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

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Βούλεται μὲν οὐδέν ἧττον 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)** *juridical entities*, which are produced through legal acts (examples of juridical entities produced by legal acts are the obligation and claim arising from a promise);
**(iii)** *legal norms*.

**0.2.** Both the theory of Reinach and the theory of Znamierowski investigate what are the relationships among these three objects of investigation.
In the present paper, I will pose two questions, in particular, which concern the relations among these three objects of investigation (legal acts, juridical entities produced through legal acts, and legal norms concerning those acts):

**(i)** *First question*: What kind of relationship exist between the *sense, the meaning of a legal act* and *legal norms* concerning that act?
**(ii)** *Second question*: What kind of relationship exist between a *legal act* and the *juridical entities* produced through that act?
In particular, Is the relationship between a legal act and the effects it produces *mediated* 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 theories are paradigmatic examples of two opposite theories of

legal acts: the *eidologic* theory of legal acts on the one hand, and the *eidonomic* theory of legal acts on the other hand.
The *a priori* theory of law proposed by Adolf Reinach is a paradigmatic case of an *eidologic* theory of legal acts.
The theory of *thetical* acts proposed by Czesław Znamierowski is a paradigmatic case of an *eidonomic* theory of legal acts is represented by.
I will examine Reinach's *eidologic* theory of legal acts *sub* 1. (*Reinach's* eidologic *theory of legal acts*), and Znamierowski's *eidonomic* theory of legal acts *sub* 2. (*Znamierowski's* eidonomic *theory of legal acts*).

## 1. Reinach's *eidologic* theory of legal acts

I said that a paradigmatic case of an *eidologic* theory of legal acts is represented by the *a priori* theory of law proposed by Adolf Reinach.
The *eidologic* theory of legal acts maintain that the *concept* (the *eîdos*) of a legal act has a logical priority over legal norms concerning that act.
This theory is divided in two main claims, which I will examine respectively *sub* 1.1. and 1.2..

### 1.1. *First claim*: The *meaning 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 exist between the *meaning 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 *eidologic* theory of legal acts:

> First claim of the *eidologic* theory of legal acts: The *meaning of a legal act* is *independent* of any legal norm on that act.

According to this claim, the sense, the meaning of legal acts, like promise, revocation, assignment, is independent of any legal norm: it is not determined by positive law norms 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 juridical 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.[1]

Basic juridical concepts are not created, then, by positive law norms: they are simply discovered by positive law.
To these juridical structures pertain *a priori* propositions (essential laws) which are independent of any positive law: they are inscribed in the very essence (in the *eîdos*) of those juridical structures.
These essential laws, which are inscribed in the *eîdos* of juridical structures, are Is-laws (laws of *Sein*), they are not Ought-laws (laws of *Sollen*).
To this theory of Reinach's, suit the words of Plato:

> Βούλεται μὲν οὐδέν ἧττον ὁ νόμος εἶναι τοῦ ὄντος ἐξεύρεσις· οἱ δ᾽ἄρα μὴ τοῖς αὐτοις ἀεὶ νόμοις χρώμενοι ἄνθροποι οὐκ ἀεὶ δύνανται ἐξευρίσκειν ὃ βούλεται ὁ νόμος, τὸ ὄν.[2]
>
> The law [νόμος] wants to be 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 sense, the meaning of a legal act is not assigned to the act by a legal norm: it is, on the contrary, inscribed in the very concept (the *eîdos*) of that act.
In other words, l'*eîdos* of a legal act is not *posed* [*gesetzt*] by positive law norms: it is *presupposed* [*vorausgesetzt*] by them.
Reinach says:

> *Die rechtlichen Gebilde bestehen unabhängig vom positiven Rechte, sie werden aber von ihm vorausgesetzt und benutzt*.[3]
>
> Juridical structures exist independently of positive law; nevertheless it *presupposes* and uses them.

**1.1.5.** Given that the sense, the meaning of legal acts is not, according to this theory, determined by legal norms on those acts, and that it is, on the contrary,

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[1] Adolf Reinach, *Die apriorischen Grundlagen des bürgerlichen Rechtes*, 1913, 1953, italian edition p. 7.

[2] Platon, *Minos* 315a-b.

[3] Adolf Reinach, *Die apriorischen Grundlagen des bürgerlichen Rechtes*, 1913, 1953, p. 145.

inscribed in the *eîdos* of that act, I propose to name this theory: *eidologic* theory of legal acts.

### 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 come now to the second question I posed *sub* 0.2.: What kind of relationship exist between a *legal act* and the *juridical entities* produced through that act (i.e., the juridical *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 *eidologic* theory of legal acts:

> Second claim of the *eidologic* theory 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".[4]
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* and *essential* relationship: it is a relationship comparable to the relationship by virtue of which 3 is bigger than 2.
The production of a claim and an obligation through a promise is founded in the proper essence of promise.

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[4] Adolf Reinach, *Die apriorischen Grundlagen des bürgerlichen Rechtes*, 1913, 1953, italian edition p. 12.

Reainach says:

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

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*-relation, is not established by legal norms: it is inscribed in the *eîdos* 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.** As well as the sense, the meaning 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 the legal norms on that act: they are, instead, produced *unmediately*, in virtue of the essence of that act.

## 2. Znamierowski's *eidonomic* theory of legal acts

The theory opposite to the *eidologic* theory of legal acts (proposed by Reinach) is the *eidonomic* theory of legal acts: a theory according to which it is the *nomos* (not the *logos*) that determines the sense, the meaning, as well as the *essential effects* of a legal acts.
In other words, the *eidonogic* theory of legal acts maintain that norms have a logical priority over (they *constitute*) the *concept* (the *eîdos*) of a legal act.
A paradigmatic case of eidonomic theory of legal acts is Czesław Znamierowski's theory of *thetical acts*, which I will examine in present paragraph 2..
Also the eidonomic theory of legal acts (as well as the eidologic one) is divided in two main claims (two claims which are antithetical to the two claims of the eidologic theory of legal acts), which I will examine respectively *sub* 2.1. and 2.2..

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[5] Adolf Reinach, *Die apriorischen Grundlagen des bürgerlichen Rechtes*, 1913, 1953, italian edition p. 22.

### 2.1. *First claim*: The *meaning 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 juridical entities, but (even if Znamierowski theory of legal acts takes inspiration from Reianch'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.[6]

**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.[7]

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.[8]

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:

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[6] 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.

[7] Czesław Znamierowski, *Podstawowe pojęcia teorji prawa. Układ prawny i norma prawna* [*Concepts fondamentals de la théorie du droit. Structure juridique et norme juridique*], 1924, p. 67 (italian edition p. 76).

[8] Czesław Znamierowski, *Podstawowe pojęcia teorji prawa. Układ prawny i norma prawna* [*Concepts fondamentals de la théorie du droit. Structure juridique et norme juridique*], 1924, p. 67 (italian edition p. 76).

All these acts could not exist if the norm which construct them didn't exist.[9]

**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 *eidonomic* theory of legal acts then (on the contrary of *eidological* theory 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 exist between the *sense, the meaning of a legal act* and *legal norms* concerning that act?) Znamierowski would answer with the *first claim* of an *eidonomic* theory of legal acts:

> First claim of the *eidonomic* theory of legal acts: The *meaning 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 exist between a *legal act* and the *juridical 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.[10]
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?

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[9] Czesław Znamierowski, *Podstawowe pojęcia teorji prawa. I. Układ prawny i norma prawna* [*Concepts fondamentals de la théorie du droit. Structure juridique et norme juridique*], 1924, p. 68 (italian edition p. 77).

[10] Czesław Znamierowski, *Podstawowe pojęcia teorji prawa. I. Układ prawny i norma prawna* [*Concepts fondamentals de la théorie du droit. Structure juridique et norme juridique*], 1924, p. 68 (italian edition p. 77).

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.
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-juridical) example of chess, and the (juridical) 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.[11]

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 exist between a *legal act* and the *juridical entities* produced through that act?) Znamierowski would answer with the *second claim* of an *eidonomic* theory of legal acts:

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

[11] Czesław Znamierowski, *Podstawowe pojęcia teorji prawa. I. Układ prawny i norma prawna*, 1924, p. 68 (italian edition p. 77).

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