Legal Logic and the Internal Contradiction of Law

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Abstract: The complexity of legal reasoning with the transformative jump from object-language to meta-language in both the qualification of facts and the interpretation of norms cannot be properly represented by either logic or any other formalism. Deontologically it is theoretically patterned, focussing on the coherence and consequentiality of conclusion; ontologically it is practical a process, dedicated to the will and thereby also to the whys of the decision to take. Theoretical definition by reference to customs and/or rules comes from the past through the tradition of following traditions, but practically defined is the context in which the hermeneutic understanding of what the "tradition of following traditions" may mean in a present casual context takes place.

1. Legal Logic

Legal logic is expected to operate with symbols developed by modern formal logic and, obviously, it is only such instrumentalities through which the notional scheme and structure of the complex processes of legal reasoning[1] can at all be represented in logic. At the same time, modern formal logic cannot claim (and, by virtue of its reductionism, it cannot either be made to become suitable) to grasp what is distinctively legal[2] in the processes of legal reasoning, thus, above all, the particular way in which the premises of decision of the so-called judicial syllogism[3] are formed in a dialectic interplay between (and individually inside) fact-qualification and norm-

[1] For introducing to hermeneutism in law, cf. *Vetter, H./Potacs, M. (eds.)*, Beiträge zur juristischen Hermeneutik (1990), Wien, Literas-Universitätsverlag as well as *Samuel, G.*, The Foundations of Legal Reasoning (1994), Ius Commune 4, Maklu, Tilburg.

[2] For the term, see *Bohannan, P.*, Law and Legal Institutions, in: *Sills, D. L. (ed.)*, Int Encyclopedia of the Social Sciences[9] (1968), Macmillan & The Free Press, NY, 73–78.

[3] For a classic formulation, see *Perelman, Ch.*, La distinction du fait et du droit, in: Le fait et le droit (1961), Travaux du Centre National de Recherches de Logique, Bruylant, Brussels, 271.

interpretation in the judicial process. For the expectation embodied by the professional deontology of the legal profession on the European continent – according to which (1) decision-making is an axiomatically reconstructive process, (2) the facts established are also actually proved, and (3) the conclusions reached are concluded by the certainty of a logical necessity – remains but a utopian dream. For both law-making and law-applying are – and cannot be but – helplessly subjective and limited. There is always a space empty of norms as reserved to discretion, which can only be filled by the law's pragmatic functioning and the social determination prevailing in its everyday operation.

Law has a binary language, reminiscent of the *Manichean* dualism, resulting in an alternative conceptual exclusivity, and legal decision amounts in principle to voluntarily "cutting something" (expressed by the French as *trancher un litige*). Moreover, instead of statements serving as premises, it is rather legal concepts that constitute the basic units of legal reasoning as atomic components: concepts that do belong to a meta-layer of language and which, as freely shapable artefacts, mediate, by establishing the normative connection, between facts and norms in the course of qualification. As known, the "qualification" of "facts" pre-defines the decision from the beginning, delineating the circle from which the legal consequence(s) can be drawn. In terms of its dichotomising alternative exclusivity, both the acts of subordinating facts to some pre-codified concept(s) and of drawing legal consequences in a more or less mechanical way from there can only take place unconditionally and totally, with no notional (i.e., taxonomical or systemic) alternative of or division/partition in either qualification or legal inference, that is, with no *reservatio mentalis* for the feasibility of any further qualification(s). Therefore, once the given facts have been qualified in a given way, the entire relevant regulation becomes at once applicable to those facts. Inversely, the relevance of all other regulations becomes automatically ruled out from the same qualification. An exclusive filtering of processes through conceptual schemes is only characteristic for law and for dogmatically constructed artificial systems such as deductive theology or rules of games. The same may cast light to the specifically fictitious nature of legal analogy as well. For independently of the nature and/or the degree of similarity in real life, by way of analogical qualification one can only conclude to – instead of dialectical, partial or conditional similarities – a definite notional intersection, ending in complete formal identification with also meting out common sanctions. It cannot but include the object into some other class, totally resolving the former (with all its practical consequences) in the latter.[4]

[4] For the background, cf. *Llompart, J.*, Dichotomisierung in der Theorie und Philosophie des Rechts (1993), Schriften zur Rechtstheorie H. 158, Duncker & Humblot, Berlin.

The formalist and the anti-formalist approaches[5] are usually characterised by the option whether an absolute determination of formal procedures by formal rules or a relative non-determination of non-formal procedures by non-formal rules is at stake. Such a simplifying view favours formalism crediting the law with uniformity and consequentiality in procedures and predictability in results, as if legal security could exclusively be promoted by the rule of logic, with the utmost exclusion of individual evaluation and discretion from the process. Reality is, however, far from such a simplistic scheme. Defining the role of the judge by allowing him certain autonomy in evaluation is the issue of legal policy considerations. At the same time, the limits of a thorough determination by formal rules are objectively given, independently of any legal policy consideration. It is in fact the taking of such limits into account and the awareness of the direction and mode of how to cope with them that make on ultimate analysis the formalist and the anti-formalist stands to differ from one another. Consequently, instead of contrasted antagonistic opposition, they represent mutually presupposing and supplementing methodological attempts at an intellectual reconstruction, offering a logically differentiated description of the various aspects and phases of and expectations towards legal reasoning, taken as a process. Or, the logical visions offered by both formalism and anti-formalism are based upon the same real processes, representing the same reality under differing contexts.[6]

In law, on the final analysis, issues are always dialectic in nature, like queries in everyday practice. Thus, also responding to them presupposes an indefatigably creative search for the hows and whys in practical issues and not an intellectually isolated sheer logical operation, free from internal contradictions through a purified system of abstracted concepts, in which axiomatic coherence will substitute to any likeness in substance. Therefore, in contrast with theoretical reasoning focussed on conclusion, practical reasoning is dedicated to the will of decision as a form of activity defying direct reduction to any inductive-deductive formalism. From the point of view of practice, any other theoretical reconstruction can only be a logical game, nothing else.

For instance, thirty-five years ago, the Belgian *Vanquickenborne* endeavoured to separating "elementary" norms from "abstract" ones[7], ob-

[5] For a contemporary overview, cf. *Horovitz, J.*, Law and Logic (1972), Springer-Verlag, NY & Wien.

[6] Cf. *Varga, C.*, The Place of Law in Lukács' World Concept[2] (1998), Akadémiai Kiadó, Budapest, para. 5.4.2-3.

[7] *Vanquickenborne, M.*, [discussion] in: *Perelman, Ch. (Hrsg)*, Études de logique juridique, IV: Le raisonnement juridique et la logique déontique (1970), Travaux du Centre Natonal de Recherche de Logique, Bruylant, Brussels, 46–47.

serving that in contrast with modern codes, backed up by a systematic doctrine [*Rechtsdogmatik*], primitive regulations operated mostly concrete contents – close to *Protokollsätze* of contemporary neo-positivism – serving as "normative atoms": "If any one hire an ox, and put out its eye, he shall pay the owner one-half of its value. If any one hire an ox, and break off a horn [...], he shall pay one-fourth of its value", and so on.[8] Well, the answer will be a function of how we understand the concept of *Elementarsätze*. For the establishment of similarity – "The simplest kind of proposition, an elementary proposition, asserts the existence of a state of affairs. [...] If all true elementary propositions are given, the result is a complete description of the world. The world is completely described by giving all elementary propositions, and adding which of them are true and which false."[9] This does not offer any solution to the basic issue. For in case we shall proceed gradually towards growing abstractness, we may logically reconstruct the development of normative regulation departing from what is always concrete and particular in order to arrive at abstraction; we may also reveal the moment of hierarchisation, layering stratification and division to further meta-languages (as built upon everyday object-language by successive doctrines). Well, all this notwithstanding, the problem of the transformative jump[10] from the object-language to the law's meta-language (together with the enigma of how qualification can establish a normative connection between fact and norm) still remains unanswered in logic. This is so because the gradual differences in the law's language cannot show more than differences of degree, i.e., quantity again. Therefore, no matter how far we may get on the way from the abstract – via the particular – towards the concrete in the breakdown of the generality of the regulation by disclosing its "concrete" and "elementary" components, what we shall find there will only be legal concepts again, in representation of the various levels of generality.

Or, considering the space freely available for motion between the concrete and the abstract in both directions, distinction between and separation of them can only be conceived as related to one another. Consequently, legal concepts are by definition always considered "normative atoms" which, in function of their contexts, may equally be qualified as either "elementary" or "abstract" ones, exposed to getting further generalised or individualised, only provided that the goal-orientation of reasoning needs to do so.

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[8] Code of Hammurabi [c. 1870 b.C.], trans. L. W. King, 247–248 [www.fordham.edu/halsall/ancient/hamcode.html#text].

[9] *Wittgenstein, L.*, Tractatus logico-philosophicus (1921), paras. 4.21 & 4.26 [ibiblio.org/gutenberg/etext04/tloph10.txt].

[10] The expression is first used by *Peczenik, A./Wróblewski, J.*, Fuzziness & Transformation (1985), 51 Theoria, 24–44.

2. The Internal Contradiction of Law

In every society and age, law has to face a dual challenge: it has to enforce its patterning definitions brought from the past according to its rules of standardisation, on the one hand, while it has to declare what solution it finds acceptable here and now in the name of the law, every factor (including incidentalities of the case) considered, on the other.

It is a figurative sense by which we say: the law "binds" us, "defines" or "determines" behaviours, and decision "follows from" it logically or otherwise. For the law we mean thereby is only a reference to a past position. This is tradition, as the basis of patterning and the means of standardisation, which may be embodied by either custom or law. Custom itself is a state of the past, and the law, a text expressing results as drawn by a one-time formulation. Either of them can meet disputed situations of the present through being referred to by someone who, entitled to declare what the law is, makes his decision in the name of the law. Consequently, three layers piled upon it now enrich what we mean by law here. Firstly, it places past states (custom) or texts (law) into a new medium of interpretation, reference and inference by contextualising what is given from the past for the present. Secondly, it selects out the rules that have to be followed in the course of comprehension, interpretation, reference and inference, by translating the following of traditions into a practical set of procedural and technical know-hows. Thirdly, it makes a decision as the law's response projected onto the given situation in the form of an actual message drawn from a past text.

This way, the law's life is marked by facing pressures from two sides: developing its own processes and sets of operations in legal standardisation which make legal decisions growingly foreseeable and calculable as increasingly controllably concluding from a previously defined set of formal criteria, on the one hand, while providing with a hermeneutical medium for the comprehension, interpretation, reference and inference so as the declaration of what the law is in any case can be presented as both assumable and desirable for the present, on the other.

Obviously, as interpreted in the present context, past and present cannot be contrasted to and made separable from each other. What they mean here is only relational, therefore visual and figurative. For past is nothing but present having passed and lived through already. All we can learn from it is taken from what has therefrom been preserved in and mediated by the memory – that is, by the memory of someone(s) belonging to the posteriority and only to the extent of its having been mentally extended to the present. Therefore, independently of whether we make our ideas engraved on a rock or printed in many copies, what may call for us therefrom cannot

be but a sign, i.e., sheer materiality, which can only build into the consciousness of the present by the very consciousness of the same present: as lived through by those actually living. Or, hermeneutical understanding is the realisation of the fact that no sign can be made alive otherwise than as the imprint of the comprehension of the present upon the present.[11]

The differentiation of hermeneutical theories from non-hermeneutical ones is based upon responding to the question whether comprehension (interpretation) will necessarily imply trans-comprehension (re-interpretation) to a certain degree or not. In the affirmative, the epistemological response will necessarily amount to an ontological statement. For the inquiry into the sources of knowledge will in fact inquire into human consciousness: what is involved by it and what the signs interpreted by us are to mean.[12] Hermeneutical theories themselves may then differ from one another in realisation by which factors and through which mechanisms they expect the observance of traditions kept controllable in processes and guaranteed in results. Yet they all will agree on the pivotal fact that only the present can select out and interpret, by cultivating both the intention of following and the very culture of its practical implementation.

When talking about legal mediation, we actually mean the culture of the following of traditions. This is what constitutes the very framework within which the signs referring to and drawn from the past are processed – in a series of acts building up to a complex procedure, in which comprehension, interpretation, reference and conclusion are given a specific form. Thereby, answers of and for the present are formulated upon reference(s) to the past.[13]

According to legal deontology, we apply past patterns to present problems. However, in the light of legal ontology, we can do so exclusively through the present, with consciousness conditioned (also in its dedication trying to conforming to the past) by the present, and so on.[14]

As is realised by now, only a figurative balance can be drawn amongst figuratively generated ideas. For instance, in a "collision" of "the past" and "the present", the "desirable" or "acceptable" "degree" of "compromise" cannot be established in a way as if actual operation with things or discrete

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[11] As "past" and "present" have only metaphorical a meaning, their relationality is not in the least changed in function whether historical past and present or, say, just sequences in everyday talk are at stake.

[12] So cognition is described as an autopoietical process by *Varga, C.*, Lectures on the Paradigms of Legal Thinking (1999), Philosophiae Iuris, Akadémiai Kiadó, Budapest.

[13] For an early epoch-launching pioneering recognition, cf. *Wurzel, K. G.*, Das juristische Denken (1904), Perles, Wien.

[14] For a monographic treatment, cf. *Varga, C.*, Theory of the Judicial Process (1995), Akadémiai Kiadó, Budapest.

entities were at stake. One-sidedness, shift and disproportion in relation of "past" and "present" may though develop strikingly under limiting conditions or as a tendency drastically changing practice in the long run, so as to become perceived as a dramatically new setting at once. In the short run, however, the issue is one of legal policy considerations, part of the reasoning itself, with the everyday job of weighing among competing (and mostly also casually conflicting) values. Ideologies of law-application are usually practice-oriented, which, by their relative over-emphases, may temporarily render law-appliers differently sensitive/insensitive to some sides or components or considerations.

By the way, this is exactly why they exist, namely, to exert, as an added factor artificially wedged in the process, influence on – by interfering with – practical actions. Ideologies as kinds of the state of consciousness of the actors put in play in practical action are always formulated and also asserted with the background idea of influencing practice by channelling it. This is the very reason, too, why particular ideologies also on the field of law can be more characteristic of given ages and cultures than others; this is the reason why particular professional deontologies as parts of the realm of ideologies can serve as a factor conditioning for the undertaking of a definite legal policy orientation in a given legal culture, by its ability to define, among others, the relationship – by demarcating the respective paths and domains – of "law-making" and „law application' in a given way.[15]

Over the past two centuries, there has been an especially turbulent metamorphosis with alternation of legal positivism and of the various criticisms of legal positivism on the European continent.[16] Namely, small-minded exegetic normativism prevailing during the first two-thirds of the 19th century had been changed over with free law movement by the first decades of the 20th century. This developed into a relaxed version of sociological (realist) pioneering between the two world wars, then got a shape coloured by natural law at its new foundations (as a revitalising response to the challenge by the barbaric experience of the last world war), which, then, from the 1950s onwards, consolidated into a more balanced kind of legal positivism. Partly resulting from own development but especially intensified by the Anglo–American influences in the 1960s, the so-called rigidity of rule-positivism started to have gradually been given up (reversing one-time virtue to a drawback), in order to increasingly yielding its

[15] For the entire context, cf. *Varga, C.*, Doctrine and Technique in Law, in: *Schünemann, B. et al (eds.)*, Festschrift für Lothar Philipps (2004), Wissenschaftsverlag, Berlin.

[16] As to a recent survey, cf. *Varga, C.*, What Is to Come after Legal Positivisms Are Over? in: *Atienza, M. et al (Hrsg)*, Festschrift für Werner Krawietz (2003), Duncker & Humblot, Berlin, 657–676.

place to a new positivism pondering upon principles by admittedly focussing growingly on consequences.[17]

Positivism, if not over as yet, is now set on looking for substantiation in practice and in values taken as able to orient human choices in situations of conflict.[18]

[17] And replacing theoretical foundation by describing the self-rationality of a culture which is labelled to have become discoursive.

[18] As to the perspectives of transcendence, cf. from *Varga, C.*, Change of Paradigms in Legal Reconstruction, Carl Schmitt and the Temptation to Reach a Synthesis, in: Rivista internazionale di Filosofia del Diritto [in press] & Buts et moyens en droit, in: *Loiodice, A. et al (Hrsg),* Giovanni Paolo II, Omaggio dei giuristi (2003), Bardi & Libreria Editrice Vaticana, Roma, 71-75.