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**THE NON-SCALABILITY OF THE CONCEPT OF LAW—A
REPLY TO THOMAS SCHULTZ**²

The thesis of the non-scalability of the concept of law put forward by Professor Thomas Schultz is under the scrutiny in this paper. The major weakness of the thesis is that the emergence of transnational normative regimes question the old paradigm of the concept of law. The deterritorialization of the legal mode of domination blocks the possibility of fixing the (indisputable) necessary and sufficient conditions which constitute the concept of law and which are the prerequisites for the justification of the non-scalability thesis. The author thinks that we need another sort of methodology to describe the problem.

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Keywords: non-scalability of law, threshold, internal morality of law, deterritorialization, concept and conception, necessary and sufficient conditions

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Introduction

Last year Professor Thomas Schultz published the book "Transnational Legality", in which he raised a vast number of strikingly interesting issues.³ It is no exaggeration to say that Schultz has written a marvellous book. In this paper I will concentrate on only one of the issues raised: the thesis of the non-scalability the concept of law. The following is a critical assessment of the thesis.

Schultz begins with the thesis that some concepts are scalable and others are not. For example the concept of "baldness" is scalable, because "baldness comes by degrees: one can be more or less bald, or bald to a greater or lesser extent."⁴ Whereas the concept of a house or a chair is not scalable: "A chair [...] is a chair or it is not, but a given chair cannot be twice a chair as another one."⁵ The concept of law is non-scalable according to Schultz.

Even if some elements of the concept of law are scalable, this does not mean that the concept is scalable too.⁶ A non-scalable concept, Schultz argues, always has a sort of a threshold⁷, by which a concept acquires its meaning. X can be X or non-X, never "more or less X".

Arguing against Lon Fuller's viewpoint that "law is like education: if you ask whether education exists in a given country, the answer would hardly be yes or no. It would rather be a description of the achievements in this respect,"⁸ Schultz notes: "The addressee of the question about education necessarily would speak of achievements because the obvious answer to the question is yes. The question would then be reinterpreted as asking how good the education system is, which is a different question entirely. The dichotomous question about the presence of education can only fairly be asked, in its true meaning, to a chimpanzee specialist, for instance, to inquire about the presence of an educational system in ape communities. There the answer may well be yes or no, or some other reply expressing degrees of clarity. In this latter situation, the question would be about X itself, whereas in the situation envisaged by Fuller, the question is about the purposeful enterprise of doing X."⁹

³ Schultz T. Transnational Legality. 2014.

⁴ Schultz, P. 68.

⁵ Ibid.

⁶ Schultz, P. 69

⁷ Let's call it "the threshold thesis".

⁸ Ibid.

⁹ Ibid.

Similarly, scalability cannot be "inferred from the gradualness of the evolution of normative systems."¹⁰ Schultz writes: "The physical phenomenon of water becoming water vapour is gradual: the thermal motion of water molecules increases, gradually, up to the point where the kinetic energy overcomes the surface tension and molecules evaporate. But of course this does not imply that the concepts of water or water vapour are obtained by degrees. Even though the transition from one state to the other has a scalable component (speed), each of the two states are non-scalar. The evolution reaches a threshold and then the difference in degree becomes a difference in kind."¹¹ "As Matthew Kramer argues, for the threshold of legality, a legal system may admit of various degrees not of legality, but of "straightforwardness," "robustness," or "vibrancy," which determine how "full blown" it is."¹²

At the same time, Schultz refuses to fix and formulate the threshold. More than that, he seems to think it to be currently impossible: "The preceding paragraphs are not meant to imply that a clear threshold distinguishes social normative systems from legal systems. On the contrary, it seems that it is not possible to position such a threshold precisely. It seems that it is merely a "rough and shifting minimum" as Ronald Dworkin said, an "unspecifiable threshold" as Matthew Kramer puts it. The boundaries of legality, these authors contend in essence, are unspecifiable, and I would tend to agree. Where I do not agree with Dworkin is when he considered that, within this zone of unspecifiability, legality is scalar, while outside it, it is not. Indeed, it seems odd to consider that law is, at certain stages of its development, a scalar property and, at other stages, a non-scalar property. The degree of development of a concept's instantiation does not change the nature of the concept."¹³

It seems as if this particular issue—the scalability of the concept of law—were not the focus of Schultz's attention. That is probably the reason why the reasons invoked for the non-scalability thesis explicitly are rather commonsensical.

The non-scalability thesis plays a very important role within Schultz's discourse, given the content of the whole book. With considerable risk of simplification, one can recapitulate the Schultz's point as the following. Schultz claims that transnational legal regimes have some important qualities of legal systems, but lack others. That's the basic reason why it is crucially

¹⁰ *Schultz*, P. 70.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Schultz*, P. 71.

important to deny the scalability of the concept of law to deny the legal character of transnational normative regimes.

This basic intricacy with the defence of the non-scalability thesis leads to a twofold analysis. First, I comment on the formal arguments for non-scalability. Then, I turn to the heart of the matter—non-scalability in a wider context. My first claim here is that non-scalability requires a realistic concept of truth and a set of necessary and sufficient conditions. The second thesis is that currently we are unable to formulate such a set of conditions for the concept of law. The third thesis is that Schultz himself seems to tacitly acknowledge this. Fourthly, I will try to elucidate the real problem that lies behind this.

I. Non-Scalability of the Concept of Law

What makes some concepts scalable and other not? Schultz does not answer this question, as if the answer was evident. Two examples, "baldness" as the scalable concept and "house" as non-scalable concept, leave much doubt—remember the sorites paradox. Most importantly, Schultz assumes as self-evident that the concept of law is an article of non-scalable concepts. But one cannot assume the thesis which is to be proved.

The scalability of the elements of the concept does not imply the scalability of the concept itself. Is this a common sense platitude or a priori synthetic judgment? The sole justification is that the scalability of the size requirement (quantity of pages) does not make the concept of novel scalable. But the concept of a novel does not depend entirely on the size of a novel. The size is not what makes a novel, a novel. The point is, there is not a "threshold" number of pages, but other conditions that constitute the concept of novel

The example with education, which Schultz uses against Fuller is extremely revealing., some threshold condition makes the concept education. Above this threshold education can be better or worse.

The basic problem with the threshold theory is the sort of semantic theory it implies. It is not completely clear what the real meaning of the threshold requirement is. It is quite plausible to interpret it here in the sense that there are certain necessary and sufficient conditions for the concept of law. However, some conceptual and pragmatic difficulties occur.

Primarily, one should be unambiguously aware of what these necessary and sufficient conditions are. The current situation with the concept of law is far from that unambiguous awareness.

The possible answer to that although any given concept is disputed, it does not necessary imply that there is no right answer. One should distinguish between truth and the human

epistemic capacities to achieve it. This is the so-called realistic concept of truth. When applied to our issue, a commitment to the realistic concept of truth means that notwithstanding epistemic difficulties, there are some necessary and sufficient conditions jointly constituting the concept of law. Even if we cannot list these conditions for now, they exist independently of our current epistemic capacities. Using this methodology one can save "the threshold thesis" in a state of epistemic uncertainty.

Nevertheless, the practical obstacle remains. There are some necessary and sufficient conditions constituting the concept of law, but we do not know for sure what exactly are they, because there are several rival theories. How can we define the threshold, which discriminates law from non-law under these circumstances? The mere fact that the threshold exists somewhere independently of the competing theories does not help. In that case, every competing theory of law would describe the threshold in its own way. Practically, that will mean that there is no threshold at all. The Hartians will argue that the threshold consists in the secondarity (the test for a legal system is the existence of secondary legal rules).¹⁴ The Dworkinians will state the most salient feature of law is a way it limits state coercion.¹⁵ The Fullerians will argue that "the inner morality of law" is the constitutive condition.¹⁶ In each case the threshold thesis has entirely different content. Being applied to existing normative regimes (state or non-state), this will result in radically non-convergent descriptions.

Through the pragmatic lens the epistemic situation of the "threshold thesis of alternative content" is not dramatically different from the epistemic situation of the gradualism, rejecting the threshold thesis. In both cases we cannot list the conventionally indisputable necessary and sufficient conditions distinguishing law from non-law.

In and of itself, this will not discredit the theoretical cogency of the threshold thesis. One can say that this uses the only right theory of law and the only truthful description of the threshold. But in that case the epistemic success of the stipulation will depend on the assumption of the cogency of the particular theory of law. Within the current highly competitive and extremely volatile environment of the present day legal theory, this is a heroic assumption.

The fact is that Schultz himself is rather hesitant to formulate the necessary and sufficient conditions of the concept of law (which is the prerequisite to the threshold thesis). He is extremely cautious in this regard. He tackles the issue in the context of understanding the nature of transnational (non-state) normative regimes. The issue is analysed from two basic viewpoints.

¹⁴ *Hart H. L. A. The Concept of Law. 1961; Raz J. Authority of Law. 1979.*

¹⁵ *Dworkin R. Law's Empire. 1986.*

¹⁶ *Fuller L. Morality of Law. 1969.*

The first viewpoint stresses the structural aspects of any normative regime. The second viewpoint fixes some minimal requirements to its content.¹⁷

The structural issues can be regarded as a set of conditions necessary to qualify a given normative regime as a legal system. Schultz equates structural conditions with the concept of secondarity. This is a very interesting synthesis of the Hartian idea of the secondary rules regarded through the lens of the functional methodology, and system theory with direct reference to Paul Bohannan¹⁸ and Niklas Luhmann.¹⁹

Grossly simplifying, the emergence of legal systems is considered to be the result of the functional differentiation of human societies. It implies the specific institutionalization, automation and the normative closure of the emergent normative regime. Schultz treats the phenomenon of secondary rules as a sign of necessary institutionalization and differentiation. Interestingly enough, Schultz ascribes to the *lex mercatoria* the quality of a legal order from the structural viewpoint.

The real problem emerges with the second perspective of the minimal requirements for the content of transnational normative regimes. The minimal content requirements are designed according to Lon Fuller's model of the eight components of the internal morality of law. Being applied to *lex mercatoria*, the model demonstrates that it cannot qualify as a legal system mainly because its inability to guarantee a necessary degree of predictability and stability. The most interesting thing in that is not the final negative verdict, but the author's reticence with regard to the question of whether we can attach to Fuller's eight requirements of internal morality of law the status of a set of conditions necessary to qualify a normative regime as a legal system.

In direct contrast to the structural requirements which are explicitly regarded as indispensable, the eight components are not. At least, not completely.

Schultz seems to be extremely ambiguous in this regard. On the one hand, there are signs of his allegiance to a purely structural Hartian perspective. On the other hand, sometimes he considers that law is not simply a highly institutionalized normative regime, but a *just* normative regime, which implies some minimal requirements. At the same time, he never explicitly states that these requirements are necessary.

It seems as if Schultz himself is hesitant to name the necessary and sufficient conditions of the concept of law, even in his own version.

¹⁷ Schultz, Ch. 7 and 8. See also an earlier paper of the author: Schultz T. Some critical comments on the juridicity of Lex Mercatoria in: Yearbook of Private International Law Volume 10 (2008), P. 667 -710.

¹⁸ Bohannan P. The Differing Realms of the Law // 67 American Anthropologist (1965).

¹⁹ Luhmann N. Das Recht der Gesellschaft. 1995.

A possible explanation is that Schultz adheres to the Fuller's own view of the formal insubstantive character of the eight requirements. Fuller's idea is elegant: to be effective legal rules must be "general, open, prospective, clear, consistent, stable, capable of being obeyed, and upheld by officials"²⁰, irrespective of their content. In that case, we can regard the internal morality of law as a ramification of its structural properties. This will mean that we can simply add the eight requirements to the set of conditions necessary to qualify given normative regime as legal.

The problem is that we can easily imagine state normative regimes (which are conventionally regarded as legal in any case) partially or completely devoid of some or all components of internal morality. Why should we impose on non-state normative regimes more severe restrictions, than are applied to their state counterparts? Recently, John Gardner cast doubt on the formal character of these requirements.²¹

Schultz himself is fully aware of that, as he strictly delineates "the external identity of law" (structural components) from "the internal identity of law" (internal morality) not only with regard to their content, but also due to the different types of justification of their importance.

The structural requirements of the external identity of legal normative systems enable us to discriminate between more coherent, hierarchical, formal and rational legal normativity, on the one side, and defuse, substantive and syncretic non-legal normativity of pre-legal societies, on the other.

The internal identity requirement itself fixes the specific qualities of legal normativity. Some theories of law regard internal identity as a constitutive quality of *any* legal system, some others ascribe it only to the legal systems of the certain type (rule of law). This is a highly disputed issue.

In other words, the problem of what the necessary and sufficient conditions of the concept of law are, is disputed. And Schultz himself tacitly acknowledged this fact.

The real problem lies behind this ambiguity. The emergence of new transnational normative regimes and the growing deterritorialization of normative regulation have added new rationales to the discussion of the nature of legal normativity. Previously state law was the sole paradigm of law *tout court*. Consequently, the main aim was to differentiate (state) law from moral or pre-modern syncretic normative phenomena. Hence, the emphasis on structural issues. The emergence of new transnational normative regimes at least similar to the state law in their structural aspects, has shifted the emphasis.

²⁰ Gardner J. Law as a Leap of Faith. 2012, P. 195.

²¹ Ibid.

One of the most interesting ideas in Schultz's book is how he invokes the concept of legitimacy. He states that those who are in favour of the legal character of transnational normative phenomena try to use the rhetorical power of the term "legal" as a correlate of "just". By invoking the legal character of transnational normative regimes, they try to legitimise it.

I would like to widen the perspective. The emergence of new transnational normative regimes has resulted in a shift of emphasis from the structural aspects of different normative systems to their legitimacy claims. My hypothesis is that the legitimacy problem concerns not only the justification of the transnational normative regimes, as Schultz seems to believe, but also state normative regimes as well. The relationship is reverse. The deterritorialization of the patterns of normative governance erodes the traditional Westfalien concept of territorial sovereignty in general and questions the empirical adequacy of the link between the territory and the law.

Under these circumstances, it is not only the adepts of the legal character of transnational normative regimes who should present arguments in order to justify the superiority of these regimes, as Schultz believes, but the statistes should also do the same thing with regard to the claims of the state law regimes. The erosion of territoriality has resulted in a loss of the supremacy, exclusiveness and comprehensiveness of state law, which Schultz himself has masterfully demonstrated.²² In other words, with regulative competition between the alternative normative systems each one should justify its regulative claim. That is why the focus shifts from structure to legitimacy.

But the legitimacy claim leaves much less room for uniformity than the structural aspect of legal systems. Schultz demonstrates that very vividly, when he analyses several types of justification for the legitimacy claim (regulatory quality, democratic legitimacy or Fuller's internal morality of law). Furthermore, some types of legitimation are consistent only with special types of normative regimes. For example, democratic legitimacy concerns only state law. Here, to my mind, lies the heart of the matter and the reason for Schultz's reticence regarding the internal identity of legal systems. One cannot fix an indisputable set of conditions constituting the internal identity of law which is a prerequisite of any successful attempt to integrate the internal identity of a legal system within the framework of the threshold thesis. Unlike the requisites for external identity, which can be fixed more or less conclusively (at least, for the legal positivistic approach), which enables us to formulate a threshold condition, the same is not true of the requisite of internal identity.

²² Schultz, Ch.4.

Now, we can make a guess about the reason for Schultz's reticence. The internal identity condition cannot be fixed undisputedly and cannot be dispensed with. More than that, one should bear in mind that the non-state normative regimes cannot be qualified as legal regimes because they do not dispose of the internal identity conditions.

Let us accept this latter thesis for the sake of clarity and try to understand its implications. There are two types of normative regimes. One, a state normative regime is called a legal order, because it possesses the eight conditions of the internal identity of law. Another, a transnational normative regime, being structurally similar, does not fulfil these eight conditions and therefore is not considered a legal regime. Thus, the eight conditions of the internal morality of law constitute the threshold, by which one can recognize legal orders.

The basic implication is that the emergence of transnational normative phenomena does not change the whole epistemic situation concerning our knowledge of the modes of governance, including state law. The paradigm of state law remains the same as before the emergence of non-state normative regimes. Furthermore, we are supposed to assess the legality of the non-state normative phenomenon through the lens of this unchanged paradigm. But why?

This implication needs, at least, some sort of justification. *Prima facie*, the hypothesis that the emergence of new normative regimes has completely and irrevocably changed the whole picture with the modes of societal governance, including the paradigm of the state law, seems similarly plausible. I have noted earlier that Schultz himself thinks that with the emergence of deterritorialized normative regimes, state law can no longer be the comprehensive and exclusive normative order.

It means, no more and no less, that the territorial character of law, which was earlier considered to be vital, are no longer important. It is no longer important precisely because of the emergence of deterritorialized normative regimes. In drastic contrast to the previous "Westphalian" state sovereignty based law, we can no longer suppose that state law has no normative competitors. The very idea of the deterritorialization presupposes simultaneously existing intersecting normative regimes.

If state law has lost important qualities as a result of the emergence of new normative phenomena, how can we be sure, that it remains the same as a concept? And what gives legitimacy to use the traditional "Westphalian" paradigm of state law as a term of reference to assess the other normative phenomena? Perhaps, we should first ask the whether some other qualities of state law have lost their relevance?

Regardless, the qualities of normative regimes, even vital ones, evolve within a highly volatile dynamic social context. We are at the centre of a process of paradigm change. So we need some sort of flexible terminology in order to describe the ever changing normative

phenomena. I doubt that semantic realism, leastwise in its traditional (pre-Kripkean) form, or the threshold thesis will be an adequate methodology given the initial task to describe that sort of reality.

II. Conclusions

We are now able to evaluate the non-scalability thesis. It presupposes a vivid and clear understanding of the vital traits of normative systems, the lack of which deprive them of the quality of legality. But since nascent non-state normative orders have changed our picture of the modes of societal governance, including state law itself, we are not now in the position to be sure about the vital traits which enable the threshold thesis and non-scalability. At least, if we agree with Schultz about the importance of the internal identity traits.

Secondly, the only thing which is more or less clear is that non-state normative regimes possess some sort of structural identity at least similar to those of the state-law systems. External, structural identity seems to be more apt to the non-scalability threshold requirement. In fact, normative regimes are in need of some sort of the structural cohesion in order to be effective. But Schultz himself has demonstrated that they possess this already.

Thirdly, the question of the availability of the internal morality of law within non-state normative regimes needs further detailed inquiry. I have tried to demonstrate that even if they do not possess these qualities, as Schultz seems to suppose, the non-scalability thesis is inadequate. My personal intuition is that transnational normative regimes are able to supply pre-visibility and normative stability, if we are able to overcome the parochialism of state-centred legal theory. But that needs very serious and attentive analysis.

Fourthly, there is the very interesting issue of whether all that means is that we must do away with the non-scalability forever. My opinion is that the non-scalability is inadequate given the current social and epistemic environment. Maybe a "paradigm shift" will accomplish a new conceptualization which will "normalize" a new threshold thesis. Or, as probably Schultz tends to think, two (or more) distinct types of normative regimes will be established. Only one of them will retain the predicate "legal".

For now non-scalability seems to be inadequate. Maybe we need not pose the question of necessary and sufficient conditions at all. The current methodology, including legal methodology gives us that opportunity.

And finally, we should turn to the "concept–conception" distinction for a proper legal epistemology. The concept is an univocal²³ and abstract ideal, and the conceptions are multiple realizations and alternative versions of the ideal. There are some indisputable paradigms representing the concept and much doubt on what the necessary and sufficient conditions constituting it are.²⁴

This fits the current epistemic situation with the concept of law ideally. We have a vague understanding of the concept. There are some paradigm cases which are (relatively) indisputable. We also have some disputes about other cases as possible instantiations of the concept of law. And we cannot list the necessary and sufficient conditions of the concept. We are able to agree only on some conditions for the application of the concept. Furthermore, different conceptions fix different catalogues of conditions, some of them necessarily intersect, but not all.

This is precisely the situation we have with the concept of (non-state) law. Nobody doubts that state law is a paradigm of law. The dispute begins as we ask what the necessary and sufficient conditions of the concept of law are. Different conceptions of the concept will provide alternative interpretations of the concept without suppressing (at least before we can realize which is the soundest) one another.

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