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The convolution of facts and norms: new approach to legal reasoning and interpretation

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Tradition of positivism teaches all lawyers to draw a sharp distinction between facts and norms, between Is and Ought. We are told that facts can be described as true or false by logical sentences. And normative phrases such as rules, principles or patterns of behavior cannot be true or false because these linguistic structures cannot say anything about the real world as it is and they are indicating a proper mode of behaviour for the future. Norms say something about the desired future and facts say something about the past and present. This trivial conclusion is of course correct if we think about words only. I doubt if this is correct when we turn to the real world of human decisions, actions, and results of any human practice. This distinction is probably less relevant for judge-made law than for a legal system dominated by enacted codes (civil law tradition in Europe).

1. What do we interpret as a matter of fact?

Trivial linguistic distinctions may lead to simplistic and unreasonable practical conclusions in legal reasoning and interpretation. What do we interpret and understand while trying to solve legal problems and to apply the law? There are just few propositions. One may believe that the proper object of legal interpretation is the following:

1. Prescriptions of enacted laws only. Positivist jurisprudence advises some shortcuts in legal reasoning such as the principle *clara non sunt interpretanda* (the principle of claritas). Among those contents that are supposed to be clear at the first glance are definitions of some concepts stipulated by a law making public authority. So the interpreter should assume that this stipulated definition is clear enough and does not request further clarification.
2. Prescriptions that are to be found in all possible sources of the valid law both enacted and judge made or based on contracts. The interpreter focuses just on meanings of words in a conventional language of documents relevant to his or her search for a proper meaning of the language.
3. Normative content of prescriptions and other sources of law. It means that we do not search for the meaning of words only but for the meaning of normative content of words. In order to be able to find the most adequate meaning of the specific legal norm one must first reconstruct the norm from all sources of legal normativity and it presumes that not only words of prescriptions of enacted law shall be taken into consideration. Normative context of the legal system may enter into legal reasoning as well. In such a case an interpreter goes beyond the text of statutory law and its wording. An act of interpretation may become an intellectual journey to precedent rulings of judges, to relevant principles of morals, tradition of customs or even to normative beliefs based on religions.

4. Facts and valid legal norms in reciprocal interactions. The proper and necessary object of legal interpretation is a set of dynamic convolutions of facts and norms viewed as institutionally interlinked and transferring their meanings within this convolution. Possible meanings of facts influence the meanings of norms and the other way around. Relationships between facts and norms are dynamic and reciprocal. It is an emergent convolution of facts and norms. It is not a regular braid made by an elegant lady in English or French style but rather irregular and a bit messy process of emergence driven by decisions and actions of many participants of the legal order. Hermeneutical circle of relevant facts and valid norms after much iteration shall bring about a clear understanding of their proper meaning at the end of interpretation. Norms are always mixed up or intermingled with relevant facts of the case under scrutiny. The meanings of facts are to be understood as well as the meaning of norms if one wants to apply norms to specific facts of a case under consideration. I would argue that as a matter of fact any deep and wise interpretation must focus both on norms and facts, on a hidden discourse of valid norms of law and facts of the case under scrutiny. The well trained mind of an interpreter shall understand all aspects of this hidden discourse in the wider context of a specific legal system and its cultural background. The practical goal is to understand meaning of the fact-norm convolution and to preserve structural, logical and axiological integrity of the given legal system¹. The principle of *claritas (clara non sunt interpretanda)* can and should be replaced by a more demanding standard of legal reasoning – *omnia sunt interpretanda*². I believe that we should interpret really everything (*omnia*): all aspects of relevant facts and

¹ I assume that the concept of integrity developed by R. Dworkin in his numerous writings is correct and helpful in legal reasoning as it focuses on moral quality of law and systemic consistency of its rules and principles.

² The principle *omnia sunt interpretanda* advanced M. Zieliński, *Wykładnia prawa: zasady, reguły, wskazówki*, Warszawa 2017.

applicable norms that are intermingled and interact within a certain structure that I call a convolution.

In ontological perspective legal norms were perceived as *institutional facts* which depend on acts and events interpreted in the light of normative order. (Neil MacCormick, Ota Weinberger) and as *cultural facts* embedded in a set of values widely shared by many participants to a given social order³. The brute facts of any case under scrutiny are less institutionalized than the cultural facts such as legal norms which are expressed as rules or principles that are binding patterns of human behaviour.

The mistake of old legal realism was an unfortunate reduction of law to some specific facts such as more or less predictable decisions of judges. The core claim of American realists of the 1920'–1940' was that judges “respond primarily to the stimulus of facts of the case, rather than to legal rules and reasons”⁴ what explains “the indeterminacy of law” which is an obstacle in predicting the rulings of courts. Some of the realists claimed that in many rulings facts were overriding legal rules even in cases where these facts were not relevant in virtue of the applicable legal norms.

New realism does not disregard the power and specific authority of legal institutions and focuses on reuniting facts and norms into a configuration that can be interpreted and understood. Legal norms and relevant facts cannot be reduced to one another because they interact simultaneously. My point is that facts and norms need each other and are doomed to exist in symbiosis in which reciprocal transfer of meanings may be accomplished with some assistance of the wise mind who uses his/her legal expertise. They do not replace each other and are not separate, but are convoluted in many different ways.

³ The concept of “institutional fact” we owe to J. Searle (*How to Derive “Ought” from “Is”*, “The Philosophical Review” 1964, Vol. 73, pp. 43–58) who has been inspired by the essay *On Brute Facts* by G.E.M. Anscombe, “Analysis” 1958, Vol. 18, pp. 69–72.

⁴ B. Leiter, *American Legal Realism*, in: *The Blackwell Guide to the Philosophy of Law and Legal Theory*, W. Edmundson, M. Golding (eds.), Oxford 2009.

The law shall not be reduced to facts: this lesson derives from mistakes made by old realism. The law shall not be reduced to conventional words on paper: this lesson derives from the long tradition of positivism, formalism and analytical theory of law. The law is much more than words and some facts. The law is a half open, emergent, and hybrid normative system. The system of law is a structured process of emerging rules, principles, institutions, decisions, practices of participants and a proper level of common understandings that provide for integrity of all components. Important source of this systemic integrity is the context of culture permanently reproduced and modified by a specific social organization of human beings, first of all by the distribution of power and ownership, that is a necessary institutional framework for the emergency of the legal system.

In terms of the realist theory of emergent legal systems we may think that the living law in action is a process of a great number of norm-fact convolutions consisting of normatively determined individual and group decisions that contribute to its moral and logical integrity and make it a robust and binding reason for actions of those who are subject to a specific legal system⁵. I agree with Klaus Ziegert that “processes are systems”⁶. Inspiring is the old view of Eugen Ehrlich that the inner order of a legal system (i.e. living law) is controlled by four specific *Tatsachen des Rechts* (*Übung, Herrschaft, Besitz, Willenserklärung*) or facts of the law from which legal propositions can be derived by human reasoning and actions⁷.

⁵ E. Ehrlich, *Grundlegung der Soziologie des Rechts*, Munchen Leipzig 1913; D. Nelken, *Law in Action or Living Law? Back to the Beginning in Sociology of Law*, “Legal Studies” 1984, Vol. 4.

⁶ K.A. Ziegert, *The Sociology behind Eugen Ehrlich’s Sociology of Law*, “International Journal of the Sociology of Law” 1979, No 7, p. 251.

⁷ B. van Klink, *Facts and Norms: The Unfinished Debate between Eugen Ehrlich and Hans Kelsen*, 2006, <http://ssrn.com/abstract=980957> (access: 10.06.2019).

2. Modes of Interactions of Convoluted Facts and Norms

How facts and norms interact? Is it a single two way street or two separate ways? We shall not trust our perception of meanings of the convolution of facts and norms that can be made at the first glance. Complexity of forms in which this convolution may appear is an obvious obstacle to human ability of understanding. Let's consider some of these forms of interaction between intermingling facts and norms that are both necessary and relevant. If one asks what is prior – fact or norm – two solutions commend themselves in this regard: facts may have stronger influence on norms or norms may have stronger influence on facts.

1. How facts exert an influence upon norms?
 - Facts (such as decisions and behaviors of persons who enact or just recognize legal validity of norms) create norms. This situation is known as a pedigree test in Hartian legal theory. Convolution has a simple shape: $F \rightarrow N$.
 - While solving the problem of validity of norms one must take into consideration the facts of the case that are relevant. Application of a legal norms presupposes the proper understanding of facts. Thus facts of the case influence the content of norm that shall be understood and applied. The very applicability of a legal norms is determined by the facts that occurred and are relevant from a perspective of valid legal norms. Nobody has the right to choose the facts regardless of the content of legal norms. Convolution : $F \rightarrow N$ and $N \rightarrow F$.
 - Decisions and actions of many participants of the legal order are facts F (intellectual acts of interpretation, arguments that are legitimating norms and decisions of application made by judges or officials in public administration) determine the ultimate meaning of norms and their cultural capability of regulating human behavior of other persons FF . Convolution here can be presented in the following manner: $F \rightarrow N \rightarrow FF$.

2. How norms can influence the facts?

- Legal norms N give the rights to law making practices of deputies in parliaments and to the ministers of the government F and these facts F create new norms or modify valid norms of law NN. Convolution: $N \rightarrow F \rightarrow NN$.
- Legal norms N determine which facts F can be regarded as relevant and may be included into the set of facts of the case. Criminal law norms N prescribe what kind of behavior is forbidden and punishable F The relevance of facts is determined by norms and not by some other facts. Convolution: $N \rightarrow F$.
- There are specific rules which constitute some objects, events, actions, activity or any other sort of social fact. Constitutive rules are known by the name given to them by John Searle⁸, however these rules were discovered in 1920' by Polish legal philosopher Czesław Znamierowski and he named them *normy konstrukcyjne* (construction norms). He defined this new concept as follows “a norm of construction creates new possibilities of action, such as without it could not exist” “without the rules of chess there would be no moves of the rook, the pawn or the queen, without the rules of contract bridge there would be no bids, tricks or passes”⁹. Constitutive/construction rules create something new in social reality and regulative rules can only regulate something that already existed¹⁰. So the convolution would look like: CN (constitutive norm) \rightarrow new F. Institutional positivists were skeptical about the constitutive rules and instead of them advanced the concept “underlying principles”
- For Hans Kelsen a valid legal norm is one that really does provide an “ought” and so the foundation of a legal system

⁸ J.R. Searle, *How to Derive “Ought” from “Is”*, “The Philosophical Review” 1964, Vol. 73, pp. 43–58.

⁹ Cz. Znamierowski, *Podstawowe pojęcia teorii prawa. Część pierwsza: Układ prawny i norma prawna*, Poznań 1924, p. 103.

¹⁰ Institutional positivists were skeptical about the constitutive rules and advanced the concept “underlying principles” of the legal system.

is, accordingly, an ought – the basic norm. Is required to animate inert facts with obligation. That special norm has no substantive content of its own. It merely says that the norms enacted in accordance with the effective constitution ought to be obeyed. Convolution: BN (basic norm) \rightarrow validity of $N \rightarrow F$.

The general model of the fact-norm convolution should look like a rootstock or rhizome or like a curly braid as it is obviously a non linear process in social reality. However it is easier to depict the convolution as if it was a linear process, for example in such a manner: Normative orders living in a specific culture (morals, customs, religions) $N^* \rightarrow F1$ Decision of enactment or recognition of norms as legally binding that is made by competent public authorities \rightarrow Legal norms $LN \rightarrow F2$ Decisions taken by public authorities who are competent to interpret and to apply LN such as judges or administrative officials $\rightarrow F2$ Legal consequences, dynamism of legal relationships and legal statuses of persons.

Any fact-norm convolution may develop over time. This development is a kind of punctuated evolution. So the linear model is actually not counter intuitive or obviously questioning the common sense. Let us keep in mind, however a non linear and somewhat chaotic modus operandi of convoluted norms and facts such as decisions, behaviours, and consequences of the implemented law.

3. Hybridism of fact-norm convolutions

Normative facts are phenomena of hybrid characteristics: they are objective regularities of nature and of human societies and in the same time they are rules perceived as binding patterns of requested behavior. The new concept of normative facts advanced recently Bruno Celano. He claims that a normative fact is a hybrid phenomenon that belongs to the area of facts (natural regularities) and area of norms (rules of behavior)¹¹.

¹¹ B. Celano, *Preconventions. A Fragment of the Background*, "Revus. Journal

Hybridism of IS and OUGHT refers to real life of normative systems and must not mean that in our acts of communication we shall make a logical mistake by mixing up sentences about what WAS in the past or IS at present with linguistic expressions about what we believe SHOULD be in the future. *Sein* and *Sollen* of Immanuel Kant may be kept as a valid distinction in epistemology but not as an ontological distinction that claims to be a true description of the reality. In real life Is and Ought are interwoven and must interact. When we study this segment of culture we can of course distinguish facts and norms but it is better to adopt the method of understanding them as the whole bundle or convolution than to keep facts and norms in artificial and purely intellectual separation. Hume and Kant were great thinkers but their distinctions of concepts shall not be regarded as a permanent obstacle that prevents legal reasoning from becoming realistic and reasonable.

The second reason why it is better to study convolutions of facts and norms and to understand them in a holistic manner relates to the very essence of the syllogism of facts and norms of the case. Interpretation and application of legal norms requests from us a complex checking and proving the proper level of analogy between the facts of the case and the relevant legal norms reconstructed from all valid sources of law under a specific system of law.

Reconstruction of norms from all valid sources of law (such as prescriptions of enacted law, legal customs, valid contracts, precedent rulings of the courts) is a necessary intellectual operation that may and should lead to a proper understanding of meaning of norms in their relation to the facts of the case. By doing this we have to combine and compare the facts and norms. Any artificial separation of facts and norms will not help in our search for an analogy and for a deep understanding of convoluted facts and norms. Holistic legal reasoning does not disregard the necessary level of analogy of facts and norms. Legal syllogism looks like an implication in a formal logic of sentences however it is not an im-

plication because one of its premises is a normative phrase that cannot be true or false (Jørgensen dilemma). Anyhow it is a basic form of legal reasoning with two premises. The first is general and normative, and the second is specific and relates to facts. Conclusion is based on our knowledge about both norms and facts. Only combined understanding of norms and facts allow for coming to the conclusion that norms and facts are similar enough and a proper degree of analogy between them can be regarded as proven.

One can consider a wider sets of facts than the facts of the case. For example, living traditions, precedents of the common law, or large segments of social relations which are linked to legal norms¹². Power games and relations of competition in all walks of life interfere into many domains of law in action. Interference of this variety may destroy the foundations of the rule of law. So expansion of facts may be destructive for a normative systems by subverting trust in impersonal procedures and institutions based on legal norms. Sociology of law and New Legal Realism have proven that looking deeper into the social context of the law in action is a very efficient method of study. Critical reflection and empirical data about facts of real life show that legal norms can be abused or distorted by facts of social, economic or political characteristic¹³.

4. Taking Facts Seriously and Responsive Law

There is another good reason why it is better to think about facts and norms in conjunction and keeping them close to each other. One of the fundamental moral requests is that legal systems should be efficient in satisfying society's expectations. Laws both enacted

¹² A. Visegrády, *The Dialectics of Social Relations and Legal Norms in the Judicial Application of Law*, "Soziologische Jurisprudenz und realistische Theorien des Rechts / Sociological Jurisprudence Rechtstheorie. Beihefte", Band 9, 1986. XVI.

¹³ V. Nourse, G. Shaffer, *Varieties of New Realism: Can a New World Order Prompt a New Legal Theory?*, "Cornell Law Review" 2009, Vol. 95, pp. 61–137.

by legislatures and judge made shall be responsive to society's expectations, needs, desires and demands. On the other hand legal system may influence aspirations and expectations of social groups.

The idea of responsive law is better understood since the book *Law and Society in Transition: Toward Responsive Law* by Philippe Nonet and Philip Selznick had been published for the first time in 2001 in New York¹⁴. They distinguished between three types of legal orders: repressive, autonomous, and responsive.

Repressive law is riddled with a raw conflict of interests and is hardly anything more than an instrument of social domination by ruling groups. The idea of repressive law presumes that any given legal order may be congealed injustice. Fairness and substantive justice is not guaranteed by the mere existence of law, because any legal order has a repressive potential, it is always bound to the status quo and makes political power more effective in keeping society under control.

Autonomous law emerges when the legal order becomes an arrangement for efficient taming repression and limiting the scope of political power. Both ideas, the German *Rechtstaat* and the Rule of Law refer to a legal and political aspiration, the creation of a government of laws and not of men. This aspiration can be fulfilled only when legal institutions acquire enough independent authority and autonomy from politics to impose standards of restraint on the exercise of governmental power. It is an achievement of legal positivism that should be appreciated even if it could not prevent all abuses of power.

American realist jurisprudence was very much engaged in the quest for responsive law; its primary purpose was making law more responsive to human needs. To this end, they urged a broadening of the field of the legally relevant, so that legal reasoning could embrace knowledge of the social contexts and effects of official action. Like legal realism, sociological jurisprudence of Roscoe Pound aimed at enabling legal institutions to take more complete and intelligent account of the social facts upon which law must

¹⁴ This little book has been printed four times by many publishing houses. It proves that little books may be very successful with the readers.

proceed and to which it is to be applied. Pound's model of responsive law was based on the assumption that law should offer something more than procedural justice and formal equality. It should help define the public interest and be committed to the achievement of substantive justice.

As we see the idea of responsive law is rooted into a deep conviction that social and cultural facts should be taken seriously and duly included into a legal reasoning. To this end, we should periodically redesign our legal institutions and to improve their ability to fulfil public expectations.

The jurisprudence of new realism is the most recent effort in an permanent quest for responsive law that protects the substantive justice¹⁵. The New Legal Realists have uncovered a standard model of judicial behaviour, demonstrating significant differences between Republican appointees and Democratic appointees, and showing that such differences can be diminished or heightened by panel composition. The New Legal Realists have found that race, sex, and other demographic characteristics sometimes have detrimental effects on judicial judgments¹⁶.

However, most of these studies focus on subjective standards of law's quality assessment. Let's ask if some objective standards make sense and could be helpful in human efforts to make the laws more human.

5. Cultural Adequacy of Law: Quest for Objective Standards

The concept of cultural adequacy of law is much wider in scope than the quest for the law responsive to social expectations. Ex-

¹⁵ H. S. Erlanger, B. Garth, J. E. Larson, E. Mertz, V. Nourse, D. B. Wilkins, *Is it Time for a New Legal Realism?*, "Wisconsin Law Review" 2005, No 2, pp. 335–363, 2005; Univ. of Wisconsin Legal Studies Research Paper, No 1015. <https://ssrn.com/abstract=896762> (access: 15.07.2019).

¹⁶ Th. J. Miles, C. R. Sunstein, *The New Legal Realism*, "University of Chicago Law Review, Forthcoming"; University of Chicago Law & Economics, Olin

pectations are subjective and volatile as they can be changed or replaced by some new expectations. They are strongly dependent upon emotions in a post-truth public communication networks.

By adequacy I mean a proper level of operational adjustment of the legal system to most important objective circumstances and challenges such as:

1. The level of development of a specific civilization. Technical and economic aspects of this civilization are very important standards of law's adequacy assessment.
2. Patterns of behavior and values rooted deeply into the cultural framework of a given society.
3. The necessity of smooth reproduction and adaptation of the institutional framework of the existing social order. The most important task of any legal system is keeping the proper level of stability and of equilibrium between public power and ownership and private power and ownership¹⁷.
4. Interests and needs of large social groups (classes, strata, ethnic groups, professions)
5. The present situation of a society and the burning problems that must be immediately solved by the ruling group with political and legal means. To some specific problems it will suffice to use judicial remedies such as legal remedies (damages) or equity remedies¹⁸. But general problems of society must be solved by more robust remedies such as new legislation, budgetary measures, institution building or military operations.

Working Paper No 372, Public Law Working Paper No 191. <https://ssrn.com/abstract=1070283> (access: 7.05.2019).

¹⁷ W. Lamentowicz, *The Emergence of the Legal Order*, "Studia Iuridica Toruniensia" 2018, Vol. 23.

¹⁸ Legal remedies are many types of damages which are available to a successful claimant as of his/her right (such as compensatory, punitive, incidental, reliance, consequential, liquidated, nominal damages). Equitable remedies are judicial remedies developed by courts of equity from about the time of Henry VII to provide more flexible responses to changing social conditions than was possible in precedent-based common law. Equitable remedies are distinguished from legal remedies by the discretion of the court to grant them.

6. Transnational challenges and global threats to security and prosperity of contemporary societies.

Adequate law should be to a proper degree adjusted to the above mentioned standards in such a manner that it will be able to regulate the processes of change and to promote the necessary innovations in culture and social order. There is no efficient regulation without adequate adaptation. There is little innovation through law feasible if adaptation and regulation is inefficient.

Low adequacy of law to the facts of life in a broad sense may cause a lot practical problems: abuse of law, cynicism toward an unresponsive state, anomic behavior, destruction of the normative power of law, diminished efficiency of law execution, instability of legal statuses of persons, delayed amendments to laws that deem necessary etc.

Legal norms without facts are helpless and pure facts without legal norms will never contribute to a stable and flexible *modus operandi* of the legal order. Some facts are conducive to the fulfillment of legal norms and some others undermine or openly destroy the system of law. But all are worthy of empirical study and critical reflection if we really want to be the guardians of the legal order in a wider sense. Values hidden in legal norms deserve a great deal of intellectual effort of identifying and understanding of all relevant facts.

6. Conclusion

Without interpretation of facts we will not be able to achieve a decent level of the adequacy of law and the law could hardly be responsive to human expectations. Our understanding and practical dealings with facts, both on a societal level and individual psychology, is an indispensable precondition for the high quality of our legal systems if we want to make them both responsive and adequate. Critical reflection about facts may show why and by whom the law can be used as a power and who might be victimized by this practice.

If we do not take facts seriously, our interpretation of norms will be very abstract and we would not be able to apply legal norms to facts that we disregard in legal reasoning.

Swedish economist and a very wise social researcher Gunnar Myrdal has rightly put this simple idea “facts kick us... kick our heads first of all”. New realist legal scholars do not like to get kicked to their heads by surprise and hope to survive in a troubled world of today due to a systematic consideration of facts.

STRESZCZENIE

Splot faktów i norm: nowe podejście do rozumowania prawniczego i interpretacji

Moim celem jest pokazanie, że fakty i normy w realnym życiu zlewają się ze sobą, są wymieszane i nie mogą istnieć bez symbiotycznych splotów faktyczno-normatywnych. W świadomości interpretatora fakty i normy dobrze jest utrzymywać jak najbliżej siebie – to pragmatyczna rada, która może przyczynić się do lepszego rozumienia problemów prawnych. W procesie stosowania prawa fakty i normy wzajemnie na siebie wpływają. Ta dynamika ukrytego, niewypowiedzianego dyskursu faktów i norm tworzy ich znaczenia, które wszyscy znawcy prawa powinni móc zrozumieć. Poważne traktowanie faktów w rozumowaniach prawniczych może być pomocne w uczynieniu systemu prawa bardziej wrażliwym na subiektywne oczekiwania społeczne oraz stosownym do obiektywnych standardów kulturowej adekwatności prawa.

Wielu profesjonalnych prawników ma dość ograniczoną zdolność rozumienia sensu faktów, zarówno faktów sprawy, jak i faktów kulturowego kontekstu. Ma to związek z niedoskonałością edukacji prawniczej. Zbyt mało uwagi poświęca się psychologii i socjologii w kształceniu młodych prawników. Prawnicy powinni być lepiej przygotowani do rozumienia kultury społecznej ludzi, a nie tylko studiować grę słów w prawie stanowionym przez parlamenty. Rozumienie sensu słów jest ważne, ale istotniejsze jest rozumienie działań i świadomości ludzi.

Słowa kluczowe: nowy realizm prawny, interpretacja faktów, sploty faktów i norm, rozumowanie prawnicze, prawo adekwatne, prawo społecznie wrażliwe

SUMMARY

The convolution of facts and norms: new approach to legal reasoning and interpretation

My purpose is to show that facts and norms in real life are intermingled and cannot exist without symbiotic convolutions with each other. Keeping facts and norms as close as possible in the minds of interpreters is a pragmatic advise that can contribute to a better understanding of legal problems. Facts and norms in the process of law application exert a great deal of influence on each other. This dynamics of hidden, unspoken discourse between facts and norms creates meanings that all experts in law should be able to understand.

Many legal professionals have quite limited capability of understanding the meaning of facts. It is related to the some fallacies of legal education. There is not enough attention paid to psychology and sociology in education of young lawyers. Lawyers should be better prepared to understand the culture of human beings and not just studying the art of playing with words in the statutory law enacted by parliaments.

Key words: new legal realism, interpretation of facts, legal reasoning, fact-norm convolution, adequate law, responsive law

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