

RECHTSTHEORIE ■ (20■), S. 1–34
Duncker & Humblot, 12165 Berlin

EXCLUSIVE LEGAL POSITIVISM AND LEGAL AUTOPOIESIS: TOWARDS A THEORY OF DIALECTICAL POSITIVISM*

By Oles Andriychuk, Stirling

I. Introduction

In spite of a relatively short period of popularity in the 1980s–1990s, *legal autopoiesis* is not amongst the most debated theories in contemporary jurisprudence. On the *methodological* side, this loss of interest was, to some extent, predetermined by its sociological origins, metaphorical apparatus, the complexity of Niklas Luhmann's *theory of social systems* and its stylistic density.¹ From the *normative* perspective, the gist of criticism and disapproval among legal scholars could be narrowed down to their scepticism towards the autopoiesis' motto: law as a self-referential system. Taken superficially, the self-referential character of law breaks the 'taboo of circularity',² endangering in some sense the very idea of democratic governance. It would be a trivial task, however, to demonstrate that the closeness of the system of legal norms has an *operational* character and is intrinsically connected to its openness. This issue has been explicitly articulated by the founders of legal autopoiesis in their reply to accusations that autopoiesis is a revival of some type of autarchic solipsism of law.³

* I am grateful to Prof. Antony Duff, Prof. Michael King, Prof. Richard Nobles and Dr. Axelle Reiter for their comments on a draft of this paper.

¹ E.g. N. Luhmann, The Unity of the Legal System, in: G. Teubner (ed.), *Autopoietic Law: A New Approach to Law and Society*, Berlin 1987, p. 15: "[T]he system must [...] always be able to re-negate the constantly concomitant, constantly implied negations. The law-code of legal and illegal is [...] nothing but the correlate of a self-referential mode of operation which reproduces itself according to this code."

² G. Teubner, Introduction, in: id. (ed.), *Autopoietic Law* (note 1), p. 1.

³ N. Luhmann, Operational Closure and Structural Coupling: The Differentiation of the Legal System, in: *Cardozo Law Review* 13 (1992), p. 1420: "[T]he theory of autopoietic, self-reproducing systems does not reinvent the idea of complete self-causation in empirical isolation. [...] This should be obvious. The description of a system as autopoietic, as autonomous, as operationally closed, refers to the network of its operations and not to the totality of all empirical conditions, that is, the world. The question is not how a system can maintain itself without any environmental support. Rather, it is what kind of operations enable a system to form a self-reproducing network which relies exclusively on self-generated in-

I do not intend in this paper to trace the evolution of autopoiesis in law and its eventual decline. My primary objective is to offer dialectical account of the discussion about the essence of law, as takes place between legal positivism and non-positivism using autopoietic analysis of law as a means in support of legal positivism. I develop my arguments in 4 sections. After the introductory notes, which set the overall tasks of the paper, Section II provides a brief description of the theory of social systems, analysing the principle of autopoiesis and its repercussion on the system of law and highlights the main research agenda of exclusive positivism (I will also use the term *exclusivism*). Section III articulates in more details the main problems related to law's incorporation of morality, providing a theoretical background for the theory of dialectical positivism (I will address the meaning of *dialectics* and *dialectical positivism* in Section IV), which is subsequently applied in Section IV to the issues of the indeterminacy of the law, legal interpretation and argumentation.

These objectives could appear ambiguous to the critics of legal positivism and to its supporters alike: doctrinal narratives are seldom invigorated by the implementation of elements borrowed from other theories. Potential confusions and discord constitute only the tip of the possible *Tower of Babel*. In addition, any attempt to combine established theories should pass between the Scylla of superficiality and Charybdis of technicality. I am aware of this difficulty and my task is to substantiate the reinforcing role of autopoiesis for the agenda of exclusive legal positivism by developing a theory which I label *dialectical positivism*, the theory which synthesises the positions of exclusivism and autopoiesis and constitutes a common denominator of both. This paper seeks to synthesise, and not to syncretise, autopoiesis and exclusive positivism. Both theories are deeply rooted in two parallel discussions (taking place in sociology of law and jurisprudence respectively), and it is hard to use them interchangeably without creating additional confusion. For this reason, I will try to articulate their mutually supportive elements in a very explicit and clear manner and I will mainly remain within the ambits of the suggested theory of dialectical positivism; which will eventually entail a certain amount of stylisation.

II. Autopoietic Law and Legal Positivism

Legal theory addresses primarily the *ontological* issue of *what* is law, while the social systems theory of autopoiesis focuses on *operational*

formation and is capable of distinguishing internal needs from what it sees as environmental problems.”

questions related to *how* law positions itself in respect to other systems of social norms and *how* law interacts with these systems. My hypothesis is that these two approaches are inseparably linked to each other, and this connection enables the comparative synergetic analysis of law from both legal theoretical and social systematic angles. The main research problems and apparatus of both theories remain different and my synthetic theory of dialectical positivism does not aim at the elimination of these differences, seeking only to demonstrate the compatibility (the minimum task of the paper) and mutual strengthening (the maximum task of the paper) of their premises.

In the following two subsections I will very briefly recapitulate the main features of both theories. These subsections can be omitted by those who are familiar with their research agenda. My main arguments are mostly developed in Section III and contextualised in Section IV.

1. Autopoietic Law as an Epistemological Construct

In the Introduction I pointed out a very common misperception of autopoiesis in law. Its closure is often perceived *claustrophobically*: as if it is a claim that law should be isolated from other social systems, living its own life, independently from the context. This impression is wrong, but the basic principles of autopoiesis indeed can provoke such conclusion. The autopoietic idea of self-referentiality in law is a synthetic epistemological construct. Its synthetic character implies some conditionality of the theoretical premises of autopoiesis. Autopoiesis is a vision of the functional coexistence of social systems. It does not claim exclusivity, but it does claim universality. If one *does* accept the premises of the autopoietic analysis, one will have no other choice than to extend them to all processes taking place in society (the universality clause of the methodological purism), but one *does not necessarily have to* accept or use this theoretical language (the non-exclusivity clause).

It is well known, that the term *autopoiesis* (self-creation) has been developed in biology,⁴ and referred to the self-generative mechanisms of *living* systems, namely biological cells. Niklas Luhmann then applied the concept to *social* systems.⁵ Metaphorically speaking, autopoiesis always implies thinking *inside* the box. Similar to biological systems, every social system – be it law, economics, morality, religion, art or, say, football,

⁴ H. Maturana/F. Varela, *Autopoiesis and Cognition: The Realization of the Living*, Dordrecht 1972.

⁵ N. Luhmann, *A Sociological Theory of Law* (translated by E. King-Utz and M. Albrow), London 1985.

is primarily interested in maintaining some coherence between its own elements. It interacts with other systems through special codes, *encoding* the information, sent to other systems, and *decoding* the information received from those systems. These coupling points are the only way to achieve meaningful interaction between the system and the remaining environment. The systems' requirements can be neglected, skipped or abandoned, but nothing can be imposed forcefully upon the system without special coupling mechanisms. As a computer would not understand commands unless they are written in a special programmatic language, law remains ignorant to anything, which is not translated into legal terms, using the special legally meaningful algorithms: this is what is meant by the system's '*operational* closure'. In this sense, law's only operational task is "continuous making possible of self, from moment to moment, from event to event, from case to case and it is designed precisely to have no end".⁶ The communication between the systems (or more precisely, the communication of the systems *about* each other)⁷ is ubiquitous, and this is why the operational closure is always accompanied by their '*functional* openness'. The closure-openness characteristics of law can be perceived in their *dialectical* dependency,⁸ which determine the numerous dualities in law. Let me highlight the most important of these dualities.

In one of the best concise descriptions of the nature of legal autopoiesis in the English-speaking literature Michael King explains two important dualities of legal autopoiesis: (i) the dual representation of individuals, which is characterised by their simultaneous presence as parts of *social* autopoietic systems and their own existence as autopoietic systems in the *biological* and the *physical* senses of the terms; and (ii) the fact that autopoietic systems are simultaneously separate from society (environment) and a component of it.⁹ At the meta-level all these systems constitute societal subsystems.¹⁰ The steering of different systems cannot be anything else than another, more complex, system.¹¹ Another impor-

⁶ *Luhmann*, The Unity of the Legal System (note 1), p. 20.

⁷ *K. Van Assche/G. Verschraegen*, The Limits of Planning: Niklas Luhmann's Systems Theory and the Analysis of Planning and Planning Ambitions, in: *Planning Theory* 7 (2008), p. 270.

⁸ *M. Van De Kerchove/F. Ost*, Legal System Between Order and Disorder, Oxford 1994, pp. 92–94.

⁹ *M. King*, The 'Truth' About Autopoiesis, in: *Journal of Law and Society* 20 (1993), p. 220.

¹⁰ *N. Luhmann*, Operational Closure and Structural Coupling: The Differentiation of the Legal System, in: *Cardozo Law Review* 13 (1992), pp. 1424–1425.

¹¹ In this respect autopoiesis has some conceptual similarities with Scott Shapiro's version of exclusivism, namely, his social planning theory, which demon-

tant dialectical duality of autopoiesis is observed by François Ewald. For him legal autopoiesis is an attempt to mitigate ‘the radical split’ between the external (sociological paradigm of law – what he calls ‘the last epigones of the jusnaturalist doctrines’) and the internal perceptions of law (Kelsen’s normativism; essentialism and positivism in general): the split, which polarised the twentieth century jurisprudence. In this sense autopoiesis is seen as ‘both post-Kelsen and post-sociological’.¹² Ultimately, François Ost refers to the last important duality of autopoiesis: namely, the dialectics of regularity and chance or determinism and indeterminism. It generates two important consequences: First, the decision-making process can never take place mechanically. Adjudication is not a logical automatism. Even leaving aside the inevitable elements of subjectivity, law always contains more than what has been deduced from it in any given legal case. Secondly, the systemic closeness of law cannot be overcome by the internal rationale of other social systems (e.g. by economic rationality, political necessity or moral virtue). Ost explains that “what appears as noise, chance or perturbation to the outside observer is in some way intelligible to or decidable by the system”,¹³ which implies that what may well appear to be *morally* good or *economically* rational does not necessarily have to be accepted by law. Conversely, what seems to be morally bad or economically unsound may well be determined by law’s own special program. The first aspect of Ost’s observation will be explored in more details in analysing law’s polysemic nature (subsections 1/III and 2/IV of this paper), law as a game (4/III) and judges’ ‘bounded arbitrariness’ in deciding hard cases (2/IV). His latter duality will be of direct relevance for the analysis of interactions between operationally closed systems (2–3/III).

2. Exclusive Legal Positivism

One of the major difficulties in describing exclusive legal positivism is its parallel development through several streams. Despite sharing the overall claim of the conceptual separation of law and morality (the separation thesis), its two most representative contemporary versions (Kel-

strates the implicit compatibility of exclusivism and autopoiesis: compare *S. J. Shapiro*, Law, Morality and the Guidance of Conduct, in: *Legal Theory* 6 (2000), pp. 128–131; *id.*, Was Inclusive Legal Positivism Founded on a Mistake?, in: *Ratio Juris* 22 (2009), pp. 326–328; *id.*, Legality, in: Harvard University Press 2011 with ■ ■ ■ *Van Assche/Verschraegen*, The Limits of Planning (note 7), pp. 270–275.

¹² *F. Ewald*, The Law of Law, in: Teubner (ed.), *Autopoietic Law* (note 1), pp. 39–41.

¹³ *F. Ost*, Between Order and Disorder: The Game of Law, in: Teubner (ed.), *Autopoietic Law* (note 1), pp. 78–79.

senian and Razian) substantially diverge in their methodological apparatus, being sometimes more critical of each other (and their predecessor – classical positivism) than of their direct (jusnaturalism) and latent (inclusivism) opponents. The literature on both exclusivist trends is so rich and comprehensive that it is hardly possible to make any general exclusivist claim without reverting to the numerous and very detailed discussions on the pros and cons of that claim. Since the objective of this subsection is to highlight the basic principles of exclusivism for further operationalisation purposes, I will not address polemical points in this context, in spite of their direct relevance to the highlighted theses of exclusivism.

The main principles of exclusivism are founded upon (but are not limited to) the writings of such philosophers as Thomas Hobbes, Jeremy Bentham and John Austin. The latest is known for providing the most stylised summary of this theory: ‘[t]he existence of law is one thing; its merit or demerit is another’.¹⁴ The term *exclusivism* as such was necessary to develop in order to distinguish those positivists who continue to subscribe to the separation thesis from those who recognize that some legal systems can either explicitly or indirectly *include* a proxy for the imperative role of morality in law (inclusive legal positivism or inclusivism). Wil Waluchow, who coined the term as such, defines it as “the claim that moral considerations *can*, but need not, figure properly in determinations of law, i.e., attempts to determine the existence or content of valid laws”.¹⁵ Judging from the literature, the majority of legal positivists are *inclusivists*. The positions of inclusivists are not united either, but most of them agree that laws – at least in developed liberal democracies – cannot be defined and/or legal decisions made without some moral input.

The definition of morality itself constitutes an important topic in contemporary jurisprudence. Most of the authors acknowledge that morality as understood in legal theory presents features that distinguish it from the notion of *commonsense* morality. The definition matters. If by morality one understands the *genuine meaning* behinds the letter of the law, this approach would not be at odds with the position of most exclusivists. Conversely, if the conception of morality endorsed is taken from outside of the legal field – namely, from the semantic meaning of the moral category, ideological convictions of the interpreters or religious beliefs – this approach would be at odds with exclusive positivism.

¹⁴ J. Austin, *The Province of Jurisprudence Determined*, London 1995, p. 157.

¹⁵ W.J. Waluchow, *Inclusive Legal Positivism*, Oxford 1994, p. 166, emphasis added.

One must clarify that no positivist denies the relevance of this broader definition of morality as such. John Gardner calls this misunderstanding *absurd*, clarifying that “no legal philosopher of note has ever endorsed it as it stands”.¹⁶ Hans Kelsen, who was the object of such line of criticism pointed out: “my theory of law [...] has nothing to do with my political attitude as a liberal democrat”.¹⁷ What exclusivism objects to in different ways is the ability of morality to define the law. In the following section I will address the issue in more details, arguing specifically in subsection 1/III that the real dividing line between morality and law can be drawn upon the ‘homonymy-polysemy’ criterion.

These fruitful discussions emerged from the debates between H. L. A. Hart and Ronald Dworkin. The latter philosopher criticise Hart’s account of positivism and introduced the notion of gapless law: even in the most controversial cases there is always either a real or at least a hypothetical right answer, which should be discovered and followed by the judge. The essence of hard cases will be addressed in subsection 2/IV. Leaving aside my strong disagreement with Dworkin’s conception of the role of morality in searching for the right legal answer, the overall picture of law that this paper puts forward is compatible with the Dworkinian notion of gapless law. Yet, unlike Dworkin’s theory, it does not rely on extra-legal elements of morality. Let me now revert to the problematic relations between law and morality.

III. Relations between Law and Morality

Prima facie the idea that law – as any other social system – can define its own way of communicating with the environment (i.e. with other social systems like morality or economics) implies that it can explicitly accept morality’s steering role. This is consonant with the *inclusive* legal positivism: implying that some (mature, democratic, humanistic) societies acknowledge the boundaries (seen as limitedness) of law as a social system and overcome law’s self-referentiality by explicitly accepting the principles of morality/justice as guiding benchmarks for the functioning of the law. The problem with this approach resides in its over-inclusive aim. From an autopoietic perspective, inclusive legal positivism is always *over-inclusivism*. Indeed, social systems define their communication codes with other systems, but they cannot overcome the natural bound-

¹⁶ J. Gardner, Legal Positivism: 5^{1/2} Myths, in: American Journal of Jurisprudence 46 (2001), p. 223.

¹⁷ H. Kelsen/A. A. Ehrenzweig, Professor Stone and the Pure Theory of Law, in: Stanford Law Review 17 (1965), p. 1135.

aries organically present in each system. A legal norm saying that “every legally meaningful action should be performed in accordance with the principles of justice” cannot establish overall justice. Structurally, it is identical to the norm in the Soviet Constitution which declared that “The supreme goal of the Soviet state is the building of a classless communist society in which there will be public, communist self-government”; in the sense that both statements are divorced from reality and merely constitute some form of wishful thinking. The *content* of what is desirable differs from one society to the next, while its legal *structure* remains identical. The natural boundaries of social systems prevent them from self-destruction (in Luhmann’s terms – from ‘de-differentiation’).

Let me explain what the de-differentiation implies. A legal norm guaranteeing ultimate justice for everyone, can either remain a mere declaratory manifestation, with no or only sporadic legal effect, or should define justice in restrictive terms, limiting it to legal apparatus. The former option does not fulfil the legal standards of predictability and certainty (although it could be adjusted to the notion of indeterminacy and interpretation of law to which I will revert in Section IV). The latter scenario transfers the concept of justice from the domain of morality to the domain of law, creating a confusing *homonymy* between these two concepts. This second approach falls in the trap, to which the natural law theories are very susceptible. In a stylised form, jusnaturalism claims that the principles of justice are mentioned explicitly in (developed) legal systems, and that the concept of justice is of a moral nature. Accordingly, (i) law is connected to morality and (ii) the legal meaning of the concept of justice is embedded into its moral meaning. The tiny difference between jusnaturalists and inclusivists is based upon the origins of such embeddedness: while the former argue for the *organic, predetermined* connection of law to morality, the latter accept it only as an *intentional act* of *some* law-makers (or law-enforcers). The opposite idea, which suggests that the self-identification of a legal system does not imply its omnipotence, is conceptually connected with the *exclusivist* version of positivism, which argues that morality *cannot* steer the law even if the steering role is declared in legal texts (i.e. that law cannot step beyond its limits). I will revert to the problem of such incorporation in subsection 4/III.

1. Homonymy vs. Polysemy

To demonstrate the implications of the jusnaturalist and the inclusivist over-inclusiveness (namely, that they include into the concept of law more than the law can digest), the distinction between *homonymy* and *polysemy* should be put forward.

Homonymy is a situation where two different concepts have an identical spelling and pronunciation.¹⁸ It does not represent a big difficulty in cases where the concepts are unrelated to each other and only share linguistic properties. But the potential for confusion becomes higher, the closer the concepts become semantically.

If the concepts share also the same etymology and are used interchangeably (polysemy), the boundaries between them become blurred, yet the unarticulated differences between the concepts are not eliminated. In spite of the fact that the terms *homonymy* and *polysemy* are not necessarily contradictory and that the features of homonymy are partly shared by the notion of polysemy, they shall be used antagonistically for the purposes of this paper.

Namely, homonymy reflects situations, where two phonetically identical concepts are used by *different* social systems (e.g. the use of the term 'justice' in law, moral theory or economics), while polysemy occurs when the concept (e.g. of justice) is used *within* each of these systems.¹⁹

Homonymy does not mandate reconciliation of incompatible concepts that share a common spelling and pronunciation, since they exist in parallel. Conversely, polysemy requires such reconciliation. I imply that the notions of *justice* discussed separately in legal, political, economic or moral theories are in a situation of *homonymy* in respect to each other, while the different perceptions and interpretations of the notion of justice *inside* each system of social norms (i.e. in law, politics, economics or morality) are *polysemic*. This is a stylised hypothesis. I do not argue that the concepts of justice as perceived in different systems of social norms share nothing but spelling and pronunciation. What I argue is that they are non-transferable from one domain to another without special encoding/decoding protocol. Let me explain the implications of this hypothesis.

The main discrepancy between exclusivism and jusnaturalism lies in exclusivism's claims that the term justice – as well as any other concept present both in moral and legal theories – can have both homonymic and polysemic features. Exclusivism requires judges to restrict their analysis solely to polysemy situations (i.e. to different *legal* interpretations of the considered concepts) and to ignore all homonymous overlaps in the con-

¹⁸ One can prefer to use the term *isomorphism* instead (S. L. Paulson, Introduction, in: id./Bonnie Litschewski Paulson (eds.), *Normativity and Norms: Critical Perspectives on Kelsenian Themes*, Oxford 1998, p. xli).

¹⁹ To my knowledge, the clearest articulation of the problem of homonymy in legal positivism has been offered in D. Priel, *Farewell to the Exclusive – Inclusive Debate*, in: *Oxford Journal of Legal Studies* 25 (2005).

cept of justice (i.e. the interpretation of which is provided from *extra-legal* sources).²⁰ Conversely, jusnaturalism does not consider the concept of justice as homonymous at all: justice is universal; it is not particular, not system-specific, in other words. Justice for jusnaturalism can be either a *mono-* or a *poly-*semic concept. Jusnaturalist theories that accept some polysemy of the notion of justice can be labelled *pluralistic*, while those that do not and argue instead for the existence of a single right definition of justice can be called *monistic*. Both argue for the moral nature of law, but while the former accepts disagreement on what this moral nature constitutes of in each case, the latter does not.

In the same vein, apropos, exclusivist theories can also be divided along such lines. Statutory positivism, which restricts the analysis either to the original intentions of the law-makers or the literal reading of statutes, is an example of *monistic* positivism. On the other side, theories that accept (either as an unavoidability, a desirability or both) the importance of interpretation, which can change the implications of legal *texts* without changing their meaning or their status as *legal* texts, operate within a *pluralistic* exclusivist discourse. Both versions of exclusivism reject the relevance of homonymous aspects of justice, arguing either for its monosemic (i.e. statutory positivism) or polysemic (i.e. those who accept the necessity of *legal* interpretation) perception. I subscribe to the latter version of exclusivism.²¹

2. Clashes between Systems

The difficulties in defining the proper borders of legal concepts are not only attributable to the relations between legal and moral theory. The theory of autopoiesis provides a theoretical framework, which helps to identify communicative clashes between various systems of social norms. Conflicts are unavoidable in this respect. One could look at the relations between law and economics as an example. Although the literature on

²⁰ H. Kelsen, *General Theory of Law and State*, New York 1973, p. 8: “Since humanity is divided into many nations, classes, religions, professions and so on, often at variance with one another, there are a great many very different ideas of justice; too many for one to be able to speak simply of justice.”

²¹ Owen Fiss (*O.M. Fiss*, *The Varieties of Positivism*, in: *The Yale Law Journal* 90 (1981), pp. 1007–1009) distinguishes between the two realms of legal positivism: (i) ethical and (ii) cognitive. The former aspect of positivity refers to the separation thesis, while the latter (a) addresses the *actual* behaviour of people and institutions and (b) accentuates on the *empirically* verifiable evidences. Only the second mode of legal positivism has its strong links with the Vienna Circle positivism as a general scientific movement (with empirical studies being positivism par excellence). In my view, one can be a positivist in one sense without being positivist in the other. I adhere only to the former version of positivism.

the theoretical aspects of the conflict between legal and economic analysis is not as rich as the discussion between positivism and jusnaturalism (probably, because law and economics tends to concentrate on practical rather than theoretical problems), it still exhibits similar features as the discussion between exclusivism and jusnaturalism.

Authors in the law and economics tradition support, in general, the claim that law can be best interpreted as an extension and formalisation of economic relations. Therefore economic theory is the most appropriate place both for defining the incentives of the participants in the legal discourse and for describing their behaviour (*positive* economic analysis). Since economics is the theory which understands best the essence of conduct in the past, it is consequently the best theory for prescribing future conducts (*normative* economic analysis). In this sense, the law and economics movement is another version of jusnaturalism: its *jusnaturalism* differs from the one that is grounded in moral theories, since it argues that legal relations are a special, formalised incarnation of economic (and not moral) relations. But conceptually they converge: both moral and economic theories argue that the best explanation of law derives from the external sources (morality and economics respectively), the sources which are *natural* in this sense.²²

Again, different law and economics schools can be either pluralistic or monistic naturalists. *Pluralists* argue that while economics is indeed the only answer to legal problems, economics itself is yet not united in what exactly these *right* answers should be. Therefore, different economic theories can compete for providing the best answer to legal problems (e.g. on the right the Chicago school criticises legal positivism for its inability to provide proper wealth *maximisation*, while on the left the socio-legal literature criticises it for preventing proper wealth *distribution*), but all these law and economics theories would agree that the answer should be given by economics. Some orthodox normative economic schools (e.g. some versions of Marxism or libertarianism) belong to *monistic* jusnaturalism: not only would they argue that the answer should be given by economics, but also that the economic answer is known only to those – and not other – economic schools.

From the perspective of systems theory, the law and economics movement appears as a natural and organic expansion of one social system to

²² It is probably possible in this respect to make an argument that all jusnaturalist theories are very closely associated with Marxist view that law is only a superstructure of society, while its real essence and regulatory importance is based in genuine relations between people (the basis). While the *content* of this genuine essence differs in moral and economic theories, its epistemic *structure* remains identical for both.

another. This is an objective process, since every discipline seeks for coherence; and coherence “is inherently expansive: It resists compartmentalization and seeks to encompass as much as possible”.²³ Its genuine meaning and its real intention would be better captured not by the ‘law and economics’ label, but rather called ‘law as economics (sees it)’. Economics is not unique in this respect: law itself, by regulating economic relations, intervenes and affects the realm of the economic social system, creating numerous discrepancies between a purely economic thinking and its legal explications, giving a technical legal definition to purely economic concepts. In this sense for a long time all lawyers were implicit representatives of an articulated but very powerful ‘economics and/as law’ movement. “[D]isciplines [...] compete] for limited space [...] have ‘interest’ in their own reproduction and spread.”²⁴

The same occurs in the relations between law and morality. For the purposes of this paper, jusnaturalists can be perceived to belong to a ‘law and morality’ movement, whose ultimate intention is to reduce it to ‘law as morality’. In the same vein, legal realists and critical legal scholars can be perceived as different versions of the ‘law as politics’ movement, etc. From the perspective of systems theory, all these approaches can be taken as external perceptions of the law, while the purely legal autopoietic discourse would solely encompass various versions of exclusive legal positivism.

Since most of the external perceptions of law are driven by their own disciplinary and research interests, they tend to ignore the existence of different external approaches, and often conflict with each other. The inclinations and methods of each system (be it politics, morals or economics) are different. They often collide. To use another stylisation, one can argue that moral theorists operate in terms of fairness and justice, while economists are more comfortable with cost-benefits approach. A majority of moral philosophers pay high attention to the deontological, non-calculable aspects of values, while most economists are consequentialists. Thus, such legal fields as constitutional law are *colonised* by moral theory, while commercial or antitrust law are dominated by economics. A consequentialist cost-benefits argument would be hard to put forward when discussing issues of rights, while a deontological approach is difficult to develop within the discourse of competition law. Morality and

²³ *E. J. Weinrib*, Legal Formalism: On the Immanent Rationality of Law, in: *The Yale Law Journal* 97 (1988), p. 972.

²⁴ *J. M. Balkin*, Interdisciplinarity as Colonisation, in: *Washington and Lee Law Review* 53 (1995), p. 960; *D. Kennedy*, Legal Formality, in: *The Journal of Legal Studies* 2 (1973), p. 356: “[T]heories tend to try to expand their scope to cover as much of reality as possible.”

economics feel comfortable in their *colonised* areas of law, but both systems tend to expand to the realm of other legal branches as well. Then the mutual neglect is replaced by the mutual refutation: economics is accused by morality for its excessive pragmatism and the tendency to commodify even the most morally significant values of life, freedom or autonomy, while morality is accused by economics for its declaratory theoretical claims which undermine efficiency and optimisation. As any domain, invaded by two strangers, law often behaves opportunistically in this respect, trying to use rational economic arguments in its *liberation movement* from morality, and the language of morals against economic expansion; which further complicates the problem of the definition of boundaries. In both cases – i.e. when morality and economics remain within their *colonised* branches of law (constitutional law for morality or competition law for economics), as well as (and more explicitly) in cases of cross-expansion in legal fields *colonised* by each other –, they remain *external* to the law itself.

Legal autopoiesis and exclusivism can be seen as law's attempts to 1) articulate; 2) defend and 3) expand its own realm. These processes are described by autopoiesis and it would be a grotesque misrepresentation to personify or generalise them: they implicitly exist in any social system, and every jusnaturalist, who recognises that a legal norm should be followed in spite of its bad consequences, acts as an exclusivist in this respect. Let me revert now to the very *functioning* of the autopoietic mechanism.

3. Encoding-decoding and the Problem of the Centre of Gravity

One of the main principles of systems theory is the premise that the same information can be processed simultaneously by different codes. This implies that some human relations can at the same time be morally, politically, economically and legally meaningful. Each discipline or each social system internalises some parts of these relations, which does not prevent their internalisation by other social systems. This leads to the situation, where some actions are at the same time regulated or addressed by several normative systems. The task of each system in its interactions with its environment is to decode (or translate) the multiple external signals into the *language* or *codes* known by the system. This objective is known metaphorically as the creation of an internal order from the external noise. Law, as a social system, is perpetually involved in this process. It addresses numerous problems, which are, at the same time, addressed by other social systems. The effectiveness of the decoding process is directly related to the mastery of the interpreters (namely,

how good the discourse of morality, economics, politics and the like are perceived by law-makers and law-enforcers) and how relevant the transferred information is to the realm of law. However, this decoding process usually gives rise to ‘unforeseen distortions and reductions to the meaning of the original communications as they were formulated in the political or economic systems’.²⁵

The better the communicative process goes, the smoother the relations between the systems. However, even inappropriate or wicked translations produce the same meaningful consequences for the system, since its knowledge about the environment is limited to the information it receives from the translators. Bad translations complicate interactions with other discourses, but they do not affect their *internal* status within the system, in which they are transferred. Thus, if law reflects properly the dominant vision of economics or morality, these social systems coexist harmoniously with no or only minimal discrepancies. As a corollary of this communicative success, situations can arise where one system claims influence on another in a direct way, without the assistance of the decoders: in such cases, moral or economic theories would perceive themselves as the ultimate decision-makers for the legal system, not only ‘knowing better’ what the law *is* but also what it *should be*.

The metaphor of *good* and the *bad* translations is yet another necessary stylisation, since in practice neither can happen. Any normative system is bound to trust *all* the information it receives from the interpreters, since the interpreters are the only sensor, through which it perceives the external world.²⁶ This implies that legal theoretical analysis is mostly interested in the process of *decoding* of the external information, making this information meaningful for the law – since it is the only source, from which law absorbs information about its environment. Any information decoded through legal translation is incorporated into the law, thereby transforming itself into law. Hans Kelsen compares law in this respect to King Midas: “just as everything he touched turned to gold, so everything to which the law refers assumes legal.”²⁷ In this sense law – as well as any other normative system – is only interested in its autopoietic existence, and not in the effectiveness of the overall communicative processes between different systems – a task, which is either purely observational or meta-managerial (steering), but not an internal objective

²⁵ M. King, The ‘Truth’ About Autopoiesis, in: Journal of Law and Society 20 (1993), p. 226.

²⁶ Luhmann, Operational Closure and Structural Coupling (note 3), pp. 1432–1434.

²⁷ H. Kelsen, The Pure Theory of Law, Berkeley 1967 (Reprint Series Edition, 1978), p. 278.

of the law. This does not entail the entire autonomy or closeness of each system, but merely negates the possibility of their communication without translators (a position which would be defended by *inclusive positivists*, as will be explained in the following subsection).

4. Law and the Im-/possibility of the Faustian Pact

As underlined above, every system operates within its natural, organic boundaries, and this implies that not every claim made by the system can be absorbed or digested by the system itself. This is the main argument against *inclusive* legal positivism, which allows direct incorporation of morality into the law. *Exclusive* legal positivism, on the contrary, does not accept this situation, arguing that law cannot be guided by rules, originating in other social systems. In such situations, the external rules were in fact decoded and absorbed by the law (like for the ‘Thou Shalt not Kill’ principle incorporated in a criminal codex). Essentially the main difference between inclusive and exclusive positivism is that the former tolerates the *Faustian Pact*²⁸ by which law can voluntarily accept the normative primacy of other social systems (be it morality or economics) without any internal decoding being constantly involved.

The typical example provided by inclusive positivists refers to the provisions of democratic constitutions or international treaties, in which the dominant role of some moral principles (e.g. human rights or justice) is explicitly recognised.²⁹ An identical situation occurs in antitrust law, where competition lawyers accept that some economic issues should be determined and regulated by economic theories, e.g. industrial organisation theory, behavioural economics etc., provided that law (or legal practice) explicitly tolerates it. For the exclusivists, on the contrary, such recognition is never a Faustian Pact. Two ways of argumentation (normative and descriptive) are possible in this respect, which differ only in terms of style and put forward virtually identical claims. The first scenario is provided by Joseph Raz in his ‘Incorporation by Law’. Raz explains that the fact that the law contains some direct acknowledgement of various non-legal norms does not render these norms legal. References to these standards merely give them ‘legal effect without turning them into part of the law of the land’.³⁰ This is a stylised representation of the

²⁸ I am interested solely in the *irrevocability* of the Pact; any other association with the metaphor is irrelevant.

²⁹ W.J. Waluchow, Herculean Positivism, in: Oxford Journal of Legal Studies 5 (1985), p. 195.

³⁰ J. Raz, Incorporation by Law, in: id., Between Authority and Interpretation, Oxford 2009, pp. 193–195.

classical *normative* argument of exclusivism. The *descriptive* argument derives from legal sociology, namely from systems theory, and emphasises the autopoietic nature of the law. It is fully compatible with the *normative* argument but puts more emphasis on the general theoretical modelling, the natural boundaries of the systems and their recursive self-referentiality. It claims that law is *incapable* of stepping beyond its own limits. The autopoietic approach is not normative in this respect. From its perspective, the operational closure of the legal system is a statement of fact.³¹ Even if a legal norm explicitly refers to the authority of morality or any other system of social norms, this reference is always a) repudiable; b) a decoding proxy, which transfers the non-legal into the legal and c) predetermined by the natural limits and capacities of the system to *digest* the referred norms.

It should be clarified at this point that Raz's *normative* scepticism in relation to the ability of moral principles to be *incorporated* into the law does not conflict with the systems theory's claim that law can only *incorporate* morality through its decoding sensors. Indeed, in the latter case, what is in fact incorporated into the legal system immediately acquires its legal attributes. Raz objects to the ability of a set of moral or other non-legal norms – as well as foreign legal norms – to be considered as law. Autopoiesis suggests the same conclusion, albeit using another method. While *inclusive* positivism acknowledges incorporation by a legal norm, which either directly or implicitly recognises the primacy of morality, the autopoietic theory perceives the incorporation as the constant process of decoding and what is being incorporated never remains extra-legal.

To illustrate this point it would be useful to refer to Allan Hutchinson's imaginary state 'Gileban' – a theocracy, ruled arbitrarily in camera by the dogmas of the Old Testament.³² Hutchinson correctly claims that Gileban remains a legal polity and incorrectly (for the purposes of my argument) concludes that this demonstrates that "legal validity can sometimes and, on occasion, must be determined by reference to its content or in terms of its larger moral legitimacy".³³ An *inclusive* positivist would agree with this conclusion: law in this case would be seen as being either partially or totally substituted by religious norms and since either direct or implicit substitution has been recognised by the legal system, there is no way back. This is a typical instance of Faustian Pact.

³¹ Luhmann, Operational Closure and Structural Coupling (note 3), p. 1440: "The system has no preference for maintaining itself, there is simply no choice."

³² A. C. Hutchinson, Razzle-Dazzle, in: Jurisprudence 1 (2010), pp. 46–48.

³³ Ibid., p. 52.

However, even assuming that Gileban's Old Testament had totally replaced secular law, this would not negate the very existence of secular law in Gileban, but only transfer its authority to the Old Testament. All agree that there is no lawless society. Even in totalitarian dystopias people are born and die, get married and divorced, manage their property and commit criminal offences. All these legally relevant facts can be regulated by a general or detailed corpus of religious norms, but the nature of this regulation remains juristic even if supplemented by the sacral statement that "this transaction is authorised in the name of god". This entails that, in spite the willingness of the rulers to commit themselves to the Faustian Pact, they cannot escape the communicative discrepancies between religious and legal norms, even though both are contingently contained in the same corpus – the Old Testament. If the same rationale is embedded in a constitutional norm saying that "nothing in this constitution can be ever changed or amended", this would only lead to some *logical* impossibility, but not to a *factual* one (I revert to the *factual* right now).

Another version of Gileban is more plausible: namely, the situation where both secular and religious norms coexist, while being at the same time transposed into the parallel system of public law via proper legal proxies.³⁴ In this scenario all the *factual* authority belongs to and derives from the Old Testament, but the purely legal decisions are made by some secular ersatz-laws. This secular law would probably contain an explicit clause, recognising the moral and legal primacy of the Old Testament and subordinating all legal decisions to the religious dogmas. The consistency of this scenario with the premises of exclusive legal positivism and the autopoietic theory of law is even more explicit. The ultimate decisions are made – though pro forma only – by the public authority and it is a legal authority, even if the legal authority coincides with or is fully subordinated to the religious authority.

Structurally, the Gileban situation perfectly corresponds to any mature democratic system too. The latter always refers to some universal moral values, which are either directly or implicitly present in the basic laws of these countries. What is valid, however, is not the content of these moral or religious values, but their legal reflection and incorporation in legal sources.³⁵ To be clear, the incorporation claim of autopoiesis is not *inclu-*

³⁴ E.g. in the Soviet Union the actual decisions were taken by the Communist Party (the communist post-New Testament), but formally they were adopted by public authorities, which coincided with governing establishment of *the Party* only *de facto*.

³⁵ J. Gardner, Justification under Authority, in: Canadian Journal of Law and Jurisprudence 23 (2010), p. 71: "It is always the official's determination of the im-

sivist, because no law can commit the Faustian Pact, renouncing its autopoietic nature and accepting the hierarchical guidance of another normative system. The Pact is null and void even if a legal clause explicitly states otherwise.³⁶ Otherwise, the all-inclusive provisions of a charter of rights and liberties would be directly applicable by the individual right holders, trumping the provisions of public law. This clause can be made explicitly in law. Any individual activity conducted in conformity with the provisions of such a charter would automatically be considered above the law. In a situation where almost all imaginary individual interests are in one form or another embedded in some right or liberty, this would lead to normative libertarian anarchism; which is impossible even if the relevant clause is adopted by law itself and will be always mitigated by legal practice.

If a democratic polity subordinates its public activities to the principles of an external system of social norms (e.g. moral norms, international or foreign law), strictly abiding not only by the norms themselves, but also by the steering interpretations of these norms, as issued by some external authority (e.g. international or foreign court, United Nations, Patriarch or Pope), each and every act of application and obedience is decoded into the legal system, tested for its compatibility with this system and only then transposed openly or implicitly into the law. It may be a matter of milliseconds or automaticity – this does not change the principle that the law cannot be refused the real or hypothetical possibility of withdrawing its consent to obey the external system at any moment. At the moment when such disobedience becomes impossible even hypothetically, the law would lose its factual authority and deprive itself from the necessary features of law (like the law of a government in exile or the law of a colonised country). In other words, I imply the *factual* impossibility of monistic application of international law. Its dualism is always implied even if *formally* it is not necessarily the case.

Schematically, the situation is very similar to a game, and this shows the potential for the use of different game-based theories (and not only mathematical game theory *sensu stricto*) in legal analysis. An individual participating in a game voluntarily conforms to its rules. These rules

morality, not the immorality itself, that bears on the action's legality. Immorality itself never affects legality; only authoritative determinations of immorality are capable of doing so. Cruel punishments, in other words, do not *per se* violate the Eighth Amendment. What violate the Eighth Amendment are punishments that have been authoritatively determined to be cruel. Or so says the exclusivist.”

³⁶ I obviously do not say that the clause as such is null and void, but only suggest that its normative reference to another system of social norms will be either rejected by law's internal *immune system* or *digested* by it, transforming the morality of the clause into its legality.

may require him to act against his own will. Any disobedience to the prescribed conduct leads to sanctions. Any individual, however, can stop playing at any moment.³⁷ This can be in conformity with the rules of the game, or against them. In the latter case the withdrawal is punishable. The individual can – in accordance with the rules of the game – accept the punishment as a precondition for her withdrawal from the game or reject it outright. The violation of the game's rules does not affect the general status of the individual, but can substantially affect his former, current or future status as a player in this or other games. Law, as a system of social norms, often plays such games with other normative systems. It can, for example, declare *every* immoral conduct illegal. As long as it is willing to continue the game, it will punish *every* immoral conduct, up to the point where this practice causes significant negative consequences for the legal system itself (e.g., to the legal certainty, enforceability or efficaciousness of the legal system). Then it can withdraw from the game (of morality or public international law) at any moment, regardless of its previous commitments, and even break them explicitly. And my argument is that the mere availability of this option implies law's internal primacy over other social norms (the other norms perceive their internal sovereignty in exactly the same manner). The fact that this situation hardly occurs does not undercut its possibility or diminish its significance. Sometimes the obligations under the game's rules extend beyond the limits of the game (a semi-criminal play-debt situation, where a gambling debt is considered as a debt of honour), and the individual is deemed responsible even after explicitly cancelling his participation in the game.³⁸ This situation is a typical Faustian Pact – the model, which corresponds to the argument of *inclusive* legal positivism.

From an autopoietic perspective, such a situation is impossible because it cannot accept that a *game* becomes the *irretrievable reality*; and – at least semantically – all promises *can* always be breached. In other words, the primary objective of every system of social norms is its self-maintenance. Even if the system explicitly subordinates itself to another normative system, the consequences of such subordination are always cancelled or mitigated by the system's own internal *immune system*. This prevents the adoption of a Faustian Pact for law contrary to law's own will. The incapacity of the football (to avoid another homonymy I should specify, 'the soccer') administrative authorities to resolve disputes in civil courts constitutes a more obvious example of this phenomenon than the rela-

³⁷ A. Marmor, *Positive Law and Objective Values*, Oxford, 2001, pp. 22–23.

³⁸ For a slightly different argumentation see *T.M. Benditt*, *Law as Rule and Principle: Problems of Legal Philosophy*, Hassocks 1978, p. 82.

tions between law and morality (or international law).³⁹ But in any event the immune system or the internal rationale of social systems always protects the interests of these systems, in the face of a risk of (self-)destruction of the system.

Likewise, the presence of the formal or factual possibility to raise a hypothetical disagreement prevents the vanishing of domestic sovereignties and their transformation into a meta-state under the UN umbrella.⁴⁰ While the presence of the *formal* possibility of disagreement does not eliminate the ultimate primacy of the domestic law semantically, the *factual* ability to oppose the unanimous decision of all foreign countries embedded in some binding UN resolution does not prevent the states from disobeying. The moment, when the factual ability becomes impossible at least hypothetically – the law of the country ceases its legal features transferring from the overthrown regime to the new authority. The transitional moment of lawlessness is a theoretical construct. In reality there might be no such gap or the gap would be immediately closed by the new legal system retroactively, under some form of legal succession. The new regime, for its part, should automatically acquire the state's hypothetical ability to disagree (either formally, factually or both). Otherwise, it cannot be considered as an independent state being in a *par in parem* relation with other states. The fact that most states never denounce their commitments under international law or their adherence to universal moral values (domestic law can explicitly declare that both have some primacy over all other domestic norms) does not undercut the factual, organic primacy of domestic law.

To sum up, according to the autopoietic and exclusivist theories, on the *normative* side, law cannot step beyond its cognitive borders. Even if the primacy of morality or international law is explicitly accepted by the law itself, this primacy is fictitious, since it is always in the *formal* or *factual* capacity of every legal system to cancel this primacy – an option that jusnaturalism explicitly denies, and that inclusive positivism opposes provided that the relevant clause is accepted by the law itself (the

³⁹ In the case of football, no club that has been unfairly treated by 'football law' can file an action outside the specialised sports courts, because the integrity of professional football as a social system would be jeopardised. This requirement of the football's *immune system* can be (and probably is) very disputable from a legal perspective (exactly in the same manner as some legal norms may be disputable from the perspective of morality, economics, politics, religion or sports). But the *illegality* of this prohibition does not *directly* affect the functionality of the football's immune system (although it can have some influence on it, through decoding).

⁴⁰ I do not intend to irritate international lawyers: what I am saying should be treated from the perspective of law's autopoietic programming, and perceived as an analytical argumentation, and not as a parochial normative claim.

Faustian Pact). On the *analytical* side, even the non-cancelled subsumption of law to other social systems has its *factual* or organic limits, as put forward by the autopoietic theory of law.⁴¹

IV. Dialectics in Legal Interpretation and Argumentation

One would be mistaken in reducing exclusivism and autopoiesis to the mechanistic closeness of legal systems or to *solipsism*. Law constantly interacts with other social systems, being in a state of permanent mutual exchange and transformation. The borders between the systems are strict and explicit only at the analytical level, as a necessary condition for theoretical assumptions. The normative aspects of this analytical assumption entail that neither morality nor any other normative system can guide a legal system (exclusivism). On the epistemological side, morality cannot be incorporated into the law without special decoding procedures and beyond the factual capacity of the legal system to absorb the suggested moral imperatives (autopoiesis). Both normative and epistemological sides of these *analytical* premises are inseparably connected. In practice, however, social systems lose their rigidity, gaining flexibility and elasticity in the process. In real life the borders between social systems are hardly visible. Often the arguments from one system predict, legitimise and substantiate the non-/reliability of another. In stable societies, economic, moral, legal, religious and political norms are not only compatible with each other in general, but they are usually mutually supportive and reinforcing.

The general compatibility between social systems creates an illusion of overall harmonious holistic coherence, leading to a perception of any attempt to articulate the differences between them as scholastic: “What’s the point in explicating their theoretical separateness if all the systems are eventually united in practice?” I do not intend to further elaborate upon the theoretical premises of exclusivism and autopoiesis, hoping that what has been said so far generally fits the Kelsenian and Razian types of exclusivism and Luhmann’s and Teubner’s types of autopoiesis. It is beyond the ambits of this paper to explore the important differences within and between these different paradigms.⁴² I intend instead to explore how these two approaches address the practical problem of the decision-making process – namely, the issue of legal interpretation taking place primarily in courts, demonstrating thereby the importance of both approaches not only at the analytical level of theoretical argumentation,

⁴¹ *Luhmann*, Operational Closure and Structural Coupling (note 3), p. 1429.

⁴² *J. Raz*, The Concept of a Legal System, Oxford, 1980, p. 89.

but also in real life situations. As it is usually the case in jurisprudential discussion, I am primarily interested in hard cases, while acknowledging that *every* legal case contains some elements of *hardness* and that what distinguishes a hard case from simpler instances is defined in terms of proportionality and not on the basis of some classification.

Exclusive legal positivism is usually said to be sceptical to the role legal interpretation plays in deciding legal cases: in plain cases there is no need for interpretation, in hard cases the judge may find himself in a position where no answer is given by positive law and the creation of a new rule becomes necessary. Assuming that this stylised thesis reflects the basic positions of exclusivism, two scenarios are possible. Both exclude the necessity to apply morality to make up for the existing legal lacunas. The first scenario is descriptive, the second functional. The descriptive scenario is open to criticism from various non-positivist approaches to law. It essentially reflects Ronald Dworkin's semantic sting argument.⁴³ It relies on the common or, as Dworkin puts it, 'preinterpretative' understanding of the word 'law'. I will not analyse here the numerous counter-arguments raised against the 'semantic sting' argument,⁴⁴ assuming that all non-positivists agree that law in its semantic, literal sense differs from what it should be from the perspective of morality. Nobody denies that a formally valid legal norm can deviate from the principles of morality:⁴⁵ not all laws are morally good laws; some are morally bad law – at least observationally. The practical importance of the semantic argument should not be underestimated and trivialised since it often brings about very important legal consequences. The argument from semantics, however, provides a satisfactory answer only to those exclusivists, who adhere to a monosemic nature of law – namely, that law has the meaning, which ought to be properly (most often, mechanically) discovered and applied. Such an uncritical statutory obedience to law is neither the main, nor even a dominant strand of exclu-

⁴³ R. M. Dworkin, *Law's Empire*, London, 1986, pp. 102–104.

⁴⁴ J. Raz, *Two Views of the Nature of the Theory of Law: A Partial Comparison*, in: *Legal Theory* 4 (1998), pp. 249–250; Brian Leiter, *Realism, Hard Positivism, and Conceptual Analysis*, in: *Legal Theory* 4 (1998), p. 535; Michael S. Green, *Does Dworkin Commit Dworkin's Fallacy?: A Reply to Justice in Robs*, in: *Oxford Journal of Legal Studies* 28 (2008), pp. 34–38.

⁴⁵ J. Finnis, *Natural Law and Natural Rights*, Oxford 2011, p. 364; M. C. Murphy, in: *Natural Law Jurisprudence* 9 (2003), p. 245: "Finnis, George, and Soper have charged that the *lex iniusta non est lex* slogan expresses an absurd view – [...] that carries its self-contradiction out in the open and hence should not be considered an accurate statement of the natural law position. Finnis has argued that the natural law motto that unjust law is not law is, construed literally, 'pure nonsense, flatly self-contradictory'; [...] Soper has written that 'the very obviousness of this contradiction' shows that no one could ever have meant to affirm the strong natural law thesis."

sivism. The vast majority of exclusivists adhere to a poly- and not to a mono-semantic nature of law.

My main interest is also in this second, functional, polysemantic, scenario, which, unlike the previous one, does not use the apagogical argument in order to defend the self-reference of law, but claims the universal nature of such self-reference. In other words, it claims more than the fact that in some (wicked) systems law and morality diverge. Its main task is to show that legal systems are *always* separate from morality, even if the reference to morality, religion, economics or international law is explicitly proclaimed by the laws themselves. The explication of this argument will also show that even wicked legal systems have some important links with the dominant morality in society at the time. I should mention this side effect only cursorily, to demonstrate that the coherence of the law with the dominant morality does not guarantee the existence of a democratic or humanistic law: morality itself is very susceptible to public manipulations and propaganda, and its imposition on the law as a benchmark of humanity does not solve the problem of wicked legal systems, since these wicked systems often refer to the realm of morality be it in its secular or divine incarnation.

Reverting to the functional argument, in deciding genuinely hard cases judges do not necessarily create a new law. Indeed, a judge *can* create a new legal norm, but most often her task is to *interpret* the existing set of legal norms in a way which extends their validity to the hard case. Two main points need to be explained: (1) whether legal interpretation goes beyond the realm of the law, referring to the principles of morality/political necessity/economic rationality; and (2) what is the essence of hard cases. In the following subsections I will address these two issues in turn.

But I should start with a remark on methodology. It has been demonstrated that neither autopoiesis nor exclusivism denies the importance of the interaction and mutual influence between law and other social norms. The type of exclusivism, which I would like to put forward in this paper, can be labelled *dialectical positivism*. Dialectics as a method of analysis operationalises the dynamic, interactive and productive nature of conflicts *between* the explored phenomena and *within* each of these phenomena. Three main elements of dialectics are of particular interest for legal scholars: (i) dialectics of quality and quantity (also known as dialectics of in-/commensurability of values) – this aspect of dialectics is a very effective method of analysis of the *mechanics* of balancing in adjudicative proceedings. I will not address this theme here, being interested in the remaining two aspects: (ii) dialectics of the material and ideal elements of law (which will be elaborated in Subsection 1/

IV in order to show how exclusivism can address the problem of interpretation without reverting to morality) and (iii) dialectics of accentuation and relativisation – the method which I will apply in Subsection 2/IV to analyse legal argumentation in hard cases.⁴⁶

1. Exclusivism, Autopoiesis and Legal Interpretation

Let me explain what I mean by the dialectics of the material and the ideal. Legal idealism has several established meanings in jurisprudence: it can refer to some implicit values, embedded in law;⁴⁷ ideal systems which motivate the law (like Roman law)⁴⁸ or to political ideology.⁴⁹ All of them imply non-positivism, stressing the importance of morality for law or, as Sean Coyle puts it, “to be understood as the opposite of legal positivism”.⁵⁰ My dialectical approach to legal idealism is different, since it belongs to exclusive positivism. It argues that *every* system of social norms in general, and *every* social norm in particular has its material and ideal dimension. The material and ideal components imply that before applying any norm – even the most trivial and unequivocal ones – the applicants and enforcers should contemplate some kind of its evaluation. I will not discuss here the quite common perception of positivism as a theory which either ignores or diminishes the importance of legal interpretation. Hopefully, the explication of the dialectics of the material and the ideal will be sufficient to demonstrate the opposite. Besides, I will not address the difference between the terms *meaning* and *interpretation*,⁵¹ or the difference between a *mere interpretation* and the *creation of a new norm*, taking as a matter of (stylised) fact that either of these

⁴⁶ This is the only meaning I attach to dialectics, and I would like to dissociate dialectics from its perception as (1) a dialogue; (2) a ‘happy medium’ or ‘simple average’ between the thesis and antithesis; and (3) an explanandum of evolution in the social and economic history. I disagree with the first two, because they reveal only a facet of dialectics, trivialising its essence. The third one, in my view, is plainly wrong. Both the Hegelian concept of universal Spirit and the Marxist dictatorship of the Proletariat are at odds with dialectics, even though both thinkers contributed to the development of dialectics as such.

⁴⁷ W. Van Der Burg, The Importance of Ideals, in: The Journal of Value Inquiry 31 (1997), p. 25.

⁴⁸ D. J. Gerber, Idea-Systems in Law: Nineteenth-Century German Experience, in: Law and History Review 10 (1992), pp. 153–154.

⁴⁹ W. Ebenstein, The Pure Theory of Law: Demythologizing Legal Thought, in: California Law Review 59 (1971), p. 623.

⁵⁰ Sean Coyle, Positivism, Idealism and the Rule of Law, in: Oxford Journal of Legal Studies 26 (2006), p. 258. For a more focused discussion about different forms of legal idealism see Tony Ward, Two Schools of Legal Idealism: A Positivist Introduction, in: Ratio Juris 19 (2006).

⁵¹ T. Endicott, Vagueness in Law, Oxford 2000.

three possibilities should necessarily occur: (i) the literal *understanding* of the norm; (ii) the *interpretation* of the norm, taking place *within* its established ambits; or (iii) the *creation* of a new norm. The third case is the most consistent with the exclusivist premises of the judge's role as a law-maker. This case may only require application of the suggested theory of dialectical positivism at the broadest level: the created norm should usually correspond with the general gist of the legal system within which it is created. If it is not to be the case, and the norm is adopted by a judge voluntaristically, it remains valid according to the exclusivist perception of law, but dialectical positivism will not need to address it.

In any case, my main interest lies in the *first two* situations, namely, (i) in the literal interpretation (i.e. interpretation as understanding) and (ii) in the creative interpretation (i.e. interpretation which goes beyond the originalist intentions, but remains within the factual ambits of the legal norm and does not require the creation of a new norm). I argue that in both cases the norm which is being interpreted has a material and ideal dimension. The material dimension could be described as *what the norm says*, while the ideal dimension reflects *what the norm should say* or rather *what does what is said by the norm mean*. This 'what it should say' does not go beyond the borders of the 'what it says'; hence, the ideal and material dimensions are dialectically connected through the constant tension of checks-and-balances. In other words, the ideal *should* is to be understood not as an *external* imperative (how we think the legal norm ought to be interpreted), but as an *internal* requirement of the normative system, within which the norm is being interpreted and an *internal* rationale of the norm itself. This *should* of the ideal is always predetermined by the given *is* of the material, and is therefore related to the internal *can* and not to the external *ought to*. This is the feature of the dialectical positivism which distinguishes it from the dialectical non-positivism developed by Robert Alexy. Its premises sound very similar: Alexy also speaks of "the dialectic of the real and the ideal",⁵² arguing that law has a dual nature, but these two theories support fundamentally different understandings of the law. Alexy's dialectical non-positivism perceives the real dimension of law as "represented by the elements of authoritative issuance and social efficacy, whereas the ideal dimension finds its expression in the element of moral correctness".⁵³ Conversely, dialectical positivism understands the ideal dimension as embedded into the legal norm itself. For the former the morality (and/as justice) is an inevitable

⁵² R. Alexy, The Dual Nature of Law, in: Ratio Juris 23 (2010), p. 178.

⁵³ Ibid., p. 167.

component of law, its *sine qua non* condition,⁵⁴ while for the latter it is alien to the law.

For dialectical positivists the ideal dimension of any legal norm prevents its literary, mechanistic application, while its material dimension keeps the norm within its factual borders, protecting it from self-cannibalisation (that is, from the situation where a norm steps beyond its meaning, transforming itself into another norm). The idea is impossible without the matter, and the matter is impossible without the idea. Epistemologically, they constitute the inevitable components of any physical and social phenomenon. Building upon what has been said above, the reason why law cannot search for its ideal dimension outside its own realm – in morality, economic rationality or political necessity – should become clearer: the ideal dimension is inevitably present in every norm. Any economic, political, religious or moral norm is endowed with the same dialectical structure. This claim is the central point of dialectical positivism that I would like to emphasise. The universal nature of the dialectics of the ideal and the material implies that *every* norm, regardless of its contents, contains both dialectical elements. This entails three fundamental consequences, which should clarify the position of dialectical positivism. The *first* consequence is of *normative* nature. It disproves the perception that both badly adopted laws and laws adopted with bad intentions lack the ideal dimension. The ideal as perceived by dialectical positivism is neither a prescription, something which *should be* achieved, nor an imaginative construct, something which we *would like* to achieve, while knowing that it is impossible in the real world. In other words, the ideal is an epistemological and not an axiological concept. The ideal is inherently present in any norm and in any system of social norms. This explains the *second* consequence, namely, that not only every legal, but also every moral norm has a material and ideal dimension. For this reason, morality should not be understood as something which *explains* the law, *guiding* its development, or an imperative dimension of what the real law should be. Morality is not an ideal component of the law. It is disentangled from the law and exists in parallel with it, sharing the same structural problems and dilemmas. The *third* consequence comes from the first two: the ideal and material elements of a norm do not correspond to the written-unwritten criterion. It would be a mistake to claim that a written norm is a material norm, and an unwritten norm an ideal norm. Any norm, regardless of its presence or absence in written

⁵⁴ R. Alexy, *Between Positivism and Non-Positivism? A Third Reply to Eugenio Bulygin*, 1st Conference On Philosophy and Law, Neutrality and Theory of Law, Girona, 20–21 May, 2010, http://www.filosofiyderecho.es/pt/tienda/?page_id=3&category=3&product_id=4 accessed on 14 September 2011, pp. 4–7.

sources, inevitably contains both ideal and material aspects. One cannot imagine a purely ideal norm, because the very act of such imagination already *embodies* this norm, providing it with a material dimension. Conversely, every written norm, regardless of its content, apart from its material dimension has also its ideal dimension, which encompasses its understanding and/or/as its interpretation. The ideal therefore is a *qualifying* feature of the norm (i.e. is it a norm or not), and not its *classifying* attribute (i.e. is it a good/achievable norm or not): every legal norm – be it wicked or virtuous – has it.

The dialectics of the material and the ideal can be extrapolated to Plato's allegory of the cave: the material aspect of a norm (be it legal, moral, religious or any other norm) is seen in how the real objects are embedded in our immediate perception, while the ideal aspects are the invisible (to us) objects themselves (and not some super-objects, which predetermine the existence of the mere-objects – as is the case with the morality's guiding force in Alexy's dialectical non-positivism). In the next subsection I will demonstrate the role of judges, who – following Plato's allegory – can be seen as Philosophers kings, who decide upon the ideal dimension of law. The task of the competing parties in adjudicative proceedings is in this respect to convince the judges that the parties' own interpretation of the ideal dimension is the most appropriate one. The discrepancy between the material and the ideal can never be totally eliminated: otherwise, the very principle of dialectics would be destroyed. Therefore, every judicial decision is potentially contestable, which explains why I will also deal in the following subsection with the issue of the 'bounded arbitrariness' of judges.

2. The Essence of Hard Cases and the Mechanics of Legal Argumentation

The articulation of the ideal dimension of law reveals how the dialectical version of exclusive legal positivism strengthens the separation thesis without reducing the concept of law to legalistic black-letter jurisprudence. This approach, however, might seemingly undermine some practical exclusivist premises in respect to legal argumentation. If the ideal dimension belongs to law, and every judge is required to discover the proper meaning of any law by revealing this ideal dimension, does it not decrease legal certainty? Do these revealed aspects of the ideal dimension of legal norm exhaust all other possible interpretations? Can the ideal dimension be ultimately discovered by the judge in its entirety? All these problems predetermine the importance of the second aspect of the dialectical positivism, namely the dialectics of accentuation and relativisation. This method operationalises another dialectical polarity: the deontologi-

cal formalism of *what is* and the pluralistic relativism of *what ought to be*, attributing the former to legal officials and the latter to the parties in the case. This helps to combine the necessity to maintain legal coherence with the inevitability of competing interpretations. It establishes the dialectical tension between the conflicting premises that a) *every* procedurally correct judicial decision is binding and b) that *every* serious legal interpretation of the parties, which has not been accepted by the court, still belongs to the domain of the law. The former claim is in conformity with exclusive positivism; the latter derives from the theory of legal autopoiesis, and implies that while the ideal dimension of law does not require the morality trump to solve legal cases, it shows that law is not monosemic (i. e. does not have only one meaning, established by courts).

First, I should clarify the aspects of hard cases which are of particular importance for dialectical positivism. The discussion of hard cases has a long pedigree in legal theory. Its contemporary version has been shaped by the debate between H. L. A. Hart and Ronald Dworkin.⁵⁵ Its main concern is related to the question whether judges have discretion in deciding legal cases, whose solution is not made sufficiently explicit by the existing law. In its stylised form the discussion can be reduced to the opposition between those who suggest that judges are entitled to create new law and those who argue that judges have to refer to the principles of morality, which are above the law (but not necessarily beyond the law). As the tonality of this paper might suggest, dialectical positivism contains elements of both stylised positions. It accepts that if neither *semantic* nor *creative* interpretations of a legal norm (or the system of legal norms) permits to apply the existing law to the case, the judge *creates* the law – and this explains the exclusivist roots of dialectical positivism. It concentrates, however, primarily on situations where such interpretation is possible, arguing – not unlike postmodern non-positivist theories – that the solution suggested by the judge as a lawmaker reveals only a tip of the iceberg created by hard cases. As an exclusive positivist theory, the dialectical approach does not accept morality as a remedy for solving hard cases, but it acknowledges the importance of non-positivist theories in elucidating most difficulties related to hard cases.

I have nothing to add to the response of exclusivism to those rare situations where neither legal norm nor the system of legal norms can provide the necessary substantiation for the case, which endows the judge to create a new law. My main interest in hard cases is different. I think that genuine *hardness does not* occur in cases where *no* legal answer is avail-

⁵⁵ H. L. A. Hart, *The Concept of Law*, Oxford 1961; R. M. Dworkin, *The Model of Rules*, in: *The University of Chicago Law Review* 35 (1967), pp. 22–28.

able, but on the contrary in situations where *more than one* legal answer can be offered. Unlike the ‘no-clear-answer’ perception of hard cases, its ‘more-than-one-answer’ version is ubiquitous. As Lord Macmillan famously suggested, “[i]n almost every case, except the very plainest, it would be possible to decide the issue either way with reasonable legal justification.”⁵⁶ The ubiquity of the difficult cases shows that the creation of new laws constitutes only a tiny part of the judges’ discretion in deciding non-plain cases. If in most cases both parties have a reasonable legal justification, some elements of arbitrariness are present in judicial decisions. However, arbitrariness is constrained by many institutional limits,⁵⁷ and is in this sense it is a *bounded* arbitrariness (by analogy with and in opposition to the term ‘bounded rationality’,⁵⁸ popular in economics and other social sciences – the claim that every rational choice is inevitably predetermined to some extent by such factors as limited information, cognitive limitations and subjective, non-rational preferences).⁵⁹ Luhmann emphasises the *contingent* nature of decision, suggesting that “it cannot really be disputed that any decision could have been made differently”,⁶⁰ and arguing for the inevitability and productive nature of epistemological paradoxes.⁶¹

If judicial cases are ultimately decided with some bounded arbitrariness, parties have to present their arguments in the way that is the most suitable to the formal requirements of the law. It would be hard to deny that personal, subjective elements (like the judge’s breakfast) as well as morality/political necessity/economic rationality always play *some* role in adjudication, yet those extra-legal elements should either be decoded

⁵⁶ Lord Macmillan, *Law and Other Things*, Cambridge 1937, p. 38. Similar point has been made by numerous other thinkers. E.g. H. Kelsen, *On the Theory of Interpretation*, in: *Legal Studies* 10 (1990), p. 130: “In terms of the positive law there is simply no method according to which only one of the several readings of a norm could be distinguished as ‘correct’”; A. T. Aleinikoff, *Constitutional Law in the Age of Balancing*, in: *The Yale Law Journal* 96 (1987), p. 943: “In almost all conflicts, especially those that make their way into a legal system, there is something to be said in favour of two or more outcome.”

⁵⁷ H. L. A. Hart, *The Concept of Law*, Second Edition, Oxford 1994, p. 273.

⁵⁸ H. A. Simon, *Models of Man: Social and Rational*, Wiley Publishing, Oxford 1957.

⁵⁹ Dworkin, *The Model of Rules* (note 55), p. 32: “Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction.” O. M. Fiss, *Objectivity and Interpretation*, in: *Stanford Law Review* 34 (1982), p. 739: “Interpretation, whether it be in the law or literary domains, is neither a wholly discretionary nor a wholly mechanical activity.”

⁶⁰ N. Luhmann, *Legal Argumentation: An Analysis of its Form*, in: *Modern Law Review* 58 (1995), p. 285.

⁶¹ N. Luhmann, *Deconstruction as Second-Order Observing*, in: *New Literary History* 24 (1993), p. 770; Teubner, *Introduction* (note 2), pp. 1–2. (I will not address in this paper the epistemological nature of legal paradoxes and their correlation with the dialectical approach of law.)

into the legal language (since the judge is always cognitively dependent on law),⁶² namely their suggested implications should always be embodied in or substantiated by legal norm (providing thereby a legal incarnation and legal meaningfulness to extra-legal concepts and impetuses) or trumped by the purely legal argumentation, at least from a dialectical positivist view. Accordingly, the task of the parties is to offer to the judge the most reliable interpretation of the existing law. Every lawyer in courtroom is trying to *actualise* the ideal dimension of law, showing its relevance to the case. She creates her own mosaic from numerous potentially related smalts (norms and facts), aiming to match the proposed constellation to the judge's own understanding of the law. In other words, the parties *compete* in the adversarial system for providing judges with the best understanding of a legal norm and/or its place in the overall system of legal norms. I do not exclude the possibility that some extra-legal arguments may still influence the judges without being either directly or implicitly decoded into the legal language or trumped by purely legal argumentation, but I will not address this problem, since it mostly belongs to the first dimension of the dialectics of law (dialectics of quality/quantity), and I am only interested in the second (dialectics of ideal and material) and the third (dialectics of accentuation and relativisation) dimensions of this phenomenon.

So far I have touched upon three interrelated aspects of the dialectics of accentuation and relativisation:

- (1) The problem of elasticity of the law, which reveals that what usually causes the difficulties in the courtrooms, is not the absence of an appropriate legal norm, but the presence of different valid norms, at the same hierarchical level as well as the availability of different reliable interpretations of norm/s, which provide the judge with the possibility to decide the case either way. Another aspect of this problem relates to the judges' personality: different judges can decide identical cases differently. A certain margin of appreciation exists in every case, and the procedurally correct decisions are not deemed to be illegal even if alternative options are available to the judge.
- (2) These situations reveal the polysemic nature of norms, which shows that almost all legal norms have potentially more than one legally significant meaning. The very structure of norms is general, and an attempt to include into the law all possible scenarios would be of no more use than the creation of a comprehensive map with a 'one to one' scale of the measured landscape. The implication of these two characteristics can be illustrated using Lon Fuller's classical case of

⁶² *Luhmann*, The Unity of the Legal System (note 1), p. 20.

the Speluncean Explorers,⁶³ in which Fuller vividly and very convincingly reveals the availability of numerous legal solutions for an extremely *difficult* (for some judges) and *hard* (for the others) case. The rationale behind this invented case speaks for itself: an opinion of *every* judge has the attributes of a legal opinion. The opinion, which ultimately prevails in court (or, using Arthur Jacobson's terminology, "marks, franks, or tags as law"),⁶⁴ is the *factual* or *official* legal opinion (legal opinion *sensu stricto*), while alternatives ones are *potential* or *hypothetical* legal opinions (legal opinions *sensu largo*). The positivist facets of dialectical positivism acknowledge only the legal opinion *sensu stricto*, while its autopoietic part also tolerates the interpretative importance of the remaining opinions, considering them useful at least for future decoding practices.⁶⁵ Such perception is compatible with Hart's paradigmatic example of the prohibition to park any vehicle in a public park. Hart asks: "[p]lainly, this forbids an automobile, but what about bicycles, roller skates, toy automobiles?"⁶⁶ and his answer shows the core and penumbral meanings of the norm. All penumbral meanings, which are articulated by the parties with sufficient strength, are accepted to be of potential relevance. The elements of bounded arbitrariness of the court constitute the only epistemological difference between them.

- (3) Parties compete in the courtrooms for providing the judges with the most meaningful interpretation of the positive law. The argumentation takes place for the best interpretation of the *ideal* dimension of a norm, while all in general agree upon its *material* dimension. The overall process is limited to the law exclusively. No elements of morality/economic rationality/political necessity can pass into the discussion without their prior decoding into the language of law. Adversarial judicial systems generally acknowledge the dynamic nature of law as a discovery procedure, containing strong elements of the Hayekian concept of competition.⁶⁷ As Ernest Weinrib puts it, "[legal] creativity [...] is essentially cognitive, and it is most naturally expressed in ad-

⁶³ L. L. Fuller, The Case of the Speluncean Explorers, in: Harvard Law Review 62 (1949).

⁶⁴ A. J. Jacobson, The Idea of a Legal Unconscious, in: Cardozo Law Review 13 (1992), p. 1491.

⁶⁵ This feature of autopoiesis is not consensually accepted. Jacobson, The Idea of a Legal Unconscious (note 64), pp. 1491–1492, suggests that similarly to positivism, Luhmann's theory rejects the *sensu largo* interpretation to be considered as law.

⁶⁶ H. L. A. Hart, Positivism and the Separation of Law and Morals, in: Harvard Law Review 71 (1958) p. 607.

⁶⁷ F. A. von Hayek, Competition as a Discovery Procedure, (translated by Marcellus S. Snow), in: The Quarterly Journal of Austrian Economics 5 (2002), p. 10.

judication conceived more as the discovery than as the making of law.”⁶⁸ Unlike the inquisitorial model of adjudication, this format does not look for the ultimate truth, though its articulation is often present in the rhetoric of parties and judges alike. This feature distinguishes dialectical positivism from essentialism: the former accepts the conditionality of judicial decisions, while the latter (in an Herculean manner) seeks to discover the right answer. Practically, this implies that in the vast majority of the 50/50 cases the parties with the most skilful lawyers have much higher chances to win the case (the probability changes proportionally *mutatis mutandis*). The main skill of the lawyers in this respect is their ability to accentuate the friendliest interpretation of the ideal aspects of the norm, and relativise the arguments of the opposing party by diminishing their relevance. The outcome of the case would differ if the parties switched lawyers. I should distinguish the suggested vision from legal realism, since unlike the latter it does not *trust* in politics, but in law. The polysemy of law is a descriptive statement. Normatively, each party tries to convince the judge of the ultimate rightfulness of their own interpretation. In other words, for the observer, litigation is incarnated in *pluralistic* positivism, while all the participants address the case as if they were *monistic* positivists (Subsection 3/III).

Let me finally mention the aspect of the dialectics of accentuation and relativisation concerned with the very process of creating the convincing and sound argument: it represents a combination of the former three, but unlike them deals mostly with the entire legal system, rather than with specific legal norms. Although cases often explicitly refer to one or several legal norms, the overall adjudicative process takes place within the legal system as a whole. The specificity of each field of law does not prevent the potential application of norms from another field. The situation is either clearly or latently exists in every legal system and every historical period, but it is most visible in contemporary liberal democracies and is connected to the powerful presence of the discourse of human rights in numerous adjudicative contexts. The reliability and weight of legal arguments depends to a large extent on the centre of gravity of the case, and this decreases the ability of the parties to refer to some universal legal norm in every case, although such a possibility still exists.

Every argumentative strategy can be considered as a *jurisprudential cocktail* of different norms, facts and reasons, prepared by lawyers to match the requirements of positive law (I do not address the extra-legal

⁶⁸ E. J. Weinrib, Legal Formalism: On the Immanent Rationality of Law, in: The Yale Law Journal 97 (1988), p. 956.

ingredients of the cocktail, implying that most of them do not fit the judicial taste unless encoded into the realm of law, losing thereby their *extra-legal* qualities). The fact that most of the cases are based on several norms (and not only one norm), with the implicit recognition of the entire objectives of the legal system, increases in geometric progression the polysemic essence of the law. The discovering process in litigation is directed not only towards revealing the ideal dimension of a legal norm, but also of the entire legal system. This, in turn, explicates the inevitability of judges' *bounded arbitrariness* and the importance of proper legal interpretation and sound legal argumentation in any, even fairly plain, case. The dialectics of accentuation and relativisation is the process of perpetual discovery of law in every legal dispute. The winning argument is the argument which has been sufficiently accentuated against competing arguments, which were successfully relativised by this argument. The perpetual nature of these dialectical tensions prevents the discovery of ultimate answers. Judicial decisions are *presumed* to be correct for law as an autopoietic system. Yet, they can never be entirely correct at the meta-level. Law is satisfied with the conditional character of this correctness, but it can tolerate different outcomes for similar cases in future disputes. The dialectical angle of the synthesis of exclusivism and autopoiesis reveals the 'dynamic stability'⁶⁹ of legal systems. Stability is articulated by exclusivism, dynamism is emphasised by autopoiesis. Dialectics seeks to unite exclusivism and autopoiesis into a mutually-reinforcing theory without eliminating the important methodological differences between the two.

Dialectical legal argumentation contains some elements of the other two major types of argumentation, namely the logical and the rhetorical argumentations, but it overcomes the mechanistic strictness of the former, while restricting the consequentialist opportunism of the latter. The logical approach is based on clear and predictable logical laws. Only a tiny and obsolete strand of exclusivism (namely, statutory positivism) is associated to it. The rhetorical approach tries to internalise into legal argumentation concepts coming from other social norms, often using such broad, opaque and polyvalent terms as *justice, equality, stability, solidarity, or consumer welfare*.⁷⁰ While dialectical positivism perceives critically any attempt to use *extra-legal* arguments for rhetorical purposes, it tolerates some elements of rhetoric if applied *within* the legal discourse itself, particularly as far as the competition in law's discovery procedure is concerned.

⁶⁹ Luhmann, Operational Closure and Structural Coupling (note 3), p. 1441.

⁷⁰ E. Feteris, A Survey of 25 Years of Research on Legal Argumentation, in: Argumentation 11 (1997) pp. 358–360.

I would like to conclude by emphasising that nothing in the suggested description of the theory of dialectical positivism should indicate that the legal discourse is not self-referential. Neither morality nor any other social system is inevitably present in this picture. Their presence is nothing but homonymic contingency. The dialectical competition between different interpretations of legal norms takes place inside the law exclusively. This explains why dialectical positivism provides a synergic synthesis of exclusive legal positivism and legal autopoiesis on one hand, and enables their harmonious coexistence with various interpretative theories of law on the other.