

LEGAL (POST)REALISM AND PRESCRIPTIVE LEGAL SCIENCE:
CAN LEGAL REALISM PROVIDE NORMATIVE GUIDANCE?
Post-realismo jurídico y teoría prescriptiva del derecho:
¿puede el realismo jurídico proporcionar orientación normativa?

TOMÁŠ GÁBRIŠ¹

Slovak Academy of Sciences /
Institute of State and Law, Slovak Republic

Abstract

One of the objections against both historical and current legal realism is that it is a merely descriptive approach and that it focuses only on attorneys and parties to a dispute. It is claimed that it provides no guidance for judges or other decision-making authorities on how to proceed in solving legal disputes and in applying law onto the facts. Should the objection be correct, legal realism can either give up on these ambitions completely and leave them for traditional legal theory, or it can instead move to a new, post-realist phase, and try to develop a theory of law which will be able to prescribe to real actors how to behave in a real-life situation. Economy denotes such a theory by the notion of “prescriptive” theory. This undertaking would, nevertheless, require to focus on modern theories of decision-making, behavioral economics and cognitive science, combined with (neo)institutionalist and discursive theories of law.

Keywords

Legal Realism, Post-Positivism, Post-Realism, Prescriptive, Theory of Law.

Resumen

Una de las objeciones contra el realismo jurídico histórico y actual es que es un enfoque meramente descriptivo y que se centra solo en abogados y partes en una disputa y que no proporciona orientación a los jueces y otras autoridades que toman decisiones sobre cómo proceder en la resolución de disputas jurídicas y en la aplicación de la ley. El realismo jurídico puede renunciar a estas ambiciones y dejarlas para la teoría jurídica tradicional, o puede pasar a una nueva fase post-realista e intentar desarrollar una teoría del derecho que pueda prescribir a los actores reales cómo comportarse en una situación de la vida real. La economía denota tal teoría por la noción de teoría “prescriptiva”. Sin embargo, esta empresa requeriría centrarse en las teorías modernas de la toma de decisiones, la economía del comportamiento y las ciencias cognitivas, combinadas con teorías del derecho (neo)institucionalistas y discursivas.

Palabras clave

Realismo jurídico, Post-positivismo, Post-realismo, Teoría prescriptiva del derecho.

¹ Prof. JUDr. PhDr. Tomáš Gábriš, PhD., LL.M., MA – researcher at the Slovak Academy of Sciences and Full Professor at the Faculty of Law of the Trnava University in Trnava, Slovak Republic. He specializes in legal theory, legal philosophy and legal history. E-mail: gabris.tomas@gmail.com ORCID: <https://orcid.org/0000-0002-6862-2688>



1. Introduction: Criticism voiced against legal realism and possible remedies

All the most important streams of both historical and contemporary legal realism – Scandinavian, American and Genovese – imply that legal realists are critical of legal formalism and sceptical of law and its “real” functioning in practice. These common features were recently summarized by Barberis (2015, p. 235). However, they are also being accused of the fact that their approach is only descriptive (at least with respect to American legal realism this is claimed by Leiter (2007, pp. 33, 38) and that they do not offer any “normative” guidance on how to proceed within creation, implementation and application of law. Thus, the suggested challenge for legal realism is to prove it provides “guidance” for legal practice, being not only guidance for addressees of law and attorneys (as claimed by Leiter [2007, p. 61]), but also a guide for judges and other authorities of application of law, in order to help them to make and take legal decisions on a daily basis.

One of the possible inspirations and ways which legal realism can take in such an endeavor may be the road of currently popular behavioral economics, distinguishing between three approaches in economy: (1) descriptive (“positive”) economy, (2) normative economy, and recently added so-called (3) “prescriptive” economy as a third stance found in the middle between the former two. Descriptive economy namely only describes the behavior of individual actors, especially in psychological, behavioral (nowadays rather “cognitive”), or institutional (“institutionalist”) terms. Normative economy, on the other hand, prescribes ideal economic standards for an ideal world — which, however, is accused of being detached from “reality”. Therefore, a third way of so-called prescriptive economy is being developed, which “prescribes” behavior to real actors in the real world (see Pearlman, 2009). Normatively correct answers may namely not always be also “prescriptively” correct in specific situations.

Thus, given that legal realism likewise points to the need to overcome a narrowly focused formalist and traditional “idealistic” view of law, should it wish to strive for not being merely descriptive, it should similarly elaborate and offer a prescriptive view on law and legal practice. Realists should propose, on one hand, a working “prescriptive legal politics” for effective creation of effective laws and, on the other hand, formulate prescriptive guidelines for actual implementation and application of law, generally by combining several levels of the “actual/real” functioning of law: (1) individual psychological, behavioral, respectively cognitive level, (2) institutional level, meaning institutions such as courts, administrative authorities; following theories of legal and economic neo-institutionalists (e.g. MacCormick and Weinberger, 1986; Rutherford, 2001), and finally (3) a society-wide level, which manifests itself in communicative and discursive theories of law. It should therefore be a realism that is not “only” sociological and psychological, but also not “only” linguistic and analytical.

Such an attempt would be indeed a sort of post-realist, not only in terms of the next stage of legal realism, but also —as will be explained below— in terms of current philosophy and methodology of science, which is overcoming the realist/anti-realist divide itself: in not relying only on reduction to empirically observable elements (psychological and behavioral, institutional, linguistic), but rather going beyond them, towards what is called “constructive empiricism” (Fraassen, 1980, p. 41).

2. The crisis of legislation and resurfacing of legal realism: New impetus for legal realism?

It would be obviously futile to repeat that countries of civil law systems are witnessing a “legislative avalanche” or a “legislative whirlwind”, which not only causes confusion and difficult orientation in law for both laypersons and professionals, but is undoubtedly also one of the causes and one of the manifestations of the loss of authority of written law (legislation)

at present. However, in addition to the rapidly increasing number of laws and regulations also other problems and questions arise, trivially articulated for example as follows: how can a regulation enjoy authority if it shows errors as soon as it is adopted and must therefore be amended even before it enters into effect? Or, how to accept authority of law if a number of amendments to an Act is adopted by the legislator within a short period of time, gradually changing the whole original concept of the Act? Moreover, often even the judicial practice (especially the interpretation by Constitutional Court) subsequently adjusts the legal regulation yet further, indeed in such a way that it is essentially a new regulation if compared to its original wording. These issues arise in particular where the interpretation by courts does not even stick to the literal meaning of the text of the law (regulation), but rather adopts the interpretation *contra legem*, respectively *contra verba legis*.

All these challenges underline the diagnosis of current “legislative crisis”, manifested in a variety of outlined forms, being based on a variety of causes —be it the failure of legislators to cope with their tasks properly, or the differing views of legislature and judiciary as to the values that the law should embody—. While such a discrepancy may sometimes be explained by the abstractness and rather difficult comprehensibility of legal values (especially in the process of their weighing or balancing), there are often cases where the legislature misinterprets or fails to take into account even the values expressly laid down in legal regulations of supreme force —in particular and primarily in the Constitution. It is mostly this situation that leads to the necessity of “fixing” the text of the law by constitutionally compliant interpretation— be it even *contra verba legis*.

Current Italian legal realist, Mauro Barberis, argues in this context by resort to legal history, in order to explain the current crisis of legislation and rise of the role of courts. According to Barberis, “legislation has prevailed over other sources of law because it was applied by royal courts, because it was codified and finally because it was legitimised by the democratic ideology of the constituent power” (Barberis, 2016, p. 10).

At the same time, however, Barberis warns and diagnoses that:

if the primacy of legislation over adjudication depends on the democratic “dignity” of the first, then it runs the risk of growing dim. After all, already in the nineteenth century, the main type of legislation was not the parliamentary statute, but the code, i.e., an “aristocratic” source, since it is produced by legal scholars. Today, moreover, legislation through parliamentary initiative is a minority compared to the legislation enacted on government’s initiative, a type of law which is more technocratic and autocratic than democratic. Not surprisingly then, checks over this type of law are guaranteed not as much by democratic parliaments (which are nowadays often controlled by the executive power itself), but rather by supreme or constitutional courts, which are legitimised only by the enforcement of rights (2016, p. 12).

Barberis thus sees a number of internal, structural changes in the functioning of the legislation, which also contribute to its questioning and crisis. In the same context, he adds that the current view notes that parliamentary legislation is no longer the most important source of law —in many states “legislation is subject to the constitution, which is considered to be true law and not just positive moral” (2016, p. 12)—.

It is precisely these situations that cause that the sceptical voice of modern legal realists (including the current Italian legal realists like Barberis) becomes louder, emphasizing the actual role of judges, respectively, in general of the authorities applying law. This goes

in hand with noting a gradually weakening position of the legislator, who is functioning merely as a creator of general regulatory guidelines (on details, see e.g. Guastini, 2006) to which the content and meaning are ascribed ultimately by the authorities applying law. These authorities are thereby inevitably influenced by the current society-wide discourse, but also by institutional discourse (an institution means, for example, the whole judicial system, but also a specific court), or even a specific discourse (dialogue) in an individual case. In addition, the personality and experience (expertise) of people embodying the authorities applying law also clearly plays an important role. These factors are thereby being currently emphasized not only by legal realists, but also by the popular discursive-communicative, neo-institutional and rhetorical-argumentative approaches to law, representing the manifold manifestations of post-positivism in law.

All these facts, both individually and in their mutual context, contribute to calling into question the exclusive status of the laws (legislation) as a primary source of law within the still prevailing iuspositivist view of law as a set of legal norms expressed in a form given or recognized by the state and enforceable by the state (Knapp, 1995, p. 50). The questioning of classical definitions of law dating back to the 20th century is, therefore, being witnessed even in contemporary textbooks. This materializes e.g. by adding new non-state or transnational levels of standardization (EU law, European law), but also repeatedly emphasizing the role of the authorities applying law (being the main idea of legal realism). Ultimately, one is also witnessing the attempts at extending the sources of law by new sources such as legal custom or “lawyers’ law” (*Juristenrecht*) or other sources and systems of normative pluralism that were abandoned in legal science of continental Europe in the 19th century under the influence of legal positivism. There is no doubt that traditional lessons on law, its functioning and individual institutes are being increasingly challenged by both practitioners and legal scholars—which is being reflected in a very tangible way for example in rich polemics or discussions concerning various methods and ways of interpretation of law and legal reasoning, etc.

To sum up, if development in the 19th and 20th centuries led (at least in civil law systems) to the positivist idea of law becoming identified with legislation (primarily with the acts of the parliament), the crisis of legislation at the turn of the 20th and 21st centuries gives birth to the popularity of post-positivism in its numerous varieties, reviving once again the ideas of legal realism.

3. Legal post-positivism and scientific post-positivism compared: Towards a new paradigm in (legal) science?

Post-positivism in law as a special contemporary stream of legal thought has a tradition emerging since the second half of the 20th century. It is most often being associated with the names of authors such as Ronald Dworkin, Robert Alexy, Ota Weinberger, Neil MacCormick, or contemporary renowned Spanish author Manuel Atienza.² It is therefore a relatively broad and internally stratified movement, the representatives of which would probably even contest against being included into one camp. That is why some of the above-mentioned authors speak of non-positivism instead of post-positivism, or they are being categorized into other sets and streams (e.g. argumentative concept of law, etc.). Still, all of the above-mentioned authors (and many others not mentioned here) are, in our view, sharing the view of questioning the formalism of positive law, or, more precisely, the idea of formalist application of law. Yet, there are also many open proponents of positivism still around, be it

² In this list cfr. Gizbert-Studnicki (2016, p. 403-ff)

in more traditional forms of positivism (Joseph Raz) or in its newer forms, such as garantism (Luigi Ferrajoli). Finally, even the stream of natural law (John Finnis) is still active, by its very nature also being directed against positivism.

Thus, post-positivism (or non-positivism; varied in its shapes and forms) in terms of rejection of positivist legal formalism is now clearly the dominant stream — notwithstanding whether its advocates rank as legal realists, neo-institutionalists, iusnaturalists, or supporters of argumentative-rhetorical, discursive or communicative theories of law.

In this context, current Polish legal scholar Tomasz Gizbert-Studnicki (Gizbert-Studnicki, 2016) boldly articulates nine theses of post-positivism as a general expression of doubts about the correctness of positivist approach in legal science. He empirically enumerates the following features of contemporary (post-positivist) law and legal science, being in no way an exhaustive or closed list, providing only some features of the current theories labelled as post-positivist — whereby not all of the features need to be met to consider a theory as post-positivist—:

1. the dual nature of law, i.e. both the authoritarian as well as the value-laden basis of law —meaning that besides the command essence of law, its values and principles also play an important role—,
2. a non-external view of law (i.e. rather internal, dogmatic view) dominates in legal science —recommending that legal theory and legal science should remain focused on practical problems of law-making and application of law, not on the broader view of law from the “outside”—,
3. the value-laden basis of the theory of law itself —i.e. the theory of law itself should also focus on questions of values and principles in law—,
4. interdisciplinarity —i.e. the need to take into account knowledge from other scientific disciplines— e.g. economics in business law, sociology and psychology in social security law and family law, etc. (while still preserving the dominantly internal approach to law in legal science),
5. moderate cognitivism —in terms of the belief in possibility of objectively recognizable fundamental values on which a given society can agree—,
6. weighing / balancing of principles and values takes precedence over logical legal syllogisms,
7. combining law and morality —in terms of taking into account values and principles in legal theory and legal practice—,
8. the practical role of the theory of law —the theory of law as a legal discipline should serve and help to formulate guidelines for legal practice—,
9. regionalism of the theory of law —legal theory, just like law, bears its regional and national specificities, which must be accepted—.

Post-positivism in T. Gizbert-Studnicki's understanding thus clearly represents a compromise between legal positivism and the effort to remedy its deficiencies in those areas in which it clearly fails — by eliminating legal formalism and emphasizing values and principles that can never be fully (neither logically nor legally) formalized, as it would go against their very essence and meaning.

However, it is important to note that this understanding of legal post-positivism is in fact “only” an expression (or equivalent) of general changes taking place in the current scientific paradigm within all scientific disciplines (on paradigms in legal science [cf. Varga, 2012]) — due to the general questioning of the belief in scientific positivism which was popular at the

turn of the 19th and 20th centuries. This sort of scientific positivism believed in an empirical cognitivity of all fundamental laws of functioning of the world — both of nature and society, these laws being valid worldwide and immutably. Such a positivism is already abandoned in contemporary methodology and philosophy of science generally — and is apparently getting to be abandoned in the conservative legal science as well.

(Very) generally speaking of positivism in the philosophy and methodology of science, a positivist scholar (scientist) hence presupposes the real existence of objective laws that can be empirically identified and investigated. In legal science, such scientific positivism took the form of (still dominant) legal positivism, emphasizing the possibility to discover legal standards from the text of legislation and to seek for their interrelations, while providing a “scientific” guidance on interpretation and argumentation in law, rejecting any external elements. However, current views in methodology and philosophy of science call into question such view both for natural sciences and *a maiori ad minus* for social sciences and humanities as well.

The stance of “realism” thereby also has its original tradition in a specific scientific thinking and is understood in current methodology and philosophy of science in terms of the possibility of knowing the reality around us. Its opposite view is anti-realism, which denies the possibility of knowing all reality, and is limited to empirically investigable and verifiable facts. Scientific positivism (including legal positivism), which gained popularity in the end of the 19th century, thereby falls (somewhat counter-intuitively) within the category of anti-realism, since it recognizes only empirically recognizable and observable facts as the basis and sole object of scientific cognition. It denies real existence of any other elements unless scientifically observable (hence: anti-realism). In law, the empirically recognizable element thereby was, and still is, the text of the legislation, legal standards and the relationship between the various elements of legislation and legal standards.

But science in general, not only legal science, often works also with empirically unverified facts that a positivist would avoid as objects not empirically proven, and therefore “unrealistic”. A realistic approach, in contrast, considers that even such empirically non-perceivable facts can also be considered real, albeit only under the condition of their scientific (though not necessarily empirical) recognition. Such a scholarly realism involves a number of possible realistic streams — for example, a distinction can be made into scientific realism, ordinary realism, and so-called scientism. To start from the latter, “scientists” would consider knowledge to be real only if scientifically proven. Ordinary realism, on the other hand, accepts everything that one can actually observe, even non-empirically, under artificial conditions. Should one wish to further specify or divide the entities in some way, these elements could be divided into detectable and undetectable. Thus, while mitochondria, for example, are detectable, although sensually invisible, mathematical knowledge is both instrumentally undetectable and sensually invisible (Schmidt and Taliga, 2013, p. 18). Finally, scientific realism is closer to ordinary realism than to scientism, considering to be real everything that one can observe (albeit non-empirically, in artificial conditions) by accepted scientific methods.

Unlike anti-realism, realism must therefore assume and prove the existence of a reality that is not directly sensible and empirically proven but is based on scientific observations and on the use of scientific methodology. Thus, realism also recognizes non-empirical, theoretical entities (for example, mathematical values, formulas and relationships).

Returning here to the problem of legal science and its relation to realism or anti-realism, should we consider the positivist legal concept to be anti-realist, focusing solely on legal standards contained in the legislation and the relationships between these (and typically speaking of valid law as “positive law”), this concept does not seem to describe the essence

of today's law and legal science. And it did not even describe all forms of positivism in the 20th century either (just compare Kelsen with Hart). Namely, should legal science only focus on legal norms (standards), these can be clearly found and based not only in legislation, but also in sources such as the natural-law concept of human rights, in legal principles and the like. Thus, legal norms, at least those resulting from these specific non-positivist sources, have a scientific nature closer to mathematical entities —undetectable and sensually invisible entities—. However, unlike mathematical “truths”, we even lack the precise and unambiguous procedures that would lead us to the only one correct regulation, its only one correct interpretation and the only one correct way of application of the standards onto facts of a case. There is hence still a great need perceived nowadays to review and further refine the nature of legal science, which is, however, not the goal of this paper, where we rather focus on legal practice and its possible prescriptive guidelines.

Still, as already pointed out, should (legal) positivism of the late 19th century and of the predominant part of the 20th century be considered an anti-realistic approach under which legal science as a proper positivist science should only deal with empirically provable facts, which were originally considered to be the legal norms expressed in legislation, legal science should (in particular in Kelsen's view) avoid any other subject matter of its investigation, such as sociological or psychological elements in law and society, but also any examination of legal history, legal politics and so forth. (Of course, this approach was moderated in the later forms of positivism, e.g. in the works by Hart.)

However, besides the dominant positivist view on law and legal science there was also another approach coined by representatives of early non-positivist legal theories, especially representatives of the sociological school of law (sometimes identified with early legal realists) and *iusnaturalists* —advocates of natural law—. They recognized and accepted the existence of other elements and entities in legal practice and science, besides the legal norms expressed or based in legal texts. They namely recognized social and psychological elements, in the spirit of realism assumed to be scientifically verifiable by specific scientific methods — for example of sociology, psychology, or history. Thereby, this approach is (was) definitely not a scientism approach, but rather an approach close to scientific realism, accepting established scientific practices. Positivist anti-realism, in contrast, disputed the real existence of such entities surveyed. Nevertheless, e.g., the Scandinavian legal realists, who themselves regarded law as verbal “magic” (Olivecrona, 1959, p.133), researched even these elements in law, trying to explain them in terms of other disciplines (e.g. psychology and sociology). Thus, their approach allowed them to work both with unobservable and undetectable entities (for example, “objective property law and subjective ownership right”), as well as with empirically observable and detectable facts (for example, real behavior, court decisions).

Of course, in situations where legal scholars rank among scientific realists working with both observable and detectable facts as well as with unobservable and undetectable but scientifically recognized entities, their approach requires scientific theories that are constantly being tested against the principles of other sciences (history, sociology, psychology), while new, previously unknown entities are often being predicted and subsequently confirmed, verified or falsified (for example, new legal principles or new legal norms). However, it is also true that such postulated entities may later be denied or disproved as it often happened also within the natural sciences. Even in law and legal science, many legal regulations and theories were not proven efficient or have been abandoned, and new theories, concepts and legal institutes or institutions have been created, seeking for better regulation and hoping to achieving more successful predictions of the future behavior and actions of addressees of law.

An often-invoked argument against the indicated realistic approach in science in general, not only in legal science, is thereby based precisely on the questioning of the success of realistic knowledge of the facts, by invoking past scientific failures such as failed theories on flogiston or caloricum (Ladyman, 2002, p. 237). In addition, it is also being pointed to the fact that some phenomena can also be explained by competing theories, which may prove true in the future; e.g., human behavior can be motivated by many other factors than legislation and its enforceability—even where the desired result coincides with the result hoped for by the legislator—. People may behave in the desired way for example due to accepted customary law, irrespective of the wording of state-produced standards, or due to various economic or behavioral factors, such as rational economic interests, instincts, and the like.

Scepticism towards scientific realism naturally gives birth to a number of “anti-realistic” streams, which today include, for example, so-called constructivists, according to whom any scientifically postulated theories and phenomena do not really exist and are just competing theories, heuristic tools. Theories, in Kuhn’s constructivist understanding of paradigmatic scientific changes, are being abandoned by scientists in the course of alternating scientific revolutions (Kuhn, 1962, p. 168). E.g., in the legal science it would be possible to speak of several possible paradigms of law and legal science that are being replaced and alternated—including the today’s transition from positivism to post-positivism—. The transition from one paradigm to another is thereby only dependent on the consensus of scientific and professional community, which is no longer satisfied with the explanations and functioning of the previous paradigm, and therefore it creates (constructs) a new paradigm.

However, this sort of constructivist anti-realism is not the only anti-realism currently present in scientific thought. There is still also a sort of positivist anti-realism present nowadays—especially in the form of logical positivism—. This type of anti-realist positivism considers some sentences of language (such as legal norms) as instrumental tools being used to derive future experience from the observed starting points. The objective truth and the real existence of legal institutes does not play a role here at all, which is the reason for the “anti-realistic” designation of this sort of positivism. In legal theory and legal philosophy, these are mainly the stances of analytical legal philosophers focusing on the tasks and functions of law as a language. However, such a view is not dominant in European continental legal science (at least so far).

Finally, since the 1980s, a third anti-realist group, also called “constructive empiricism” by B. van Fraassen, has gradually emerged in the philosophy and methodology of science. Instead of objective truth and its knowledge, it speaks only of the empirical adequacy of theories, i.e. of the possibility to observe to what extent a theory corresponds to practice. At the same time, it acknowledges the transgression of empirical experience by abstraction and by construction of structures and models as specific empirically unobservable entities. These are being confronted with empirical data in the context of scientific activity, in an effort to embed empirical experience into structures and models. If this is possible, the theory is considered to be empirically adequate. If not, structures and models are to be changed, abandoned. This is an approach which in legal science appears to be present and accepted mainly in the movement of iuspositivists who change their theories and regulations should these not correspond to empirical experience—to the goals aimed at—.

Finally, a kind of compromise between realism and anti-realism in the philosophy and methodology of science is currently being offered by a so-called “structural realism” approach, based on the fact that individual elements of a structure such as legal institutes can be changed, abandoned or replaced, but the basic structure of scientific theory still remains preserved—for example in legal science this structure could be an effort to regulate human behavior by

specific instruments with the possibility of their enforcement—. This structure is currently being searched for and explored foremost by cognitive scientists researching in the field of law, hoping thereby to “naturalize jurisprudence” (Leiter, 2007, p. 32).

To sum up, the current post-positivist shift in the legal paradigm is only a mark of the ongoing post-positivist shift present in the philosophy and methodology of science in general.

4. Legal post-realism and the prescriptive theory of law: Guidance for actual legal practice?

The post-positivist insights are expanding the concept of law over and beyond “written law” (legislation), which is being perceived as a step beyond and after iuspositivism. However, just as M. Barberis used historical arguments to explain that the changes are actually a return to the dominance of judges and courts, we can also use historical arguments here to claim that post-positivism means —paradoxically— returning back to the pre-positivist period.

From a historical point of view, this might be namely perceived as a natural development and an eternal struggle between formalism and antiformalism, systematic and casuistic, and iuspositivist and iusnaturalist views of law. Still, in addition to the “paradigm duels” mentioned above, one may thereby also witness the restoration of the battlefield between descriptive and normative perception of law and legal science, which is worth to pay closer attention to at this place.

Pre-modern and pre-positivist legal thinking in Europe was namely characterized by anti-formalist, casuistic, and also descriptive legal thinking, where “ought” was derived from and identified with “is”. The good old law could not be changed and the immutability and static nature of law guaranteed that there was no formal contradiction between is and ought at least at the level of law-making. It was only with the rise of the modern legal science that the separation between is and ought arose with the attempts to regulate and change the society by an absolutist ruler using newly created laws — laying down how the country “ought” to be run. In this newly introduced concept of law, “ought” was not to be derived from what “is” any longer, but rather from what “is written” (as a design, plan). Moreover, law and legal thinking was to gradually become systematic and formalistic.

Current legal realism as well as the past legal realisms might be seen as searching for a balance between the two competing combatants, the dual opposites in legal thought enumerated above. Legal realism is namely connecting the discrepancy between “is” and “ought” once again, arguing the law is what “is” present in the judicial practice, or in the daily practice of authorities applying law (as suggested by Frank, 1936, p. 56).

At the same time, legal realism also disrupts to a certain extent the systematic concept of law, by its inclinations to case-law and casuistry in judicial practice. This means that it is both anti-formalistic and at the same time found outside of the duality of iuspositivism and iusnaturalism, posing completely different sets of questions as to the functioning of law.

However, albeit this realistic approach to law is probably best describing the actual nature of law in a society, authorities applying law still traditionally expect that law, legislator and lawyers are supposed to provide them with clear (systematic, formalistic) guidance as to what and how to do, how to act and proceed, being thereby used to have these guiding rules inferred not from what “is”, but rather from what “is written” (being a iuspositivist approach to law), i.e. from what “ought to be”.

This situation again has its historical parallel in the past — judges and authorities applying law namely similarly sought for guidance in their legal practice (including canon law practice), in the times when the systematic legal thinking was not yet fully developed and when

casuistic thinking was still dominant. This situation was not unlike the situation described by legal realism, according to which law is casuistically reflected in what courts do in individual cases. The pre-modern judges, hesitating in how to decide in individual cases, were in these circumstances to be guided by specifically developed decision theories (precursors of modern scientific decision theories) —called according to the degree of adherence to legal certainty or the degree of freedom in assessing the facts of the case by names of tutorism, probabilism, probabiorism, equiprobabilism, etc. (on the historical decision theories cf. Gábriš, 2019)—.

Thus, should the main counter-argument against legal realism that nowadays keeps resurfacing be the one claiming that realism is only descriptive, while it is also necessary to provide “normative” guidance on how to proceed in the process of creation, implementation and application of law, the answer might be to build upon the historical prescriptive theories and to try to provide some “guidance” for legal practice in the post-positivist world.

This would also be in line with the views of very popular behavioral economics, distinguishing between descriptive economy, normative economy, and so-called prescriptive economy (Pearlman, 2009). Descriptive economy thereby allegedly only describes the behavior of individual actors, especially psychologically, behaviorally, or nowadays in terms of “cognitive science”, or of “neo-institutionalism” (this is done by institutional economics). Normative economy, on the other hand, prescribes ideal economic standards for an ideal world —which, however, is often accused of being detached from the “reality”—. Therefore, the third way, so-called prescriptive economy, is nowadays being developed, building on the modern decision theories, to prescribe patterns of behavior to real actors in the real world.

Something similar, if underpinned by historical theories of casuistry and modern theories of judgment and decision-making, can maybe be used to construct a sort of guiding principles for modern decision-makers in the post-positivist era of crisis of legislation. This could be the answer for legal realists in their search to offer to legal practitioners a prescriptive view on law, proposing a suitable prescriptive legal politics as well as prescriptive theory of the implementation and application of law, by combining all three levels of functioning of the law: (1) individual psychological and behavioral, respectively cognitive level, (2) institutional level (functioning of institutions, courts, administrative offices), and finally (3) societal —communicative-discursive level of the concept of law—.

However, such an attempt would indeed be not only post-positivist but also to a great extent post-realist, not only in terms of the next stage of legal realism, but also in terms of philosophy and methodology of science —not relying only on reduction to observable and detectable elements (psychological, behavioral, institutional), but even going further beyond them, towards constructive empiricism or structural realism, taking into account both the constructivist as well as naturalistic input—.

5. Conclusions: The next stage in legal post-positivism and in legal realism?

Should today’s post-positivist and in fact post-structuralist thinking be considered a period of overcoming traditional binary opposites, it should also do away with the dualisms of iuspositivism and iusnaturalism - just as it happens in legal realism, of systematic and casuistic approaches to law - being united again in legal realism, but also of descriptive and normative nature of law and legal science, what legal realism should attempt at. This would thereby mean a sort of return to pre-positivist and pre-modern concepts of law, proving we were never really modern.

From among all forms and streams of legal post-positivism, it might hence seem that legal realism best reflects the current trends of post-positivism in philosophy and methodology of science. At the same time, in legal science it represents a meta-theory of law, being aware

and sceptical towards the traditional legal theories of the past and present. It is these features of legal realism that may stand behind bold claims such as “We are all legal realists now” (Singer, 1988, p. 467).

However, this statement can be accepted mostly for legal science as a predominantly descriptive and critical undertaking. In case of legal practice and actual application of law, such critical and sceptical stances are not of much use, though. A prescriptive guidance needs to be provided for bodies applying the law in order to transform legal realism into a generally accepted theory of law.

Certainly, works of some legal realists might be interpreted in such a way that they do provide for some guidance (see Leiter, 2005, p. 59). Still, legal practice would certainly welcome more explicit directions or guidelines to follow. Clearly, that is namely the “secret” of success of legal positivism. In that respect, therefore, maybe we should all try to become post-positivists or post-realists not only with respect to meta-theories, but also with respect to legal practice — attempting to provide for prescriptive guidance for law-makers and decision-makers, on top of the descriptive scientific theory of law and jurisprudence. This is namely what the casuistic theories of decision-making were striving at already in the pre-modern era. We can build on these foundations with our new cognitive theories of decision-making, just as economy is doing this when introducing the concept of prescriptive economy.

Thereby, maybe it would be enough to start with lawyers simply realizing and taking into account the actual court practice and case law, respecting the reality of individual courts and judges. On the other hand, the guidance for the judges might be phrased as follows: Act as your institution, your colleagues, or you did in the past. Consider the circumstances of the case but proceed cautiously in interpreting and applying law — especially if you operate in lower instances within the system. Any diversion from the existing (legal) standards developed or given by explicit regulations, practices, institutional background or experience must be justified by the specific circumstances of the case.

These might be the very first steps towards a new prescriptive theory of application of law, addressing the deficiencies and criticisms voiced against legal realism in its traditional and new forms alike.

Bibliographical references

- Barberis, M. (2015). El realismo jurídico europeo-continental. In: Fabra Zamora and J. L. — Núñez Vaquero Á. (eds.). *Enciclopedia de Filosofía y Teoría del Derecho*. Volumen 1. Mexico: UNAM, 2015.
- Barberis, M. (2016). *For a truly realistic theory of law*. *Revus* 29, pp. 7-14.
- Fraassen, B. van (1980). *The Scientific Image*. Oxford: Oxford University Press, 1980.
- Frank, J. (1936). *Law and the Modern Mind*. New York: Tudor Publishing Company, 1936.
- Gábríš, T. (2019). Systematic versus Casuistic Approach to Law: On the Benefits of Legal Casuistry. *Journal of Ethics and Legal Technologies* (1)1, pp. 57-76.
- Gizbert-Studnicki, T. et al. (2016). *Metodologiczne dychotomie*. Warszawa: Wolters Kluwer.
- Guastini, R. (2006). Variaciones sobre temas de Carlos Alchourrón y Eugenio Bulygin. Derrotabilidad, lagunas axiológicas e interpretación. *Análisis filosófico XXVI*(2), pp. 290-291.
- Kuhn, T. (1962). *The Structure of Scientific Revolutions*. Chicago: The University of Chicago Press, 1962.

- Ladyman, J. (2002). *Understanding Philosophy of Science*. London: Routledge, 2002.
- Leiter, B. (2007). *Naturalizing Jurisprudence*. Oxford: Oxford University Press.
- MacCormick, N. and Weinberger, O. (1986). *An Institutional Theory of Law : New Approaches to Legal Positivism*. Dordrecht: Springer.
- Olivecrona, K. (1959). The Legal Theories of Axel Hägerström and Vilhelm Lundstedt. *Scandinavian Studies in Law* 3.
- Pearlman, P. (2009). Normative, Descriptive and Prescriptive Economic Models. <http://www.philpearlman.com/2009/03/04/83525206/>
- Rutherford, M. (2001). Institutional Economics: Then and Now. *Journal of Economic Perspectives* 15(3), pp.185-190.
- Schmidt, M. and Taliga, M. (2013). *Filozofia prírodných vied* [Philosophy of Natural Sciences]. Bratislava: Aleph.
- Singer, J. W. (1988). Legal Realism Now. *California Law Review* 76, pp. 465-544.
- Varga, Cs. (2012). *The Paradigms of Legal Thinking*. Budapest: Szent István Társulat.