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SOPHISTICATED TEXTUALISM AND SANCTIONS*

1. INTRODUCTION¹

In a series of articles² and a recent book,³ Marcin Matczak has developed a fascinating account (which he dubs “sophisticated textualism”) of a number of phenomena related to legal practice. His central claim is that legal text, construed as a set of normative acts valid in a given place at a given time, is a *description* of a possible world. Accordingly, legal interpretation is the process of recovering the image of said possible world, whereas application of law is ensuring convergence between the actual world and the possible world stipulated by the legal text.

His theory deserves attention for at least two reasons. First, it provides insightful answers to some particularly persistent puzzles in the philosophy of law, including Jørgensen’s dilemma⁴ and the problem of aggregation of legislative intent. More importantly, however, Matczak takes significant effort to show the relevance of his theory for praxis. His theory thus provides valuable hints for officials, in particular judges, involved in the process of interpretation and application of law.

* The scientific work behind the text was financed from the budget for science in 2017–2018, as a research project under the “Diamond Grant” program (grant no. DI2016001846).

¹ For helpful comments I am grateful to: Marcin Matczak, Wojciech Graboń, Stanisław Jędrzak, Krzysztof Szczucki, Bartosz Szyler, Gniewomir Wycichowski-Kuchta, Anna Zientara, participants of the “Administrować i karać. Dylematy odpowiedzialności represyjnej” held at the University of Warsaw in May 2018, and participants of Marcin Matczak’s philosophy of law seminar at the University of Warsaw.

² M. Matczak, *Interpretacja prawnicza w świetle semantyki Kripkego-Putnama*, „Państwo i Prawo” 2008, Vol. 6; *Does Legal Interpretation Need Paul Grice?: Reflections on Lepore and Stone’s Imagination and Convention*, “Polish Journal of Philosophy” 2016, Vol. 10, No. 1; *Three Kinds of Intention in Lawmaking*, “Law and Philosophy” 2017, Vol. 36, No. 6; *On the Alleged Redundancy of the Rule of Recognition*, <https://dx.doi.org/10.2139/ssrn.2990602>, 2017; *Why Judicial Formalism Is Incompatible with the Rule of Law*, “Canadian Journal of Law & Jurisprudence” 2018, Vol. 31, No. 1.

³ M. Matczak, *Imperium tekstu. Prawo jako postulowanie i urzeczywistnianie świata możliwego*, Warszawa 2019.

⁴ J. Jørgensen, *Imperatives and Logic*, “Erkenntnis” 1937, Vol. 7, No. 1.

My goal in this paper is to offer a friendly critique of Matczak's account. I will discuss a difficulty faced by his theory and consequently suggest a modification which allows avoiding it. The difficulty is that Matczak's theory as it stands cannot account for sanctions, understood as negative consequences of citizens' actions imposed by the state.⁵ On his account, if a statute prohibits ϕ -ing, then – other things being equal – it describes a possible world in which no one ϕ -s. Now, a sanction is plausibly seen as a reaction to a breach of duty, i.e. to ϕ -ing. But since no one ϕ -s in the possible world of law, Matczak's account provides the interpreters with no clue as to how to react to ϕ -ing. This is an unsettling conclusion, for there are no good reasons to deny that norms expressing directives for fixing sanctions are law, nor to claim that judges have full discretion when fixing sanctions.

Therefore, I suggest a modification of Matczak's theory which allows for avoiding this undesired consequence. Namely, I believe that Matczak should abandon the assumption that the legal text describes a *single* possible world. I show that doing so enables him to analyze sanctions in a fashion parallel to Lewis-Stalnaker analysis of counterfactuals, i.e. conditional statements with false antecedents.

In the first section, I introduce major characteristics of Matczak's theory. In the second section, I raise the objection that the theory has difficulties with accounting for sanctions. In the third section, I discuss and reject two unsatisfactory replies: one that appeals to the accessibility relation, and one, Matczak's own, that appeals to the distinction between the world of text and the world of discourse. In the fourth section, I argue that the appropriate response is to drop the assumption that the legal text describes a *single* possible world.

2. SOPHISTICATED TEXTUALISM

Matczak classifies his theory as *textualism* because of the special role it ascribes to the legal text, understood, following Maciej Zieliński,⁶ as an aggregate of all normative acts in force in a given territory at a given time. On this account a legal text is a complex artifact which lies at the center of a peculiar social practice, namely *law*. According to Matczak the legal text has a *descriptive* character; it describes a possible world postulated by the legislature, the bringing about of which is the task of law's addressees. Henceforth I will refer to this possible world as "PWL" (the possible world of law).

⁵ I have been informed by Marcin Matczak that Tomasz Gizbert-Studnicki independently expressed an objection that questioned whether Matczak's account can accommodate sanctions.

⁶ M. Zieliński, *Wykładnia prawa. Zasady, reguły, wskazówki*, Warszawa 2012.

The *sophistication* of Matczak's account signals the fact that its author distances himself from a formalistic approach to legal interpretation, which is typically associated with more orthodox forms of textualism. In particular, he rejects semantic internalism, i.e. the view on which the meaning of an utterance is determined by the mental states of its utterer. Semantic internalism is deeply ingrained in how we think about language. All in all, it is intuitively unobjectionable to say that the meaning of our interlocutor's words depends on what she *intended* to say. This approach is also manifested in our thinking about the law – consider, for instance, the popularity of the view that legal interpretation is tantamount to discovering *legislative intent*.⁷ Matczak appeals to the works of American philosophers of language, including Peirce,⁸ Millikan,⁹ Putnam,¹⁰ Kripke,¹¹ and Devitt,¹² to argue that we should stop thinking about law in an internalistic fashion. Instead we should embrace semantic *externalism*, on which the utterer has only limited impact on the meaning of her words, for it is also dependent on (i) features of the actual world and (ii) existing social practice of uttering equimorphous signs (or sounds).

An important advantage of Matczak's account is that it enables elegant solutions to numerous theoretical puzzles within the philosophy of law, such as Jørgensen's dilemma or the problem of aggregation of legislative intent. What is more important, however, from the perspective of the current paper, is that his theory provides conceptual tools well suited to describing numerous phenomena central to legal practice, such as law enactment, interpretation of the legal text, and application of/abiding by the law. They are defined as follows:

(i) **Law enactment** is the designing of future by describing or changing a description of a possible world, by using the legal text, understood as an aggregate of all normative acts in force at a given time.

(ii) **Interpretation of the legal text** is the recovery of a picture of the possible world from the legal text, which ought to be brought about by a given society.

(iii) **Application of/abiding by the law** is the adjustment of the actual world to the picture of the possible world described in the legal text or the punishment for the lack of such adjustment.¹³

It should be clear from these definitions that the notion of a possible world plays a crucial role in Matczak's account. Some readers may find this a bit unserious, due to the connotations with science fiction evoked by the phrase. Yet,

⁷ Z. Tobor, *W poszukiwaniu intencji prawodawcy*, Warszawa 2013.

⁸ C. S. Peirce, *C. S. Peirce Collected Papers*, Cambridge, 1933–1936.

⁹ R. G. Millikan, *Language, Thought, and Other Biological Categories: New Foundations for Realism*, Cambridge 1984.

¹⁰ H. Putnam, *The Meaning of 'Meaning'*, "Minnesota Studies in the Philosophy of Science" 1975, Vol. 7.

¹¹ S. Kripke, *Naming and Necessity*, Cambridge 1980.

¹² M. Devitt, *Designation*, New York 1981.

¹³ M. Matczak, *Imperium tekstu...*, p. 159, translation mine.

such a judgement would be entirely unwarranted. The notion of a possible world has proven extremely helpful in analyzing multiple troublesome concepts and has thus earned its keep in analytic philosophy.¹⁴ It has also found applications in other disciplines, such as linguistics, literary theory, and computer science. Moreover, there have already been attempts to employ possible worlds in the analysis of legal phenomena.¹⁵ Due to the variety of uses to which the notion of possible worlds is put, it shall not surprise that different authors understand it in differing ways. On Matczak's account, a possible world is a mental representation that arises upon a lawyer's contact with the legal text. A possible world thus construed has three crucial features: unity, accessibility from the actual world, and underdetermination by the legal text.¹⁶ These characteristics are meant to capture the deep structure of legal thinking.¹⁷

First, the assumption pertaining to the unity of PWL is meant to explain the systematicity of law. Since multiple legal provisions can refer to the same state of affairs, it is possible that they could prescribe conflicting behaviors in a particular situation. Thus lawyers ought to come up with an interpretation that realizes as many of them as possible to the highest possible degree. Further, the assumption enables us to capture the relation between higher order general norms and lower order norms of a more local character. According to Matczak, realization of the former is a result of the realization of the latter. Finally, the assumption of unity helps us understand the arbitrariness of dividing the law into branches (e.g. civil, criminal, administrative). Ultimately, when a lay person asks a legal counsel for advice, she is primarily interested in ensuring that she will act in accordance with *the law*, not just with, say, criminal law.

Second, the assumption of PWL's accessibility from the actual world operationalizes the principle *impossibilia nulla obligatio est*. In doing so, it is meant to capture the elementary intuition that the law is created for real people (as opposed to, say, robots or archangels). Therefore, it should take into account their real capabilities if it is to successfully fulfil its function of coordinating human behavior. A possible world can be inaccessible in various ways. On the most general level it can be inaccessible *logically*, due to containing a contradiction. An instance of such a world is one in which people drive *simultaneously* on the right and on the left side of the road. Matczak's theory aptly instructs lawyers to reject

¹⁴ For an overview of some applications, see chapter 2 of D. Lewis, *On the Plurality of Worlds*, Oxford 1986.

¹⁵ See e.g. J. Woleński, *Logiczne problemy wykładni prawa*, Kraków 1972; R. Sarkowicz, *Poziomowa interpretacja tekstu prawnego*, Kraków 1995; J. Hage, *Separating Rules from Normativity*, (in:) M. Araszkiewicz, P. Banaś, T. Gizbert-Studnicki, K. Pleszka (eds.), *Problems of Normativity, Rules and Rule-Following*, Heidelberg–New York–Dordrecht–London 2015; M. Jakubiec, *David Lewisa koncepcja fikcyjnego stanu rzeczy jako opisu świata możliwego a problem statusu norm prawnych*, „Semina Scientiarum” 2016, Vol. 15.

¹⁶ M. Matczak, *Imperium tekstu...*, pp. 203–217.

¹⁷ L. Nowak, *Interpretacja prawnicza*, Warszawa 1973.

any interpretation of law that results in such a PWL. The same goes for *physical* inaccessibility. A PWL in which cars move with the speed of light cannot be plausibly used as a model for the actual world. Clearly, it would be rather difficult to find a lawyer who would seriously put forward one of the two interpretations just sketched. However, inaccessibility can take a subtler form. In particular it seems that it can be relativized to the features of a given society. For instance, we would deem a PWL in which a liquor license fee exceeds the income of any liquor vendor in the country *economically* inaccessible.

Finally, Matczak invokes Ingarden's concept of places of indeterminacy to argue that legal text alone does not fully determine the PWL. This observation is used to show that an interpreter's creative input is not only justified but also indispensable in practice. Indeed, Matczak embraces antirealism with respect to law.¹⁸ It is therefore in principle possible that while interpreting the very same legal text, two perfectly informed interpreters acting in good faith come up with inconsistent interpretations. However, Matczak believes that this does not pose a threat to the certainty of law. In particular, he argues that the common biological make-up and cultural background of lawyers functioning within a legal system significantly reduce the divergence of admissible interpretations.

In his book, Matczak uses the apparatus described above to provide insightful analyses of multiple concepts related to legal interpretation. His discussion warrants the belief that his theory can be put to an even broader use in the future. However, instead of trying to use the theory to shed light on some rather obscure theoretical concept, I will try to show that it faces difficulties accommodating a relatively unproblematic phenomenon, namely sanctions. The discussion in the following section will provide reasons for amending Matczak's account in a way that stands to further increase its explanatory potential.

3. OBJECTION: SANCTIONS

One of the theoretical advantages of Matczak's account is that it provides a straightforward solution to a puzzle made famous by Jørgensen, according to which imperatives cannot be premises or conclusions of valid inferences. This is widely taken to be a serious problem for jurisprudence, for on the dominant view imperatives permeate positive law, e.g., as in Austin's claim that law is a sovereign's order backed by a threat. Matczak's theory is immune to the famous objection because it takes legal language to be descriptive rather than normative. However, this theoretical maneuver combined with the assumption of PWL's unity

¹⁸ M. Matczak, *Imperium tekstu...*, p. 380.

leads to difficulties concerning the analysis of sanctions. In order to see this, let us first have a closer look at Jørgensen's puzzle and Matczak's solution thereto.

The first horn of the dilemma is that imperatives cannot be premises or conclusions of valid inferences. This conclusion follows from the observation that imperative statements, like "close the door", are not truth-apt, i.e. they are logically incapable of being true or false. Now, it is quite intuitive to think of an inference as something that takes us from true premises to a true conclusion. Since imperatives are not truth-apt, they are logically not suited to being premises nor conclusions of inferences.

The other horn of the dilemma has it that we intuitively consider valid some of the inferences which are partly constituted by imperatives. For instance, the following set of statements seems to constitute a valid inference in any legal system whose positive law introduces a property tax.

(P1) If you own a house, pay the property tax.

(P2) You own a house

(C) Pay the property tax.

Aside from the intuitive sense in which the arguments like this appear to be correct, it is quite plausible that they are in fact an indispensable part of legal practice. One such robust example is a court's verdict that orders X to pay amends to Y due to the damage X incurred to Y. In a rule of law, such a verdict should be supported by a justification that includes a mixture of factual and legal premises. It is quite plausible to think of the court's verdict as a conclusion, formulated in the imperative mood, that follows from both descriptive (factual) and imperative (legal) premises. Yet, according to the first horn, we cannot think of this as a valid inference. This is a grave difficulty for legal theory, for if judges are necessarily unable to pinpoint the logical basis of their verdicts, then their decisions are prone to the charge of arbitrariness. Ultimately, we care about valid inferences precisely because they guarantee that the truth of the premises is preserved in the conclusion. If judges use invalid inferences, it is perfectly possible that they reach wrong conclusions, even assuming that they got all the relevant facts right and applied the right legal provisions.

Prima facie, the most tempting way out of this difficulty for a legal theorist is to deny that positive law expresses any imperatives. However, this solution comes at a price. Namely, a major reason why so many legal philosophers think that positive law includes imperatives is that the law is thought to enjoy certain authority, a feature that distinguishes a legal text from, for instance, a novel. A natural reply to this latter challenge is to say that the difference is reflected on a linguistic level; whereas literary or scientific texts are descriptive, legal text is (at least partly) normative. However, this claim flies in the face of the lesson we have just drawn from Jørgensen's dilemma.

Thus, legal theorists face another dilemma. *Either* they claim legal language to consist exclusively of descriptive statements *or* they admit that legal language

involves some imperative statements. Proponents of the first horn have at their disposal an uncontroversial account of legal inference. However, they face difficulties explaining law's normativity. In turn, grabbing the second horn does not incur any *additional* problem for the normativity of law (i.e. on their account law's normativity is no more mysterious than normativity in general). Yet, this maneuver comes at the price of obscuring the nature of legal inferences. In short, it is either legal inferences or normativity.

Matczak offers an interesting solution that attempts to fulfill both of the allegedly conflicting desiderata. On the one hand, he believes that legal language is descriptive in the sense that each legal norm describes a state of affairs, whereas legal text taken as a whole describes a single PWL. On the other hand, he explains law's normativity by claiming that law is the command of a sovereign to adjust the actual world to the PWL. What distinguishes his account from those of other proponents of the first horn of the descriptive/normative dilemma is his holistic approach to law. For instance, on Shapiro's planning theory of law,¹⁹ each legal norm *describes* a plan.²⁰ By contrast, on Matczak's account it is strictly speaking false that a single legal norm, or indeed a group of them, considered in isolation from the rest of the legal text, imposes duties or confers obligations on individuals. Indeed, according to sophisticated textualism the sole duty of the citizens is to ensure the convergence between the actual world and the PWL.

Now, my claim is that Matczak's account fails to accommodate legal norms that express directives on fixing legal sanctions. I will introduce it by entertaining a fictional case and analyzing the relevant provisions of Polish law within Matczak's framework.

Chopin's home. Maria owns a building in Warsaw which, between 1823 and 1829, had been home to the famous Polish composer and pianist Frederic Chopin. There is reliable historical evidence that during that period Chopin had composed some of his most influential works. The building is registered as a historic monument. On July 2, 2018, the building caught fire. Maria called the fire department right away. Thanks to their quick intervention, the outer façade remained untouched. However, the chambers once occupied by the famous pianist were completely destroyed. On August 14, 2018, a third party informed the Mazovian voivodship monuments conservator about the fire.

Let us take a closer look at the authority's interpretation and application of law in Maria's case. Their first step is to locate the relevant fragment of the PWL. According to 28.1.1 of the Polish law on the conservation of monuments,²¹ the owner of a registered monument informs the relevant voivodship monument

¹⁹ S. Shapiro, *Legality*, Cambridge 2011.

²⁰ It is worth noting that Shapiro's account has also been criticized for downplaying the role of sanctions. See F. Schauer, *The Best Laid Plans*, "Yale Law Journal" 2010, Vol. 120, issue 3.

²¹ Ustawa o ochronie zabytków i opiece nad zabytkami, Act of July 23, 2003, Journal of Laws of 2017, pos. 2187, as amended.

conservator about the destruction, loss, or theft of a monument no later than 14 days since finding out about the occurrence. On Matczak's account, this provision describes a state of affairs in which someone owns a registered monument and that monument is destroyed. Furthermore, such a person informs the competent authority about the destruction, loss, or theft of the monument within 14 days of acquiring knowledge about the occurrence. Other things being equal, the discussed provision's contribution to the PWL is that in the PWL the owners of registered monuments always inform the relevant authorities about the destruction of their monuments within 14 days of acquiring knowledge of the destruction.

The next step is to reconstruct a relevant fragment of the actual world. This is typically done by gathering evidence. Let us assume that the evidence collected by the monument conservator provides more or less the same picture as one emerging from my description of the case.

Now it remains to compare the actual world with the PWL. It is straightforward that the two diverge, hence the law has been broken. Unless we are dealing with a *lex imperfecta*, the authority should impose a sanction on Maria for her failure to comply with the model of behavior provided by the PWL. In fact, the norm expressed by the discussed provision does not express a *lex imperfecta*, for art. 107a.1.1 foresees an administrative fine between 500 and 2000 zlotys for violation of the monument owner's duty to inform the relevant authority within 14 days about the destruction of the monument. According to art. 107a.1.2, the fine is to be imposed in an administrative decision issued by the authority whom the monument's owner was obliged to inform about the destruction of the monument. This is the point at which Matczak's account falls short of the resources necessary to explicate the reasoning behind the authority's decision.

The heart of the problem is that the legal text describes the fine as a *consequence* of a violation of a legal duty. It is hard to see how this relation between the violation and the sanction is to be reflected in the PWL, for the PWL is such that no one fails to inform the relevant authority if their monument is destroyed. The difficulty becomes especially vivid if we consider legal provisions that describe factors the authorities have to take into account when establishing the degree of the penalty. For our hypothetical scenario, the relevant provision would be art. 189d of the Polish administrative procedure code.²² According to the norm expressed by this provision, the monument conservator should determine the height of the fine by considering *inter alia* such factors as seriousness and circumstances of the violation or the person's contribution to the violation. Yet, it is in principle impossible for the monument conservator to reconstruct a PWL in which such factors are taken into account due to the fact that they make an essential reference to the violation of the norm, whereas – as we have already

²² Ustawa – Kodeks postępowania administracyjnego, Act of June 14, 1960, Journal of Laws of 2017, pos. 1257, as amended.

established – the PWL described by the Polish legal text is a possible world in which the owners of the monuments always fulfil their informational duties. Including sanctions in the PWL of Polish law would lead to a logical inconsistency – it would be a possible world in which monument owners both inform and fail to inform the relevant authorities about the destruction of monuments.²³

The upshot of the preceding discussion is that Matczak's account is incapable of accommodating some important types of provisions related to imposing sanctions by competent authorities. In order to show that, I invoked some specific Polish regulations. However, the argument generalizes easily, for nothing in it rests on the peculiarity of the norms invoked in the example; they were merely instances of institutions that are found in many legal systems across the world. In fact, all that is needed to mount my objection against sophisticated textualism is to make a case that a token of sanctioning is a reaction to a violation of a duty. This is a dominant view among legal theorists.²⁴

4. TWO UNSATISFYING REPLIES

Before presenting my own solution to the problem of sanctions, I will first discuss two replies which do not require a modification of Matczak's account. The first one appeals to the accessibility relation, the other one invokes a distinction between the text world and the discourse world. I will argue that neither of them succeeds.

The accessibility solution runs as follows. We are an imperfect society. Even though most of us typically obey the law, it systematically happens that some individuals break it. Indeed, this is why we need sanctions in our legal systems. A PWL in which everyone fulfils their duties is too distant from the actual world to effectively serve as a model for our society.²⁵ We should therefore deem it an inappropriate interpretation of the legal text, due to its inaccessibility from the actual

²³ The argument was inspired by the so-called Chisholm's paradox. See R. Chisholm, *Contrary-to-Duty Imperatives and Deontic Logic*, "Analysis" 1963, Vol. 24, issue 2.

²⁴ Some theorists oppose this orthodoxy by arguing that sanctions should not be conceived of as reactions to *duty violations* but rather to *wrongdoings*. See in particular R. A. Duff, *Rule-Violations and Wrongdoings*, (in:) A.P. Simester, S. Shute (eds.), *Criminal Law Theory. Doctrines of the General Part.*, Oxford 2002. However, his arguments focus exclusively on the criminal sanctions. Moreover, it is not clear whether the *normative* notion of a wrongdoing can be accommodated within Matczak's descriptive account of legal language. For a recent discussion see L. Miotto, *Sanctioning*, "Jurisprudence" 2017.

²⁵ K. Brownlee, *What's Virtuous About the Law?*, "Legal Theory" 2015, Vol. 21, issue 1, pp. 3–4.

world. The right interpretation is one in which most but not all people fulfil their duties and those who fail to do so are subject to sanctions.

This reply may seem very appealing because it captures pragmatic considerations that are known to underpin the legislative process. No member of the legislature who voted in favor of imposing stricter fines for speeding believes that this novelization would reduce the amount of traffic offences to zero. Indeed, it is not uncommon for the budget acts to foresee incomes from administrative fines (notice that there is no principled reason to deny that on Matczak's account the budget act also describes a part of the PWL). Notwithstanding the sociological appeal of this suggestion, it fails on legal dogmatic grounds. If the PWL is such that some people violate their duty to ϕ , then in any particular case it is unclear whether a person involved should have ϕ -ed. In order to see this more clearly, consider cases in which the law imposes a disjunctive obligation, as in "one is required to pay the fee in cash or via bank transfer." Such a norm is clearly different from the pair of norms: "do ϕ " and "if you do not ϕ , then you pay the fine." However, the proposal under consideration interprets both of the norms in the same fashion. In the first case, the PWL is such that some people pay the fee in cash, others via bank transfer. In the second case, the PWL is such that some people ϕ , others pay the fine for not ϕ -ing. The reason why the two norms should be treated differently is that our theory of law should capture the way in which the law guides Hartian puzzled man.²⁶ In the first case we intuitively expect the law to instruct the puzzled citizen to pay the fee, while remaining indifferent as to the payment method. By contrast, in the second case the law is not indifferent between fulfilling the duty and paying the fine for failing to do so. Rather, the law unequivocally instructs puzzled citizens to fulfill their duties. Moreover, it is untenable to say that in, say, 9 out of 10 cases the law instructs the citizens to fulfill the duties and in the remaining case it instructs them to pay the fine. Of course, it may so happen that as a matter of fact they sometimes fail to fulfill their duties but their reasons for doing so are non-legal reasons. The legal text *always* requires them to fulfill their duties, full stop. Thus the appeal to accessibility fails to block the objection that Matczak's account cannot accommodate sanctions.

The second reply, suggested by Matczak, appeals to a distinction between the *text world* and the *discourse world*. The distinction has been introduced by Joanna Gavins,²⁷ whose work in literary theory significantly influenced Matczak's core idea that the legal text describes a possible world.²⁸ The text world is the world described by a given text. In our case it corresponds to the PWL. The discourse world, in turn, is a world in which we talk about the text, i.e. the actual world. Matczak believes that whereas Hartian primary rules describe the text

²⁶ H. L. A. Hart, *The Concept of Law. Second Edition*, Oxford 1994, p. 40.

²⁷ J. Gavins, *Text World Theory: An Introduction*, Edinburgh 2007.

²⁸ M. Matczak, *Imperium tekstu...*, p. 145.

world, secondary rules describe the discourse world.²⁹ He goes on to argue that norms foreseeing sanctions, as rules of adjudication, describe the discourse world, not the text world:

“It should be emphasized that the manner of application of means of adjusting the actual world to the postulated world (restitutive sanctions), as well as the manner of application of means of preventing the future divergences (repressive sanctions) is also described by the relevant elements of the legal text. This description, like the description from which Hartian secondary rules are decoded, is a description of the discourse world, not the legal text world. Once those means have been applied, i.e. when their application becomes an element of the actual world, they can be evaluated as compatible or incompatible with the model postulated by the legal text.”³⁰

There are at least four reasons why this reply is unsatisfying. First, the notion of the discourse world is underspecified on Matczak’s account – there is a number of open questions that prevent it from being serviceable to jurists involved in actual legal interpretation. What is its relation to the text world? Does it fulfill the three necessary features of the text world, i.e. unity, accessibility, impossibility of full determination? Finally, what does it mean for the authorities to abide by the law? (The actual world is necessarily compatible with the actual world). Second, it is not uncontroversial that the norms expressive of factors to be taken into account when determining the measure of sanction are to be classified as secondary rules.³¹ Thirdly, and most importantly, by admitting that the authority competent to review the decision imposing a sanction entertains the text world, Matczak only relocates the problem. All in all, the higher court/administrative authority reviewing a decision has to consider the very same legal provisions as the authority that issued the decision. In order to assess whether the applied sanction was proportional, e.g., to the seriousness of duty violation she needs to recover the PWL in which there is both a violation and a corresponding sanction and compare such PWL with the actual world. However, as I have already shown in the previous section, such a PWL is inconsistent and cannot therefore be the right interpretation of the legal text within Matczak’s framework. Finally, Matczak’s solution entails that the first instance authority interprets the law in a different way than the second instance authority. There seems to be no principled reason to stick to such an asymmetry. Therefore, we should conclude that Matczak’s reply fails to provide a satisfactory account of some norms related to sanctions. Nonetheless, in the following section I will try do justice to his intuition that

²⁹ *Ibidem*, pp. 166–167, 183–185.

³⁰ *Ibidem*, p. 325, translation mine.

³¹ For instance, the 2017 novelization of Polish administrative procedure code that introduced an entire section pertaining to administrative fines has been criticized on the grounds that provisions of substantive law should not be included in a procedural code.

such norms describe a possible world different from the one described by norms expressive of primary rules.

5. REJECTING THE UNITY ASSUMPTION

The upshot of the argument presented in section 3 was that norms related to fixing sanctions do not describe the PWL. Now, my thesis is that they describe a possible world that is as close as possible to the PWL, such that the relevant legally required behavior, e.g. informing the monument conservator about the damaging of the monument, is legally indifferent (henceforth: “PWL*”). Such PWL* does not *logically* exclude the possibility of someone’s violating their duty. It can therefore be used to determine what sort of consequences the violation entails.

Although the closeness relations between possible worlds is a notoriously puzzling concept, I believe we can provide a satisfying approximation of how to identify the PWL* in each particular case. Our primary cue is the principle of minimal change. Other things being equal, if we consider two possible worlds, one of which is exactly like the PWL, save for the fact that the monument owners do not fulfil their informational duties, whereas the other is such that the monument owners do not fulfil their informational duties *and* people do not pay their taxes, then the former is closer to the PWL, for there are numerically less differences between them. Of course, it may often so happen that the principle of minimal change fails to uniquely determine the PWL*. In such a case, the interpreter should settle the indeterminacy by appealing to the values of the legal system.

The solution just proposed offers a straightforward account of the interpretation of norms related to fixing sanctions. In fact, it parallels the orthodox account of counterfactuals (conditional statements with false antecedents) within the framework of possible world semantics, championed by Robert Stalnaker and David Lewis.³² However, it requires dropping one of Matczak’s central assumptions – that the legal text describes a single possible world. In spite of this, I believe Matczak should bite the bullet. All in all, my solution does not affect in any way Matczak’s account of the interpretation of norms expressing primary rules. As for the norms related to fixing sanctions, Matczak himself readily admits that they are interpreted in a peculiar way.

Furthermore, there is an independent reason to claim that judges entertain more than one possible world when interpreting any legal provision. It has to do with the desideratum of legal certainty and the phenomenon of legal gaps. On Matczak’s antirealist approach to law, each of the judges creates their own PWL

³² R. Stalnaker, *A Theory of Conditionals*, (in:) N. Rescher (ed.), *Studies in Logical Theory*, Oxford 1968; D. Lewis, *Counterfactuals*, Oxford 1973.

upon the contact with the legal text. Those PWLs converge most of the time but sometimes they do not. Now, I believe it is plausible to claim that even though any particular judge is in principle capable of providing a determinate answer to any legal question, in some cases they are aware that if their mental states had been slightly different, they would have come up with a different answer to the very same question. What is more, this instability of their judgment need not stem from moral considerations. For instance, it may so happen that a society has two equally widespread conventions of usage of a certain word, each of which would lead to a different decision. Now, I believe that judges often conduct the thought experiments of entertaining the interpretations they would have reached, had they slightly different mental makeup. Thereby they represent possible worlds close to their own. If in all the closest possible worlds to the PWL they reach the same verdict, we can say that the law is determinate. Conversely, if some of the closest possible worlds lead them to diverging verdicts, then we speak of a *legal gap*. This process is of utmost importance for formulating *de lege ferenda* postulates.³³

6. CONCLUSIONS

In this paper I have argued that Matczak's theory in its current form cannot provide a satisfactory account of interpretation of norms pertaining to fixing the sanctions. Consequently, I have suggested that the best reaction to this difficulty is to drop the assumption about the unity of the possible world stipulated by the legal text. This enables us to analyze sanctions in terms of the closest possible world in which the forbidden behavior is legally indifferent. On a more general level I believe that this paper fits in the recent tendency of restoring the importance of sanctions in the philosophy of law.³⁴

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³³ For instance, the President of the Polish Supreme Court annually publishes a report on the detected legal gaps that obstruct the application of law, http://www.sn.pl/osadzienajwyzszym/SitePages/Wystapienia_Pierwszego_Prezesa_SN.aspx (accessed: 10.08.2018).

³⁴ In particular, see F. Schauer, *The Force of Law*, Cambridge 2015.

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SOPHISTICATED TEXTUALISM AND SANCTIONS

Summary

In this paper I present a difficulty for Matczak's sophisticated textualism. I argue that, due to his claims about the descriptive character of legal language and the unity of the possible world postulated by the legal text, his theory cannot successfully account for norms that express factors that an authority should take into account when determining the measure of sanction. I reject two replies to this objection that do not require a modification of Matczak's account. The upshot of my argument is that in order to accommodate norms pertaining to sanctions, Matczak should drop the assumption of unity of the possible world described by the legal text.

KEYWORDS

possible worlds, legal interpretation, sanctions, sophisticated textualism, Matczak, contrary-to-duty-obligations

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światy możliwe, interpretacja prawnicza, sankcje, tekstualizm wyrafinowany