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A Jigsaw Puzzle for Rainy Days – How to Put Together the Pieces: Sources of Law, Forms of Law, Principles, Standards, Rules and Norms – to Get a Consistent Picture of Law?

Układanka na deszczowe dni. Jak połączyć części – źródła prawa, formy prawne, zasady, standardy, reguły i normy – aby otrzymać spójny obraz prawa?

SUMMARY

This is a proposal – "a tentative smile on the face of law" – how to create a consistent picture of law and diminish the confusion in the usage of the most frequent key-legal concepts. Its outcome is that law is one entity: its structure so far contains terms of the same degree with respect to all of their variables (sources, forms or rules, norms), from general rules (principles, laws) to individual rules (judicial and administrative decisions).

Keywords: sources/forms of law; principles; general and individual norms/rules; all-what-is-law

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There are a few things, and one, which is not new,
is writing about the rules, and analyzing what rules
are, what rules can do, and how they do it…

Frederick Schauer

ON PSEUDO-PROBLEMS AND WRONG QUESTIONS

Do you think you have ever seen a consistent picture of the law? Because this is what I am trying to focus on and to piece together from the relevant building stones as a jigsaw puzzle. For millennia, for centuries, again and again the disquieting voice is echoing: Jurists are still searching for a definition of their concept of law[1]. Law is one homogenous entity: from the point of view of its structure, it is containing elements (particles) of the same degree (essence) with respect to all of the variables.

Everything we do is tentative. To do science means to raise proper questions. The world is overflown with problems. All life is about solving problems (a problem is a question set for solution). Wherever we look we see a problem: in private or professional life, in economy, in technic, art or science[2]. Another question is whether and how we are able to identify a real problem and to solve it. There are existing a number of false or pseudo-problems. Much depends on the initial question asked. I would like to offer two questions at the very beginning of the research. They can be derived from the basic one: What are the constitutive elements of a legal system? These two questions, as old as they are, still should make sense: What are the sources of law? What is the law?[3] I will try to show the consequences connected with the answers to them.

[1] I. Kant, *Kritik der reinen Vernunft*, Leipzig 1971, p. 671.

[2] M. Planck, *Vom Wesen der Willensfreiheit und andere Vorträge*, Frankfurt am Main 1990, p. 213; K.R. Popper, *Alles Leben ist Problemlösen*, München–Zürich 1996, p. 255 and 257 (originally a lecture given in 1991 in Bad Homburg).

[3] Here I am using the type of question "What is it?" in the sense of methodological essentialism (realism), not the question in the sense of methodological nominalism (How does it function?). See more A. Bröstl, *On Definitions in Legal Science*, [in:] *Justice, Morality and Society. A Tribute to Aleksander Peczenik*, eds. A. Aarnio, R. Alexy, G. Bergholtz, Lund 1997, pp. 111–117.

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DANCING AROUND THE SOURCES

The right way towards identification is probably to try to find the origins, beginnings, roots of a problem (phenomena). This leads to the question about the sources of law.

For a long time, there is much confusion in the use of the term "source of law". Indeed, the term is still used in a number of senses, often without distinguishing the different things called by the same name[4]. The doctrine of the sources of law was always "one of the most disputable and difficult in the whole area of law". But at least one answer we should remember. I mean the one presented by F.C. von Savigny in his *System of Contemporary Roman Law*, which is remarkable decisive: "The content of the source of law was […] considered as everything, what contains a self-standing rule of law"[5].

J. Austin in his well-known *Lectures on Jurisprudence* tried to be precise, when dealing with various sources of law:

> In many legal treatises, and especially in treatises which profess to expound the Roman law, that department or division which regards the origins of laws, is frequently entitled *De juris fontibus*. This expression *fontes juris*, or sources of law, is of course metaphorical[6], and is used in two meanings. In one of its senses, the sources of a law is its direct or immediate author. […] In another acceptation of the term, the fountains or sources of laws are the original or earliest extant monuments or documents by which the existence and purport of the body of law may be known and conjectured[7].

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[4] R. Pound, *Sources and Forms of Law*, "Notre Dame Lawyer" 1946, Vol. 21(4), p. 247.

[5] F.C. von Savigny, *System des heutigen römischen Rechts. Erste Auflage*, Bd. 1, Berlin 1840, p. 206. See, first of all, § 6 Begriff der Rechtsquellen, § 32 Begriff der Auslegung: "Bisher wurde der Inhalt der Rechtsquelle […] als die selbständige Regel des Rechts […] betrachtet" (p. 206); "Sources of law we call the causes/reasons of the origin of the general law, thus as well as of the legal institutes, as from those through abstraction created legal rules" ("Wir nennen Rechtsquellen die Entstehungsgründe des allgemeinen Rechts, also sowohl der Rechtsinstitute, als der aus denselben durch Abstraction gebildeten Rechtsregeln", p. 11). Savigny in connection with the sources of law/rules introduces another structural concept "legal institute", which will not be discussed here.

[6] By the term "metaphorical" Austin meant: "Metaphor, in its larger sense, may be defined as the transference of the term from its primitive signification to objects which it is applied in a secondary sense" (p. 59).

[7] J. Austin, *Lectures on Jurisprudence or Philosophy of Positive Law*, New York 1875, p. 264 ff. Austin's Lecture XXVIII was subtitled "On the Various Sources of Law". Taken in this acceptation, the fountains or sources of laws are properly sources of the knowledge which is conversant about laws. Speaking generally, the extracts from the classical jurists contained in Justinian's Digest, the Imperial Constitutions, contained in his Code, and such other relics of antiquity as regard the Roman Law, are the earliest extant evidence for the several parts of the system to which they respectively relate. These, therefore, are fontes. But the works of the Glossators and Commentators who wrote in the Middle Ages, with the works of the Civilians who have written in subsequent periods, are not fountains or sources of that knowledge of the system which may be gotten at the present hour.

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The fundamental problem of legal sources is expressed by its most relevant setting: Legal source or source of law means in a formal definition a reason of recognition for something as law.

R.A. Shiner in Volume 3 of *A Treatise of Legal Philosophy and General Jurisprudence* offered to *Legal Institutions and the Sources of Law* opened the discussion on the problem by his introductory sentence: The topic of the sources of law is a traditional one in jurisprudence, continuing by a paradox, that "remarkably, very little attention has been paid to the topic in recent analytical jurisprudence", when "much contemporary analytical legal theory does not consider the notion of a »source of law« at all"[8]. Sources of law in the civil law countries are elaborated by A. Rotolo, who is dealing with the contributions to the topic to the general theory of sources as written by H. Kelsen, H.L.A. Hart and A. Ross[9].

The legal source (source of law) itself can be law only when the law spawns itself[10]. From this point of view, the source of law is not only a "form" of law, but also a "content" of law, and as such it is an object of "norming/ruling".

TO BE CONTINUED: SOURCES AND FORMS OF LAW

Repetitio mater studiorum est. In the section about the so-called "sources of law" H. Kelsen, in this respect similarly to Savigny, indicates that the legislative and the custom are often identified as the two "sources" of law. The same time by "law" are often understood only the general norms of the state law: "But individual legal norms are equally (likewise) belonging to the law, they are equally (likewise) part of the legal order as the general legal norms on the basis of which they are created"[11]. And then he adds: "And if there the general international law is taken into consideration, then not the legislative, but only custom and agreement can be recognized as a »source« of that law"[12]. Already in 1929 A. Ross

[8] R.A. Shiner, *Legal Institutions and the Sources of Law: A Treatise of Legal Philosophy and the Sources of Law*, Dordrecht–Berlin–Heidelberg–New York 2005, p. 1. Maybe the mentioned authors do not consider the concept (term) "sources of law" as one of the most important (crucial) one in and for jurisprudence – I am closed to such a view, I can imagine sharing it, too.

[9] A. Rotolo, *Sources of Law in the Civil Law*, [in:] *A Treatise of Legal Philosophy and General Jurisprudence*, eds. R.A. Shiner, E. Pattaro, H. Rottleuthner, A. Peczenik, G. Sartor, Dordrecht 2005, pp. 728–779. In this respect see A. Ross, *Theorie der Rechtsquellen. Ein Beitrag zur Theorie des positiven Rechts auf Grundlage dogmenhistorischer Untersuchungen*, Aalen 1989.

[10] F.G. Callejón, *Das System der Rechtsquellen in der spanischen Verfassungsrechtsordnung*, http://www.ugr.es/~jmonnet/Publicaciones/Das%20System%20der%20Rechtsquellen%20in%20der%20spanischen%20Verfassungsrechtsordnung.%20Francisco%20Balaguer%20Callejon.pdf [access: 10.01.2020].

[11] H. Kelsen, *Reine Rechtslehre*, Wien 1960, p. 238.

[12] *Ibidem*.

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published his book according to which Sources of Law are not the reason of origin, but the "reason of recognition for something as a positive law".

R. Pound in his article *Sources and Forms of Law* from June 1946, published in the "Notre Dame Lawyer", also expressed concerns that "for a long time there was much confusion in the use of the term »source of law«"[13] and that the respective term "is still used in a number of senses, often without distinguishing the different things called by the same name"[14].

In the following part Pound mentioned five senses of the respective term:

- fountain of law,
- authoritative texts which are the basis of juristic and traditional element of a legal system,
- raw material, both statutory and traditional, from which the judges derive the grounds of deciding the cases brought before them,
- formulating agencies by which rules or principles or conceptions are shaped so that legislation and judicial decision may give them authority, and
- literary shapes in which legal precepts are found, the forms in which we find them expressed.

A sceptical question is how much do we need the term "sources of law" (or which one of its different senses is making "most sense")? For me especially the third question of E.Ch. Clark (discussed also by R. Pound in his above-mentioned article) is of special interest: Where, if one wishes to know the law must he go to find it? In what forms is it expressed?[15] The answer to this question had been expressed by the phrase "source of law". Clark gave the answer to the second question the name "source" and called the answer to the third "forms of law"[16].

According to J.C. Gray (within the topic of the sources of law) the law is composed of the rules which the courts, this is, the judicial organs of that body, lay down for the determination of legal rights and duties. From another view he admits that it may be supposed that the legislation enacts a statute which is so odious to the inhabitants of the state that the bulk of the community disobey it from the start: "In

[13] R. Pound, *op. cit.*, p. 247 ff.

[14] These questions then correspond to the category of *fontes iuris cognoscendi*. Here I would like to refer to my contribution presented at the IVR Lisbon World Congress 2017 and published as: A. Bröstl, *On Precedents in General and in a Statutory Legal System*, "Studia Iuridica Lubliniensia" 2018, Vol. 27(1), DOI: http://dx.doi.org/10.17951/sil.2018.27.1.177, pp. 177–189.

[15] Although on the first view it does not look like this contribution is in the line with my previous one from the IVR World Congress in Lisbon (see *ibidem*), focusing on more general problems and the attempts to solve them correctly.

[16] R. Pound, *op. cit.*, p. 248.

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countries where statutes can be abrogated by disuse, the courts may, after a space of time, declare such a statute is no longer to consider binding"[17].

The difference in this matter of the sources of law between contending schools of Jurisprudence in Gray's opinion arises largely from not distinguishing between the Law and the Sources of Law[18].

J. Salmond in 1902 distinguished "formal source" from "material source"; the latter determining the content of a legal precept, the former giving it the guinea stamp of the state's authority[19].

Sources of law can be also classified as either legal or historical. The former are those sources which are recognized as such by the law itself. The latter are those sources lacking formal recognition by the law. This is an important distinction which calls for careful consideration.

> In respect of its origin, a rule of law is often of long descent. The immediate source of a rule of English law may be the decision of an English court of justice. But that court may have drawn the matter of its decision from the writings of some lawyer, let us say the celebrated Frenchman Pothier; and Pothier in his turn may have taken it from the compilations of the Emperor Justinian, who may have obtained it from the praetorian edict[20].

Legal sources of law are authoritative, the historical are unauthoritative. The former are allowed by the law courts as of right; the latter have no such claim. The legal sources are the only gates through which new principles can find entrance into the law. Historical sources operate only mediately and indirectly.

The second one of the classical or traditional sources of law is precedent, expressed in the maxim *stare decisis et non quieta movere* ("to stand by what has been decided, and not to disturb what is still"[21]).

In my previous article, I touched also the topic of precedents as individual rules and the question, whether we should put precedents into the category of

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[17] J.C. Gray, *The Nature and the Sources of Law*, New York 1921, p. 108: "It is impossible to say that any general rule of conduct laid down by an administrative organ of a political (or other) organized body, and applied, if necessary, by the courts, is not a source of law".

[18] *Ibidem*, p. 84.

[19] The socialist (Marxist-Leninist) legal theory / legal science has taken over and "developed" this differentiation in official teaching books. In the Slovak Republic, e.g., see P. Dojčák [et al.], *Teória štátu a práva*, Bratislava 1977, Chapter XIX: *Sources of Law. The Concept and the Kinds (Types) of Sources of Law*: "In the juridical sense sources of law are the forms in which valid legal norms are expressed" (p. 235). Also later on this classification played a role. L. Morawski speaks among others about "sources of law in the formal sense" (*fontes iuris oriundi*: each act, document or decision, which in the given legal system is considered as a source of law) – and the "sources of law in the material sense" (which is less elaborated). See L. Morawski, *Wstęp do prawoznawstwa*, Toruń 1998, p. 106 ff.

[20] P.J. Fitzgerald, *Salmon on Jurisprudence*, Wellington 1966, pp. 109–110.

[21] R.A. Shiner, *op. cit.*, p. 27.

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sources of law or as individual rules consider them parts of the (judicial) law, and about judges – what are they doing, making law or applying law?[22] In this respect I would like to add that concerning this topic I share the opinion of the German Constitutional Court declared some more years ago:

> The formula holds the conscience upright, that statute and law are indeed factually covering each other, but not necessarily and not always. The Law is not identical with the aggregate of written statutes. The Judge is according to the Basic Law not entirely dependent to apply legislative directives in the limits of possible word meanings to the individual case[23].

Such an opinion/notion would presuppose a principal of the positive state legal order, a situation, which is defendable as a principal postulate of legal certainty, but is almost unreachable. Judicial activity is not consisting only in the recognition (identification) and in the pronunciation (utterance) of the decisions of the legislator. The task of the adjudication may especially require to bring on light and realize value concepts which are immanent to the constitutionally legal order, but which are not expressed in the texts of written statutes (or expressed imperfectly) in an act of recognition, which is not missing willingly elements.

PRINCIPLES AND/OR STANDARDS VS RULES AND/OR NORMS?

In accordance with the subtitle of this particular section I would like to return to J. Austin and his relevant generalization by one sentence from his *Lectures on Jurisprudence*: "Speaking then generally, human conduct is inevitably guided by rules, in the form for the most part, of general principles or maxims"[24].

Although rules such as the ones set out above are highly precise, and although the standards just described are vague in the extreme, the difference between rules and standards is actually a matter of degree[25].

We may remember also the terminology used by I. Kant in his *Rechtslehre*, where he pointed out that "the state in the idea how it should be according to the

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[22] See A. Bröstl, *On Precedents in General…* In footnote No. 15 "What is required from our side is an intellectual activity, thus how easy it is often looking like, a scientific deal, the beginning and basis of the legal science", Savigny (*op. cit.*, p. 206) wrote in connection with interpretation of statutes.

[23] BVerfGE 34, 269 (286, 287). Beschluss des Ersten Senats vom 14. Februar 1973, 1 BvR 112/65, [in:] *Entscheidungen des Bundesverfassungsgerichts. Studienauswahl (Band 1–89)*, hrsg. v. J. Schwabe, Hamburg 1998, pp. 410–411.

[24] J. Austin, *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence*, Indianopolis–Cambridge 1998, p. 50.

[25] F. Schauer, *Thinking Like A Lawyer: A New Introduction to Legal Reasoning*, Cambridge, Mass. – London 2009, p. 189.

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pure principles of law, which serves for each real association to a (political) community (thus inside) as a *Richtschnur* (guideline, standard, *norma*)"[26].

It was said that what apparently differs the legal rule (*Rechtssatz*) from any other state power expressions is its "generality". But not all what is in a certain point general is, therefore, a legal rule and not every legal rule is in all points general. (G. Jellinek in 1887 described the legal norm, the legal rule [*Rechtssatz*] as one of the most difficult problems of the judicial competence/jurisdiction.)

H.L.A. Hart distinguished two kinds of legal rules, primary rules (rules imposing duties) and secondary rules (those conferring powers, public or private)[27]. The concept of a rule of recognition is general to Hart's theory. He considers it as a set of criteria by which the officials decide which rules are and which rules are not a part of a legal system.

On the traces of the nature of the judicial "further creation" of the law (*richterliche Rechtsfortbildung*) J. Esser is speaking about principles and norms[28]. According to him "legal maxims are those broad and usually terse statements of such general propositions as that »nobody will be heard to plead his own wrong«, or »error of law is no excuse«". General clauses, in German terminology, are those sections of a code or statute which do not contain a definitely formulated rule of law but refer the judge to some extralegal standard[29].

Kelsen in his criticism of Esser reminds that "if there is a difference between a principle and a norm, than a principle cannot be a norm"[30]. R. Dworkin in his strategy of the general attack on legal positivism is targeting on the fact when:

> […] lawyers reason and dispute about legal rights and obligations, particularly on those hard cases when our problem with these concepts seems most acute, they make use of standards that do not function as rules (that are not rules), but operate differently as principles, policies, and other sorts of standards[31].

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[26] I. Kant, *Rechtslehre*, Berlin 1988, p. 127. Here Kant uses the word *norma* in brakes, as an equivalent for *Richtschnur*.

[27] H.L.A. Hart, *The Concept of Law*, Oxford 1994, p. 81.

[28] J. Esser, *Grundsatz und Norm*, Tübingen 1974. He introduces also other notions like general legal ideas (with a comment of Dawson "Ideas do not walk on legs – but they constantly tend to become a rule"). See more details in the Chapter XXVIII entitled *Universelle Prinzipien als Basis der Funktionsvergleichung von Privatrechtsinstitutionen*, p. 348 ff. of the quoted book.

[29] See also idem, *Vorverständnis und Methodenwahl in der Rechtsfindung. Rationalitätsgrundlagen richterlicher Entscheidungspraxis*, Frankfurt am Main 1970. Although this work is not focusing on the question of the sources of law, but on the importance of hermeneutics and on the question of safeguarding the correctness in the process of application of law.

[30] H. Kelsen, *Allgemeine Theorie der Normen*, Wien 1979, p. 95.

[31] R.M. Dworkin, *Taking Rights Seriously*, Massachusetts 1977, p. 22.

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Dworkin characterizes the distinction between principles and rules as follows:

> The difference between legal principles and legal rules is a logical distinction. Both sets of standards point to particular decisions about legal obligation in particular circumstances, but they differ in the character of the direction they give. Rules are applicable in an all-or-nothing fashion, than either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision[32].

He is characterizing a legal principle as "a reason which is an argument in a certain direction, but which doesn't make a certain decision necessary". He understands legal rules and legal principles as "building-stones of the valid law".

R. Alexy in his theory "based on Dworkin and familiar with Esser's dogmatic"[33] brings rules and principles under the roof of the concept of norm. So far both, rules and principles are norms, because both say, what shall be ought. Both can be formulated by the help of the deontic basic expressions of command, permission and prohibition. Alexy finds that principles are distinct optimization orders, which need to be complied with at different levels. Rules are provisions that either must be followed or need not be followed, which is making them definite[34]. In comparison, implementation or formation of principles has nothing to do with a deductive subsumption process. Another difference between principles and rules is that a conflict of principles is solved by "considering the circumstances of the case the preferential regulation is determined between both possible practicable principles"[35].

Rules and principles according to Alexy are reasons of a different kind. Principles are always prima facie reasons, and rules are, if there is no exception, *definite* reasons. By the *prima facie* and *definite* reasons it is not said *for what* they (principles and rules) are reasons. They may be seen as reasons for actions or reasons for universal (abstract-general) or individual norms (concrete legal ought to be decision/judgement).

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[32] *Ibidem*, p. 24.

[33] R. Narits, *Principles of Law and Legal Dogmatic as Methods Used by Constitutional Courts*, "XII Juridica International" 2007, pp. 15–22.

[34] R. Alexy, *Zum Begriff des Rechtsprinzips*, [in:] *Argumentation und Hermeneutik in der Jurisprudenz*, hrsg. v. W Krawietz, K. Opałek, A. Peczenik, A. Schramm, „Rechtstheorie" 1979, Beiheft 1, p. 79 ff.

[35] Idem, *Zur Struktur der Rechtsprinzipien*, [in:] *Regeln, Prinzipien und Elemente im System des Rechts*, hrsg. v. B. Schilcher, P. Koller, B.-C. Funk, Wien 2000, p. 35.

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TO BE CONTINUED: LAW AS A MATTER OF RULES (AND PRINCIPLES?) LOOKING FOR A COMMON GROUND

K. Llewellyn has described rules in *The Bramble Bush* in the following way: "Rules […] are important so far as they help you see or predict what judges will do or so far as they help you get judges to do something. That is their importance, except as »pretty playthings«"[36].

The above-mentioned monography of J. Esser from 1956 *Principle and Norm in the Judicial Formation of the Private Law* (*Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts*) is of programmatic importance and had a great influence in German speaking countries. According to the author the principle differs from a legal norm in the way that it "does not contain any binding directive of direct for a certain scope/ sphere of questions, but is rather asking and presupposing a judicial or legislative shape/ characteristic of such directives". Principles as a part of positive law would be eligible for support only if they are institutionally incorporated through legally-advanced acts of legislation, jurisprudence or those of legal life. They are parts of the positive law as "immanent conditions of being and functioning of the individual, without presenting for itself alone the content of a material legal rule/proposition (*Rechtssatz*)"[37]. C. Canaris as a follower of Esser is claiming that principles "need to their realization and concretization by subprinciples and individual evaluations with self-standing content. […] They are no norms by itself, and that's why they are not able of straight (direct) application".

Diverse acceptances of the term principle refer to diverse meanings (normally understood as "fundamental notion"), however close they may be to one another. In colloquial Italian *principio* is used as a synonym for "beginning". Otherwise, principle may be used as a synonym for fundamental value[38].

For a long time, the best known of Dworkin's criticism of Hart's *The Concept of Law* was that "it mistakenly represents otherwise principle is used law as consisting solely of »all-or-nothing« rules, and ignores a different kind of legal standard, namely principles, which play an important and distinctive part in legal reasoning and adjudication". Hart is finally bowing to Dworkin's criticism and pressure stating:

> But I certainly wish to confess now that I said far too little in my book about the title of adjudication and legal reasoning and in particular, about arguments from what my critics call legal principles. I now agree that it is a defect of my book that principles are touched upon only in passing[39].

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[36] K.N. Llewellyn, *The Bramble Bush: On Our Law and Its Study*, New Orleans 1930.

[37] J. Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts*, Tübingen 1990, p. 69 ff., 70 and 73.

[38] G. Alpa, *General Principles of Law*, "Annual Survey of International and Comparative Law" 1994, Vol. 1(1), p. 2 ff.

[39] H.L.A. Hart, *op. cit.*, p. 259.

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I think it is possible to conclude that laws, principles and norms are all examples of different types of rules. It is stated that for Kant also concepts are functioning as rules, because they state what is universal in a single distance[40].

By "norm" we indicate (denote) that something ought to be or to become, especially that a man ought to behave in a certain manner[41]. Kelsen is speaking about the act by which the individual norm of the judicial decision is set – it is mostly pre-determined by general norms of formal or material law. No doubt that individual "legal norms" or rules are also belonging to the law, they are in the same way part of the legal order as the general norms on the basis of which they have been created.

Another situation indicates a doctrine: "In default of the law, the maxim rules" (*Regula pro lege si deficit lex*). In other words: if the law is inadequate, the Latin maxim serves in its place[42].

It is time to come to some conclusions:

1. I agree with Kelsen, that the ambiguity of the term "sources of law" (unclear, figurative, metaphorical) let it "appear quite unnecessary. It is recommended instead of the slightly misleading picture to use another expression, which is plainly identifying the legal phenomena we have in mind"[43]. The only one acceptable sense of the "sources of law" is its "fourth dimension" – "formal sources" (sources of law in the formal sense).
2. In my opinion, it is necessary to speak in all respects (towards principles, standards, maxims[44], norms (either general or individual) first of all rather of rules[45] than of norms, thus, about different types of rules (*de diversis*

[40] S. Moller, *Kant's Tribunal of Reason: Legal Metaphor and Normativity in the Critique of Pure Reason*, Cambridge 2020, p. 41.

[41] H. Kelsen, *Reine*…, p. 4.

[42] S. Rinehart, *Regula pro lege, si deficit lex: The Latin Sapience of High Judges*, "Federal Lawyer" 2016, Vol. 63(8), 2016, pp. 52–57.

[43] H. Kelsen, *Reine*…, p. 239. Compare with Austin: *fontes iuris is of course metaphorical*. But Austin, before Kelsen, has paid much more attention to this term elaborating it in respect to the common law system.

[44] Maxim is understood as a subjective principle of action, what the subject made by himself a rule (how he will act) and must be distinguished from the objective principle, namely from practical law. The rule of the actor which he by himself, because of subjective reasons, made to a principle, calls his maxim (see I. Kant, *Metaphysische Anfangsgründe der Rechtslehre*, Berlin 1999, p. 30). Practical principles are sentences, which contain a general determination of the will. Objective practical laws, when thy are acknowledged as objective, i.e. as valid for each rational entity (see H. Kelsen, *Reine*…, p. 412).

[45] Rule as derived from the original Latin *regula*, which I prefer before *norm* (originally also a legal principle). I am not going to analyze the development of the relationship between the mentioned terms, their medieval and modern coinage. The *norm* is by Kelsen (*Reine*…, p. 3) an interpretive scheme (*Deutungsschema*) given to a content of a legal ought-to-be requirement. By *Regulae* also a type of juristic writing is understood. Under this title collections of rules were written by, e.g., Pomponius, Gaius, Modestinus, Ulpian and Paul. Excerpts from this collection of "rules" show a picture

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regulis iuris). From the historical point of view *regula* (rule) was used in classical Roman law, since *norma* was not used by classical jurists, but much later (in the language of postclassical and Justinian's constitutions). Focusing on *regula*: "A rule is that which briefly expounds a matter […]. *Per regulam igitur brevis rerum narratio traditur* […] *Regula est, quae rem, quae est breviter, enarrat*), a short decision, of the point in question is made by the rule […]" (Digesta, 50,17,1). According to the *Encyclopedic Dictionary of Roman Law* "*regula* (*iuris*) is an abstract legal principle of a more general nature whether originating in jurisprudence or in an imperial enactment"[46]. Rules are the basic element (building stone) of the structure of the law, legal system. Thus, the legal system (order) is an aggregate of rules. Principles are also included like a type/mode of general (abstract) rules. Rules and norms are often used as synonyms (in a certain similarity is also the German term *Rechtssatz*)[47]. As a last surprise, it is important to bring it back to the memory that it is even possible to use the mention triad of concepts (principle, rule, norm) *promiscue*, in the same sense.

3. In the case of the dispute between Jellinek and Kelsen concerning the nature of the norm (in my proposed terminology here rule) on general norms and individual norms, I am clearly on Kelsen's side. There is no reason to insist upon generality as an attribute or the main feature of the norm (Jellinek), so I agree with Kelsen's classifications distinguishing between general and individual norms, in my preference rules[48].
4. Principles are in fact rules, kinds of rules, general rules, by their nature[49]. (Reason is the ability to create principles.) The level of their ultimate ab-

different from the title 50.17 of the Digest: the texts there are by far not so concisely formulated as generally *regulae* were. See A. Berger, *Encyclopedic Dictionary of Roman Law*, Clark, New Jersey 2004 (New Series – Vol. 43, Part 2, 1953), p. 672.

[46] *Ibidem*.

[47] See also on legal norms: "Legal norms are »elementary particles« of the legal order" (in: B. Rüthers, Ch. Fischer, A. Birk, *Rechtstheorie mit juristischer Methodenlehre*, München 2018, p. 59). The opinion that *Rechtssatz* and "legal norm" are not synonyms was defended by P. Eltzbacher already in 1903: "Legal norms generally do not appear as a whole, but in single *Rechtssätze*, thus in paragraphs, and articles and in sections and sentences which are building stones of them" (see P. Eltzbacher, *Die Handlungsfähigkeit nach deutschem bürgerlichem Recht*, Berlin 1903, p. 43).

[48] H. Kelsen, *Reine*..., p. 239. Here Kelsen explains the respective "flow": "In this sense the constitution is the source of the general legal norm created on the way of the legislative or custom, the general legal norm is then a source of the judicial decision, which is applying it and creating in this way an individual norm; but the judicial decision can be viewed as a source of an obligation or a right (permission) of the disputing parties laid down by this decision or an empowerment of an authority in charge of enforcing this particular decision".

[49] By *principium* the initial words of an interdictory formula are also meant. In citations of texts of Justinian's legislation principium (= pr.) indicates the introductory passage of a text where numbered sections follow. See A. Berger, *op. cit.*, p. 651.

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stractness or ultimate generality does not change this identification; the way of dealing with them, the way of their application may differ from this one of ordinary rules. Principles are "rules *in statu nascendi*" or "rules of rules". I do not agree with Kelsen's logical argument saying that "if there is a difference between a principle and a norm, than a principle cannot be a norm".

So, the law is a matter of rules, and as an aggregate of rules it is composed of various kinds/modes or types of them, and if I would try to enlist them: Rules – principles (general legal ideas), General rules (constitution, statutes, regulations), Individual rules (judicial and administrative precedents and decisions), Rules of Equity… I try seriously to think about including "subjective rights and freedoms", e.g. as (general) principles – although they are "hidden" under the constitution. This version is concerning the *genus* of the definition, concerning the main *differentia* it is looking like their relationship to the state (also as a set of rules) in the sense of a body with the purpose of guaranteeing to its citizens a "nugget of freedom".

CONCLUDING REMARKS

I have to remind of the questions from the very beginning of the discussion with my Polish colleagues a few years ago. That time I was among others asked what do I think about Article 87 section 1 of the Constitution of the Republic of Poland adopted on 2 April 1997, which states: "The sources of universally binding law of the Republic of Poland shall be the Constitution, statutes, ratified international agreements (treaties), and regulations". That time I did not give a direct answer, I just pointed out that it depends on how we are treating and solving a few questions more[50].

The wording of the respective Article of the Polish Constitution is carefully sourced out (e.g. speaking about "sources of universally binding law"). But I can imagine a different wording of "a Constitution" also of a continental European one (after all having roots in Roman law), based on the discussion presented in this article (anticipating/supposing, that the "sources of law" are best fitting in the sense of "forms of law", or in the sense of "general [universally binding] and individual rules [individually binding]" shall be expressed in the Constitution): "The sources of (binding) law shall be the Constitution, statutes, international agreements, judicial and administrative precedents, and other decisions, customary law, equity".

[50] M.T. Cicero, *Topica*, § 28, www.attalus.org/old/topica.html [access: 10.01.2020]: "[…] as if one were to say that civil law was that which consists of laws, resolutions of the senate, precedents, the authority of the lawyers, the edicts of magistrates, custom and equity (*Ut si quis ius civile dicat id esse, quid in legibus, senatus consultis, rebus judicatis, juris peritorum auctoritate, edictis magistratuum,more, aequitate consultat*)".

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I think that we need an Ariadnean string for all attempts to reach the true level of theoretical explanations, we need it also in the field of law, as something safely leading us from general principles to individual decisions and backward.

Last word, I can imagine raising doubtful objections, so I think the presented discussion shall be continued.

REFERENCES

Alexy R., *Zum Begriff des Rechtsprinzips*, [in:] *Argumentation und Hermeneutik in der Jurisprudenz*, hrsg. v. W Krawietz, K. Opałek, A. Peczenik, A. Schramm, „Rechtstheorie" 1979, Beiheft 1.

Alexy R., *Zur Struktur der Rechtsprinzipien*, [in:] *Regeln, Prinzipien und Elemente im System des Rechts*, hrsg. v. B. Schilcher, P. Koller, B.-C. Funk, Wien 2000.

Alpa G., *General Principles of Law*, "Annual Survey of International and Comparative Law" 1994, Vol. 1(1).

Austin J., *Lectures on Jurisprudence or Philosophy of Positive Law*, New York 1875.

Austin J., *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence*, Indianopolis–Cambridge 1998.

Berger A., *Encyclopedic Dictionary of Roman Law*, Clark, New Jersey 2004 (New Series – Vol. 43, Part 2, 1953).

Bröstl A., *On Definitions in Legal Science*, [in:] *Justice, Morality and Society: A Tribute to Aleksander Peczenik*, eds. A. Aarnio, R. Alexy, G. Bergholtz, Lund 1997.

Bröstl A., *On Precedents in General and in a Statutory Legal System*, "Studia Iuridica Lubliniensia" 2018, Vol. 27(1), **DOI: http://dx.doi.org/10.17951/sil.2018.27.1.177**.

Callejón F.G., *Das System der Rechtsquellen in der spanischen Verfassungsrechtsordnung*, http://www.ugr.es/~jmonnet/Publicaciones/Das%20System%20der%20Rechtsquellen%20in%20der%20spanischen%20Verfassungsrechtsordnung.%20Francisco%20Balaguer%20Callejon.pdf [access: 10.01.2020].

Cicero M.T., *Topica*, www.attalus.org/old/topica.html [access: 10.01.2020].

Dojčák P. [et al.], *Teória štátu a práva*, Bratislava 1977.

Dworkin R.M., *Taking Rights Seriously*, Massachusetts 1977.

Eltzbacher P., *Die Handlungsfähigkeit nach deutschem bürgerlichem Recht*, Berlin 1903.

Entscheidungen des Bundesverfassungsgerichts. Studienauswahl (Band 1–89), hrsg. v. J. Schwabe, Hamburg 1998.

Esser J., *Grundsatz und Norm*, Tübingen 1974.

Esser J., *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts*, Tübingen 1990.

Esser J., *Vorverständnis und Methodenwahl in der Rechtsfindung. Rationalitätsgrundlagen richterlicher Entscheidungspraxis*, Frankfurt am Main 1970.

Fitzgerald P.J., *Salmon on Jurisprudence*, Wellington 1966.

Gray J.C., *The Nature and the Sources of Law*, New York 1921.

Hart H.L.A., *The Concept of Law*, Oxford 1994.

Kant I., *Kritik der reinen Vernunft*, Leipzig 1971.

Kant I., *Metaphysische Anfangsgründe der Rechtslehre*, Berlin 1999.

Kant I., *Rechtslehre*, Berlin 1988.

Kelsen H., *Allgemeine Theorie der Normen*, Wien 1979.

Kelsen H., *Reine Rechtslehre*, Wien 1960.

Llewellyn K.N., *The Bramble Bush: On Our Law and Its Study*, New Orleans 1930.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 21/11/2026 12:06:09

Moller S., *Kant's Tribunal of Reason: Legal Metaphor and Normativity in the Critique of Pure Reason*, Cambridge 2020.
Morawski L., *Wstęp do prawoznawstwa*, Toruń 1998.
Narits R., *Principles of Law and Legal Dogmatic as Methods Used by Constitutional Courts*, "XII Juridica International" 2007.
Planck M., *Vom Wesen der Willensfreiheit und andere Vorträge*, Frankfurt am Main 1990.
Popper K.R., *Alles Leben ist Problemlöse*, München–Zürich 1996.
Pound R., *Sources and Forms of Law*, "Notre Dame Lawyer" 1946, Vol. 21(4).
Rinehart S., *Regula pro lege, si deficit lex: The Latin Sapience of High Judges*, "Federal Lawyer" 2016, Vol. 63(8).
Ross A., *Theorie der Rechtsquellen. Ein Beitrag zur Theorie des positiven Rechts auf Grundlage dogmenhistorischer Untersuchungen*, Aalen 1989.
Rotolo A., *Sources of Law in the Civil Law*, [in:] *A Treatise of Legal Philosophy and General Jurisprudence*, eds. R.A. Shiner, E. Pattaro, H. Rottleuthner, A. Peczenik, G. Sartor, Dordrecht 2005.
Rüthers B., Fischer Ch., Birk A., *Rechtstheorie mit juristischer Methodenlehre*, München 2018.
Savigny F.C. von, *System des heutigen römischen Rechts. Erste Auflage*, Berlin 1840.
Schauer F., *Thinking Like A Lawyer: A New Introduction to Legal Reasoning*, Cambridge, Mass. – London 2009.
Shiner R.A., *Legal Institutions and the Sources of Law: A Treatise of Legal Philosophy and the Sources of Law*, Dordrecht–Berlin–Heidelberg–New York 2005.

STRESZCZENIE

W artykule przedstawiono propozycję („niepewny uśmiech na obliczu prawa"), jak stworzyć spójny obraz prawa i zmniejszyć zamieszanie w stosowaniu kluczowych pojęć. Wynika z tego, że prawo jest jednym bytem; jak dotąd, jego struktura zawiera terminy tego samego rodzaju w odniesieniu do wszystkich zmiennych (źródła/formy, reguły/normy): od reguł ogólnych (zasady, prawa) do norm jednostkowych (sądowe/administracyjne decyzje).

Słowa kluczowe: źródła/formy prawa; zasady; ogólne/indywidualne normy/reguły; wszystko to, co jest prawem