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Članak se bavi provokativnom knjigom Bojana Spaića pod naslovom„Priroda i determinante sudijskog tumačenja prava". Izražavajući saglasnost sa sveukupnim opovrgavanjem formalizma kao teorije sudijskog odlučivanja, kritički osvrt u radu osporava Spaićevu ekstremnu verziju pravnog skepticizma. Dok su jezičke formulacije pravnih normi nesumnjivo neodređene, ta neodređenost nije toliko prožimajuća kako to Spaić tvrdi. Izvestan stepen određenosti, međutim, ubedljivije objašnjava interpretativnu uniformnost koju Spaić pokušava da objasni oslanjajući se na determinante sudijskog tumačenja prava. Iako ovi faktori mogu donekle baciti svetlo na stvarni proces donošenja presuda, kritika izražava sumnju da li oni mogu garantovati uniformnost do stepena koji tvrdi Spaić.

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Legal Realism Bound

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- Formalism
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- Indeterminacy
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- Determinants of judicial interpretation of law

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The article engages with a rich and provocative book by Bojan Spaić titled Priroda i determinante sudijskog tumačenja prava. While expressing agreement with the overall refutation of formalism as a theory of judicial decision-making, the critique challenges Spaić's extreme version of legal scepticism. While linguistic formulations of legal norms are undoubtedly indeterminate, this indeterminacy is not as pervasive as Spaić contends. A degree of determinacy, however, explains more convincingly the interpretive uniformity that Spaić tries to explain by relying on determinants of judicial interpretation of law. While these factors may throw some light on the actual process of adjudication, the critique expresses doubts as to whether they can guarantee uniformity to the degree that Spaić asserts.

1. INTERPRETATION AND CERTAINTY

Interpretation of law has come to be regarded as the central topic of modern jurisprudence. With its ability to connect the drearier world of theoretical ruminations with the vibrant practice of law, the topic of interpretation holds out a tempting promise to make jurisprudence relevant to the practicing lawyer. It may be true, as Barberis has observed, that in the history of philosophy of law, the problem of interpretation may have been the last to surface, but it has managed to absorb all the other problems (Barberis 2008, 209).[1] Dworkin might have been right, after all, in his observation that everything in law is interpretation.[2] On the other hand, in the mundane world outside the realm of jurisprudence, a parallel process has taken place. Judicial decision-making has become the focus of our civic attention, as practically every important political or even philosophical question will ultimately be decided before a court. While the jurisprudence revels in esoteric intricacies of interpretation, there is a keenly felt need by the general public to understand the mysterious process that determines their lives.

The wonderfully rich book by Bojan Spaić, *Priroda i determinante sudijskog tumačenja prava*, tries to straddle both worlds and present a coherent and compelling argument how interpretation in law can be better understood. This is an important and valuable endeavour. There is much in this book that I am in complete agreement with, but the craft of writing critical comments like this demands me to locate possible flaws and disagreements I might have with the author. As I reluctantly embark on this journey, I only wish the reader will recognise that my comments are made in the spirit of fostering discussion and deeper insight into the topic which is so provocatively been addressed in Spaić's book. I would hate to resemble those torches, which shine, as Seneca remarked in one of his epistles, not so much to brighten the darkness, but to make themselves seen (Seneca Ep. 57 1925, 383; the English translation is not completely accurate).

Two themes dominate Spaić's book. The first is legal formalism and its emphatic refutation. The other is his articulation of "determinants of judicial interpretations of law" (*determinante sudijskog tumačenja prava*), factors which can help us understand the interpretive uniformity despite a particular flavour of anti-formalism which Spaić embraces. Let me address the first theme first, not only because it is the more elaborated one but because the entire discussion of the second can only be understood in light of the first.

1 "*Nella storia della filosofia del diritto, il problema dell'intepretazione viene per ultimo, ma tende di assorbire tutti gli altri*".

2 "[...] legal practice is an exercise in interpretation not only when lawyers interpret particular documents or statutes, but generally" (Dworkin 1982, 527).

Jurisprudential problems are sometimes just a reflection of broader philosophical puzzles. Greek philosopher Democritus believed that a universe is composed of atoms, moving in a linear and thus completely predetermined manner. This outlook obliged him to a completely deterministic understanding. There is and cannot be free will, because everything is pre-determined. In a much more modest way, formalism (as a theory of decision-making[3]) espouses similar position. Once we have legal rules, the decision-making of a judge is restrained to a point of him or her being transformed into "the mouth that pronounces the words of the law", as the infamous Montesquieu's dictum goes (XI, 6, 2001, 180). So is this representation believable? Is the judicial decision-making predetermined by rules or do judges have at least a modicum of discretion? If they enjoy a realm of freedom, is this domain of discretion (legally) unbounded? And if it is not, what constitutes the confines that judges are obliged (or obligated) to respect? Spaić's book lays before us a cogent argument disproving any idea that legal decision-making can be predetermined. But he goes a step further and argues for what is in essence a legal realist position heavily emphasizing the (linguistic) indeterminacy of law. Finally, in a cathartic twist, he identifies certain determinants that nevertheless reign in the looming possibility of an unbounded judicial discretion. We end up with a vision of judicial decision-making that is not predetermined but possesses the same virtue of predictability that is commonly attributed to formalism. Legal realism, for sure, but a bounded one.

2. THE MANY VICES AND SOME VIRTUES OF FORMALISM

2.1. Formalism – (Yet Another) Tentative Outline

Let me begin with the first of the question implicitly posed in Spaić's book: is the judicial decision-making predetermined? Legal formalism would have us believe it is. This view of adjudication unsurprisingly finds itself in the crosshairs of Spaić's book. I will take its central tenets of formalism to be the following three assumptions:[4] legal reasoning is (i) *deductive*, (ii) based on *clearly definable legal norms* and (iii) capable of yielding *a single correct answer* to any legal problem. Legal formalism understands

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3 See e.g. Pildes (1999, 609–619) for different understandings of formalism (even) within jurisprudence.

4 Being keenly aware that the last thing the world of legal philosophy needs is yet another attempt at a definition of legal formalism, I nevertheless venture on this perilous path in order to make a point further on. I therefore ask the reader for a bit of indulgence. Spaić defines legal formalism somewhat differently; see Spaić (2020, 89–90).

legal reasoning as a sort of logical operation that proceeds in a strictly rational fashion, untainted (or unhampered) by non-rational considerations. It is guided solely by legal considerations, entail\ed in norms. These norms are capable of being articulated, although not necessarily in the form of legal rules. The experience of *Begriffsjurisprudenz*[5] or, for that matter, Christopher Columbus Langdell's (1871, vi-vii; Beal 1916, 135–136)[6] legal formalism makes it clear, that the directives leading the interpreter to a legal decision can also take the form of legal principles or legal concepts. And, finally, Dworkin's one-right-answer thesis clearly articulated[7] what was up to that point only implied in the formalist thought of the yesteryear. Savigny's comparison of legal reasoning to solving of a geometrical problem Savigny (1814, 22) or Puchta's talk of calculating with legal concepts as a proper way to reach a legal decision implied there is one correct solution but never quite articulated this insight.

These formalist articles of faith entail certain corollaries that are equally important. (i) Judicial reasoning and, in the same vein, law, is *autonomous*. By having to rely solely on *legal* norms, the law is protected from the unwarranted extraneous influences. (ii) Every judge must decide the controversy before him or her *in the same way*. As there are many different ways to get the decision in a legal case wrong, there is only one way to get it right. The formalist views different opinions on legal matters to be (at best) *bona fide* mistakes. Honest and rational judges are bound to reach the same conclusions thus making the maxim of treating like cases alike a reality. (iii) By combining deductive reasoning and its indisputable starting point of legal norms, we acquire a reliable method of distinguishing wrong decisions from the right ones. (iv) Thus, establishing an almost complete predictability of legal decision-making and (v) ensuring that the reasoning in the judgment is a perfect reflection of the judge's mental process in arriving at the decision.

This description of judicial decision-making is highly improbable. So improbable, in fact, that we would have trouble finding a legal philosopher who would subscribe to these tenets. Now, devising a straw man, or, to be politically correct, a straw person, is a time honoured tradition from Plato (remember Callicles?) to Dworkin (remember Judge Herbert?). It is a device to highlight differences and emphasize subtle distinctions that might be important. But as far as I can tell, there is no legal philosopher of repute[8] who would simultaneously hold all three central

5 For a succinct overview see Wieacker (1996, 430–458) and Krawietz (1976, 1–11). Wieacker is speaking there of *rechtswissenschaflitches Positivismus* but he is largely describing the outlines of *Begriffsjurisprudenz*.

6 For a (caricature) of such approach to adjudication see Pound (1908, 605).

7 For the first time in his article Judicial Discretion (1963, 624–638).

8 Tamanaha (2010, 59) observes that at the turn of nineteenth century no one described himself as a formalist. Lyons (5/1980, 950) makes essentially the same point. Labels such as legal formalism or *Begriffsjurisprudenz* were coined latter as terms of abuse or derision.

tenets of formalism at once.[9] Savigny and Puchta subscribed to proposition (i) and perhaps implicitly endorsed proposition (iii) but would object to proposition (ii). The same can be said for Langdell and Beal,[10] but their reliance on principles makes their acquiescence to proposition (ii) highly unlikely. Dworkin famously subscribes to proposition (iii) but can hardly be accused of accepting propositions (i) and (ii).

I would almost be tempted to dismiss formalism out of hand, had it not been for giant strides towards application of artificial intelligence in the legal domain. To claim that *a judge* always reasons in a completely logical fashion and relies solely on legal norms is a supremely doubtful contention. To assert that *a computer programme* reaches conclusions that are predetermined by the algorithm, which can be based on syllogistic logic, and uses only linguistically clearly defined propositions (however mistaken or debateable such determinations might be) is a truism. If such sad state of affairs will ever materialise and a computer programme effectively takes the place of a judge,[11] anti-formalist legal philosophy can find itself in an unhappy position having to choose between apparent irrelevance and patent falsity. If it decides to ignore judgements rendered by computer programme the anti-formalist might soon be able to explain an ever-shrinking portion of the actual decision-making. If it decides to espouse an anti-formalist creed, it would quite plainly be mistaken in his or her analysis.

But, as I can only hope, we will avoid the nightmare of such an automated judicial decision-making, the formalist creed does not seem particularly convincing. So why bother?

2.2. The Guilty Pleasure of Formalism

There is (at least) one reason why this preoccupation with formalism is not completely misguided. Time and time again echoes of formalist themes reverberate not so much through jurisprudential literature but through judicial opinions and extrajudicial writings of judges and shape the popular perception of adjudication. This predilection for formalism can be explained by the confluence of two factors. The first is the doctrine of a separation of powers, which is fundamental to most

9 Jeremy Waldron claims that “it is even difficult to state [...] formalist doctrine coherently” and remarks that may be why “no legal philosopher ever held it” (Waldron 1994, 509).

10 See fn. 8.

11 A few years ago, Estonia announced the introduction of an artificial intelligence software to hear and decide on small claims disputes (below €7,000); see Park (2022). There have also been reports from China that Pudong People’s Procuratorate has created an artificial intelligence “judge” that helps prosecutors in their decisions. The more sceptical among us will be bemused by the assertion on the Hindustan Web Hub that this machine gives “97 percent correct decisions” (Tarar 2021). More troubling is the undertone of supreme confidence in this programmes that might foreshadow low degree of scepticism about its more widespread use in adjudication.

modern political systems. Following Montesquieu's interpretation there are three distinct state functions, the legislative, executive and judicial function. They should not only be separated, but also vested in three distinct bodies. This *trias politica* is predicated on the assumption that none of the powers should encroach in the sphere of another. Montesquieu paints a bleak picture of what such an intrusion might foreshadow for the cause of freedom:

> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.
>
> Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression (Montesquieu XI, 6, 2001, 173).

Separation of powers is not only a vestige of enlightenment political theory; it is a vibrant part of modern political theory and practice. This principle has found its way into most of today's constitutions and today informs the functioning of the vast majority of contemporary political systems. We would have a hard time finding a constitution or discovering a political system that does not proclaim to be founded on this very precept. The modern understanding of this principle in still predicated on the belief that only a rather strict adherence to the delimitation of the spheres of different branches of government can fulfil the promise of a liberal political order. It is therefore not at all surprising that formalist or formalist-ish themes keep turning up. What is a bit more surprising is that this formalist (or formalist-ish) narrative is often rather uncritically echoed in judicial opinions past and present.[12] This, shall we call it *tactical formalism*, offers the courts a convenient cover to disguise its law-

12 Lord Esher's pronouncement in Willis & Co v Baddeley [1892] 2 QB 324, 326 is a pre-eminent historic example of such a stance: "This is not a case, as has been suggested, of what is sometimes called judge-made law. There is, in fact, no such thing as judge-made law, for the judges do not make the law, though they frequently have to apply existing law to circumstances as to which it has not been authoritatively laid down that such law is applicable". But even as late as 2019 the UK Supreme court observed that "[...] the boundaries of a prerogative power relating to the operation of Parliament are likely to be illuminated, and indeed *determined, by the fundamental principles of our constitutional law*" (R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland [2019] UKSC 41, para. 38 (emphasis added). Such an attitude is even more pronounced in some other common law jurisdiction. See, for example, Vemaredy Kumaraswamy Reddy v. State Of A.P (2006) 2 SCC 670, p. 675, para 15, where the Indian supreme court boldly stated: "The judges should not proclaim that they are playing the role of a lawmaker merely for an exhibition of judicial valour. They have to remember that there is a line though thin which separates adjudication from legislation. That line should not be crossed or erased."

making activity.[13] Why should that be necessary? Dworkin's initial attack on judicial discretion certainly strikes a chord. Given the democratic nature of modern political system, we would be hard pressed to convincingly explain (in this particular framework) why it falls to a judge to formulate a duty not previously imposed or why he or she may do so retroactively (Dworkin 1963, 638; 2001, 84–86). The rejection of formalism does create some tensions in the common understanding of the law. It was more than a hundred year ago that a German legal philosopher, Gustav Radbruch, astutely observed that the three cardinal propositions put forward by the legal formalism's guise of the day, *Begriffsjurisprudenz*, must necessarily exists simultaneously (Radbruch 1906, 358–364). These propositions were the principle of the separation of powers, the belief that the law is complete and the belief that the judge cannot decline to decide a case because there are no applicable rules.[14] Radbruch plainly showed that all three propositions can only function in unison. You cannot retreat only from one of them. So, for example, abandoning the proposition that the law is complete (and claiming that judges create law) also entails abandoning the principle of a separation of powers. It is this predicament that helps us better understand the rhetoric of legal formalism. And it is largely rhetoric, for even judges who coach their opinions in vaguely formalist terms, sometimes confess to creating law when speaking or writing extrajudicially.[15] So is this a misapprehension or a white lie? I would argue it is neither. For in this guilty pleasure of formalism lies a kernel of truth, which is intimately connected to the significance of rules for any societal endeavour.

2.3. In Defense of (the Relative Determinacy of) Rules

The sound core appeal of formalism resides in the recognition of the value that rule-following entails for any ordered society. The idea that society should be governed by laws and not by individual whims has its enduring appeal. But rules have other virtues as well.

The value of rules, as John Stuart Mill has taught us a while ago in his *System of Logic* (VI, 12, 3) is (at least) twofold:

> By a wise practitioner, therefore, rules of conduct will only be considered as provisional. Being made for the most numerous cases, or for those

13 Wade rather insightfully attributes this to judicial abhorrence of responsibility. See Wade (1941, 195).

14 A court's refusal to decide a case because of the absence of controlling law is known in international law as *non liquet*. This rejection of jurisdiction was expressly prohibited in most domestic legal systems, most notably in the Art. 4 of the French *Code civil* which reads in the original: "*Le juge qui refusera de juger, sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice*".

15 See, for example, Reid (1972, 22) and Mason (1996, 1–2 *et passim*).

of most ordinary occurrence, they point out the manner in which it will be least perilous to act, where time or means do not exist for analysing the actual circumstances of the case, or where we can not trust our judgment in estimating them.

The existence of rules allows us to save time and energy that we would need to spend in order to make a decision in every particular case, even then when the situations we encounter are sufficiently similar. Having a rule enables us to rely on decision made in advance as the working hypothesis what is the best way to act. Rules are *time and energy saving devices*.[16] The other advantage of this device is the fact that we are not forced to make decisions when circumstances inhibit optimal decision-making process. Having the possibility to formulate a template for action in advance enables us to come up with the closest approximation of the best course of action. Rules allow us to formulate decisions that are superior to those we would have formulated having no time to consider the whole range of possible courses of action. Rules are also *decision optimisation devices*.

I would point out two additional benefits of *legal* rules (without any illusion[17] that the list is exhaustive). They both elucidate the societal dimension of the existence of rules. The first benefit is *foreseeability*. The foreseeability is not only a virtue of a rule that benefits the immediate addressee. Knowing what the rule for my conduct is does not benefit me alone. It also allows others to predict what my behaviour will in all likelihood be. The traffic light is a case in point. Red light is not only an information directed at me, it also allows others to predict that I will stop and not drive through the intersection when it is not my turn. Finally, existence of general rules reinforces the feeling that the law treats us as equals. Being subjected to the same rules is an outward and public affirmation of the *equality* before the law. Rules, to summarise the two points, reinforce and create mutual expectations that bind us and thus foster the establishment of a community.

But and here is my crucial point, the rules can perform all of these indispensable functions, only on condition that they are *by and large intelligible*. Or, to put it more bluntly, they will fail in their quest to order human behaviour, if they do not convey at least some meaning most of the time. The mere existence of rules would seem to suggest they are able to perform the behaviour-guiding task as they are expected to.[18]

16 See Raz (1999, 59).

17 Any such illusion would be summarily dispelled by a glance at chapter 7 of Schauer's Playing by the Rules (2002).

18 I will return to this (possibly controversial) point later on.

2.4. The Perils in the Refutation of Formalism

All the praises being sung to the virtues of a rule-based jurisprudence, formalism looks not a jot more convincing as a general theory of adjudication. But finding the alternative account presents us with a much more delicate problem. Formalism, remember, takes a very extreme position that legal reasoning is conducted on the basis of clearly definable legal norms and that logical deduction can yield a single correct answer to any legal problem. The refutation of this (extreme) position can take two distinct forms. Spaić seems to embrace a more radical one, stating that the judges can ascribe to the legal provisions "any meaning whatsoever" (2020, 131) because the language of legal provisions is "always ambiguous and indeterminate" Spaić (2020, 120).[19] This position is described by Guastini (2005, 142) as "hard scepticism" and is characterised by the unconstrained possibility of interpreters "to ascribe to any legal text any meaning *whatsoever*" (emphasis in the original). Not only does such a stance strike me as unconvincing and liable to cause problems further on, it is also unwarranted.

It doesn't take much to disprove something. Remember Democritus' determinism, which strains credulity to the same extent as does formalism in law. When one of his later followers, Lucretius, great Roman philosopher-poet tried to explain how free will is possible in a universe composed of atoms, he hypothesized that atoms "deflect a bit in space at a quite uncertain time and in uncertain places" (Lucretius II, 219–220). These subtle aberration of the atom, which Lucretius dubbed *clinamen*, sufficed to explain how a person is endowed with a free will, unshackled from the dictates of destiny (Lucretius II, 255–263). One single aberration from a preordained path was enough to disprove the rigid determinism of Democritus.

The same move would suffice for the refutation of formalism. All that we need to prove is that there is at least *one case* that (i) has been not been decided solely on the basis of deductive reasoning, (ii) has been decided despite the absence of clearly definable legal norms or (iii) admits of more than one correct right answer. Any of these three possibilities disprove the formalist contentions.[20] So, anti-formalism can take a number of different guises.[21] If we decide to settle with a more modest refuta-

19 The author also claims that „[...] *tekst izvora prava ne utvrđuje jedno moguće značenje pravila*" [...] (2020, 125). To be fair, the author does somewhat qualify these rather sweeping statements elsewhere.

20 Cf. The discussion in Leiter, Coleman (1993, 561–564) and Leiter (1995, 485–488).

21 I have my doubts that Guastini's (2005, 141) "soft scepticism" can really be distinguished from the gist of Hart's approach to interpretation. Chiassoni's attempt (*ogni disposizione è da ritenersi problematica, potendo sempre essere intesa a esprimere* – quantomeno da punto di vista metodologico, *se non da un punto di vista dell'oportunità pratica o sociologico*" (2007, 144; emphasis in the original) seems to me to be rather tenuous and unworkable.

tion of formalism and claim that *in some cases* the legal provision does not provide a definite answer, we can perhaps defend both the value of judicial creativity and relative predictability of adjudication.

2.5. Relative Determinacy of Legal Rules

This insight, which is far from original, has led many scholars, infinitely more insightful than me to claim that the essential indeterminacy of legal rules, which Spaić makes the hallmark of law,[22] to be a much more ephemeral phenomenon. Even American legal realists, known for their relentless critique of legal determinacy, had their sober moments, when they admitted the law might be slightly more predictable than they would at times imply. Cardozo, for example, offered a more precise estimation:

> Nine-tenths, perhaps more, of the cases that come before a court are predetermined – predetermined in a sense that they are predestined – their fate preestablished by inevitable laws that follow them from birth to death. The range of free activity is relatively small.

Similar contentions have been made by Max Radin (1942, 1271)[23] and Karl Llewellyn (1931, 1239)[24] The same sentiment pervades at least part of more recent scholarly work, where a number of scholars of different stripes have contended that there *are* easy cases,[25] implying at least that rules have somewhat less contested meaning that has often been asserted and that judicial discretion might be somewhat more constrained.

If this is true, then the need of explaining the interpretative conformity between different actors, which occasions Spaić to identify determinants of judicial interpretation, seems less pressing. The spectre of "arbitrary, erratic, unpredictable" (Spaić 2020, 131) judicial decision-making seems a little less daunting. In fact, it looks like a self-inflicted problem. If we step away from hard scepticism, the intriguing

22 See fn. 26 and 27.

23 "In spite of the possible variety and number of [...] factors [which will determine the future judgment], the advance estimate is so highly probable in a number of cases that the statement of the law can be made with a fair degree of certainty and precision, and no decision will be required to test its accuracy since most men will regard the decision as a foregone conclusion".

24 The author admits that while in contested cases there are at least two available authoritative premises, and that the two are mutually contradictory as applied to the case in hand, this only applies to "cases that [are] doubtful enough to make litigation respectable, implying that at least some cases are not".

25 See Endicott (1996, 669), Endicott (2003, 9), Marmor (1990, 61 *et passim*), Schauer (1985, 406–407), Kress (1989, 295–297), Greenawalt (1990, 31–38), Poscher (2011, 142), Wilkins (1990, 484), Baude, Sachs (2017, 1143) and Burton (1985, 95–96).

puzzle of relative conformity in the face of radically indeterminate rules is perhaps not so intriguing after all. Assuming, *arguendo*, that the content of rules is by and large determinate and as such intelligible in a majority of cases, than the relative conformity of those who interpret, apply or merely follow those rules should come as no surprise Spaić (2020, 130–131). Although Occkham's Razor[26] would suggest that the simpler explanation (most of the rules are determinate and some are not) is preferable to a more complex one (few rules are determinate, so additional factors have to interact in exactly the right way to achieve conformity), this is not the argument that I wish to make here. Nevertheless, while Spaić's elaborations of the determinants of judicial interpretations of law loose none of their sophistication and depth, they do loose a considerable amount of their explanatory power if they are confined to a periphery of hard cases. And even there proving that determinants of judicial interpretation of law can induce uniformity seems an exacting task.[27]

2.6. The Shortcomings of a Court-Oriented Jurisprudence

Perhaps, though, my contention that the mere existence of rules somehow suggests that the rules are relatively determined and are thus able to guide are behaviour most of the time might be too Hegelian[28] for everyone's taste. It is not unthinkable that the rules – while being utterly indeterminate – serve only as a kind of elaborate front, masking the real discretionary decision-making by judges. Llewellyn's famous quip that the rules are only "pretty playthings" ([1930] 2008, 7) might have a point. And maybe this impotence of rules really stems from their vagueness.

Now, vagueness can serve a variety of (useful) purposes. A vague notion can be introduced into legislation on purpose in order to allow for future flexibility. The legislator can be wise enough to realise that no amount of legislative precision can forestall some outlandish future case. Reliance on vague provisions can smooth the way for legislative compromises, allowing every legislator to read into a vague term its own solution (Schmitt 2008, 84–85). Vagueness can even be strategically deployed to foster future civic dialogue on the precise meaning and significance of a legal provision (Waldron 1994, 539–540). I have no doubt that a fair number of

26 Claiming that "*entia non sunt multiplicanda praeter necessitatem*". If something can be explained by explanations positing fewer entities, or fewer kinds of entities, this explanaiton is to be preferred to explanations that posit more.

27 See section 3, below.

28 I am hinting at his famous dictum "the rational is real and the real is rational" from his Preface to the Elements of the Philosophy of Right (2008, 20) ("*was vernünftig ist das ist wirklich und was wirklich ist das ist vernünftig*"). My statement can be read as implying that the sheer existence of rules proves their practical usefulness (their rationality in the sense of being capable of performing the task of guiding behaviour).

legal rules is vague, ambiguous or indeterminate in some other way. My only point is that this indeterminacy cannot be pervasive. One simple reason would be that significant amount of non-conformity with legal rules would indicate a serious flaw in the functioning of a legal system that could reach a point where the very existence of such legal system could be questioned. There is, I believe, a consensus that a certain degree of efficacy of a legal system is a *conditio sine qua non* for the existence of such a system. Kelsen (1949, 119) thought that it was the efficacy of the legal order as a whole that was necessary for the legal system to exist.[29] There is no doubt that his notion of legal efficacy denotes how addresses actually behave (Kelsen 1949, 39–40). Hart (1994, 112–117) improved on this relatively straightforward formula with a more sophisticated account of obedience of primary rules by citizens at large and acceptance of the secondary rules by the officials. But again, both obedience and acceptance imply conformity to such rules. Getting back to my original point, the existence of a legal system indicates that pervasive indeterminacy is unlikely.

This is a point that is easily missed if our primary focus is on *judicial* interpretation of law. For a long time, jurisprudence has been heavily focused on the judicial application of law, treating it as a focal example of interpretation of law. This emphasis has probably started with the German Free Law Movement (Moench 1971, 121–126)[30], been adopted by American Legal Realism, found its way into Hart's[31] and Dworkin's[32] jurisprudence and permeates much of contemporary debate on legal interpretation. This court-oriented jurisprudence has been very illuminating and has revealed many important features of the law's nature. It has, however, concealed some others. The most salient for the point I am trying to make is that interpretation of legal provision is not only conducted by judges, it has to be undertaken daily by all those *lay persons* who wish to navigate a complex system of rules.[33] The pervasiveness of rule conformity among ordinary citizens who have no legal training may be much harder to explain if rules really are profoundly indeterminate. That is the main reason why I believe that the mere fact of a continued reliance on rules to guide human behaviour testifies to the fact that most rules in most situation reach the sufficient level of determinacy.

29 See also Raz (1997, 93–95).

30 See also Pokrovac (2018, 255–257).

31 See for example his The Concept of Law, chap. VII.

32 See, for example Law's Empire, e.g. chap. I, II etc.

33 Bobbio, before the days of the court-oriented jurisprudence, observed (echoing Rousseau) that we might believe ourselves to be free, but in truth we are tangled in an endless web of norms that guide our behaviour (1958, 3).

Finally, the court-oriented jurisprudence obscures the fact that *interpretation of law* is an activity not reserved for judges alone.[34] I have already pointed out that ordinary citizens have to interpret legal provisions in order to understand what rights and obligations they have. But there is also law application more akin to judicial interpretation. Think of a wide array of administrative[35] and quasi-administrative bodies that issue all sorts of individual legal acts. Their application of law resembles judicial application to a point that was sufficient for Kelsen (1949, 273–275) to declare that both judicial and administrative activity are essentially the same. If that is true, then substantially the same mental process (setting aside whether it is primarily cognitive, discretionary or some combination of both) is involved in achieving some interpretation. Accepting for the moment the presumption that law is indeterminate to the extent our author seems to imply, presumably the same determinants that govern judicial decision-making guide the law-application of these bodies. This, however, seems highly unlikely, since the determinants identified by our author demand a high degree of legal sophistication. Consider rules of interpretation.[36] The formal rules of interpretation, i.e. those expressly spelled out in the legislation, present less of a problem. But informal ones are more difficult to come to know and master. They often form a part of lawyer's *habitus*, to borrow a concept from Bourdieu (1987, 833).[37] Their mastery is acquired through sustained involvement in the workings of a legal system. This is predominantly the domain of lawyers and not of lay people. Fortescue's remark about "twenty years of nocturnal studies"[38] being necessary for the proper discharge of judicial office might be a bit hyperbolic, but all the intricacies of legal interpretation are surely lost on most lay people who typically do not devote themselves to the study of law in a systematic fashion. Similarly, the institutional determinants require the interpreter to engage in a delicate analysis of institutional arrangements in a particular polity, and the epistemic determinants presuppose a high degree of familiarity with legal doctrine, the decisions of international and foreign tribunals and the co-ordinate courts in his or her own jurisdiction. Not to belabour the point further – it seems to me highly unlikely that a plethora of different interpreters of legal texts apart from judges would

34 It is telling that Guastini distinguishes between mere three types of interpretations with regards to the interpreter: *interpretazione dottrinale* (offered by legal scholars), *interpretazione giudiziale* (pronounced by a judge) and *interpretazione autentica* (adopted by the legislator) (2004, 85–89).

35 In recent years, there is a growing awareness that this over-emphasis needs to be addressed; see e.g. Kramer (2018, 206) and Žgur (2020, 84).

36 Which constitute the gist of Spaić's normative determinants of judicial interpretation of law (2020, 151–153).

37 See also Terdiman (1987, 811).

38 In his De Laudibus Legum Angliae VII ([1543?] 1825, 23; I have altered the translation of the quite happy original phrase "*lucubrationes viginti annorum*").

possess the knowledge and skills to justify the pervasive interpretative uniformity that is exhibited in their authoritative decisions or their actual behaviour.

3. SOME REMARKS ABOUT THE PROPOSED DETERMINANTS

The most thought-provoking aspect of Spaić's book is his suggestion that it is possible to identify certain determinants of judicial interpretations of law that can elucidate the seemingly ubiquitous uniformity of judicial interpretation of law. As Baude and Sachs pithily observe, "[i]f language alone can't finish the job [of determining the meaning of a legal provision] then something else must" (2017, 1093). His suggestion is that there are at least three clusters of determinants, normative, institutional and epistemic, that can adequately account for the interpretative uniformity. Or, to quote the author himself:

> "[o]boriva pretpostavka [...] jeste, da se većina legitimnih razloga za donošenje odluke o značenju pravnoga teksta može identifikovati uzimajući u obzir 1) pravne tekstove i 2) determinante sudijskog tumačenja prava [...] (Spaić 2020, 149)

The author is quite clear that his list of determinants might be *incomplete* (Spaić 2020, 149). There may well be some additional factors that legitimately influence the judicial decision-making. We have here a tentative list that is put forward for out intuitive evaluation. Secondly, let me point out that by his own admission the author is making *an empirical claim* (Spaić 2020, 149–150). That means that there is limited space for theoretical discussion of his proposition, apart from a very general inquiry whether the proposed determinants can possibly explain judicial interpretation of law. And to my lights, that is possible (but not probable). Thirdly, the author takes care to emphasise that the wording of legal provisions combined with the determinants of judicial decision-making can justify most of *legitimate* reasons for a particular decision. Note the word legitimate.

3.1. Doctrine Under the Guise of a Theory of Interpretation?

Spaić's book is premised on a descriptive approach (Spaić 2020, 5). One of its proclaimed goals is to "describe legal interpretation in general as a theory of nature of interpretation of law" (Spaić 2020, 6). Spaić differentiates between a theory of adjudication and a doctrine of adjudication (Spaić 2016, 75). The first is a descriptive endeavour that strives to understand the nature of judicial interpretation

of law. The latter is a normative quest of laying out the guidelines for a correct judicial interpretation of law. This poses a recurrent problem for any realist account of legal interpretation. What if, for example, there were some way to prove that the beauty (or ugliness) of the defendant consistently results in a more lenient interpretation of criminal statues?[39] Or if we would be able to conclusively show that the incessant criticism of the judiciary by the executive branch in the United Kingdom did in fact occasion a dramatic decrease in successful challenges to government policy (at least in part presumably on account of a modified interpretative approach), as has recently been indicated by an article in the Guardian (Siddique 2022).

Would any of these factors need to be included in a correct theory of legal interpretation? In a truly realistic vein, the answer would have to be yes. Perhaps a genuinely realistic account of interpretation is best surmised by a famous (or infamous, as the reader prefers) Jerome Frank's formula: "*Stimuli* affecting the judge x the *Personality of the judge = Decisions*" (1931–1932, 242). When a legal theorist is called upon to evaluate the legitimacy of this or that factor influencing the judge, then his enterprise can no longer be truly realist and perhaps not even an exercise in legal theory. My own intuition tells me that there surely must be a way to tell apart acceptable judicial decisions (even though I might disagree with them) from utterly flawed and hence unacceptable ones, so this faint-hearted realism – although incongruous with the author's espoused articles of faith holds some appeal for me. But the problem for the author remains. Is his commitment to a descriptive account of interpretation truly honoured?

3.2. Determinants As the Source of (Dis)Harmony

Leaving that to one side, I would like to concentrate on Spaić's claim that the determinants of judicial interpretation of law contribute to (if not ensure) the uniformity of interpretation. Let me briefly summarise the outlines of his argument. Although the language of legal provisions is indeterminate to the point that the judges can ascribe to them "any meaning whatsoever" (Spaić 2020, 131) there are sets of reasons, dubbed determinants of judicial interpretation of law, which guarantee considerable measure of conformity and predictability. These determinants are grouped in three clusters. Normative determinants comprise of formal and informal interpretative rules that guide the ascription of meaning to legal proposi-

39 So far, the research offers convincing evidence that the relative beauty of the defendant affects only the severity of sentencing. See Rice *et al.* (2020, 273–276) and Dumas, Testé (2006, 237–239) and further literature cited therein.

tions Spaić (2020, 151–153).[40] Institutional determinants denote the considerations concerning (i) relations between the branches of government and (ii) relations (especially between the courts) within the judicial branch (Spaić 2020, 192–201). The author argues that the "peculiarities of the institutional relations between the legislatures, agencies, and courts" can and do limit the range of acceptable interpretational strategies in a given legal system.[41] So, for example, the specific model of a separation of powers may render certain interpretive approaches unacceptable and others preferable. In much the same vein, the doctrine of precedent (or, in civil law countries, reliance on *jurisprudence constant*, *giurisprudenza stabile* or *ständige Rechtsprechung*) can similarly exclude a range of possible interpretations to be seriously considered. Finally, epistemic determinants encompass an array of pronouncements by a person or an institution which is accepted as an epistemic authority (i.e. is taken to possess some expert knowledge) (Spaić 2020, 201–208).[42] These authorities include law professors, (accepted) legal doctrine, international courts and tribunals, some well-respected national supreme or constitutional courts, prominent jurists or even opinions of other courts in the same jurisdiction (Spaić 2020, 207).

Although Spaić has identified important factors that influence adjudication, I am not convinced that these determinants are by themselves conducive to interpretative uniformity. Let me begin by noticing a curious opposition. While our author is convinced that factors such as interpretative rules and legal doctrine foster interpretative uniformity and limit inherent disagreement stemming from the indeterminacy of legal provisions, Riccardo Guastini identifies as the main sources of "interpretive controversies" (apart from the obvious ambiguity of normative sentences) "plurality of interpretive methods" and "juristic theories (so-called legal dogmatics in continental jurisprudential language)".[43]

3.3. Normative Determinants – Unity From Discord?

Here, I have to agree with Guastini. It has long been the main tenet of the Realist creed that there is a plethora of equally valid rules of interpretation (Llewellyn 1950, 396). Spaić himself in a previously published article recounts the analysis of Scalia and Gardner identifying 57 canons of interpretation and their remark that

40 See also Spaić (2018, 157–175). For the concept of epistemic (or theoretical authority) see Raz (1985, 296) and Raz (1999, 15–16).

41 See also Spaić (2019, 207 *et passim*).

42 See also Spaić (2018, 152–153).

43 See Guastini (2019, 21; quotations omitted) or Guastini (2011, 147–148). See also Guastini (2005, 140–141) and Chiassoni (2007, 144–145).

this stunning arsenal comprises only a third of applicable canons in common law adjudication (Spaić 2018, 158–159).[44] Unsurprisingly, these "canons of construction" often lead to divergent results. Moreover, these interpretative strategies can also be mutually exclusive.[45] It would by a remarkable coincidence if this dazzling array of interpretative opportunities would promote uniformity in interpretation. It seems to me that the sheer number of different interpretative tools is a testament to a keenly felt need to loosen the shackles of (seemingly determinate) legal provision.[46] Finally, in assessing their ability to generate uniformity, we might be well advised to remember Hart's observation that "these canons [of interpretation] are themselves general rules for the use of language, and make use of general terms which themselves require interpretation" (Hart 1994, 126). It is somewhat puzzling to expect the rules of interpretation to provide clear and unequivocal guidance, when the same cannot be expected of all the other rules.

3.4. The Unfulfilled Promise of Institutional Determinants

Similar doubts can be raised against the two other clusters of determinants. In order to dispel the ambiguity inherent in legal provisions, institutional and epistemic determinants would need to be able to reduce the level of uncertainty. They would have to give unequivocal guidance to the judge interpreting an indeterminate legal provision.

It is not altogether clear what exactly would the precise guidance that could be derived from institutional arrangements look like. In particular, what can an understanding of a specific model of separation of powers offer a judge who has to decide on the meaning of an ambiguous provision regarding "taking or possessing" bullfrogs in Ottawa?[47] The gap between the theoretical nature of implications derived from abstract institutional arrangements on the one hand and concrete and factual nature of application of a particular rule on the other seems to be too great for the former to be truly useful. In fact, the institutional arrangements of a liberal state stemming from the idea of separation of powers have often been suspicious of judicial interpretation. When some explicit guidance for the interpretation was proposed, it was more often than not aimed to curtail if not to bar judicial interpretation. *Référé législatif* obliging a judge faced with a gap in the law or an ambiguous

44 The source of this analysis is Scalia (Gardner 2012).

45 This delightful insight was to my knowledge first formulated by Ernst Fuchs of the Free Law Movement (1910, 284).

46 One could (slightly mischievously) argue that the interpretative methods are a device to introduce indeterminacy where previously there was none.

47 I have borrowed this example from Endicott (2003, 7).

provision to turn to legislator for guidance is a case in point.[48] Another and perhaps more promising avenue Spaić pursues is the reliance on precedents (or its opposites in civil law jurisdictions). True, one of the most important consequences of the *stare decisis* is the predictability of future decisions.

In that regard, precedent is indeed a uniformity-inducing device. I wish to mention, but not to overstate, that we might be a bit too optimistic about the actual bite this doctrine might in fact have. First, there is a perennial problem of deriving *ratio decidendi* from a judicial decision, which I will not address here.[49] Second, judicial ingenuity has produced a number of sophisticated manoeuvres to avoid the unwelcome implications of a binding case-law.[50] The court unhappy with precedent might disregard it, it can, for example, resort to distinguishing and point out some factual differences of the case in hand or choose to outright overrule the precedent. The lower court can also employ anticipatory overruling when they are reasonably sure the higher court will overrule its prior (but doubtful) decision (Bradford 1990, 40–41). Nonetheless, I do not dispute that precedents have a harmonising effect on the jurisprudence of the courts. But here is the rub. Isn't this uniformity achieved at the expense of an interpretation a judge might offer had he or she not defer to the precedent? A precedent supplants his or her potentially innovative and creative interpretation. Uniformity results precisely from precedents being taken as (exclusionary) reasons not to engage in interpretation each time anew. This adherence to precedents must in addition present a different kind of puzzle to a legal realist. If precedent entails a (linguistically formulated) legal rule, how could it be that it has the necessary determinacy to guide judges when legislative rules are unable to?

3.5. In the Crossfire of Epistemic Determinants

Epistemic determinants suffer less from their indeterminacy than from the inconsistencies between them. They are reasonably determinate, but they are manifold. It is not difficult to imagine how different epistemic determinants would be incongruous. Consider the scholarly discussions on a given (non-trivial) topic. Are we likely to encounter harmony and agreement or something else altogether? It seems that reliance on prominent foreign courts or international tribunals is quite often of a strategic nature. Courts cite other judicial opinions when it suits their interpretation of some contested provision and ignore them when they would undermine their preferred decision. To make matters even more complex, it is more than likely

48 See Miersch (2000, 25–59). See also his interesting classification of different types of référés *législatifs* (2000, 115–119).

49 See Cross, Harris (1991, 39–75) and Štajnpihler (2012, 137–149).

50 See Atiyah, Summers (2002 120–127).

that discrete categories within epistemic determinants would be incompatible. Is it not a favourite pastime of legal scholars to expose gleefully judicial blunders to their ridicule? I am certainly not the first to observe that this kind of factors affecting adjudication can conflict.[51]

3.6. The Challenge of Working in Unison

Finally, normative, institutional and epistemic determinants would have to work in concert and point to a single possible interpretation. This would be the only way to achieve the task of correctly "identifying legitimate reasons for a [specific judicial] decision" (Spaić 2020, 149). Otherwise, we would find ourselves in exactly the same predicament that prompted our quest for those additional factors that would instil determinacy in the otherwise uncertain operation of linguistically vague legal rules. Can three different clusters of possibly incoherent determinants accomplish this task? I doubt it. It is much more likely that at least sometimes different determinants (even when there are no contradictions within a cluster of determinants) will pull in different directions. One set of determinants may favour one interpretation, while the other(s) may point to a different one. How is one to decide which one to prefer?

4. CONCLUSION

There are, as I have tried to show, many shortcomings of both the Spaić's refutations of and his slightly too optimistic account of how his version of legal realism could be tamed to ensure some foreseeability of legal interpretation. But there is a lot I believe Spaić got wright. We both agree that a thoroughly formalistic theory of legal interpretation is untenable. Adjudication contains at least an eradicable modicum of creativity. Sometimes this amounts to more than interpretation and crosses into *Rechtsfortbildung* or construction.[52] We also agree that there are limits to acceptable interpretation. And we see eye to eye that a number of intrinsically legal criteria, as his determinants decidedly are, are important in evaluating the persuasive power of an interpretation. As for the rest, I can only say that Spaić is asking important questions and that his answers will, all my misgivings aside, have me wondering whether his understanding does not, after all, come closer to the truth than my own.

51 See Gardner (1988, 459–460). There is considerable overlap between Spaić's epistemic determinants and what Hart calls permissive sources (1994, 294 n. to page 101) and what Peczenik would probably call May-Sources (2008, 261–263).

52 See Spaić (2021, 29–37).

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