# IS LEGAL KNOWLEDGE PRACTICAL?

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> Who could these men be? What were they talking about? What authority could they represent?
>
> (Kafka, *The Trial*)

> it is an extremely painful thing to be ruled by laws that one does not know.
>
> (Kafka, *The Problem of Our Laws*)

## 1. *On Legal Knowledge*

Andrei Marmor has recently claimed that generally, "if N is a norm, then to know what N is, is to know *how* to go about doing something, or at least what it takes to do, or such. Actually following a norm is typically a form of action, manifest in the way you do things."[1] If you apply this to legal norms, you get the conclusion that knowing them is knowing *how* to do something which is legally relevant.

Even more recently, Scott Shapiro has claimed that most entering students think the sole educational mission of American law schools is to teach them "the rules", but they quickly discover that this is not the case, for although they learn some "black letter" law in the first year, "the bulk of class time is taken up not with reciting or explaining these rules, but with arguing over what they are. Students are taught to think like lawyers, which involves learning *how* to argue both sides of a case."[2] "Finding the law", continues Shapiro, "involves more than just looking up a statutory provision in a legal code and reading the answer. Legal reasoning is not the same as legal research. Nor is it an impersonal, technical, scientific process. To know the law, one must exercise a considerable degree of *judgment*, which is a mental faculty ungoverned by explicitly specifiable and quantifiable rules and procedures."[3] This seems to be uncontroversial.

You may find indeed similar claims in many jurisprudential works.[4] Such claims seem to convey the idea that legal knowledge (what is taught and learned in law schools and universities) is eminently practical: one who knows the law knows *how* to exercise certain intellectual faculties, or *how* to perform certain activities.

Even if that seems uncontroversial, I will present here some arguments to the effect that legal knowledge is *not* practical, being rather propositional in nature. I will start by distinguishing three kinds of knowledge, direct, practical and propositional (§ 2), and will relate them to legal knowledge (§§ 3-5); then I will present three arguments against the practical account of legal knowledge (§ 6) and a basic argument in favor of it (§ 7). I will end by considering some practical consequences of the issue (§ 8).

Before starting the exposition, let me clarify that by "legal knowledge" I do not mean such knowledge that can be relevant in the legal domain (for instance the knowledge of the relevant facts in a criminal trial); nor mean I such knowledge that may be extracted from the law (for instance, if the law regulates interstate commerce, the knowledge that there are commercial practices in the relevant context); I exclusively mean the knowledge of the law itself.

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[1] Marmor (2007, p. 601).

[2] Shapiro (2009, p. 210; emphasis mine).

[3] Shapiro (2009, p. 213).

[4] "Learning the law means more than memorizing the rules that have been set down in past cases, even a very large number of them; it means understanding *how* the rules would be applied to other cases with different facts." (Weinreb 2005, p. 145; emphasis mine)

## 2. *Three Kinds of Knowledge*

What is knowledge? A way to respond to this question is to distinguish three kinds of it: (1) *direct*, (2) *practical* and (3) *propositional* knowledge.

The first, which is also called "knowledge-of", amounts to perceptual knowledge of objects. You may have perceptual knowledge of fairly simple objects like a table, and also of quite complex ones like a town. This is what James called "knowledge of acquaintance" and Russell, after him, "knowledge by acquaintance".[5]

The second kind of it, which is usually called "knowledge-how", is the knowledge of the way to perform a certain activity, or, to put it differently, the disposition to behave in a certain, appropriate, way on certain conditions.[6] It consists in knowing how to do something, for instance swimming or biking.

The third, which is called "knowledge-that", consists in knowing that a certain proposition is true.[7] For instance that Rome is in Italy. Notice that conceptual content is taken to be a distinguishing feature of this last form of knowing.

Various questions can be raised concerning the present categorization of knowledge. The first is whether these are three species of the same genus. Take (2) and (3), whose features are different: you may ask by virtue of what they would belong to the same genus, namely knowledge. One might say that perhaps, even if they lack a common core, they have some "family resemblance". Or, if one is in search of a common core – thin as it might be – she might say that they share some treating of information. This is not the point I want to discuss, however.

Another question about them is what their relations are, and, in particular, what their ordering is, if any. Their relations seem to be various and fluid; it is difficult to claim that one of them is necessarily involved in the others; in the end they seem to be relatively independent from one another. I can have direct knowledge of a certain object without knowing what kind of object it is (think of a pretty new technological device I do not know nothing about): in this case I have knowledge of kind (1) without a related knowledge of kind (3). I can also have some practical knowledge of which I am not able to give an accurate description or explanation (for instance, knowing how to orientate without being able to explain what I precisely do when I orientate myself): in this case I have knowledge of kind (2) without a related knowledge of kind (3). Vice versa, I can have an accurate propositional knowledge of an activity I am not able to perform (for instance heart surgery): then I have knowledge of kind (3) without the related knowledge of kind (2). Furthermore, I can have an accurate propositional knowledge of an object with which I have no acquaintance at all (for instance a dinosaur): in such case I have knowledge of kind (3) without knowledge of kind (1).

Tough, even if these forms of knowledge are relatively independent from one another, we may ask if one of them has some primacy or takes some precedence over the others. Some philosophers claim that direct knowledge has such primacy, for it is a necessary condition of the others. Without perception, they say, no further knowledge could be acquired and developed. But some claim that practical knowledge comes first, since direct and propositional knowledge are the result of our dispositions, abilities, skills and competences. Those who claim that propositional knowledge has such primacy, instead, point out that only propositional knowledge has a genuinely conceptual

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[5] See James (1890, vol. 1, pp. 216-218, 250; vol. 2, p. 652) and Russell (1912, chap. 5). Cf. also James (1895, p. 107): "There are two ways of knowing things, knowing them immediately or intuitively, and knowing them conceptually or representatively."

[6] Knowing-how and knowing-that are famously distinguished and discussed by Ryle (1949, chap. 2). More recently, cf. Stanley & Williamson (2001) and Stanley (2005).

[7] James (1890) called it "knowledge about", while Russell (1912) used the label "knowledge by description".

character and is capable of growth and social transmission, making ourselves different from all the other animals on earth.
I think that direct knowledge has a *genetic* primacy, while propositional one has a *final* primacy, since the former is the most important in starting to get knowledge and the latter is the most important in the development of it. However, this is not a point I want to insist on.
The issue I want to address here, putting ourselves in the perspective of legal philosophy, is the following: What kind of knowledge is legal knowledge? You may find in the literature several answers to this, but, as we shall see, the real dispute is between practical and propositional knowledge.

## 3. *Legal Knowledge as Direct?*

It is difficult to see and even to imagine how legal knowledge might be direct, that is of perceptual kind, like knowing a physical object by acquaintance. Insofar as the law is not made of physical entities but, rather, of normative entities like rules and principles, it is impossible to have a direct knowledge of it, at least of the same kind as the knowledge we have of a table or a room. There is no phenomenology of law in this sense.[8] We cannot smell the law, nor taste it, nor touch it, nor see it, nor hear it as we hear the voice of a friend – strictly speaking. Of course we may have direct knowledge of legal texts and legal acts, but this is a different issue: I can perceptually detect some marks on the paper, but the law is not the marks themselves nor the paper itself: it is rather their content.
A different sense in which one might try to claim that legal knowledge is direct is the *intuitionist* one according to which the essential properties of a thing are grasped by an act of direct intellectual apprehension. One might claim along these lines that knowing the law is grasping its principles, that is experiencing a form of direct, non-mediated, knowledge.[9] Frankly I do not see how could one prove a claim of this sort, in particular if we admit that the law is by and large a contextual and historical matter. At most, if you are a natural law theorist, you might assume from the beginning, as self-evident, that the law has some basic principles capable of being grasped by intuition, that is, by a form of direct knowledge. But to assume is not to argue. So I find it quite difficult to argue that legal knowledge is direct; it is more promising to think of legal knowledge in a different sense.

## 4. *Legal Knowledge as Practical?*

Let us move to the claim that legal knowledge is practical. We saw at the outset that Marmor and Shapiro support a thesis of this sort, focusing on norm-following and law-teaching respectively. Indeed a claim of this sort can be found in several recent works, going from the topic of legal interpretation to that of legal ontology.
Some authors claim that law itself is a social, interpretive practice.[10] In such a perspective knowing the law is being engaged in a certain practice, that is, knowing *how* to do certain things, namely detect the sources of law, interpret the legal texts, give reasons to justify an interpretation, etc. All these things are supposedly instances of knowing-how rather than of knowing-that, if I get their point correctly.

[8] Amselek (1991, p. 22). But see Villey (1991, p. 3), according to whom the law is "a thing".
[9] Cf. Finnis (1980, chap. 4).
[10] See e.g. Dworkin (1986). It is true that Dworkin deals with "propositions of law", but it is also true that they are constructed out of a *practice*. In the Italian debate, cf. Viola & Zaccaria (1999, pp. 435 ff.), Villa (1999) and, for an inferentialist picture, Canale (2003, pp. 141-142, 146-147, 160, 179 ff.).

The same conclusion has been reached by other authors focusing on legal argumentation and legal ontology. For example, Neil MacCormick's legal ontology is built on the fact that the law "exists" because it can enter our practical life "through acts and arguments".

> I suggest that we can quite acceptably treat legal texts (rule-texts) as factually existent entities constitutive in a certain sense of "the law" as it stands at some moment of time. This is not, of course, factual existence as brute fact, but rather only as institutional fact. "The law" in this sense is of practical concern to us only because it can be operationalised through acts and arguments, and it is not adequately understood as "law" until we have a good knowledge of relevant types of act and of argument.[11]

The same idea seems to be shared by Dennis Patterson, when he claims that "understanding law is a matter of being the master of a technique, specifically, a technique of argument."[12] Notice this: being the "master of a technique". Something practical indeed.
You may find this sort of claim in less recent works as well. To take an extremely clear example, Julius Stone elaborated on a thesis of Pound according to which the law includes rules, precepts other than rules, ideals and "techniques of dealing with the sources of law and the literary forms in which they are found".[13] Lawyers and judges are expected to have such knowledge, which is essentially *practical*.

> The traditional techniques of a legal order […] cannot be fully explained *in words* to the novice, any more than mere words can explain to a novice how to ride a bicycle. They are learned by operating or watching others operating, perhaps with ancillary verbal instructions; they are part of "the law" which is transmitted by using it.[14]

Consider the example on which the analogy is built: riding a bicycle. This is typical case of practical knowledge that cannot be fully put into words to the novice: *how to ride* a bicycle. You learn it by practice, not by being told the rules or the propositions about it. Analogously, you learn such specific legal techniques only practicing them.
Of course, this is not to say that all legal knowledge is practical and hardly translatable into propositional terms. But, if you agree with the premise that "black letter" law is just a minimal part of the law, you are committed to the conclusion that knowing the law is for the most part a practical business.

## 5. *Legal Knowledge as Propositional?*

We finally come to the claim that legal knowledge is propositional. This is to my impression the standard view of twentieth century jurisprudence. It is Kelsen's view, for instance.

> If jurisprudence is to present law as a system of valid norms, the propositions by which it describes its object must be "ought" propositions, statements in which an "ought", not an "is", is expressed.[15]

Jurisprudence (in the sense of legal science) describes the law and transmits the knowledge of it if it provides a set of propositions expressing its normative content. When such propositions are true, the description is correct. This is not formally different from describing a natural phenomenon, save the fact that the content of jurisprudence is normative, while the content of natural science is not.

> The difference between natural science and jurisprudence lies not in the logical structure of the propositions describing the object, but rather in the object itself, and hence in the meaning of the description. Natural science

[11] MacCormick (1991, p. 80).
[12] Patterson (2005, p. 688).
[13] Stone (1981, p. 230).
[14] Stone (1981, p. 231).
[15] Kelsen (1941, p. 51).

> describes its object – nature – in *is*-propositions; jurisprudence describes its object – law – in *ought*-propositions.[16]

The logical structure of such propositions is that of a conditional attaching a specific consequence to a specific condition, but the difference from natural science lays in the normative connection between condition and consequence:

> the science of law describes its object by propositions in which the delict is connected with the sanction by the copula "ought".[17]

Being a normative science, legal science is a norm-describing science. Now, is it possible to give a description of something in non-propositional terms? I think it is not, *a fortiori* when we deal with non perceptible entities like norms.[18] If this is correct, the description of legal norms cannot be but propositional in nature.

How is such propositional knowledge acquired? Not only by going through legal authoritative texts as constitutions, codes and statutes, but also by consulting interpretive texts as treatises, textbooks and the like, and by reading interpretive and applicative texts like judicial opinions, administrative proceedings and the like, insofar as legal theorizing, interpretation and application have a cognitive dimension and do not reduce to stipulation or discretionary decision.[19] This is an entrenched view in continental legal theory, although it is widely admitted that legal doctrine is both knowledge of the law and a source of it.[20]

Now, if direct knowledge is not a good candidate and there are no other forms of knowledge, our question faces the following alternative: legal knowledge is either *practical* or *propositional*. The idea that it is a form of knowing-how is philosophically attractive and, if we consider the arguments in favor of it, convincing to some extent. The idea that it is instead a form of knowing-that is more traditional and therefore less exiting; is it also less convincing? In what follows I will examine three arguments in favor of it; such arguments do also provide serious objections to the claim that legal knowledge is practical in the sense of being a sort of ability or a set of abilities.

## 6. *Three Arguments Against Legal Knowledge as Practical*

### 6.1. *The Category Mistake Argument*

The supposedly practical knowledge of the law is knowledge of legal activities, not of the law itself. It consists in knowing how to persuade a jury, how to interpret, how to judge, how to justify a decision, etc. These are of course extremely important activities in the legal domain. But strictly

[16] Kelsen (1941, p. 51).
[17] Kelsen (1950, p. 2).
[18] However some non-cognitivist claim that the very notion of "practical" or "normative knowledge" is somehow awkward, or misleading at least. See a discussion about this in Kalinowski (1969, pp. 63 ff.).
[19] According to Chiassoni (2007, pp. 147-148), if we look at it from the point of view of any ordinary practitioner in the Western legal world, knowing the law "it is knowing that there are certain authoritative texts that jurists and judges usually interpret to get norms for regulating cases; it is knowing how certain texts have been in fact interpreted by law professors in their hornbooks and review essays; it is knowing how certain texts have been in fact interpreted and applied by judges in such-and-such a case; it is knowing that a certain text has never been interpreted and applied so far; it is knowing that a certain text has been interpreted in different, and incompatible, ways by different judges and jurists at different times; it is knowing which interpretive methods and "theories of interpretation" have been used in fact by jurists and judges to interpret certain texts, and may be safely used in the future; it is knowing which interpretations of a text are likely to be provided by which court in the future; etc. Accordingly, *this*, and nothing else, is a sound notion of 'knowing the law' (as a knowing-that knowledge)."
[20] "Legal doctrine is Janus-faced: It aims to attain a knowledge of the law. At the same time, it is a part of the law in the broadest sense, for it participates in developing the norms of society." (Peczenik 2005, p. 6)

speaking they do not amount to knowing the law. Claiming that knowing how to perform such activities is knowing the law is incurring in a category mistake.
A supporter of the practical legal knowledge might reply that (i) there is no legal knowledge without interpretation of legal texts and (ii) interpretation is an activity irreducible to, and prior to, propositional knowledge. (A similar reply is possible in terms of legal argument). I confess that I am not persuaded by this. I think that one can have a detailed knowledge of Roman law without having any specific ability related to Roman law. You do not need to engage in specific Roman activities in order to get knowledge about Roman law. Analogously, you can compare legal institutions of different times and places without engaging in dialectical activities related to them.

### 6.2. *The Specificity Argument*

Someone who knows how to swim, knows it without regard to location. Potentially she can swim everywhere, in every pool or river or sea on earth. But someone who knows the law (as an ability), does not know it without regard to context. She does not know the law of every possible legal system. Is legal knowledge propositional then?
The supporter of practical legal knowledge might reply that legal abilities are a specific kind of practical knowledge, related to contexts. While knowing how to swim has no contextual components and those who know it can swim in every possible place with enough water, those who know the law know it in a contextual way and cannot practice it in every possible place. If I may draw a lay analogy, knowing the law is in this sense similar to cooking: both are contextual activities, tied to specific traditions and cultures; on the contrary, swimming does not depend on culture. Moreover, the supporter of practical knowledge might add that the contextual character of legal knowledge depends on a set of institutional features and constraints structuring our specific legal practices. Therefore, legal knowledge would be a form of contextually- and institutionally-constrained practical knowledge. Surely it is not a universal affair.

### 6.3. *The Justification Argument*

Since a specific trait of practical knowledge is the impossibility to translate it into propositional knowledge (or at least the difficulty of doing it), the practical knowledge supporter is committed to the claim that judicial interpretive and argumentative abilities are not translatable into propositional knowledge (or at least they are hardly translatable into such terms). Then, she is also committed to the claim that asking a propositional justification of what cannot be put into propositional terms is fairly near to nonsense. But most of the contemporary legal systems require the judges to expose the reasons of their decisions, i.e. to give a propositional justification of them.[21] Insofar as such justification is propositional and concerns the legal rules or principles applied to the case in hand, the knowledge of such rules or principles is propositional as well.
The supporter of practical knowledge, I guess, is ready to admit that judicial decisions have to be justified according to many contemporary legal systems; she is also ready to recognize that justifying them requires making reference to legal rules or principles. Nevertheless, I suppose, she will stress that deciding is an activity, and justifying it is making it explicit – i.e., saying what the decision criteria are, what the interpretive canons are, what the relevant arguments are, etc.[22] In this way the relevant practical knowledge (how to decide the case) is put into propositional terms for the sake of justification; even if it is finally put into such terms, as many legal systems require, for the supporter of practical knowledge – according to my reconstruction – it is basically a matter of practical competences and abilities resulting in that sophisticated form of activity which we call "deciding a case" and "justifying the outcome". If this is true, we have to notice an important point:

[21] See for instance art. 111 of the Italian Constitution.
[22] See Canale (2003, p. 184).

in the end, the specificity of practical knowledge is missing from this practical account. What is specific to it is that it is hardly translatable into propositional terms. If I teach someone how to bike, I show her how to do it; I do not afflict her with a list of explicit rules for doing it. It may be the case that such rules are implicit in my knowledge, but the point is exactly this: they are implicit and it is hard or even impossible to make them explicit. Even if some of them can be made explicit, what is important in learning how to bike is not learning such rules explicitly and repeating them by heart, but developing the ability to perform the relevant activity. On the contrary, in the justification of legal decisions what is important is not the ability to perform the relevant activity, but the reasons on which the decision is made.

An argument which is connected to the argument from justification is the argument I would call "from reflexivity". According to many writers in epistemology, knowing that *p* implies knowing that one knows that *p*. Some think that our ascriptions of knowledge do not require the satisfaction of such a demanding condition.[23] In any case, insofar as it is correct to require it, it is a requirement that only applies to propositional knowledge. Knowing-that is reflexive, knowing-how is not. It does not make sense to require knowing how one knows how do to something. On the contrary, it seems a legitimate requirement on propositional knowledge, especially when one is also required to give, as a judge is, a fully propositional account of what she decided and why. The same seems to be true of legal doctrine or jurisprudence. "Jurisprudence", according to Gray, "is the science of Law, the statement and systematic arrangement of the rules followed by the courts and of the principles involved in those rules."[24] What knowledge is this? Certainly propositional and presumably reflexive, for in order to "state" and "systematically arrange" such rules and principles one has also to know what she is doing and why. (If you think that Gray's account is flawed because it refers to the rules followed by the courts instead of the rules enacted by the lawmakers, you can change that part of the definition and draw the same conclusion as before: the statement and systematic arrangement of the rules enacted by the lawmakers is propositional and reflexive).

Now, what is the conclusion to be drawn from these three (or four) arguments? Perhaps the supporter of legal knowledge as practical may resist the first and the second, claiming that knowing the law requires in any case some contextual ability; but resisting the third is more difficult, since, granted that some basic ability is necessary to perform any legal activity, what is specific to legal practice is the requirement of making it explicit, that is, exposing in propositional terms why a given decision was made, on what legal criteria, on what rules or principles, and so on. Giving reasons of this kind is saying on what knowable norms the activity of decision-making was performed. Here legal knowledge is not practical in the strict sense of hardly translatable in propositional terms. On the contrary, it is essentially propositional and, notwithstanding the different roles of judges and legal scholars, it is not different from the knowledge displayed in the works of jurisprudence according to Kelsen in particular.

## 7. *An Argument Against Legal Knowledge as Propositional*

There is however a very basic argument on which the supporter of legal knowledge as practical may rely. It concerns the practice-based nature of language in general and legal language in particular. Marmor has presented a position of this sort, if I am right.

> A very important and fundamental aspect of language, as Wittgenstein famously argued, does not consist in knowledge *that* such and such is the case, but in knowledge *how*; that is, when we use language correctly, we know how to go about doing something. The use of language is a move within a social practice. Furthermore, the

[23] Cf. Williamson (2000).
[24] Gray (1909, § 288, p. 128).

> idea of "use" cannot be reduced to some form of knowledge that such and such is the case, which would not in itself involve knowledge of the meaning of the expressions of that language.[25]

In a later paper, Marmor says that is not part of his "understanding of what following a norm consists in that *knowing how* is categorically different from *knowing that*."[26] He admits, as a plausible account, that knowing how is a species of knowing that; but he adds that, in any case, "it is a unique species and one which is probably not reducible to knowledge that."[27]

With such precautions, he contends that following a norm typically involves a form of knowing how. This is not only true of legal norms as we said: it is true of any norm, in particular of norms governing language use and concept formation. According to Marmor, "it would be difficult to deny that a significant aspect of our language use and concept formation is governed by norms. In other words, it is plausible to maintain that some of the concepts and categories we use in a natural language manifest a *know how* that is, indeed, analogous to playing a game."[28]

Starting from this one could even try to build an argument to the conclusion that knowing that is basically dependent on knowing how. I will try to put the argument in a very basic form, and will call it the "argument from the nature of concepts". The arguments goes as follows. Concepts are inferential roles, and mastery of concepts is mastery of inferential moves. Mastery of inferential moves is clearly an activity, and those who exhibit it exhibit a form of practical knowledge (they know how to apply the relevant concepts). Now, since propositional knowledge involves concepts, such knowledge involves mastery of concepts. Therefore, propositional knowledge involves practical knowledge. To put it differently, practical knowledge is a necessary condition of propositional knowledge, while the converse is not true. This would be true of any kind of concepts, including the legal ones.

Is this a sound argument? There are reasons to doubt it. In the first place, saying that a certain kind of practical knowledge (mastery of concepts) is a necessary condition of propositional knowledge is not saying that the latter is just, or can be reduced to, the former. In the same sense – one could say – direct knowledge is a condition of both propositional and practical knowledge. But this seems quite innocuous. In the second place, notice that we are talking about *inferential* mastery. What kind of mastery is it? Inference involves not just concepts, but concept application. So, it involves sentences. So, it involves propositions and, presumably, some sort of propositional knowledge. Hence the argument from the nature of concepts does not bring to the conclusion it was intended for, but to the nearly opposite one. If there are any inferential rules, they tell us *what* to do, not *how* to do it.

In any case, the philosophical discussion on these points is definitely open.[29] For our purposes what is in my opinion important is the following: (i) knowing-how and knowing-that are presumably two irreducible forms of knowledge, with specific features and problems; (ii) trying to say which comes first is probably idle; (iii) in our cognitive development we acquire and employ both of them; (iv) in the legal domain, in the light of the preceding arguments knowing the law amounts to propositional knowledge; (v) interpreting, arguing and similar activities are extremely important in legal practice, but strictly speaking they do not count as legal knowledge.[30] One can of course use a broad notion of legal knowledge including all such activities. But the considerations we will make in the last part of this work suggest not to do that.

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[25] Marmor (2001, p. 75).
[26] Marmor (2007, p. 601).
[27] Marmor (2007, p. 601).
[28] Marmor (2007, p. 602).
[29] See Brandom (1995), Coyle (1999), Snowdon (2004), Kornblith (2007), Millar (2007), Douven (2008), Setiya (2008). Cf. also Engel (2007, pp. 228-232).
[30] On such activities cf. Canale & Tuzet (2007), (2008), (2009) and (forthcoming). See also e.g. Gianformaggio & Paulson (1995).

## 8. *Consequences and Conclusions*

Famously, Langdell pretended to teach law "as a science": if law were not a science, there could be no justification for making it an academic subject of university teaching; if it were merely a "species of handicraft" it would be a skill best acquired, not from lectures and books, but by apprenticeship, and the university would consult its own dignity in declining to teach it.[31] Were the law just a skill, why teaching it in law schools and universities? I think that Langdell had a point in making this claim, but, as you know, he was a formalist with no real interest in legal activities such as interpretation and argumentation. Unfortunately for formalists, such things are tremendously important in the "life of the law" (to echo Holmes' well-known dictum).[32] Why not use a broad notion of legal knowledge including them? I suspect it would be a confusing notion in various important respects. Let us consider which are the practical implications of our matter.

The rule of law requires that law be knowable, and knowable in advance. What ought to be done in order to comply with this principle? First of all, the law has to be public. Secrete law does not comply with such principle. "Law as a guide to conduct is reduced to the level of mere futility if it is unknown and unknowable", as Cardozo put it.[33] Also prospective legislation, instead of retrospective, is essential in this respect. For only prospective legislation can be known in advance. Let me elaborate a bit on this topic.

Among the requirements defining the "inner morality of law", Lon Fuller indicates the need of promulgation.[34] The rules should satisfy a requirement of publicity in order to be legal rules. They should be knowable, and knowable in advance. The rationale of the requirement is that they should be knowable if we want their addressees to comply with them.[35] Aharon Barak calls it the *principle of publicity*. "The principle of publicity requires, in addition to the publication itself, that the public be able to know, by reading the text, what is permitted and what is forbidden, to plan its activities accordingly, and to have its expectations of legality met."[36]

What kind of knowability is this? Suppose it is *practical* knowability. What should the public institutions do in order to provide citizens with it? They should provide them with certain abilities and skills, training them in arguing, interpreting, judging, etc. Is this what our public institutions do? Certainly not, or certainly not for the laymen. This is evidence to the conclusion that it is not what the principle of publicity requires.[37] Of course the knowledge of the law depends, inter alia, on some basic abilities like reading and understanding a text; but it does not identify with them. It *depends on* them but *it is not* them. You may also observe that some public institutions like law schools and universities do provide their students with such skills and abilities. This is certainly true. But, is this what the principle of publicity requires? It is a principle requiring that the *public* be able to know what is permitted and what is forbidden, in order to plan its activities accordingly. I think that training a minority in such professional and academic activities is not enough to satisfy the principle. The law's knowability is of a different kind.

Suppose now it is *propositional* knowability. What should the public institutions do in order to provide citizens with it? As we said, they should enact *public* law according to some promulgation criterion and public *prospective* law; moreover, they should provide citizens with the very abilities

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[31] My source is Haack (2007, p. 6). *Contra* such scientific ambitions, see e.g. Radin (1942).

[32] "The life of the law has not been logic: it has been experience." (Holmes 1881, p. 1)

[33] Cardozo (1924, p. 3).

[34] Fuller (1969, pp. 49-51).

[35] In addition, they "should also be given adequate publication so that they may be subject to public criticism" (Fuller 1969, p. 51).

[36] Barak (2005, p. 244).

[37] From a logical point of view, you may also draw the conclusion that our public institutions do not do what they are required to do according to the hypothesis of practical knowability. I suspect this is not a plausible reading of the matter.

of basic education, in order to put them in the condition of understanding what the law requires from them, in order to use it as a guide and to plan their lives accordingly. This is what our public institutions do indeed, even if at various degrees and not always well. When the public is not able to learn the contents of the law, the principle of publicity is not satisfied. When the principle of publicity is not satisfied, an important component of the rule of law is not satisfied.

I do not want to claim that practical knowledge is private and propositional is public. It would be exaggerate and probably wrong. But, in some sense, propositional knowledge fits better the principles of publicity and democracy, has Bentham taught us. It does not require on the citizens' part any specific ability save the basic capacities to understand a publicly enacted law.[38] If you ask for a specific illustration of this, consider the classic maxim *ignorantia legis non excusat*. It makes sense in a propositional perspective, not in a practical one: the idea that a citizen is be sanctioned since she was not sufficiently skilled to perform a certain activity is hard to digest.

Finally, consider again the important point made by the argument from justification: practical knowledge is relevant in the legal domain when it results in (convincing) arguments and claims from the justification point of view, with respect to the propositional content of the performed speech act, not to the act itself.

Now, a broad conception of legal knowledge would be confusing in these respects. It is important to keep knowing that the law requires such-and-such distinct from knowing how to perform a specific legal and professional activity. An ecumenical conclusion for our discussion would read as follows: legal knowledge is *practical* in part and *propositional* in part; on the one hand, knowing the law requires having some competences and basic abilities; on the other, one cannot be said to know what the law is if she is not able to give a propositional account of it, and, more in particular, an account of why a certain legal decision was made, a certain inference was drawn, a certain argument was accepted, and so on. Furthermore, in ecumenical spirit we might also reconsider the hypothesis of legal knowledge as *direct*, not only in the intuitionist sense cheered by the natural law theorist, but also in the empirical sense cherished by the law and economics supporters and by legal sociologists as well. As a social phenomenon and a set of institutions and social rules, they may say, the law can be known with the methods of empirical social science.[39] The law amounts to a set of empirical social phenomena that can be categorized in the light of our concepts and according to the constitutive rules of institutional reality.[40]

So far so good. Economic analysis of law and legal sociology provide us with empirical knowledge of the law. Interpretation and argumentation theory with practical knowledge about it. Legal theory, jurisprudence and philosophy with the propositional aspects of it. It is good to have a complex picture like this where many elements articulate. But remember what the rule of law and the principle of publicity require: something simpler and at the same time more important from a political and moral point of view, namely that the law be propositionally cognizable.

Last but not least, you can wonder whether legal knowledge may be practical in a different sense from the one we discussed. Until now we have dealt with the meaning of "knowledge", neglecting the meaning of "practical". It was taken in the knowing-how sense. Is this the only possible meaning of it? Far from that. In a different sense, "practical" means "with a view to decision and action".[41] In this sense, practical though is thinking about what (one ought) to do, and practical knowledge is knowledge about what (one ought) to do. If now we ask "Is legal knowledge practical?", the issue is not about our dispositions, abilities or skills: it is on the relation between legal knowledge on the one hand and decision and action on the other. Assume that the right answer to our previous question is "propositional": now the question is whether propositional legal knowledge is knowledge with a view to decision and action; whether propositional knowledge of

[38] The written form is particularly important in this respect: it makes the law accessible to everyone, at least in principle.
[39] Cf. e.g. Ross (1958), Calabresi (1970), Carbonnier (1994), Posner (1990) and (2001).
[40] See e.g. Searle (1995). Cf. Tuzet (2007).
[41] Finnis (1980, p. 12).

the law is nevertheless practical in this different sense. I think that the answer is quite easy: it is certainly practical for legal participants, and officials in particular; but it is not essentially so if you consider the possibility that you have a very detailed knowledge of legal systems different from your own one, even of legal systems very distant in space and time. Suppose you are an expert in Roman law: such knowledge will be hardly related to your practical deliberations, decisions and actions; perhaps it will animate your intellectual life, but anything more than that: in making your practical decisions you will eventually refer to, and defer on, your *actual* legal system, not the Roman one. Therefore, legal knowledge is not practical in this sense either.

BIBLIOGRAPHICAL REFERENCES


Amselek, P. (1991), *Law in the Mind*, in Amselek & MacCormick (1991), pp. 13-29.

Amselek, P. & MacCormick, N. (eds.) (1991), *Controversies about Law's Ontology*, Edinburgh University Press, Edinburgh.

Brandom, R. (1995), *Knowledge and the Social Articulation of the Space of Reasons*, Philosophy and Phenomenological Research, vol. LV, pp. 895-908.

Calabresi, G. (1970), *The Costs of Accidents: A Legal and Economic Analysis*, Yale University Press, New Haven.

Canale, D. (2003), *Forme del limite nell'interpretazione giudiziale*, Cedam, Padova.

Canale, D. & Tuzet, G. (2007), *On Legal Inferentialism. Toward a Pragmatics of Semantic Content in Legal Interpretation?*, Ratio Juris, vol. 20, pp. 32-44.

Canale, D. & Tuzet, G. (2008), *On the Contrary. Inferential Analysis and Ontological Assumptions of the* A Contrario *Argument*, Informal Logic, vol. 28, pp. 31-43.

Canale, D. & Tuzet, G. (2009), *The A Simili Argument: An Inferentialist Setting*, Ratio Juris, vol. 22, 2009, pp. 499-509.

Canale, D. & Tuzet, G. (forthcoming), *What is the Reason for this Rule? An Inferential Account of the* Ratio Legis, Argumentation.

Carbonnier, J. (1994), *Sociologie juridique*, PUF, Paris.

Cardozo, B.N. (1924), *The Growth of the Law*, Yale University Press, New Haven.

Chiassoni, P. (2007), *On the Wrong Track: Andrei Marmor on Legal Positivism, Interpretation, and Easy Cases*, in "Analisi e diritto 2007", ed. by P. Comanducci and R. Guastini, Giappichelli, Torino, 2008, pp. 141-158.

Coyle, S. (1999), *Our Knowledge of the Legal Order*, Legal Theory, vol. 5, pp. 389-413.

Douven, I. (2008), *Knowledge and Practical Reasoning*, Dialectica, vol. 62, pp. 101-118.

Dworkin, R. (1986), *Law's Empire*, Harvard University Press, Cambridge (Mass.).

Engel, P. (2007), *Va savoir! De la connaissance en général*, Hermann, Paris.

Finnis, J. (1980), *Natural Law and Natural Rights*, Clarendon Press, Oxford.

Fuller, L.L., (1969), *The Morality of Law*, revised ed., Yale University Press, New Haven.

Gianformaggio, L. & Paulson, S.L. (eds.) (1995), *Cognition and Interpretation of Law*, Giappichelli, Torino.

Gray, J.C. (1909), *The Nature and Sources of the Law*, The Columbia University Press, New York.

Holmes, O.W. (1881), *The Common Law*, Little, Brown & Company, Boston, 1923.

James, W. (1890), *The Principles of Psychology*, 2 vols., Harvard University Press, Cambridge, 1981.

James, W. (1895), *The Knowing of Things Together*, The Psychological Review, vol. 2, pp. 105-124.

Kalinowski, G. (1969), *Querelle de la science normative. (Une contribution à la théorie de la science)*, LGDJ, Paris.

Kelsen, H. (1941), *The Pure Theory of Law and Analytical Jurisprudence*, Harvard Law Review, vol. 55, pp. 44-70.

Kelsen, H. (1950), *Causality and Imputation*, Ethics, vol. 61, pp. 1-11.

Kornblith, H. (2007), *The Metaphysical Status of Knowledge*, Philosophical Issues, vol. 17, pp. 145-164.

MacCormick, N. (1991), *On "Open Texture" in Law*, in Amselek & MacCormick (1991), pp. 72-83.

Marmor, A. (2001), *Positive Law and Objective Values*, Clarendon Press, Oxford.

Marmor, A. (2007), *Deep Conventions*, Philosophy and Phenomenological Research, vol. 74, pp. 586-610.

Millar, A. (2007), *The State of Knowing*, Philosophical Issues, vol. 17, pp. 179-196.

Patterson, D. (2005), *Interpretation in Law*, San Diego Law Review, vol. 42, pp. 685-709.

Peczenik, A. (2005), *Scientia Juris. Legal Doctrine as Knowledge of Law and as a Source of Law*, Springer, Dordrecht.

Posner, R.A. (1990), *The Problems of Jurisprudence*, Harvard University Press, Cambridge (Mass.).

Posner, R.A. (2001), *Frontiers of Legal Theory*, Harvard University Press, Cambridge (Mass.).

Radin, M. (1942), *In Defense of an Unsystematic Science of Law*, The Yale Law Journal, vol. 51, pp. 1269-1279.

Ross, A. (1958), *On Law and Justice*, Stevens & Sons, London.

Russell, B. (1912), *The Problems of Philosophy*, new introduction by J. Skorupski, Oxford University Press, Oxford, 1998.

Ryle, G. (1949), *The Concept of Mind*, introduction by D.C. Dennett, The University of Chicago Press, Chicago, 2002.

Searle, J.R. (1995), *The Construction of Social Reality*, The Free Press, New York.

Setiya, K. (2008), *Practical Knowledge*, Ethics, vol. 118, pp. 388-409.
Shapiro, S. (2009), *Legality*, typescript.
Snowdon, P. (2004), *Knowing How and Knowing That. A Distinction Reconsidered*, Proceedings of the Aristotelian Society, vol. 104, pp. 1-29.
Stanley, J. & Williamson, T. (2001), *Knowing How*, Journal of Philosophy, vol. 98, pp. 411-444.
Stanley, J. (2005), *Knowledge and Practical Interests*, Clarendon Press, Oxford.
Stone, J. (1981), *From Principles to Principles*, The Law Quarterly Review, vol. 97, pp. 224-253.
Tuzet, G. (2007), *The Social Reality of Law*, in "Analisi e diritto 2007", ed. by P. Comanducci and R. Guastini, Giappichelli, Torino, 2008, pp. 179-198.
Villa, V. (1999), *Costruttivismo e teorie del diritto*, Giappichelli, Torino.
Villey, M. (1991), *Law in Things*, in Amselek & MacCormick (1991), pp. 2-12.
Viola, F. & Zaccaria, G. (1999), *Diritto e interpretazione. Lineamenti di teoria ermeneutica del diritto*, Laterza, Roma-Bari.
Weinreb, L.L. (2005), *Legal Reason. The Use of Analogy in Legal Argument*, Cambridge University Press, Cambridge.
Williamson, T. (2000), *Knowledge and its Limits*, Oxford University Press, Oxford.