Rule and/or Norm Or the Conceptualisability and Logifiability of Law

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Abstract: In language use, 'rule' and 'norm' are mostly taken as synonymous to one another. Actually they may denote the same but from differing points of view: the former from the one of signalling that there is a normative message made available and the latter from the one of the logically processed conceptual embodiment of such a message. As norms presuppose an axiomatic ideal of conceptualising and logifying the law, they are at home only in Civil Law where they are construed to form a *Rechtsdogmatik*. Or, the norm is indeed a logical unit, while the rule is a proposition.

1. Language Use and Language Habits

From the wide range of linguistic expressions used in the direction of behaviour,[1] the dilemma of rule and/or norm is not a scholarly issue in a direct sense. It can be derived neither from the historical etymology of the relevant words nor from investigations into the history of ideas, inspiring or merely reflecting one or another language use. Clear-cut distinctions of meanings regarding these two terms are not even specified either by various historical periods or by cultures of law. Although their regular usages may be different compared to each other, in most attempts at a theoretical definition they are still decisively referred to as synonyms,[2] as concepts able to substitute each other

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[1] *Opałek, K.*, Theorie der Direktiven und der Normen (1986), Forschungen aus Staat und Recht Bd 70, Springer, Wien/New York, 88 lists norms, rules and principles, alongside with persuasion, wish, proposal, request, supplication, advice, warning, recommendation and encouragement, as directions of behaviour.

[2] "The rule is a synonym for »norm« or »directive« taken as the declaration of a prescriptive function." *W[róblewski], J.*, Règle, in: *Arnaud, A.-J. (dir)*, Diction-

nearly completely.[3] Therefore which language and culture prefer the usage of which depends for the most part on mere habits of parlance. However, these habits may then – through the latent creative (socially constructive) force of the usage of language – become organised into certain blocks, and these may from then on, in their own ways, generate additional meanings with specifications according to context, a fact that may, on its part, also eventually lead to a separation providing some basis for added theorisation.

2. 'Rule' and 'Norm'

2.1. Origins, Meaning and Use

The term 'rule' originates from the Latin *'regula'*, while 'norm' stems from Latin *'norma'* as used to denote a tool applied by masons and carpenters in ancient Rome to draw a straight line. In its present sense, 'norm' – mostly in its derivatives as 'normal, 'normality', etc – is a product of 19th-century development, differentiating and homogenising human conditions and processes for adjusting them to previously set standards. To denote 'standard', the term 'norm' was first used in pedagogy and then in health care, and later on, in the course of the same century, it was also extended to standardisation in technology, isolating, combining and re-organising industrial production through a series of patterns.[4]

Let us mention as an illustrative example of incidentalities in the history of the usage of words that, in its original meaning, 'rule' once served – instead of the causal succession meant by the expres-

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naire encyclopédique de Théorie et de Sociologie juridique (1988), Librairie Générale de Droit et de Jurisprudence, Paris, 346. An even simpler solution is proposed by *Gray, C. B. (ed)*, The Philosophy of Law: An Encyclopedia, vol. I–II (1999), Garland Reference Library of the Humanities vol. 1743, Garland Publishing, New York & London, with the entry 'Rule' referred to but speaking about nothing but 'Norms' eventually.

[3] This is illustrated by the way how in case even of otherwise minutely precise authors — eg *Pavčnik, M.*, Pravno pravilo [Legal rule], in: Zbornik znanstvenih razprav [Ljubljana] 1995, No 55, 217–240 and Die Rechtsnorm, in: Archiv für Rechts- und Sozialphilosophie 83 (1997), 463–482 — one term is simply replaced by the other when changing between languages.

[4] Cf., eg, *Foucault, G.*, Surveiller et punir (1975), Gallimard, Paris, 186 and *Canguilhem, G.*, Le normal et le pathologique, 4e éd. (1979), Presses Universitaires de France, Paris, 175.

sion of "if […], then […]", implying conditional repetition firstly describing and, then, partly prescribing those facts which may in their conceptual generality constitute a case [*Tatbestand*] in law and, partly, also ascribing a sanction to them – to express some basic wisdom or *adage*, summarising the versatility of Roman jurisprudents indefatigably searching for the principles of a justifiably right solution.[5]

According to its philosophical definition, the r u l e is a "formula indicating or prescribing what is to be done in a certain situation", noting that its prescriptive use affords a criterion with selective force and that no such use shall be overshadowed by those recently spread constative uses which are – mostly as connected with the senses of 'regular/irregular' or 'regularity', etc – worded as if they were merely descriptive.[6]

On the other hand, n o r m is the "concrete type or abstract formula of what has to be done, at the same time including a value judgement in the form of some kind of ideal or rule, aim or model", noting that norms are mostly formulated to express some logical thought or act of will, free representation or emotion or beauty ideal.[7]

While norm is "synonym of »rule«" (with the latter regarded as somewhat "more general"[8] or "more wide and generic"[9]), it is remarkable that, in everyday usage, the r u l e is still primarily an explicit or posited formulation as the in-itself neutral and historically accidental outcome of some 'rule-enactment' or 'regulation', while the n o r m is either the logical (logified) form of the above or the logical (normative) prerequisite of an act of regulation itself.

This explains why ' r u l e s ' may either be ones of experience or ones of a game, eg, of the law [*Spielregeln* & *Rechtsregeln*]. All this is unproblematic providing that we are interested in them as the manifestation of or access to some linguistic form of regulation. As to its

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[5] For more details, see, *Varga, Cs.*, A jogi gondolkodás paradigmái [published also in English as Lectures on the Paradigms of Legal Thinking (1996), Philosophiae Iuris, Akadémiai Kiadó, Budapest], 2nd enlarged & revised ed (2004), Akadémai Kiadó, Budapest, 33–34.

[6] *Lalande, A.*, Vocabulaire technique et critique de la philosophie [1926] (1991), Presses Universitaires de France, Paris, 906–907. According to *O. Weinberger*'s similar formulation – The Role of Rules, in: Ratio Juris 1 (1988), 224–240 (especially para 1, 225) – "Rules are advice to be used in determining action."

[7] *T[roper], M./L[ochak], D.*, Norme, in: Dictionnaire…[FN 2], 691.

[8] Eg, *Perrin, J.-F.*, Règle, in: Archives de Philosophie du Droit, tome 35: Vocabulaire fondamental du droit (1990), Sirey, Paris, 245–255.

[9] *Borsellino, P.*, Norms, in: The Philosophy of Law [FN 2], especially on 596.

apparent pair, 'norms' enter the scene when the rule's intended or probable notation becomes problematic and requires further investigation in a way that out of the rule as the presentation of something made accessible to us, we start searching for gaining an identifiable message by means of the former's logical (etc) analysis.

It is surely not for mere chance that we can hardly speak of 'creation of norms'; and we only speak of 'provision of norms' when we intend to emphasise either the field as being "normed" (ordained under regulation) or the artificiality of the said regulation. Notwithstanding, present-day literature suggests the idea as if the norm separated out of the rule by its mere linguistic formulation as a logical proposition. Actually, however, it is not the rule but the norm that is considered and also treated in an onto-epistemological (and also psychological and logical, etc) perspective, in order to be able to interpret it both as an enunciation and as the contents of denotation (inherent, among others, also in a psychologically examinable act of will).[10]

The above seems to be substantiated by the fact that while in English language, for instance, historical dictionaries specify more than twenty entries of meaning and fields of application for the usage of the single word 'rule', each of these are still related exclusively to the availability or prevalence of a given measure of behaviour, either indicating or just carrying and/or enforcing it, without any of them claiming even incidentally that the rule itself can serve as the *denotatum* (with the objectivation itself or its communication embodying this very measure either through its textuality and grammatical make-up or owing to the logical interrelationship among its elements).[11] Moreover,

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[10] For the former, see, above all, *Alchourrón, C. E./Bulygin, E.*, Normative Systems (1971), Library of Exact Philosophy vol 5, Springer, Wien & New York and, for the latter, *Kelsen, H.*, Allgemeine Theorie der Normen (1979), Manz, Wien, especially paras 1-10 (and explicitly para 1, passage III).

[11] The Compact Edition of the Oxford English Dictionary: Complete Text Reproduced Micrographically, I-II (1971), Oxford University Press, Oxford, 2599-2600. In incidences far away in the past, such examples may affirm this: "Þeos riwle" [Ancren Riwle a (1225) {2 (Camden Soc. 1853)}] or "Þe pope […] forsook Þe rule of Þe olde tyme" [*Bartholomeus (de Glanvilla) Trevisa, J. de*, Polychronicon Randulphi Higden (tr. 1387), {Rolls series 1865-1867}, VII, 431] (original edition of Oxford English Dictionary, 881, column 3 and 882, column 1, respectively). Against the historically established use, it is exclusively the modern (and, in a linguistic sense, rarer) professional usage that can attribute the word such a meaning: "Either according to the rules of the common law, or by the operation of the Statute of Uses." Penny Cyclopædia of the Society for the Diffusion of Useful Knowledge (1842), XIX, 379/2 (Oxford English Dictionary, 882, column 2).

the pervasive strength and functional conservatism of the English language mentality are strikingly shown by the fact that not even the amazingly late and slow spread of the word 'n o r m' provoked any change. Namely in English, quite until linguistic analysis grew into the main trend of moral philosophising in the first decade of the 20th century, the word 'norm' had exclusively been used to refer to some standard, pattern or measure made available, and by far not in order to imply that the standards, patterns or measures themselves could have been embodied (objectified) by it in a way that one and exclusively one single right meaning could be extricable from such an embodiment.[12]

In language use, we do not to talk about 'logic of rules' instead of 'logic of norms'. No way in everyday practice we do equate the two terms with each other. Only a 'logic of norms' can be thought of, accepting in advance that nothing but linguistic propositions conceived of (or prepared as to serve) as logical units can be subjected to either logical operation or any genuine linguistico-logical analysis.

2.2. Interrelations

All this may lead us to the conclusion that in actual occurrences and according to a nominal definition, 'r u l e' and 'n o r m' denote the same, the former considered from the point of view of making it accessible (communicable) as a message and the latter from the one of logic, namely, of internal coherence and consequentiality of contents. Yet regarding either their *genus proximum* or *differentia specifica*, we have to realise that, in point of principle, both their conceptual volume and extension will be different. For no norm can be found in the rule but, incidentally, the mental reconstruction of its message may generate one. Or a rule may refer to a norm by forecasting the chance that a norm can indeed be reconstru(ct)ed through – and as mediated by – it. For in itself, rule is but a specific linguistic expression, while in logic an abstract logical relation is stated by the norm. They are common in that none of them can stand by itself. A rule may come into being if thematised (expressed, declared, posited, etc) as such; and a norm, if a logical form is given to it in result of mental operations in intellectual (re)construction. All this notwithstanding, they are not even related as form and contents to one another. Moreover,

[12] It is to be noted that, from 1676 on, the word appeared in the form of *'norma/normae'*, always italicised as a borrowance from the Latin, and started to spread as 'norm' only from 1885, albeit, between 1821 and 1877, mostly in pairs of synonyms, such as, eg, 'norm or model', 'norm and measure', or 'norm or principle'. Ibid., 1942 (207, column 3).

they are not co-extensive either. After all, rules differing by language, culture, structure and wording (etc) may be logified as expressing the same norm, and the same rule (in case of intentional or unintentional ambiguity, misprint, or with omission of punctuation, etc) may serve for the reconstruction of differing norms.

2.3. Civil Law/Common Law, or Conceptualisability and Logifiability of the Law

In terms of what has been said above, it is the norm that has become the cornerstone of theoretical system-construction in our continentally rooted Civil Law, based upon the axiomatic inclination to logification. It is no mere chance that the construction of KELSEN's Pure Theory of Law is founded on the *Grundnorm*, as it builds the derivation of validity throughout the entire prevailing law and order either on direct logical or indirect linguistic (conceptual) inference [*Ableitung*]. Accordingly, the norm is conceived as a logical unit, which has been generated through logical reconstruction and can be subject to further logical operation. Therefore, it is by far no chance either that both the need for and the conceptual performance of a doctrinal study of the law – I with its call for a meta-system strictly conceptualised and rigidly logified upon the law (taken as a body of texts thoroughly consistent as concluding from its elements[13]) – were only formed within the Civil Law.[14] (It is to be noted, too, that a theory of norms serving as a *Rechtsdogmatik* can be erected with no concept of rule implied,[15] and a theory of rules dedicated to the law's

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[13] Cf *Varga, Cs.*, Law and Its Approach as a System, in: Informatica e Diritto 8 (1981), 177-199.

[14] The predominance of the analytical method in applied legal philosophy and the thoroughly constitutionalised doctrine of the law in recent decades may suggest a greatly changed trend by today. However, the preference to analysis comes from an external interest, and the elitist libertine development of constitutionalism, achieved by the US Supreme Court with academic assistance (ie, by democratically non-elected fora), has not yet exceeded the impact once exerted by the German doctrine on the English legal thought during the second half of the 19th century, which may have enriched Common Law in both theoretical interpretability and conceptualisation without, however, disassimilating it from its own traditions.

[15] *H. Kelsen* [FN 11] supplies an illustrative example by avoiding the use of 'rule' (except for the term of 'rule of law' with 'rule' meaning just 'government, dominion, or order') in his final theory of norms.

phenomenal form can also be built up on the exclusive basis of norm-concepts.)

On the other hand, the Common Law culture – which, instead of striving either for an exhaustive conceptual representation and textual embodiment (objectification) of the law or re-establishing it according to axiomatic ideals, and also instead of reducing security in law to logical deductibility from previously set propositions, focuses rather on social directness, on the rectifying (feedbacking) medium of everyday experience, drawn from dilemmas of decision on the level of common sense as organically rooted in tradition, as well as on the force of social continuity, able to framework both preservation and renewal in the law – does speak in terms of rules as an exemplification of the law, that is, as an accidental manifestation and incidental actualisation in situations when one has eventually to declare what the law in and for the given case is.[16]

Yet, if rule is unconceptualised (without ever conceptually related to, analysed and/or classified within, the "universe of concepts"[17]), that is, if neither logical conceptualisation nor any systemic idea stands behind the practical act of denomination,[18] then it is to be doubted whether a *Rechtsdogmatik* can ever be erected upon such a scheme. For no doctrine can be built without norms.[19]

If and in so far as the norm is logical a unit, the rule is a kind of linguistic proposition. As to their environment, norms may stand both on their own and in a systemic context. On the other hand,

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[16]This is well illustrated by literature which uses exclusively the term 'rule' as a phenomenal designation. In contrast, even in hypothetical situations when some normative staff is expressed in a logifying context, one can mostly encounter a norm-concept.

[17] An expression by *Alchourrón* & *Bulygin* [FN 11].

[18] Cf *Varga, Cs.*, Codification à l'aune de troisième millénaire, in: *Wachsmann, P. et al (dir),* Mélanges pour l'hommage de Monsieur le Professeur Paul Amselek (2005), Bruylant, Bruxelles, 745–766.

[19] A conclusion like this is facilitated by the unclarified English word usage and also by the fact that, instead of any doctrinal study, it was the attempt at an axiomatical foundation of sciences that became instrumental in developing the linguistic analysis of law in the Common Law world. This very fact has anticipated English legal analysis not to be based on the very law but on sample sentences authorly hypostatised or – l as the early criticism upon *H. L. A. Hart*'s The Concept of Law had shown – although presented in a sociologising manner, yet actually constructed with no factual coverage whatsoever. Cf *Varga, Cs.*, The 'Hart-Phenomenon', in: Archiv für Rechts- und Sozialphilosophie LXXXI (2005), 83–95.

rules do presuppose principles, standards and policies that can, without being rules themselves, demarcate the sphere of the rules' casual relevance or practical applicability.[20]

It is for the "scientific" methodology of the doctrinal study of the law to answer how and to which depth the unlimited (and in principle also illimitable) demand of logical correlation, consequence and coherence may (if at all) be complemented to with axiologically founded teleological considerations. Therefore, the introduction of either broader (socially sensitive) definitions (in confronting, eg, free law to exegesis) or brand new aspects (in, eg, teleological interpretation) in an established discourse in Civil Law may equally induce debates shattering the normativism's basic claim. In contrast, the ascientific approach to law in Common Law may openly admit that law can only cover the field of practical reason, in which sober everyday considerations are used to be given preference.

3. Signalling and Embodying a Message: Conclusion

In sum, the dilemma of "rule and/or norm" carries marks of ambivalence inherent in coupling linguistic conventionalisation with attempts at theoretical (logifying and analytical) system building. On the final analysis, both can be used as conceptually justified in their own place and within their own context, respectively. For in language any term may be – and is usually being – used instrumentally and according to established habits, while concepts are strictly formed as mental representations according to homogenising requirements set up by the given theoretical outlook and framework.

All in all, we have thereby justified the moment of identity, ambivalence and duality inherent in the terminological dilemma of "rule and/or norm". Despite any remaining conceptual uncertainty, we may find it fortunate that scholarship developed in both German and Hungarian language cultures belongs to the orbit of Civil Law, which makes a difference between the mere act of signalling the fact that there is a normative message made available, on the one hand, and the logically processed conceptual embodiment (objectification) of such a message, on the other.

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[20] Practically the entire oeuvre of *R. M. Dworkin* – starting from his paper on The Model of Rules, in: University of Chicago Law Review XXXV (1967) – serves just the explication of (with developments on) this.