because it is one of the most successful ways of argumentation, but the real reason has its source in individual moral choice.<sup>25</sup> They cover an act of individual evaluation. But are evaluative facts really different from descriptive facts on the semantic level?

It seems to me, that from the point of view of Wittgenstein's position on the objectivity of meaning, facts are shaped in the same way, no matter whether they are descriptive or evaluative. Both are subjected to the test of common shared meaning.

## Wittgenstein and Kripke

Now I present the so-called antirealist approach to the theory of meaning, considering mainly Kripke's interpretation of Wittgenstein's philosophy. Then I would like to consider the application of this theory to the legal discourse, especially to legal facts. Kripke's skeptical and non-skeptical analysis of Wittgenstein would give an answer to the question about the level of determination of meaning in regard to different types of legal facts. (Kripke's skeptical interpretation is commonly known as the skeptical approach.<sup>26</sup> A middle position is taken by Friderick Schauer,<sup>27</sup> who claims that formulated rules are not radically indeterminate, but unformulated rules are.<sup>28</sup>)

## Kripke's skeptical position

Kripke was criticized very strongly for his skeptical interpretation of Wittgenstein and it has been the topic of twenty-five years of controversy.<sup>29</sup>

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<sup>25</sup> See, J. Nowacki, *Domniemanie dobrej wiary*, Studia Iuridica Silesiana, Katowice 1979, Ed. by M. Pazdan, p. 123.

<sup>26</sup> See Charles M. Yablon, *Law and Metaphysics*, In: *Law and Legal Interpretation*, Ed. By Fernando Atria and D. Neil MacCormick, ASHGATE, Dartmouth, 2003. p. 371–384.

<sup>27</sup> See, Timothy A. O. Endicott, *Linguistic Indeterminacy*, In: *Law and language*, Ed. by Thomas Morawetz, Ashgate/Dartmouth, 2000, p. 689.

<sup>28</sup> See, F. Schauer, *Playing by the Rules. A Philosophical Examination of Rules-based Decisions-making in Law and in Life*, Clarendon Press, Oxford, 1991, p. 64–68.

<sup>29</sup> See, Martin Kusch, *A Skeptical Guide to Meaning and Rules. Defending Kripke's Wittgenstein*, Acumen, 2006.

After all the many commentaries, today this position is called “Kripkesteinism”, and is taken as new philosophical proposition in the theory of meaning, quite distinct from Wittgenstein’s original position. His approach is quite controversial for many reasons but has been also defended as suitable for law.<sup>30</sup> Developing Kripke’s position could bring us quite far from Wittgenstein to a very controversial point, namely the radical indeterminacy of meaning.

To enter into speculations on Wittgenstein’s skeptical problem<sup>31</sup> one must go through the door of the thesis that there is no fact in the world that constitutes meaning.<sup>32</sup> This is the very basic assumption, which is incompatible with or even contradictory to the realist approach to the theory of meaning. Generally speaking, it means that a particular discourse is not primarily descriptive or fact stating. Such a discourse states no facts but instead gives expressions of certain attitudes. The meaning is derived from these expressions not from truth conditions.<sup>33</sup> Kripke offers the example of “ $57 + 65 = 5$ ” to show that there is no fact determining meanings in this statement. He argues that the statement “ $57 + 65 = 122$ ” is correct, not because there are facts which constitute it, but our community permits us to use certain signs like “+” in certain way; in this case, to mean addition.

Kripke’s second argument is as follows: there is no such a thing as a fixed meaning of an expression because any use in the past does not determine its present or future use. This argument can be developed to say that conventional meaning is also not rigidly binding and could be subject to change. In addition, there is no such thing as a general rule, as Wittgenstein’s infinitive regression argument demonstrates:

“But how can a rule show me what I have to do at this point? Whatever I do is, on some interpretation, in accord with this rule”. That is not what we ought to say, but rather: any interpretation still hangs in the air along with what it interprets, and cannot give any support. Interpretations by themselves do not determine meaning<sup>34</sup>.

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<sup>30</sup> See, Charles M. Yablon, *Law and Metaphysics*, In: *Law and Legal Interpretation*, Ed. By Fernando Atria and D. Neil MacCormick, ASHGATE, Dartmouth, 2003. p. 371–384.

<sup>31</sup> Saul A. Kripke, *Wittgenstein on Rules and Private Language. An elementary Exposition*. Basil Blackwell, Oxford, 1982, p. 145.

<sup>32</sup> See, Saul A. Kripke, *Wittgenstein on Rules and Private Language. An elementary Exposition*. Basil Blackwell, Oxford, 1982, p. 15.

<sup>33</sup> See, J. Coleman, B. Leiter, *Determinacy...*, p. 220.

<sup>34</sup> See, L. Wittgenstein, *Philosophical Investigations*, Wiley Blackwell, 2009, paragraph 198.

The important point is that, if the understanding of an utterance or sign were a matter of advancing interpretation, then the interpretation would require its own interpretation, and so on, indefinitely.<sup>35</sup> So, as one can see, the problem is just moved one level higher – “rules say how to interpret other rules”. It could lead to *regresus ad infinitum*, and be used as criterion for a meaning with no end.<sup>36</sup> The next important point in Wittgenstein’s philosophy is that “for him understanding, not interpretation is primary”.<sup>37</sup> He said also: “there is a way of grasping a rule which is not an interpretation (...)”.<sup>38</sup>

### Kripke’s non-skeptical interpretation of Wittgenstein

Kripke was criticized for omitting the passage from Wittgenstein’s Investigations saying that “there is a way of grasping of rule which is not an interpretation but which is exhibited in what we call ‘obeying the rule’ and ‘going against it’ in actual cases<sup>39</sup>”. Kripke’s so-called misunderstanding was that understanding consists in part of an interpretation, verbal or quasi-verbal, presenting itself to the mind.<sup>40</sup> In other words, Kripke treats interpretation as a part of meaning. It is not clear to me if interpretation was really misunderstood by Kripke or whether he was fully aware of what he was omitting.<sup>41</sup> He said he didn’t find it so important in analyzing the main argument against private language.<sup>42</sup> (Anyway, I will treat Kripke’s interpretation as a separate from Wittgenstein thoughts, although there is no possibility to analyze Kripke without Wittgenstein’s “Investigations” at the readers hands, of course.)

It has to be made clear that this not a problem of description; Kripke is fully aware of differences between justification and description. He is not

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<sup>35</sup> See, D. Patterson, *Normativity and Objectivity in Law*, William and Mary Law Review, 43:1 (October) p. 339.

<sup>36</sup> See, S. Kripke, *Wittgenstein on Rules and Private...*, p. 43.

<sup>37</sup> See, D. Patterson, *Wittgenstein on Understanding and Interpretation*, In: Philosophical Investigation 29: 2, April, p. 9.

<sup>38</sup> See, L. Wittgenstein, *Philosophical Investigations*, par. 201.

<sup>39</sup> See, L. Wittgenstein, *Philosophical Investigations*, par. 203.

<sup>40</sup> See, Jes Bjarup, *Kripke’s Case*, in: *Law and Legal Interpretation*, Ed. By Fernando Atria and D. Neil MacCormick, ASHGATE, Dartmouth, 2003, p. 380.

<sup>41</sup> See, S. A. Kripke, *Wittgenstein o regulach i języku prywatnym*, Aletheia, Warszawa 2007, p. 6.

<sup>42</sup> See, S. Kripke, *Wittgenstein, O regulach i języku prywatnym*, Aletheia, 2007, Preface to Polish edition.

asking if what he stated is the truth in the statement “ $57 + 65 = 122$ ”, but how it is possible to justify that it is so. The point he is making is that we are not able to justify the use of rules on the basis of facts.

The main difference then between Wittgenstein and Kripke is that Kripke finds interpretation to be a part of meaning. This main difference between the two philosophers has great consequences in semantic theories. This distinction is the most problematic in thinking about meaning, mainly because of the *mixing* of these two approaches. This is exemplified by radical authors, like Stanley Fish,<sup>43</sup> who once advocated interpretative semantic theory,<sup>44</sup> claiming that the meaning of the text is produced through the process of interpretation.

In opposition, Wittgenstein claims that we don't need any semantic theory to decipher reality. Language is a setting of games with loose relations, and meanings appear in the moment of acting. So, Wittgenstein breaks the realism-skepticism debate, arguing that rule following is not a mental phenomenon. He locates everything in action, especially in social action. Kripke's draws our attention to claims in Wittgenstein's *Investigations* that there is no difference between the philosophy of mathematics and the philosophy of mind. So this is another argument for taking away meaning from individual minds, arguing that private language is not possible. Acceptance of community is what gives license in deciding about the rules that give meanings.

## **Objectivity of legal facts**

In order to find out in what sense legal facts could be objective, I sum up the most important points from the Wittgenstein's theory. I will then use them as assumptions to give an answer about the objectivity of legal facts.

1. The meaning of words cannot be found by looking for their associations with particular objects. Instead, the meaning of words should be understood by the way in which they are used within their social context.
2. The distinction between understanding and interpretation is as an elementary key to the conceptualization of meaning.

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<sup>43</sup> This position was represented by S. Fish, until he adopted a less radical stand.

<sup>44</sup> See, S. Fish, *Is There a Text in this Class? The Authority of Interpretive Communities*, Cambridge, MA: Harvard UP, 1980, He has changed his claims a few times, but the above claims are represented in this text.

If the objectivity of legal facts can be regarded as objective on the basis of acceptance by the community, it reflects a way of legal facts becoming objective in a minimal sense, where the majority of the auditorium decides what a certain word means.

The main consequence of this is that the degree of objectivity is not dependent on the type of fact one is dealing with. When facts don't determine meaning, there is no difference between descriptive, evaluative, or any other type of facts. No matter what kind of facts are being settled, they are all constituted on the basis of common acceptance and the direction of determination goes from institutional rules, not from empirical constitution. This also means that all types of facts, including legal facts are objective to the same degree, but only in regard to their meanings, it also infers that there are no differences between them at the semantic level.

The differentiation of types of legal facts and its influence on the extent of their objective status has sense only on a metaphysic level. This obviously begs the question what sense legal facts could be objective on the metaphysical level, but this is outside the scope of my research. However, I would just like to mention briefly that even differentiation on the level of status of values has no meaning according to Wittgenstein's proposition. That is why there is no difference between cognitive and non-cognitive approaches and why this has no influence on the question of the objective status of facts on the semantic level.

On the basis of the above assumptions, I would like to analyze some specific problems with the objectivity of legal facts. First of all, if meaning is something that every speaker of a certain language shares, the implication is that the meaning of legal facts is objective, at least in a minimal sense. But what about interpretation and application, which are not commonly shared? This problem is especially seen in difficult cases, which are difficult exactly because of the lack of a single shared interpretation. In such cases, expressions like "correct application", "correct meaning", and "objective legal fact" are viewed differently by opposing parties.

What follows from this is that the interpretation decides about the application and therefore has a major influence on it. So, what makes certain interpretations valid and what kind of justifications makes certain applications stronger than others? Is common acceptance a strong enough argument in the domain of law?

As indicated by legal practice, common acceptance is only one of several methods of argumentation. It is one of the most successful one, and can be very convincing in certain situations, especially in the context when one

of the key values is common agreement. An example is a society based on democratic agreement.

However, common acceptance is only one of arguments used in the process of legal argumentation. In many of the Polish judge's justifications examined, especially the more difficult cases, arguments based on social acceptance are used, but amongst many other arguments.

To analyze the possibility of objectivity of interpretation, I would like to settle it in the context of the determination of the process of interpretation in law. My position can be summarised by the following quotation:

“If the interpretation is not determined, then there is no true answer to the question of how a certain situation is regulated by the law, therefore in such cases the law is not objective.<sup>45</sup>”

The practical perspective could be delivered by analyzing the judges' justifications. It could give an answer about the factual and postulated ways of following the doctrine of determinacy and objectivity. Very often the legislator takes the decision by means of legal definitions and it is also the task of judges in most cases.<sup>46</sup> But as I have shown, in a number of cases there is a problem with legal definitions. They also have to be interpreted as part of the judge's decision-making process. So, in this sense, judges contribute to determinacy and objectivity of law. In their justifications, lawyers and judges seem to speak about the law in terms that presupposed strongly objective standards, but after looking at what they actually do, the situation appears to be a little bit different. In practice, the sphere of subjectivity is extended, which is indeed necessary for lawyers and judges to do their jobs.

In the next part I would like to make a comparison between the above theories and practice of law. In particular, I would like to analyze the vagueness of language in legal definitions using examples from the Polish judicature.

## **Legal definitions**

Considering the problem of determination in the application of law, a good example could be delivered by the usage of legal definitions. They are perceived as the more determined part of law in the process of its appli-

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<sup>45</sup> See, E. Bulygin, *Objectivity of Law in the View of Legal Positivism*, Online: [http://www.giuri.unige.it/intro/dipist/digita/filo/testi/analisi\\_2004/15bulygin.pdf](http://www.giuri.unige.it/intro/dipist/digita/filo/testi/analisi_2004/15bulygin.pdf), p. 225.

<sup>46</sup> E. Bulygin, *Objectivity of Law...*, p. 225.

cation, because the legislator gives both meaning and interpretation. The main aims of statutory definitions are to increase the certainty of law, improve the clarity of language, and to determine statutory meaning. However, one should check the hypothesis that legal definitions play that the role in the process of their application.

In the Polish legal system,<sup>47</sup> one of the main interpretive directives imposes a duty upon the judge to use statutory definitions (the “legislator’s meaning”) as a first step in the process of interpretation. This is the first and the strongest of all the interpretive directives that have to be fulfilled in the process of the application of law.

Theory of interpretation questions to what extent the meaning is determined by the readers’ understanding, the legislator’s intent, or by other variables. So, even if the legislator defines some legal terms, it still does not guarantee the precision of legal expressions. When we analyze the process of application of legal definitions we can realize how far they are from fulfilling their prescribed functions.

Statutory definitions in the process of application of law are still a source of doubts. Very often they are not ready-made or clear expressions. Legal definitions still need to be interpreted and problems in the process of application remain. I would like to make a short analysis of a working statutory definition in the process of application of Polish law. I will take into account three main spheres to show how complicated the application of legal definitions are:

1. First and the most common is the problem with the interpretation of statutory definitions. Legal definitions are very often just starting point in the process of applying law. But as it is indicated in the jurisprudential literature “a definition, as a legal rule, is interpreted the same as any other legal rule. Opinions that legal definitions shouldn’t be interpreted are limited to the situations when definitions are unequivocal from the point of view of linguistic rules. Their interpretation should be based on the references to other definitions or to dictionaries.<sup>48</sup>

2. The second problem is the extent of applicability of legal definitions. Judges looking for legal definitions have to question whether it’s only pos-

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<sup>47</sup> It is important to stress that legal definitions in the Polish legal system are one of the most important principles in the interpretation process, and they have to be applied first. In other legal systems there is no such obligation. The person making interpretation can take into account the definition by the legislator but is not bound by it. For example, the Belgium legal system works according to such rules. See more, M. Van Hoecke, *Law as Communication*, Hart Publishing, Oxford Portland Oregon, 2002, p. 131–134.

<sup>48</sup> M. Zieliński, *Wykładnia prawa. Zasady. Reguły. Wskazówki*, Warszawa, 2002, p. 205.

sible to apply a certain definition to one statute, many statutes, or whether it's limited to one branch of law or can be applied to others. There are also definitions that give references to other legal acts: for example, tax law has no definition of life annuity and as one may read in one of the court rulings "it should be understood according to the definition given by civil law".<sup>49</sup>

An attempt of answering this question could be done by showing Quine's and Kripke's positions. Quine names this problem the "thesis of indeterminateness of translation", in other words, there is no fixed meaning of statements no matter what language they are in. It means that its applicability could not be determined in a way that could be accepted as objective. Kripke goes one step further and attacks fixed meaning even within a single language. Law has exactly the kind of "language" that can offer some proof in favor of Quine's and Kripke's theories and the problem of legal definitions illustrates this very clearly. Quine, on the basis of his theory allows us to apply a certain meaning no matter what the context is. Kripke allows for changing meaning in changing contexts. The extent of applicability of legal definitions illustrates the problem exactly.

3. The final problem is with recognizing or distinguishing legal definitions in legal texts.<sup>50</sup> Legal definition is such a definition, which we can find in legal texts and give a meaning to notions in a legal text. As we can learn from legal literature, there are many different types of definitions. They can be reconstructed from different parts of legal texts, from a few articles, from a whole statute, or even constructed using different statutes. Such definitions are described as axiomatic.<sup>51</sup> Exaggerating, one could say that one could find or create a legal definition from almost anywhere in a statute given the many possible ways of constructing definitions.

Analyzing these three problems can show the real role of a definition in the process of interpretation of legal texts. Of course, we can observe many easy cases where the "legal dictionary" fulfills its prescribed function. But, there is a whole group of difficult cases that confirm that legal definitions don't help in more precise communication between legislator and courts. Contrary to a dominant opinion, there are even examples in difficult cases where legal definitions are used to justify interpretations that go in a different direction than the will of the legislator.

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<sup>49</sup> A. Bielska-Brodziak, *Kłopoty z definicjami legalnymi* (Troubles with a legal definitions), In: *System prawny a porządek prawny*, Szczecin, Wydawnictwo Naukowe Uniwersytetu Szczecińskiego, 2008, p. 159–174.

<sup>50</sup> A. Bielska-Brodziak, *Kłopoty z definicjami legalnymi*, In: *System prawny a porządek prawny*, Szczecin, Wydawnictwo Naukowe Uniwersytetu Szczecińskiego, 2008, p. 159–174.

<sup>51</sup> See, J. Wróblewski, *Judicial...*, p. 234.

As one can see, there are some special conditions for setting meanings and it is pretty impossible in the legal domain to make a generalization to embrace the practice of judging in one semantic theory. My observation leads rather in the direction of even more radical indeterminacy of meaning in law's domain. It's my view that judges and lawyers use many different strategies to make their argumentation more successful in order to justify their deep conviction for the position they want to argue for. That is why it is possible to find fragments in case law where the argumentation mixes different semantic interpretations, switching from realist to the antirealist positions to suit their needs.

### The semantic theory of Kripke and Putnam

It is important to stress that there are two levels of consideration, the level of description of what judges are doing and the abstract level of the semantic theory of meaning. I don't question the possibility of application of Wittgenstein's approach to law or the coherence of semantic Kripke-Putnam, but only try to show its inconsistency with some examples from legal practice.

Semantic Kripke – Putnam is quite a controversial theory when applied to law. Authors in the jurisprudential literature write about many different aspects of controversy when applying the new semantic theory.<sup>52</sup> I will analyze only the aspect of common acceptance and common shared meaning in the process of applying law in Polish courts. The first argument says that there is no such thing as a fixed meaning of an expression based on justification by common acceptance. In consequence, there is possibility of changing meaning according to different usage in the past, present or in the future.

The argument against making rule of usages of semantic Kripke – Putnam as a full theory in law is that the common acceptance is not always respectable in the law's domain, especially in hard cases. The practice of law shows many cases where meaning is set in very different ways. Meaning can be set without regard to or against common usage on the basis of the of law's authority. For example, take again the definition of tree, which according to Polish legislature must be "above 1.20 meters", or the attempt to formulate the definition of a human being in order to penalize abortion.

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<sup>52</sup> See, J. Coleman, B. Leiter, *Democracy...*, p. 345,

There are also definitions that have no previous social practice of usage in common language (like a legal person), and are quite different from common understanding. There are a lot of examples that make legal language specific, for example: legal definition of “night time” which is understood as the time between 10.00 p.m. and 6.00 a.m.” From analyzing Polish judiciary, one can draw the conclusion that there is no single strategy in the process of interpretation. Judges very often quote the dictionary to find<sup>53</sup> the so-called linguistic meaning and, in spite of the primacy of using this kind of interpretative direction, they choose different meanings when, for example, considering non-linguistic elements, or interpreting the intention of the legislator.<sup>54</sup> They also justify their choice by arguing that a certain meaning is specific for law or belongs to the language of law and that is why the meaning is different.<sup>55</sup> There are a lot of situations where lawyers have to choose between meanings from common language and legal language and the choice is often done *ad usum*. For example: “tax exemption” has a different meaning in common language and civil law and the courts use both meanings in their rulings. This specific feature of legal language, the creative power of legal language, makes common acceptance a secondary argument.

It is not very risky to claim that even semantic Kripke-Putnam is not suitable to apply fully in law. The theory does not cover all existing practices in law’s domain. Maybe it works at the level of declaration of what judges are going to do, but on the level of action, it seems to be quite incoherent.

There are some legal philosophers who claim that interpretation is always indeterminate and law is never objective. The main representative of this style of thinking is the Skeptical School of Genoa.<sup>56</sup> However, this approach is criticized on the grounds that “all normative formulations can be

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<sup>53</sup> See more, L. Solan, *When Judges use the Dictionary*, In: *American Speech* 86.1993, p. 50–57, A. Bielska-Brodziak, Zygmunt Tobor, Piotr Żmigrodzki, *Co każdy prawnik o słownikach wiedzieć powinien* (What every lawyer should know about the Dictionary), Przegąd Sądowy 2008, No 7–8, p. 79–95.

<sup>54</sup> See example, Uchwała SN z dn 16.01. 2004, sygn. III CZP 101/03, OSNC 2005/4/58.

<sup>55</sup> See, wyrok NSA z dnia 13 kwietnia 2005 r., sygn. FSK 1652/04, LEX nr 166048. wyrok NSA z dnia 4 listopada 2005 r., sygn. FSK 2423/04, LEX nr 187977. uchwałę NSA z dnia 29 listopada 1999 r., sygn. FPK 4/99, Pr. Gosp. 2000/2/27.

<sup>56</sup> Skeptical School of Genoa: Giovanni Tarello, *Dottrine giuridiche e ideologie sindacali*, 1973, Riccardo Guastini, *Rules, Validity and Statutory Construction*, in: *Italian studies in law: a review of legal problems*, Ed A. Pizzorusso, Dordrecht, The Netherlands, Kluwer Academic Publisher 1992, Paolo Comanducci, Tecla Mazzarese, *Grounds of Liability. An Introduction to the Philosophy of Law*, Philosophia 18, 1988, Pierluigi Chiassoni.

ambiguous<sup>57</sup>”, and that it is an essential feature of language that at least some expressions have to be univocal. The skeptical approach about radical indeterminacy seems to be the consequence of identifying meaning with interpretation, as Kripke did.

Considerations about objectivity in terms of the determinacy and indeterminacy of law should also be done in the context of judicial discretion (decisions made on moral or political criteria), the normative gap, and inconsistencies in the legal system, and the problem of judicial activism versus formalism. It’s not sufficient to consider them just under the penumbra of vagueness on the linguistic level. The problem of objectivity may go according to the schema of three pairs of notions:

- determination/indetermination,
- formalism/judicial activism,
- objectivity/subjectivity.

The above consideration may find its source in the problem of judicial activism and formalism. In the Polish judicature, the doctrine of formalism is very strongly represented, but theoretically almost impossible to defend.<sup>58</sup> Maybe this phenomenon explains some of the curiosities drawn from legal practice.

Summing up, the possible objective status of legal facts is a controversial thesis. Even when considered only at the semantic level, the justification for claiming that legal facts are objective is limited as to its meaning. The necessity for interpretation and its application make the dream of objectivity unreal. Legal facts also need to be conceived in a broader context on normative and narrative coherence of institutional facts. Physical facts from human reality are dependent on interpretation with reference to their normative and narrative frameworks.<sup>59</sup> So, institutional facts consist of brute facts and an institutional framework and they are perceived according to legal narrative rules. This kind of paradigm of interpretation, which is used to set or grasp the sense of legal facts, allows only a weak assumption of objectivity.

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<sup>57</sup> See, E. Bulygin, *Objectivity...*, p. 228.

<sup>58</sup> It is impossible to defend from the point of view of the character of judging. It is postulated by the division of power principle that judges should only apply law and not make it (through interpreting).

<sup>59</sup> See, N. MacCormick, *Institutions...*, p. 34.

S U M M A R Y

The article examines objectivity of legal facts in order to determine what it means for legal facts to be objective, and to discover when and under what conditions it is justified to call them “objective”. This enquiry is on two levels: the semantic and the semantic-pragmatic. That is why I introduce first the different conceptions of legal facts and then the relation between legal facts and statements about legal facts. From this, I analyze how the statements identified by legal facts could be objective on a semantic level and under what conditions. Using Wittgenstein, and Kripke’s interpretation of Wittgenstein’s theory, I will further explore whether the meanings of statements about legal facts could be objective and in what sense. The semantic-pragmatic approach is based on the conception of institutional legal facts in a narrative and normative context illustrated by the examples from Polish courts.

