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*Adolf Reinach and Czesław Znamierowski:  
Two Antithetical Conceptions of Legal Acts*

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0. Introduction

1. Reinach's *eidological* conception of legal acts

1.1. *First claim*: The *concept* (the *eídos*) of a legal act is *independent* of any legal norm on that act

1.2. *Second claim*: The production of the *essential effects* of a legal act is *unmediated*: it is not mediated by legal norms on that act

2. Znamierowski's *eidonomical* conception of legal acts

2.1. *First claim*: The *concept* (the *eídos*) of a legal act is *determined* by legal norms on that act

2.2. *Second claim*: The production of the *essential effects* of a legal act is *mediated*: it is mediated by legal norms on that act

Βούλεται μὲν οὐδὲν ἦττον ὁ νόμος εἶναι τοῦ ὄντος ἐξεύρεσις.

The law [νόμος] wants to be but the discovery of being [τοῦ ὄντος].

Platon, *Minos* 315a-b

0. Introduction

0.1. Two philosophers, the first German: Adolf Reinach [1883-1913], the latter Polish: Czesław Znamierowski [1888-1967], in the first half of twentieth century, made a valuable contribution to the study of three objects of philosophical investigation, which are very significant for legal theory and, in particular, for the theory of legal acts.

Those three objects are:

- (i) *legal acts* (examples of legal acts are: promises, orders, revocations, waivers, assignments);
- (ii) *legal entities* which are produced through legal acts (examples of legal entities produced through legal acts are the obligation and claim arising from a promise);
- (iii) *legal norms*.

0.2. Both Reinach and Znamierowski investigate what are the relationships among these three objects of investigation.

In the present paper, I will pose, in particular, two questions which concern the relations among these three objects of investigation (legal acts, legal entities produced through legal acts, and legal norms concerning those acts):

- (i) *First question*: What kind of relationship exists between (1.) the *concept* (the *eídos*) of a legal act and (2.) *legal norms* concerning that act?
- (ii) *Second question*: What kind of relationship exists between (1.) a *legal act* and (2.) the *legal entities* produced through that act?  
In particular: Is the relationship between a legal act and the effects it produces *mediated*, [*vermittelt, bedingt und ermöglicht*] by legal norms on that act?

0.3. I will examine and compare the answers given to these two questions respectively by Reinach and Znamierowski, and maintain that Reinach's and Znamierowski's conceptions are paradigmatic examples of two opposite

conceptions of legal acts: an *eidological* conception of legal acts on the one hand, and an *eidonomical* conception of legal acts on the other hand.

The *a priori* theory of law proposed by Adolf Reinach is a paradigmatic case of an *eidological* conception of legal acts.

The theory of *thetical* acts proposed by Czesław Znamierowski is a paradigmatic case of an *eidonomical* conception of legal acts.

I will examine Reinach's *eidological* conception of legal acts *sub* 1. (Reinach's *eidological conception of legal acts*), and Znamierowski's *eidonomical* conception of legal acts *sub* 2. (Znamierowski's *eidonomical conception of legal acts*).

## 1. Reinach's *eidological* conception of legal acts

I said that a paradigmatic case of an *eidological* conception of legal acts is represented by the *a priori* theory of law proposed by Adolf Reinach.

The *eidological* conception of legal acts maintain that the *concept* (the *eidos*) of a legal act has a logical priority over legal norms concerning that act.

This conception is divided in two main claims, which I will examine respectively *sub* 1.1. and 1.2..

### 1.1. *First claim: The concept (the *eidos*) of a legal act is independent of any legal norm on that act*

1.1.1. The first question I posed *sub* 0.2. was: What kind of relationship exists between the *concept* (the *eidos*) of a legal act and *legal norms* concerning that act?

1.1.2. A possible answer to this question is given by the *first* claim of the *eidological* conception of legal acts:

[First claim of the *eidological* conception of legal acts:] The *concept* (the *eidos*) of a legal act is *independent* of any legal norm on that act.

According to this claim, the sense, the *concept* (the *eidos*) of legal acts, like promise, revocation, assignment, is independent of any legal norm: it is not determined by norms of positive law regulating that act: it pre-exists to legal norms regulating that act.

1.1.3. In his *a priori* theory of law, Reinach compares the independence of basic legal concepts (and, among them, of the concepts of basic legal acts) with regard to positive law, to the independence of numbers with regard to mathematical science.

The so-called basic concepts of law have a pre-normative being, as well as numbers have a being which is independent of mathematical science. Positive law may elaborate and transform them: they are found by it, not created by it.<sup>1</sup>

Basic legal concepts are not created, then, by positive law norms: they are simply discovered by positive law.

To these legal structures pertain *a priori* propositions (essential laws) which are independent of any positive law: they are inscribed in the very essence (in the *eidos*) of those legal structures.

These essential laws, which are inscribed in the *eidos* of legal structures, are *Is-laws* (laws of *Sein*), they are not *Ought-laws* (laws of *Sollen*).

To this conception of Reinach's, suit the words of Plato:

Βούλεται μὲν οὐδὲν ἤττον ὁ νόμος εἶναι τοῦ ὄντος ἐξεύρεσις· οἱ δ' ἄρα μὴ τοῖς αὐτοῖς ἀεὶ νόμοις χρώμενοι ἄνθρωποι οὐκ ἀεὶ δύνανται ἐξευρίσκειν ὁ βούλεται ὁ νόμος, τὸ ὄν.<sup>2</sup>

The law [νόμος] wants to be nothing but the discovery of being [τοῦ ὄντος]: those men who do not always use the same laws, cannot always find what the law wants: the being [τὸ ὄν].

1.1.4. The *concept* (the *eidos*) of a legal act, then, is not created by a legal norm: it is, on the contrary, independent of any norm.

In other words, the *eidos* of a legal act is not *posed* [gesetzt] by norms of positive law: it is *presupposed* [vorausgesetzt] by them.

Reinach says:

Die rechtlichen Gebilde bestehen unabhängig vom positiven Rechte, sie werden aber von ihm vorausgesetzt und benutzt.<sup>3</sup>

Legal structures exist independently of positive law; nevertheless they are *presupposed* and used by it.

1.1.5. Given that the *concept* (the *eidos*) of legal acts is not, according to this conception, determined by legal norms on those acts, I propose to name this conception: *eidological* conception of legal acts.

<sup>1</sup> Adolf Reinach, *Die apriorischen Grundlagen des bürgerlichen Rechtes*, 1913, 1953, italian edition p. 7.

<sup>2</sup> Platon, *Minos* 315a-b.

<sup>3</sup> Adolf Reinach, *Die apriorischen Grundlagen des bürgerlichen Rechtes*, 1913, 1953, p. 145.

**1.2. Second claim: The production of the essential effects of a legal act is unmediated: it is not mediated by legal norms on that act**

**1.2.1.** Let's now turn to the second question I posed *sub* 0.2.: What kind of relationship exists between a *legal act* and the *legal entities* produced through that act (i.e., the *legal effects* of that act)?

In particular, Is the relationship between a legal act and the effects it produces *mediated* by legal norms on that act?

**1.2.2.** A possible answer to this question is given by the *second* claim of the *eidological* conception of legal acts:

[Second claim of the *eidological* conception of legal acts:] The production of the *essential effects* of a legal act is *immediate*, it is *unmediated*: it is *not* mediated by legal norms on that act.

**1.2.3.** Reinach carries out his enquiry on the relationship between legal acts and the essential effects they produce by investigating the act of promising.

When a promise is made, "then something new comes to being: a claim arises on the one hand, and an obligation arises on the other hand".<sup>4</sup>

But how are the claim and the obligation produced by the promise?

According to Reinach, the relationship between the promise on the one hand, and the claim and obligation generated by it on the other hand,

- (i) is neither, evidently, a *material relationship*, comparable to the relationship between a fire and the smoke produced by that fire,
- (ii) nor is a *normative relationship*, determined and mediated by legal norms.

The relationship between the promise on the one hand, and the claim and obligation generated by it on the other hand, is, on the contrary, an *unmediated*, an *essential* relationship: it is a relationship comparable to the relationship in virtue of which 3 is bigger than 2.

According to Reinach, indeed, the production of a claim and an obligation through a promise is founded in the proper essence of promise.

Reinach says:

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<sup>4</sup> Adolf Reinach, *Die apriorischen Grundlagen des bürgerlichen Rechtes*, 1913, 1953, italian edition p. 12.

It is founded in the essence of [the act of promising] that it produces, in certain circumstances, a claim and an obligation.<sup>5</sup>

So, claim and obligation arise from a promise in virtue of an eidetic relationship, in virtue of a necessary essence-relationship.

This essence-relationship, as *essence-relationship*, is not established by legal norms: it is inscribed in the *éidos* of the act of promising.

Reinach says:

These essence-relationships are immediately evident; they are not "creations" or "inventions" of some legal code.

**1.2.4.** So, as well as the *concept* (the *éidos*) of a legal act is not determined by legal norms on that act, neither the *essential effects* of a legal act are determined by *legal norms* on that act; they are not produced through the *mediation* of legal norms: they are, instead, produced *un-mediately*, in virtue of the essence of that act.

## **2. Znamierowski's eidonomical conception of legal acts**

The conception opposite to the *eidological* conception of legal acts (proposed by Reinach) is the *eidonomical* conception of legal acts: a conception according to which it is the *nomos* (and not the *logos*) that determines the *sense*, the *meaning*, as well as the *essential effects* of a legal acts.

In other words, the *eidological* conception of legal acts maintain that *norms* have a logical priority over (they *constitute*) the *concept* (the *éidos*) of a legal act.

A paradigmatic case of eidonomical conception of legal acts is Czesław Znamierowski's theory of *thetical acts*, which I will examine in present paragraph 2..

Also the eidonomical conception of legal acts (as well as the eidological one) is divided in two main claims (two claims which are antithetical to the two claims of the eidological conception of legal acts); I will examine these two claims respectively *sub* 2.1. and 2.2..

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<sup>5</sup> Adolf Reinach, *Die apriorischen Grundlagen des bürgerlichen Rechtes*, 1913, 1953, italian edition p. 22.

## 2.1. *First claim: The concept (the eidos) of a legal act is determined by legal norms on that act*

2.1.1 Znamierowski took up Reinach's investigations on legal acts and legal entities, but (even if Znamierowski conception of legal acts takes a nimportant inspiration from Reinach's *a priori* legal theory) he reached opposite, antithetical conclusions.

According to Znamierowski, indeed, legal acts belong to the category of "thetical acts" ["*akty tetyczne*"].

Thetical acts are acts that exist only in virtue of a norm (*norma konstrukcyjna*), or a complex of norms, which "construct" them.<sup>6</sup>

2.1.2. Znamierowski illustrates the concept of "thetical act" through the example of solitaire:

I set out a rule on the disposition of cards which I call "solitaire". In this rule I set out that in certain situations I can lay an ace over a king. To lay an ace and a king on a table are undoubtedly psycho-physical activities; but the rule of solitaire has constructed between those psycho-physical activities a connexion, which assigns to those activities a particular meaning.<sup>7</sup>

Znamierowski's claim is as follows:

It is thanks to the rule that those acts are not simply disposing some pieces of colored paper, but rather "laying an ace" or "laying a king". These acts are acts which are constructed by the rule.<sup>8</sup>

It is a rule then (a norm) that assigns to certain psycho-physical activities the sense, the meaning of "laying an ace" and "laying a king".

Znamierowski adds that these acts couldn't even exist without the rules that construct them:

All these acts could not exist if the norm which construct them didn't exist.<sup>9</sup>

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<sup>6</sup> In the essay: *Z nauki o normie postępowania*, 1927, as Giuseppe Lorini remarks, Znamierowski introduced the concept of "constructive rule" [*norma konstrukcyjna*]; this concept is a prefiguration of later concepts of "constitutive rules" and of "constitutive norm" proposed by John R. Searle, Amedeo G. Conte, and Gaetano Carcaterra.

<sup>7</sup> Czesław Znamierowski, *Podstawowe pojęcia teorii prawa. Układ prawny i norma prawna*, 1924, p. 67 (italian edition p. 76).

<sup>8</sup> Czesław Znamierowski, *Podstawowe pojęcia teorii prawa. Układ prawny i norma prawna*, 1924, p. 67 (italian edition p. 76).

2.1.2. As well as "laying an ace" and "laying a king", also legal acts like making one's will, making a donation, getting married, *etc.*, are, according to Znamierowski, *thetical* acts: they are constructed by some norms, and their sense, their meaning is determined by those norms.

According to the *eidonomical* conception of legal acts then (on the contrary of *eidological* conception of legal acts), legal acts *presuppose* the legal norms which construct them, and which assign to them their proper meaning.

2.1.3. So, to my first question (the question: What kind of relationship exists between the *concept* (the *eidos*) of a legal act and *legal norms* concerning that act?) Znamierowski would answer with the *first claim* of an *eidonomical* conception of legal acts:

[First claim of the *eidonomical* conception of legal acts:] The *concept* (the *eidos*) of a legal act is determined by legal norms on that act.

## 2.2. *Second claim: The production of the essential effects of a legal act is mediated: it is mediated by legal norms on that act*

2.2.1. I come back now to my second question: What kind of relationship exists between a *legal act* and the *legal entities* produced through that act?

2.2.2. "For every thetical act" Znamierowski says "it is essential that it be an efficacious act [*akty sprawczy*]"; that is to say: it has to be an act that creates a specific state-of-affairs [*stan rzeczy*].<sup>10</sup>

By moving a piece of chess, for example, you can "capture a pawn"; similarly, by making donation of a horse to somebody, you can transfer to him the property of that horse.

2.2.3. But how are these effects produced, according to Znamierowski?

As well as for Reinach, also according to Znamierowski, the effects of a legal act aren't produced, evidently, in virtue of a relation of material causality.

But, unlike Reinach, Znamierowski doesn't maintain that the effects of a legal act derive from the very essence of that act.

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<sup>9</sup> Czesław Znamierowski, *Podstawowe pojęcia teorii prawa. I. Układ prawny i norma prawna*, 1924, p. 68 (italian edition p. 77).

<sup>10</sup> Czesław Znamierowski, *Podstawowe pojęcia teorii prawa. I. Układ prawny i norma prawna*, 1924, p. 68 (italian edition p. 77).

On the contrary, it is the norm which constructs the legal act that sets out the relation between a legal act and its effects.

Without the norm which constructs a certain legal act, it would be impossible to perform that act and, *a fortiori*, to produce its effects.

Znamierowski gives a double example: the (non-legal) example of chess, and the (legal) example of donation:

It is impossible to “capture a pawn” without the rules of chess, as well as it is impossible to make a donation of a horse to somebody, without a norm which institutes property and the act of donation.

Shouldn't the norm exist, in the first case it wouldn't be possible but to take away a piece of wood from the chessboard, and to put another one at its place. In the second case, it wouldn't be possible but to yield the material possession of the horse.<sup>11</sup>

So, the effects produced by a legal act aren't produced but *in virtue*, and *through the mediation* of the norms that construct that act.

**2.2.3.** So, to my second question (the question: What kind of relationship exists between a *legal act* and the *legal entities* produced through that act?) Znamierowski would answer with the *second claim* of an *eidonomical* conception of legal acts:

[Second claim of the *eidonomical* conception of legal acts:] The production of the *essential effects* of a legal act is *mediated*: it is mediated (made thinkable, and possible) by legal norms on that act.

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<sup>11</sup> Czesław Znamierowski, *Podstawowe pojęcia teorii prawa. I. Układ prawny i norma prawna*, 1924, p. 68 (italian edition p. 77).

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