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Values Underlying the Conventionalization of Law

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Abstract: **Values Underlying the Conventionalization of Law**
The article has two aims: firstly, to show that values underlie the conventionalization of law. Secondly, to show that values limit the risk of certain meaning rules of conventional acts being identified as meaning rules of legal conventional acts, which may lead to a blurring of the boundary between what is and what is not law. The conventionalization of law consists of three elements: the substrate of a legal conventional act, legal conventional acts, and the rules of meaning of legal conventional acts. The article argues that the meaning rules of conventional acts do not constitute individual natural acts, or conventional acts built upon those natural acts, but rather constitute social practice – a certain type of activity governed by a whole set of interrelated rules. Moreover, these rules are conventional in the sense given to them by A. Marmor. The article argues that the meaning rules constituting legal practice also constitute the values inherent to that practice. These are values that can be described as core, constitutive values of that practice. This makes it very difficult to classify certain meaning rules found in culture in the strict sense as belonging to legal practice, and the risk of blurring the boundaries of law thus appears to be minimal.

Keywords: Values, Constitutive Rule, Conventional Rule, Legal Conventional Acts, Meaning Rules of Conventional Acts, Stanisław Czepita.

Summary: 1. Introduction – 2. Formalization and conventionalization in law – 3. Meaning rules of conventional acts as conventional and constitutive rules – 4. Values and the conventionalization of law – 5. Meaning rules of conventional acts and the values of legal practice – 6. Conclusion.

1. Introduction

One of the fundamental scientific achievements of Stanisław Czepita, a representative of the Poznań School of Legal Theory, was drawing attention to the fact that the conventionalization of law consists of three components: the substrate of the legal conventional act, legal conventional acts, and the meaning rules legal conventional acts. Meaning rules of conventional acts, expressed in normative acts and other "written sources of law", are undoubtedly meaning rules of legal conventional acts. But it would follow consistently that the meaning rules of conventional acts contained in the accepted legal culture or more broadly in the culture in the strict sense are also meaning rules of legal conventional acts (e.g. a handshake). The meaning rules of a legal conventional act are, as it were,

necessarily embedded not only in the normative system that is the legal system, but also in language and culture. This could, according to Czepita, lead to a situation where the line between law and what is not law becomes dangerously blurred[1].

While I appreciate Czepita's observations on the conventionalization of law, I argue that the risk he identifies is minimal. For meaning rules, as rules constituting conventional acts, not only create individual natural acts or conventional acts of the first degree built upon them, then of the second degree, and so forth, but they also constitute social practice, that is, a certain type of activity governed by a whole set of interrelated rules. Furthermore, I argue that the meaning rules constituting complex legal conventional acts that make up a specific legal practice also constitute the values inherent to that practice. In other words, failing to take into account the values of legal practice undermines the essence of participating in the "legal practice game". I am referring to the values that can be described as the core values for this practice. This severely limits the possibility of classifying certain meaning rules found in culture in the strict sense as legal rules, and the danger Czepita identified thus appears to be minimal.

2. Formalization and conventionalization in law

One of the achievements of Czepita, a representative of the Poznań School of Legal Theory, was to draw attention to the importance of distinguishing between the formalization and conventionalization of law. Let us point out the main differences between them. The formalization of act C occurs when legal norms regulate someone's behaviour, formalizing it to some extent, but not constituting a conventional act. Formalization can apply to both natural and conventional acts. Czepita distinguished formalization by the designation of duty and formalization by the designation of consequences. The former consists in norm *N* imposing on subject P[2] the obligation to perform the act C[3] in this, and not another, way. An example of formalization is a norm that requires a room to be searched only between 6 AM and 10 PM, or a norm that requires a roadway to be at least 6 meters wide. The latter consists in the fact that if act C is performed in this way and not another, it gives rise to the obligation to perform a specific act by subject P or another subject. For example, if a party files a lawsuit using the appropriate form, the court is obliged to consider it.

Conventionalization of act C, on the other hand, consists in the rules requiring that the performance of act C in a certain way be assigned the meaning of

[1] S. Czepita, "Formalizacja i konwencjonalizacja w systemie prawnym", in O. Bogucki, S. Czepita (eds.), *System prawny a porządek prawn*y, Wydawnictwo Uniwersytetu Szczecińskiego, Szczecin, 2008, pp. 116 ff.
[2] Here, P derives from the Polish *podmiot* ("subject" or "entity").
[3] Here, C derives from the Polish *czynność* ("act").

performing conventional act Ck[4]. The essence of the conventionalization of act C is that performing an act otherwise than as provided for by the rules constituting a given conventional act Ck is not recognized as performing conventional act Ck. Additionally, the conventionalization of act C consists in the fact that act C is recognized as a conventional act Ck only when it is performed in specific circumstances, by a specific person and in a specific way. More broadly, conventionalization is essentially a function of the rules of the sense of conventional acts: a necessary condition for recognizing a specific natural act – performed in specific circumstances by a specific subject, as a given type of conventional act – is the validity of the corresponding meaning rule[5].

As Czepita points out, the recognition of act C performed in a specific way as a conventional act Ck is manifested: firstly, in the designation of conventional act Ck with a name different from the name of act C in a given language. We say, for example, that someone bowed rather than raised and then removed their hat; secondly, in attributing conventional Ck act to someone other than the person who performed act C; thirdly, in the indication, sometimes, of normatively designated, conceptually significant consequences for conventional act Ck – that is, consequences without which conventional Ck act would not have been occurred[6].

It is easy to see from the relationship between formalization and conventionalization that formalization can concern not only natural psychophysical acts, but also conventional acts. Moreover, to anticipate the argument, speech acts – and therefore conventional acts performed at the level of language in which legal provisions are formulated – are acts of legal significance. Legal conventionalization is, as it were, superimposed over conventionalization within the rules of the cultural system, particularly over language as the basic element of the cultural system presupposed by the given legal system.

Legal conventionalization, on the other hand, occurs when the rules for recognizing a given course of conduct as a legal conventional act are formulated in law: explicitly in legal provisions or as a specific element of legal culture. This means that the boundary between legal conventionalization and conventionalization within the cultural system presupposed by the given legal system is indistinct. In other words, normative regulation in the legal system overlaps with the informal and often imprecise regulation of cultural interpretation within a given culture, supplementing it, clarifying it or modifying it. In this way, it would have to be acknowledged that the legal system as a system of rules or norms must also include the rules constituting legal conventional acts contained in legal culture or more broadly in culture *par excellence*.

[4] Ck derives from *czynność konwencjonalna* ("conventional act").
[5] The concept of conventional acts was first formulated in Polish jurisprudence by L. Nowak, S. Wronkowska, M. Zieliński, Z. Ziembiński, "Czynności konwencjonalne w prawie", in *Studia Prawnicze*, 33 (1972), pp. 73-99.
[6] S. Czepita, "O koncepcji czynności konwencjonalnej w prawie", in M. Smolak (ed.), *Wykładnia konstytucji. Aktualne problemy i tendencje*, Wolters Kluwer Polska, Warszawa, 2016, pp. 137 ff.

As Czepita points out, legal conventionalization is most prevalent in private law, particularly in substantive civil law. This character applies to civil law constructions such as declarations of intent, legal acts, and void legal acts. Civil lawyers treat void legal acts as legal events that are not legal acts. Even traditionalists acknowledge that sometimes the defect of a legal act is so serious that it is not a void legal act, but not a legal act at all, just a legal event (e.g. making a statement of intent in jest). Of course, not every regulation is a form of conventionalization. For example, the requirement that a real estate sale agreement be drawn up in the form of a notarial deed – in accordance with established doctrine – remains an informal sale agreement, but does not produce legal effects. On the other hand, we encounter clear conventionalization in the case of essential elements of the content of legal acts (*essentialia negotii*) since the failure of a given act to meet any of the requirements indicated therein will determine that it is not a legal act of a given type[7].

In this approach to the conventionalization of law, its most important components should be pointed out: the substrate of the conventional act, conventional acts of legal significance, and the meaning rules of a conventional act. A legal conventional act (e.g. a handshake taken as the conclusion of an agreement) is performed through the performance of the act called the material substrate of that act. The object of a conventional act is always the act itself, not the result. In its simplest form, the substrate of a conventional act is a simple, uncomplicated psychophysical act, such as shaking hands. But what should be emphasised is that the substrate of a conventional act is usually a more or less complex natural act. Of course, the substrate of a conventional act can be a cultural act, and particularly a linguistic act (a speech act). Czepita drew attention to another important feature of the substrate of a conventional act, namely its complexity. This complexity is manifested in the following aspects: multi-levelness, aggregateness, sequencing, and stage-by-stage progression.

The multi-level nature of this process is that the natural act C is the substrate of the cultural act Ck_1 of the first degree, and the cultural act Ck_1 is the substrate of the conventional act Ck_2 *of the* second degree, and so on. For example, the emission of certain sounds is the material substrate of the conventional act of formulating a specific utterance in a given language, and the act of formulating a specific linguistic utterance is the substrate of the act of promising, apologizing, etc. The aggregation of the substrate means that the substrate of a conventional act of a given subject is sometimes not a natural act or a lower-level conventional act of the same subject, but an aggregate, i.e. a set of natural acts or lower-level conventional acts, and sometimes those of many different subjects. For example, the substrate of the conventional act of concluding a contract is a set of acts involving the submission of declarations of will by the parties, and sometimes other acts as well.

[7] S. Czepita, "Formalizacja i konwencjonalizacja działań w prawie", in S. Czepita (ed.), *Konwencjonalne i formalne aspekty prawa*, Wydawnictwo Uniwersytetu Szczecińskiego, Szczecin, 2006, pp. 9 ff.

Sequentiality, on the other hand, consists in the fact that the material substrate of a conventional act is sometimes a sequence of natural acts or lower-level conventional acts, i.e. a set of acts ordered in time. As a result, we are dealing not only with conventional acts performed at a specific moment, but also with conventional processes or procedures, such as judicial proceedings or legislative proceedings. The stage-by-stage progression associated with sequentiality consists in the fact that for many complex conventional acts, a preparatory stage, a central stage – which determines whether the conventional act has been performed – and a final stage can be identified, although the boundaries between the individual stages are often not precise. For example, in the case of a conventional act of adopting a resolution, the preparatory stage involves drafting the resolution and discussion, the central stage involves voting on the draft resolution of a specific content, and the final stage involves announcing the outcome of the vote.

The following example, provided by Czepita, illustrates the complexity of the material substrate of conventional acts. The conventional character of legal regulation in criminal proceedings concerns the sequence of certain proceedings as a whole and their ordering. For example, if a sequence of acts is performed before a body that is not a court at all because it consists only of non-judges – this sequence is not criminal proceedings at all, although proceedings taking place before a court lacking jurisdiction do become proceedings. As a result, certain conduct of the participants in the proceedings, such as filing an indictment, constitute procedural acts only if they are undertaken in the proceedings in a specific sequence. The issuing of a judgment in a criminal case is indeed a judgment if it concludes the trial proceedings, which in turn were preceded by preparatory proceedings. Of course, the indicated aspects of the complexity of the material substrate of conventional act are not mutually exclusive: they occur simultaneously, which is especially evident in the conventional procedures of social life, such as the legislative procedure. It must be strongly emphasised that criminal proceedings or legislative proceedings do not consist solely of conventional acts, but are a sequence of conventional and natural acts regulated by law and carried out by many subjects[8].

It is worth noting – as a marginal observation on the above – that there is a similarity between this understanding of the structuring of the material substrate of a conventional act and the formalization and subsequent institutionalization of the normative order proposed by N. MacCormick. The formation of a queue and one's place in it is not random but determined by a specific internal order. This queue order is not just a behaviour that can be analysed from an external point of view and subjected to statistical analysis. This order is a normative order, as people interact with each other based on mutual expectations (mutual beliefs) about how to form a queue, how they should behave in the queue (not pushing in, the last person stands at the end of the queue, etc.) and what conduct is expected on the basis of the rules of forming a queue. It is possible to reconstruct some idea of "orderliness" on this

[8] S. Czepita, "Formalizacja i konwencjonalizacja w systemie prawnym", cit., p. 114.

basis, which arises as a result of mutually shared beliefs and dispositions held by various people. Of course, the mere fact that a rule is established, for example by a railway station manager, regulating the way a queue is formed is not necessary for a normative order to emerge. In other words, even when there is no clearly established rule specifying how to form a queue and how to behave in one, people still know "how one ought to behave in a queue". Shared mutual beliefs are normative in nature, and the sheer number of people who act in accordance with mutual expectations about how we should behave makes them binding[9].

There are times, however, when it is necessary to formalize the normative order, or more precisely, to institutionalize it. And situations may arise where it is necessary to interfere with the formation of the queue – for example, the queue at the counter is managed by an electronic display that indicates, by displaying a certain number, who will be served and in what order. Different complications may arise – for example, if a person with ticket number 5 fails to appear at the window when their number is displayed, and a person with ticket number 4 appears instead. The above situation exemplifies at least two rule-governed practices; one is connected with the behaviour of those who indicate that the conduct in the queue is determined by the number display, and the other with the behaviour of those who, being in the queue, act accordingly. Of course, it may be necessary to establish further rules indicating who and how duties will be assigned to those who manage the queue. In other words, there is a social need to establish an institution whose task is to specify – by establishing clear rules (not through mutual expectations or social conventions) – the procedures for appointing and defining the scope of powers and competences of, for example, municipal office employees. In this way, the normative order of the queue becomes a formalized and institutionalized normative order of queuing. It is not difficult to notice that the emergence of the whole set of acts that make up the material substrate of conventional acts adequately reflects MacCormick's account of the emergence of an institutionalized normative order[10].

3. Meaning rules of conventional acts as constitutive and conventional rules

Czepita's observation regarding the complexity of the substrate of conventional acts gives rise to the following thought: the meaning rules of conventional acts do not create individual natural acts or those conventional acts of the first degree built upon them, then of the second degree and so forth – acts which make up the sequence and stage-by-stage progression of acts, but rather constitute social practice, that is, a certain type of activity governed by a whole set of interrelated rules. Of course, the status of this practice is not related to the characteristics of the

[9] N. MacCormick, *Institutions of Law. An Essay in Legal Theory*, Oxford University Press, Oxford, 2007, p. 18.
[10] *Ivi*, pp. 31-32.

participants in this practice (there may be many people who are participants in criminal proceedings, and they may differ from each other). Moreover, the meaning rules of conventional acts, taken as rules constituting a given legal practice, also constitute the structure of the material substrate of the conventional act, structuring it in the form of multi-levelness, aggregateness, sequentiality and stage-by-stage progression. With relation to the above example of criminal proceedings, the meaning rules of conventional acts, taken as rules constituting a given legal practice, would structure acts within the framework of the trial proceedings, preparatory proceedings, and proceedings before a criminal court, each taken as an individual legal practice.

This thought would be justified if it were possible to demonstrate that the meaning rules of conventional acts have a constitutive character and, moreover, a conventional one. Let us recall that, according to Searle, regulative rules regulate existing forms of behaviour, whereas constitutive rules do not regulate behaviour, but create or define new forms of behaviour. It would be natural to consider that coordinating rules are regulative rules. The regulative rule usually takes an imperative form: do X, or if you do X, then do Y. By contrast, Searle's constitutive rule takes the following form: X in circumstances C counts as Y. Despite the difficulties in identifying a clear distinction between the two types of directives, Searle made a discovery of great importance. In Marmor's view, however – which I share – constitutive rules do not create an act, or even a set of acts, but rather create social practice: a certain type of activity governed by a whole set of interrelated rules. Consequently, constitutive rules are those that constitute a specific type of activity known as social practice. As Marmor observed, there are many rules that are constitutive rules, precisely because their main function is to constitute social practice and regulate behaviour within it. In other words, these rules constitute structured activities. In this context, it is worth drawing attention to another important distinction. For example, the rules that constitute the game of bridge indicate who wins and who loses the game, and what moves are allowed and what are forbidden. One could say that they formalize the game of bridge. But more importantly, they also constitute the game itself. The rule that dictates how a bidding auction is conducted in bridge also defines what the game is. In other words, constitutive rules are part of the game and at the same time introduce new facts in the context of that practice. It is not difficult to see that, for example, a single meaning rule – for example, "a holographic will must be written by hand, dated, and signed" does not in itself constitute legal practice. It is a set of interrelated meaning rules that constitutes legal practice. The meaning rules of conventional acts, taken as constitutive rules, indicate what the practice is and regulate the acts undertaken within the framework of that practice. Of course, a necessary element of constituting legal practice is the existence of conscious intentional states (collective intentionality) on the part of those who assign a specific function to states of affairs, objects or practices. For example, the requirement that a will governs universal succession is interpreted by civil law scholars as deriving from the Roman conception of a will as a disposition of one's entire estate upon death.

In light of the above observations, the following question arises: would the meaning rules of conventional acts, understood as constitutive rules, constituting legal practice, also be conventional rules? If so, this could explain why so many meaning rules of conventional acts become meaning rules of legal conventional acts. For example, when entering into an adhesion contract, a mere nod of the head counts as concluding the contract, and likewise the placement of the exact sum of money on a tabletop also counts as concluding the contract.

Certainly, in the light of D. Lewis's concept of the conventionality of rules, which links their conventionality to the solution of coordination problems, the meaning rules of a conventional act constituting legal practice would not have a conventional character[11]. However, in the light of Marmor's more "moderate" conception of the conventionality of rules, constitutive rules can be attributed the quality of arbitrariness and therefore conventionality. According to Marmor, there are three facts that support the arbitrary and therefore conventional character of the meaning rules of a conventional act. Firstly, human needs and desires, which are then expressed in constitutive rules, do not determine the content of the rules themselves. Our social need to create and then participate in the game of bridge, for example, does not determine the content of the rules themselves regarding, for example, the course of the bidding. Secondly, the reasons for participating in a given practice depend on the fact that the practice already exists and that the rules of the given social practice are applied by a given population. Without that degree of agreement among the members of the relevant population about the application of the rules constituting a given practice, there is no social practice. Thirdly, there are other specific reasons in favour of applying alternative rules, which a given population applies in its practice without thereby losing the essential function or purpose that these rules fulfil for that population[12].

Marmor presented this thought in the following argument related to the rules constituting the game of chess. Rule S1 is arbitrary and therefore conventional if it meets the following conditions:

1. There is a community A that applies rule S1 in context C;

2. There are specific reasons for community A on account of which rule S1 is applied in context C;

3. There is an alternative rule S2 that a given community would apply in circumstances C if there were sufficient reasons to apply rule S2 instead of rule S1, at least for the reason that rule S2 is more widely applied than rule S1[13].

[11] D. Lewis, *Convention, A Philosophical Study*, Oxford University Press, Oxford, 1969, pp. 76-80; pp. 104-105.

[12] A. Marmor highlights the difficulties involved in grounding the relationship between rules and social practice without taking into account the collective understanding, within the relevant community, of what the rules are for, what the essence of that practice is, and the fact that when people engage in a given practice, they take into account the reasons underlying that engagement, reasons which reflect the values and aims associated with that activity. Cfr. A. Marmor, *Foundations of Institutional Reality*, Oxford University Press, Oxford, 2023, p. 78.

[13] A. Marmor, *Social Conventions*, Princeton University Press, Princeton-Oxford, 2009, p. 42.

Based on the above characteristics of the conventionality of Marmor's constitutive rules, I take the view that the meaning rules of a conventional act have a conventional character. Let us consider the above-mentioned conditions one by one. The first condition: there is a community that applies S1 rules in circumstances C. Does the above example meet this condition? In my opinion, it does. For example, there are lawyers who take the view that the rule requiring a real estate sale agreement to executed in the form of a notarial deed on pain of absolute nullity is a constitutive rule for that act. However, it should be noted that there are also lawyers who take the view that the meaning rule of a conventional act gives the act the character of formalization rather than conventionalization.

Let us recall the second condition: there are certain reasons for population A on account of which it applies S1 rules in context C. It is worth noting at the outset that the reason for applying a given meaning rule of a conventional act is to assess whether acting in accordance with that rule realizes or expresses certain values. Of course, the conventionality of this rule is not contingent on awareness of the reasons for which the rule is applied. Subjects may apply a given rule for various, often inconsistent and ill-founded reasons.

Let us move on to the third condition: there are alternative S2 rules that the community would apply in circumstances C if reasons A were sufficient grounds for applying S2 rules instead of S1 rules, at least on the grounds that S2 rules are more widely applied than S1 rules. This third condition is clearly met. There are rules that could serve as alternatives to one another[14].

The question that could be formulated at this point is as follows: what if the alternative meaning rules of conventional acts are different from those previously applied to such an extent that it can reasonably be claimed that this is not a legal practice, but a completely different practice – for example, a research practice consisting in describing whether and how given subjects apply the meaning rules of conventional acts. The answer is that if these rules are significantly different from those constituting legal practice, it is no longer a "game" in legal practice. Marmor draws attention to the fact that only significant changes matter here, since insignificant changes to the rules do not mean that one is playing a completely different game. The rules of the game of bridge often change – altering the rules of the bidding or the play – without changing the essence of the game of bridge. The same applies to the meaning rules of a conventional act. As long as one is able to identify alternative meaning rules of conventional acts without significantly losing the essence of the "game" of legal practice or the function of these rules, and the reasons for their application are mutually shared by the community of lawyers, the meaning rules of legal conventional acts are arbitrary, and therefore conventional[15].

[14] M. Smolak, "The Application of Juristic Concepts in Legal Reasoning", in V. Klappstein, M. Dybowski (eds.), *Languages of the Law. Vocabularies and Uses*, Springer, Cham, 2025, pp. 205-206.
[15] A. Marmor, *Social Conventions*, cit., pp. 43-44.

These findings are only possible if one adopts a conventional perspective. Legal practice is a conventionalized social practice, and its emergence is not causal in character, but conventional. Therefore, there are no limits to introducing new legal practices. We can change our legal practices according to our normative needs. As long as we are able to apply alternative rules that would essentially achieve the same goal for the relevant legal community, there should be no problem with attributing an arbitrary character to them as a consequence of their conventionality. This would mean that the risk Czepita mentioned is minimal. As long as we are able to identify alternative meaning rules for conventional acts to those that a given population applies in its social practice, without losing the essential function or purpose that these rules fulfil, and the reasons for applying the alternative rules are mutually dependent (compliance dependent), one cannot deny them their arbitrariness and therefore conventionality. A conventional legal practice may exist even if the participants in that practice differ with regard to the duties disclosed within that practice or with regard to the goals that that practice should realize[16].

Let us add, parenthetically, that legislative, criminal, civil or procedural proceedings are not solely composed of conventional acts, but consist of sequences of conventional and natural acts regulated by the law governing legislation, criminal procedure, or civil procedure, and carried out by many subjects. This suggests that the text of legal acts presupposes both raw facts and institutional facts. By way of example, the raw facts presupposed in a legal text include fruit, fish and honey. However, the institutional fact is that fruits, fish and honey are natural products of property. Similarly, buildings and land referred to in a legal text count as immovable property, and documents and fingerprint traces count as evidence. Finally, in terms of constitutive artefacts, stones placed on the boundary of a property are constitutive artefacts that do not regulate behaviour, but indicate what behaviour should be adopted, for example, that one should not cross the boundary of the property[17].

[16] *Ivi*, pp. 36 ff.

[17] Cfr. J. Hage, "Rules and the Social World", in *L'Ircocervo*, 21 (2022), n. 2, p. 34; G. Lorini, S. Moroni, O.G. Loddo, "Regulatory Artifacts: Prescribing, Constituting, Steering", in *International Journal for the Semiotics of Law*, 36 (2023), pp. 215-216; M. Smolak, "Kilka uwag do artykułu Maurycego Zajęckiego, Presupozycje surowe i instytucjonalne: próba poszerzenia koncepcji presupozycji tekstu prawnego Marka Smolaka", in *Ruch Prawniczy Ekonomiczny i Socjologiczny,* 75 (2013), n. 2, p. 283. A. Marmor notes that all institutional facts are social facts, but not all social facts are institutional facts. Examples of such facts include taking a walk together or cooking together. A. Marmor, *Foundations of Institutional Facts*, cit., p. 5. J. Hage, in turn, indicates that for social facts to exist, they must be recognized on two levels: a particular state of affairs must be recognized as social and, in addition, that state of affairs must be recognized as actually existing. Cfr. J. Hage, *op. cit*., p. 24.

4. Values and the Conventionalization of Law

If it is accepted that the meaning rules of conventional legal acts are responsive to various human needs and values – then the values that are significant for those participating in these practices underlie legal practice thus understood. Therefore, it should be accepted that the foundation of any social practice lies in social needs or values, which are the seeds of the creation of that practice. Values or needs are then realized within a given social practice created by constitutive rules. Moreover, rules do not constitute individual acts, but rather a specific type of activity, namely social practice. Social practices can only be properly understood if – alongside the rules that constitute them – we take into account the full complexity of those practices, together with the values that underpin the legal practice thus understood. The suggestion thus emerges that the meaning rules of conventional acts that constitute legal practice also constitute the values inherent to that practice (though each rule taken separately does not constitute a value). And just as the set of rules for the game of bridge constitutes values that are characteristic of that game, such as intellectual challenge, conviviality, enjoyment, and the development of predictive skills, the set of meaning rules of conventional acts constituting legal practice gives rise to values such as the coherence of analytical thinking, the appropriateness of reasoning by analogy, and the ability to argue syllogistically or topically[18].

Whilst appreciating this axiological dimension of the constitution of legal practice, I wish to draw attention to yet another – in my opinion more significant – aspect of it. Let us note that social practice does not merely involve performing acts in accordance with the content of given rules. To be more precise, there must be a reason or a set of reasons behind the decision to undertake a given act. Reasons are facts that we take into account when we want to undertake some act, or facts that speak against undertaking certain acts. Reasons are therefore closely related to values. The reason for undertaking a given act derives from the fact that the act is valuable or that it leads to some valuable goal. Values or needs are then realized within a given social practice, both through formalization of law and through its conventionalization. The rule that requires everyone except the presiding judge to stand up formalizes proceedings, taking into account the value of respect for the verdict issued on behalf of the state. The norm that requires a holographic will to be written by hand, dated and signed constitutes the act of making a will, taking into account the value of certainty in legal transactions. However, the difficulty

[18] Having regard to the types of constitutive rules – conventional rules and institutional rules – two types of social practices may be distinguished: conventional practices and institutional practices. Conventional practices include such games as bridge, chess, and football, but also theatrical and operatic performances, behaviour at the table, and ways of writing letters, whether private, official, or formal. Institutional practices, by contrast, include the application of law by courts, legislative activity, academic activity, the activity of political parties, and the activity of religious associations. Cfr. A. Marmor, *Social Conventions*, cit., p. 35.

consists in adequately specifying the relationship between the meaning rules of conventional acts that constitute legal practice and the values on account of which acting in accordance with those rules is desirable for those engaged in that practice[19].

To suggest a possible explanation for this relationship I propose distinguishing between two types of values: values in the strong sense and values in the weak sense. Values in the strong sense are values whose realization within a given established legal practice is independent of any context. In other words, failing to take into account values in the strong sense within legal practice undermines the point and destroys the essence of participating in the "legal practice game". I am referring to the values that can be described as core values of this practice. I will give two examples to illustrate this point. Legal acts undertaken by actors as part of a theatrical performance cannot infringe on values in the strong sense of legal practice, since these acts are elements of a different social practice from legal practice. The same applies to the conduct of a historian who studies legislative materials. This conduct cannot infringe upon the values of legal practice in the strong sense, since this conduct is an element of a different social practice from legal practice.

Values in the weak sense are values whose realization within a given established legal practice is dependent on the social, axiological or cultural context. Legal practice does not merely involve performing acts in accordance with the content of a given rule. Social practices also have their basis in social needs, in values, and in the functions they perform for those participating in them.

As a result, lawyers perform legal acts in accordance with the content of the meaning rules of conventional acts because the legal practice in which they engage realizes specific values both in the weak and the strong sense. One cannot fail to notice that such and not other characteristics of values in the strong and weak sense identify those values with the goals of legal practice. Such an approach is justified by the fact that the status of a constitutive value is attributed to values that have no material or physical referent, their existence being reducible to the occurrence of normative consequences, that is, to serving as reasons for applying the meaning rules of conventional acts.

Based on the distinction between values in the weak and strong senses drawn above, I arrive at the following conclusion. If we accept that, firstly, reasons are facts that we take into account when we wish to undertake a given action; and secondly, that they are closely related to values, in the sense that the act is valuable or leads to some valuable goals, then we must accept that values in the weak and strong sense are reasons for the lawyer's conduct of being guided by a specific rule. The application of the meaning rules of conventional acts is mandated not only by the content of these rules, but on account of the fact that acting in accordance with

[19] M. Smolak, "Konstytutywny i konwencjonalny charakter dyrektyw wykładni prawa", in *Archiwum Filozofii Prawa i Filozofii Społecznej*, 43 (2025), n. 2, pp. 91-93.

these rules is valuable since they realize values in both the strong and weak sense. Importantly, the meaning rules of conventional acts that constitute legal practice also constitute the values inherent to this practice[20].

5. Meaning rules of conventional acts and the values of legal practice

Against this backdrop, two further questions arise: which rules defining the normative situation of the subject performing a conventional act are so closely related to that act that their absence means it is not a conventional act of that type? What factors determine that for a conventional act of a given type, precisely these rules are conceptually associated with that act, while others are incidental? Is this determined by some a priori essence of a particular type of conventional act of legal significance (in the manner of A. Reinach) or are these factors the result of a cultural tradition that happens to be this way and could be otherwise? I am inclined to believe that cultural tradition is decisive here, and since people always function within a given culture, the rules that are essentially, and consequently conceptually, bound up with conventional acts are those determined by factors present in every culture, and more specifically by the values of a legal practice originating in a given legal culture[21].

The question then arises whether the fact that the meaning rules of a legally significant conventional act are linked to the act itself can be connected with values? Let us turn to the institution of *essentialia negotii. Essentialia negotii* (the objectively essential elements of the content of a legal act) are the fundamental elements of a contract, defining its type and nature (e.g. the object of the sale and the price in a contract of sale). Their absence means that the contract is void or does not come into effect. For example, in a contract of sale, the objectively essential elements are, on the one hand, the obligation to transfer ownership and deliver the item, and on the other hand, the obligation to pay the price. Others, however, point out that an essential element of the content of a legal act is the specification of the deadline for performance of the obligation.

In response to the above question, it is worth noting that the rationale for applying the rules in question rests on the fact that these rules exist and are applied by the relevant population. Recourse to these rules rather than other meaning rules

[20] *Ivi*, p. 94.

[21] Cfr. O. Bogucki, S. Czepita (eds.), *System prawny a porządek prawn*y, cit., pp. 116 ff.; G. Lorini, O.G. Loddo, "Legal Objects: Essence and Existence", in B.C. Hopkins, J.J. Drummond (eds.), *The New Yearbook of Phenomenology and Phenomenological Philosophy. Reinach and Contemporary Philosophy*, Routledge, London, 2023, p. 53. The authors provide an excellent example. The fact that an unsigned holographic will is invalid is not a matter of empirical fact. Mere observation of such a will tells us nothing about its validity or legal significance, nor does it verify whether the statement "this will is invalid" or, still less, "a holographic will must be signed" is true. This relation between the signature and the validity of a will is neither a relation of ideas nor a matter of fact, but a matter of law.

of a conventional act is normatively significant, not only on account of the values that are significant for this type of activity, but also because a connection exists between those values and the meaning rules of a conventional act. This connection is established by members of the legal community on the basis of their mutual expectation that this meaning rule best realises the value of the legal practice in question. The application of the meaning rules of a conventional act in legal practice is mutual (that is, it is based on the exchange of values between participants in the so-called "social practice game"). As can be seen, this social practice is based on knowledge, which includes information addressed to all members of the legal community, about which rule to apply in order to realize a specific constitutive value. The effectiveness of applying the meaning rules of a conventional act is strictly dependent on respecting the mutual expectations of the community regarding the significance of values for legal practice[22].

The following concern arises at this point. Imagine that the legal system provides for the institution of *essentialia negotii* in contracts, but no one makes use of it. Are we prepared to say that the statement "there is an institution of *essentialia negotii* in a given society" is false in such a case? Let us consider two extreme situations: the first, in which no one in a given country enters into contracts, but the rule of entering into contracts in a given way (and the consequences associated with it) is widely accepted in society, and the second, in which members of the legal community do not widely accept the rules of entering into contracts in a given way (and the consequences associated with them) as set out in the legal text.

The question arises as to what exactly is meant by the claim that "the application of the meaning rules of a conventional act" is strictly dependent on respecting the mutual expectations of the community as to the significance of values for legal practice. The requirement is not absolute. It does not mean that all members of the community must accept the rule. If even one person did not accept the meaning rule, they would cease to be a member of the Searlean intentional collective – and as a result, would begin living in a "different world" and in a community other than the original one.

In the second case, it is natural to regard the institution of *essentialia negotii* as non-existent. It is worth distinguishing two possibilities: the institution of *essentialia negotii* of the contract may be "not accepted" due to a lack of knowledge or may be consciously "reinterpreted". The first case is straightforward: a lack of widespread knowledge that certain rules are assigned the status of meaning rules means that such an "institution" simply does not exist (it becomes a "dead letter of the law")[23]. The second case concerns a permanent dispute over the scope of application of a given meaning rule, as a result of which it becomes an unacceptable

[22] E. Lagerspetz, *The Opposite Mirrors. An Essay on the Conventionalist Theory of Institutions,* Kluwer Academic Publishers, Dordrecht-Boston-London, pp. 141-146.

[23] M. Zajęcki, "Presupozycje surowe i presupozycje instytucjonalne: próba poszerzenia koncepcji presupozycji tekstu prawnego Marka Smolaka", in *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 75 (2013), n. 2, p. 276.

rule. An example of such a rule is the rule which indicates that a contract is concluded if the content of the contract specifies the characteristics of the object of the agreement. However, it should be noted that when I referred to intentional beliefs, common knowledge or shared belief as a condition for accepting a given meaning rule governing an act, I meant an assumption with a metaphysical connotation – as J. Searle put it – rather than a strictly empirical one[24].

6. Conclusion

The meaning rules of conventional legal acts constitute legal practice. The identity of this practice undoubtedly depends largely on these rules. Moreover, these rules are conventional in Marmor's sense. As long as we are able to identify alternative meaning rules of conventional acts without significant loss of the essence of that practice, and the reasons for applying alternative meaning rules of conventional acts are mutually dependent (compliance-dependent), those rules are arbitrary, and therefore conventional in the sense indicated above. At the basis of any social practice are human needs and values significant for the people participating in it, and these values are realized by rules formalizing legal practice and rules constituting social practice. Two types of such values can be distinguished: values in the strong sense and values in the weak sense. Values in the strong sense are values whose realization is acontextual – that is, independent of any context of a given legal practice. In turn, values in the weak sense are values whose realization is contextual – that is, dependent on the context of a given legal practice. More significantly, the meaning rules constituting legal conventional acts which make up a specific legal practice also constitute the values inherent to that legal practice.

As Czepita observed, conventional acts – including conventional acts in law – are necessarily embedded not only in the normative system that is the legal system, but also in culture. What, then, does this embedding consist in? The point is that culture encompasses not only the rules of cultural interpretation as rules that establish the conditions for recognizing an act C performed by a relevant subject, in a relevant situation, in a relevant way as a cultural act *Ck* of a given type, but also the value systems pertaining to cultural acts and the states of affairs constituting their consequences as the meanings of those acts and states of affairs. Culture also includes specific normative beliefs about how to conduct oneself in the sphere of cultural activities and products, and therefore norms of conduct axiologically grounded in those values – although such norms are usually informal and non-institutionalized. Normative regulation in the legal system overlaps, as it were, with the informal and often vague regulation of the cultural interpretation of a given culture, supplementing, clarifying or modifying the latter. If so, it would follow

[24] A. Marmor argues that a metaphysical grounding of collective intentions is possible. See A. Marmor, *Foundations of Institutional Reality*, cit., pp. 42-49.

consistently to acknowledge that the legal system as a system of rules or norms must also include the rules constituting legally significant conventional acts contained in the legal culture or more broadly in the culture *par excellence*. As Czepita pointed out, in such a situation, there is a serious risk that the line between what is law and what is not law becomes blurred[25].

As I argued earlier, this danger is limited by the fact that the meaning rules of conventional acts in law also constitute the values inherent to this legal practice. Failing to take into account the values of legal practice destroys the essence of participating in, for example, a "game of criminal proceedings". This makes it very difficult to classify certain meaning rules contained not in the legal system – for example in civil law – but in culture in the strict sense, and the risk mentioned by Czepita seems to be minimal.

As I mentioned earlier, these findings are only possible if one adopts a conventional perspective. As long as we are able to apply alternative rules that would substantially achieve the same goal for the relevant legal community, there should be no problem with attributing an arbitrary character to them as a consequence of conventionality. However, two assumptions must be accepted in the context of legal practices: firstly, the reasons for applying the meaning rules of legal conventional acts are mutually dependent on their application by other members of the same community, and secondly, legal practice should realize values both in the weak and strong sense, but above all the values inherent to that practice[26].

[25] S. Czepita, "O koncepcji czynności konwencjonalnej w prawie", cit., pp. 145-146.
[26] M. Smolak, "Konstytutywny i konwencjonalny charakter dyrektyw wykładni prawa", cit., p. 94.