Sonderdruck aus:

Sprache, Performanz und Ontologie des Rechts

Festgabe für Kazimierz Opałek zum 75. Geburtstag

Herausgegeben von

Werner Krawietz und Jerzy Wróblewski

Duncker & Humblot · Berlin

Dieser Beitrag ist in der Festgabe für Kazimierz Opalek zum 75. Geburtstag im Jahre 1993 erschienen. Die Festgabe enthält folgende Beiträge:

I. Identifikation von Normen und Fakten in der Sprache des Rechts

Aulis Aarnio
On the Knowledge of Legal Facts through Norms 3

Fernando Galindo
Die Reinheit der Sprache als Voraussetzung einer juristischen Methodenlehre 9

Stig Jørgensen
The State of Legal Dogmatics 35

Stanley L. Paulson
Kelsen in the Role of Critic 45

Michel Troper
Deklaration oder Konstitution von Rechten 57

Roberto J. Vernengo
Legal Rationality and Divergent Normative Logics 75

Zygmunt Ziembiński
Prescriptive and/or Descriptive Language in Legal Sciences 85

II. Ethisch-politische Prämissen rechtsstaatlicher Autoritätsausübung

Jan M. Broekman
Sprechakt, Freiheit und Autorität 95

Ernesto Garzón Valdés
Repräsentation und Demokratie 111

Hermann Klenner
Thomas Hobbes, ein Theoretiker des Rechts in böser Zeit 131

Aleksander Peczenik
Morality, Law and Rights 141

Marek Zirk-Sadowski
Philosophical Aspects of the Problem of Normative Novelty 159

Legal Rationality and Divergent Normative Logics

By Roberto J. Vernengo, Buenos Aires

1. Reason in law – law's rationality – is, paradoxically, a perplexingly entagled affair. Perhaps it could be admitted that legal science, where it has evolved in an objective discourse accepted by social scientists and legal scholars, must have, as all scientific discourses, a logical structure; legal science must obviously be logically organized. But the existence of a scientific knowledge of the law is a very contingent historic phenomenon for it is a fact that many cultures did not ever attempt anything in that direction. Jurists, on the other hand, pretend not only that legal science is rational – a verdict that may sound like a truism –, but that law itself, positive law is rational. For modern thinkers, positive law is somehow composed of rules or norms. Norms as such are sentences lacking truth value. Nevertheless, in some decisions, judges infer rules or norms from normative premises, as if logical inferences were valid also between norms. And everybody recognizes conflicts of norms where logically incompatible norms pretend to be simultaneously valid. If norms are not sentences having truth value, the question arises of how to allow logical operations on normative premises that are knowingly unqualified to function like classical propositions. This quandary was formulated many years ago by J. Jørgensen as a dilemma threatening a rational normative knowledge.

Some of the classical proposals for dealing with this dilemma are problematic. Kelsen, for instance, suggested that norms, in their primary prescriptive function, are not susceptible of deductive procedures, but that in their use as descriptive sentences by legal science they were subject to logical strictures. Accordingly, prescriptive norms could be considered to be also indirectly subject of logical rules, as a reflexion or extension of their appearence as descriptive normative sentences. Prescriptions or norms as such are neither propositions *(Sätze)* nor declarative sentences *(Aussage)*; therefore it is inconsistent to attach to them semantic characteristics proper of those linguistic forms. Legal norms, in their prescriptive sense, lack truth or falsity. They are another kind of linguistic data, expressing the meaning *(Sinn)* of will acts. Therefore it would be absurd to claim that they are subject to logical principles, which correspond only to *Sätze* expressing the sense of intellectual acts. Notwithstanding that conclusion, Kelsen owns that "daß logische Prinzipien, wenn nicht direkt, so doch indirekt, auf Rechtsnormen angewendet werden können, sofern sie auf die diese Rechtsnormen beschreibenden Rechtssätze, die wahr oder

unwahr sein können, anwendbar sind".[1] This acknowledgment sounds strange, not only because it implies that norms, as prescriptions, are irrational objects, as Ross and Weinberger stressed, but also inasmuch as law's rationality becomes a contingent property ascribed to law. In those cultures where no legal science has been developed and where, consequently, there are no *Rechtssätze* in existence, legal norms would not even have an indirect logical status. It presupposes also a not defined isomorphism between prescriptive norms and the descriptive sentences of legal science, an isomorphism that is not the mere correspondence relation that a Tarskian truth concept would suggest. *Rechtssätze* may be true as adequate descriptions of norms, but that does not imply that there is any syntactical similarity between them. As logic operates syntactically, it is not clear what is meant when the logic applicable to *Rechtssätze* is extended, although indirectly, to norms.

Nevertheless, the Kelsenian proposal concerning the relationship between law as a set of prescriptive norms and logic in some of its traditional forms, is generally accepted. Thus, G. von Wright's pronouncement: "on the prescriptive interpretation deontic formulas have a «prescriptive meaning» and do not express true or false propositions. It makes no sense to speak of relations of contradiction or entailment between the formulas thus interpreted. The positivistic sceptics who, like Alf Ross, doubted the possibility of a deontic logic were in an important sense right in maintaining that norms have no logic or that normative discourse is «alogic»",[2] although a deontic logic has sense as "a logic of descriptively interpreted formalized norm-formulation". For norms, as such, as "expressions of a norm-giving authority's will", and under the supposition of the rationality of that will, deontic logic could be interpreted as the set of "principles of rational norm-giving" and, "on the basis of this criterion, one can then determine the analogical meanings of contradiction and entailment also for norms, although norms have no truth-value". Those analogical logical expressions resemble the indirect logic of Kelsen. In any case, the postulated analogy presupposes also some kind of isomorphism between norm-formulations (descriptive sentences) and norms as prescriptions. Hence, that debatable assumption does not require an *a priori* acceptation.

Opałek has in that respect a rather negative opinion: "Die Schlüsse, die vor dem Hintergrund von Normen und Aussagen über Normen in der natürlichen Sprache aus diesen Überlegungen über deontische Sätze gezogen werden können, sind deprimierend".[3] And, therefore, he draws a very sceptic conclusion about the endeavours to get a rational analysis of the logical structure of law:

[1] *H. Kelsen,* Reine Rechtslehre, 2nd edition, Wien 1960, p. 77.

[2] *G. H. von Wright,* Practical reason, Philosophical Papers, vol. I: "Norms, truth and logic", Oxford 1983, p. 132.

[3] *K. Opałek,* Theorie der Direktiven und der Normen, Wien - New York 1986, p. 169.

"Deshalb kann man mit Recht sagen, daß die formale Analyse der normativen Begriffe als eine besondere Logik für den Bereich der Normen zumindest in den bisherigen Versionen problematisch ist", a conclusion with which he closes a book where the present situation of theories about norms and directives is thouroughly discussed. I think it has some interest to put into a general perspective those very sceptical attitudes regarding the rationality of law from the point of view of what kind of logical rationality can be attributed to norms. I tried some time ago to give a provisional picture of the different trends existing in the contemporary technical literature about that matter.[4] But some very recent developments into that controversial field need to be heeded if the question of the rationality of law is not to remain in the domain of mere wishful thinking and vacuous proclaims.

2. One can think, as O. Weinberger has proposed, that legal theory, through some of its most distinguised masters, like Kelsen, has given up any pretension to admit law's rationality, incurring a normative irrationalism, as it has been branded. Or to renounce to a strict rational control of law, accepting that it has to be accepted as a kind of objective domain where only prudential reasons or a kind of more or less intuitive reasonableness should prevail. That seems to be, for instance, the present attitude shown by H. von Wright.[5] This claimed irrationalism or resigned rationalism joins, in their practical consequences, influential trends of modern scientific ideologies, as exemplified by the so called critical theories of law, hermeneutical movements and, surprisingly enough, by repeated revivals of scolastic legal philosophy.

Another form of that unsatisfactory situation, regarding the question of law's rationality, appears in some new proposals concerning first the analysis of the kind of logic required by law, and secondly the development of new logics supposed to be more suitable for modelling legal reasoning.

3. One tentative approach of the first sort can be found, for instance, in F. Miró Quesada's "idiomatic legal logic",[6] which is expressedly developed with the aim of "formalizing deduction as it takes place in the practice of law". That new logic is taken to be, from the outset, different from classical propositional logic and from predicate logic of first order and, intriguingly enough, from the current modal deontic logics. The specific legal logic proposed would deviate from ordinary logics in the fact that it would recognize "*sui generis* inference rules". Let us discuss some of its tenets cursorily, as, according to its creator, it lacks up to now of sufficient development to authorize a thorough criticism of its adequacy.

[4] *R. J. Vernengo,* Derecho y lógica: un balance provisional, Madrid 1987.

[5] *Von Wright,* Vetenskapen och förnunfted, Stockholm 1987.

[6] *F. Miró Quesada,* Lógica jurídica idiomática, in: Conferências III Congresso Brasileiro de Filosofia do Direito, Paraíba 1988, p. 224/232.

Miró Quesada stresses, at the very beginning of his essay, that the currently accepted formalization of legal norms as conditionals – be they the vague hypothetical judgments of Kantian descent in the *Reine Rechtslehre* or the Horn clauses fancied in logical programming – is questionable. Norms, as deontically modalized sentences, do not give expression to propositions having truth value and, therefore, its meaningless to apply to them logical operators that are extensionally defined on a binary truth calculus. Those classical operators are closed on the functions they establish; they produce propositions operating on propositions. They could not, by definition, produce propositions when operating upon norms lacking truth value. Hence, to accept as an adequate formalization of a so called conditional legal norm a formula like *CpOq*, where *p* is a sentence representing the proposition referring to a fact, and *Oq* the formal representation of a norms saying that *q* ought to be, implies that the molecular formula resulting from applying the if-then operator to a factual proposition and to a norm had to produce, due to its closeness, the formal representation of a material conditional, that is, a molecular proposition having a precise truth value. But, by definition of its formation rules, *CpOq* is generally taken to be a normative expression that cannot be the result of the traditional operation symbolised by the if-then operator.

Consequently, propositional logic's operators and forms are not adequate to represent the very current relationship that jurists introduce between facts and norms. Kelsen, in this point, had always been very reluctant to accept material conditionals as proper representation of the relationship that jurists attribute to sentences expressing the normative consequence of some factual antecedents; Kelsen thought that, under whatever verbal form, a peculiar category, *Zurechnung*, different from the causal categories applicable to natural laws, was there at work. But, although relegated to the obscure domain of Kantian transcendental categories, no further light was given about the logical behaviour of *Zurechnung*.

Instead, Miró Quesada advances a more radical interpretation: legal norms do not exhibit a classical logical form as working field of gnoseological categories, but they show an original logical form as a result of the operation of suitable deontic operators, similar nevertheless in the denomination to classical propositional operators. That is: there is an "and" and an "or" and an "if" which differ, in normative context, from the very trite words "and", "or" "if", etc. This suggestion involves that the language spoken by jurists differs deeply from the normal language spoken by less exalted mortals, where mere classical propositional logic and its operators work currently. Deontic negation, conjunction, disjunction, etc., are not equivalent to what is normally understood as negation, conjunction, etc., nor are they construable taking the latter as primitives.

Trivial logical rules reflecting the operation of classical binary propositional operators would have to be rejected in legal language or jargon, as, for instance, the rule for the introduction of a disjunction: *CpApq*, a principle banal enough in classical logic, but forbidden, it seems, in the new legal idiomatic logic. It is true that, with this formal manoeuvering some obnoxious paradoxes, like Ross', are radically quelled, because it is not possible to obtain them in this new logic. In any case, the not equivalence between propositional classical operators and the new deontic operators has as an outcome that "a complete isomorphism between deontic expressions descriptively interpretated" – as Kelsen and von Wright suggested as a way out for the eradication of classical logic from normative discourse – "and deontic expressions prescriptively interpreted" has to be rejected. For instance: in a prescriptive construction, the normative expression *C'pOq* (where *C'* represents deontic implication) implies *A'C'pOq C'rOs* (where *A'* represents deontic disjunction). The first formula "is a norm, whereas the second is not a norm in any case", so that the parallelism or even isomorphism proposed by Kelsen and von Wright between normative expressions in descriptive sense and norms in prescriptive function, disappears.

4. If as Kelsen, von Wright and Miró Quesada recommend it is necessary "to distinguish carefully between propositions and norms", it would not be possible to accept as valid the classical logical laws in legal language except when they were ratified by legal practice. Nevertheless, this new legal logic requires, to take heed of multiple aspects of practical legal discourse, of some type of propositional logic, because "in law's practice propositional deduction can take place". Miró Quesada, to avoid undesirable consequences, like deontic expressions of the form $O\alpha$, where α is a classical tautology, suggests the usefulness of relevant logic where "no tautology could be inferred from any proposition whatsoever". The new legal logic would demand, therefore, from relevant operators, plus the deontic propositional operators and the usual deontic modalizers. These are defined in the ordinary way: $Op = VNp = NPNp$, etc., with the exception that the indifference operator, *Fp*, read as *p* is strongly permitted, is not defined as the normal conjunction of the permission of the action described by *p* and of its forbearence, *Np*, but as the deontic conjunction of action and forbearance: *K'PpPNp* where *K'* represents the new deontic operator.

But Miró Quesada finds that, with formation rules *ad hoc* as he proposes and with due respect for the distinction between norms and descriptive propositions, no satisfactory set of axioms can be evinced for this legal idiomatic logic. Principles like the deontic contrariness rule, *NKOpONp*, in its "idiomatic" version may have a certain theoretical interest, "as a guide for the elaboration of a normative system, but by itself seems to lack any direct use in legal inferences". Therefore, Miró Quesada advocates an inferential logic à la

Gentzen instead of a deductive apparatus build on a set of axioms. The inferential rules are just those that "are used when in legal practice deductions are made". Some of the rules suggested are quite similar to the deductive procedures permissible in classical propositional logic or in standard deontic logic. Moreover, others, like the one authorizing to infer from a permitted disjunction, *PApq*, the distributive deontic conjunction of the permitted acts, *K'PpPq*, leads, in principle, to similar difficulties as those stressed by von Wright when adopting the so called "free choice permission", a formula literally identical with Miró's scheme of inference, except that for the Finish writer conjunction is always the known classical conjunction.[7]

5. But, just when this inferential rule has to be explained and justified, we find a rather odd declaration: "we believe" – says Miró Quesada in the text we are commenting – "that this rule" (the one mentioned at the end of last paragraph, whose resemblance with von Wright's axiom its inventor notes) "is founded in an *evident intuition*" (our undelining); "it shows that a legal logic that effectively corresponds to the manner in which deductive inferences are done in the practice of law is very different from propositional logic".[8] That "evident intuition" must be very solid indeed when, after all, the very same serious difficulties that von Wright pointed out regarding the similar standard deontic formula are put aside only by virtue of a conventional formation rule authorizing the introduction of the so called deontic conjunction, an operator that, whatever be said, seems to be, in my opinion, not very evident or clear in its functioning from an intuitive point of view. It seems, rather, a pure conventional solution at the level of the adopted symbolism, a solution needed by the initial presupposition: the exclusive distinction between norms (prescriptive sentences) and propositions (sentences having a truth value). It follows that some of these rules of inference are subject to a sort of proof rather peculiar in logic: "the rule seems correct to us (maintains Miró), but we will not present it as definitely valid meanwhile, until further analyses of its possible application are made". "Up to now we have not found a counterexample that puts us under the obligation to eliminate it".[9] But, it may be asked, is the dearth of counterexamples sufficient reason for accepting a logical rule of inference? On the other hand, in the very same text, Miró Quesada concludes that one of his rules of inference, although *prima facie* intuitively evident, authorizes that "a conjunction with a complete arbitrary component deontically implies an action", a thing that is not a paradox (affirms Miró) but that gives way to expressions not usual in legal jargon, to expressions, avers our author, that are simply ridiculous in legal speech.[10]

[7] Cf. *A. Soeteman,* A weak and strong permission in the law, in: The structure of law, edited by A. Frändberg, Uppsala 1987.

[8] *Miró Quesada* (note 6), p. 231.

[9] Ibid., p. 231.

I would rather not discuss here the greater or lesser adequacy of the inference schemata proposed by Miró Quesada. But, what to think of rules of inference, not endorsed by classical logic, rules supposedly educed from the deductions made by jurists in their practice of law, that, nevertheless, result in expressions that those very same jurists would reject as unusual? Or, more generally, how can one expect that this kind of logic, a sort of logic *ad hoc* built according to what jurists are supposed to do in their practice, to constitute a necessary condition of the rationality of law?

6. The special logic just examined somehow presupposes that in the practice of law an adequate answer to the query about the kind of logic law requires is automatically given. But it is not at all clear why the deduction lawyers supposedly do, which after all may be a merely rethorical device, have to be accepted at their face value. The traditional function of logic has been, on the contrary, to act as a means of rational control of arguments offered as constraining, their effective use not being sufficient reason for their acceptance as valid. Other attempts have been made to evolve a specific legal logic according, not to the argumentative practice of lawyers, but to ontological characteristics attributed to law. A case in point, which I have discussed elsewhere, is the legal-moral paraconsistent logic proposed by N. da Costa.[11] In it some postulated relationships between values and norms, or between morals and legal rules, are taken into account to propose several sets of axioms. Those logics, still in development, take as their inspiring factor the postulated ontologies suggested by different law philosophers.

Another kind of approach, although somehow related to Miró Quesada's endeavour to emphasize logic as an inferential artifice, is found in the very recent proposal by C. Alchourrón and A. Martino to built a deontic logic as a sequence logic, following Genzen's model.[12] Accepting at face value the challenge introduced by Jørgensen's dilemma, they try to build a normative logic where inferences are not dependent on the alleged truth value of norms. Their starting point is the acceptance as a primitive of the notion of consequence, a notion which admits, following Tarki's insinuations, a pure syntatical formal explanation. Hence a logic without truth is postulated as possible; as no semantical interpretation is necessary for the inferences authorized in a Genzen's type of logic, the current operators and also the deontic modalizers are introduced by rules indicating how to introduce or eliminate those logical and modal words from the antecedent sequence or the consequent sequence in a logic of sequences. Therefore, as regards deontic operators, one operational

[10] Ibid., p. 231.

[11] *N. da Costa/L. Z. Puga,* Logic with deontic and legal modalities: preliminary account, Bulletin of the Section of logic, vol. 16, n° 2, Lodz 1987.

[12] *C. Alchourrón/A. A. Martino,* Logic without truth, in: Acts of Expert Systems in law, Conference on Law & Intelligence, Bologna 1989.

rule is proposed, that sets out that a duty (a normative expression) can be inferred from a set of duties; the ought operator thus defined, *Op,* the other deontic operators can be defined in the traditional way through external and internal negation of the *O*-operator and the propositional operand.

But that normative logic without truth has some limitations as it depends on the Tarskian notion of consequence as an operation between sets of sentences in some language. The definition properties of that function are accepted without much ado, through the sets of axioms proposed and their different formulations. One of the essential characteristics so endorsed is monotonicity, which the authors summarise thus: "when the premises are ... increased, the consequences obtained with a smaller set must be maintained", a principle, sensible enough, that classical logics, as algebraic lattices, for instance, certainly presuppose. But it as has repeatedly been pointed out lately it is very doubtful that legal reasoning – what is known currently as such – is monotonic. On the contrary, it seems natural to regard it as one of those kinds of reasoning where "the addition of new information ... renders no longer acceptable conclusions that were previously so".[13] Makinson hints that typical ways of legal thinking, like the use of presumptions, are typical of non monotonic ways of reasoning, be they called non-deductive or quasi-deductive or what not. If that is so – and the experiences with expert systems in law show that strict monotonic reasoning may be inadequate as regards legal reasoning –, one wonders how to understand a normative logic built accepting the monotonicity condition which now seems not necessary for the interpretation of a sufficiently rational consequence function. Let the problem be further worked out by logicians, computer scientists and jurists.

But for the legal philosopher, traditionally fettered to the idea that rationality is essentially linked to a single logic – a belief that even Carnap's dictum about the arbitrariness in the choice of one's logic did not shake –, some observations by Alchourrón and Martino sound always irritating. The logic they propose, they say, "is that logic where the rules for the introduction and elimination of the operators can be given univocally, *following a common linguistic practice. But whether these rules fit with a common practice is an empirical fact.*[14] Is the validity of the logical rules empirically verified and justified?

Is there no "right logic" as Carnap announced? And, therefore, no "right" or unique notion of rationality? Do legal scientists have to yield, not only to an ethical relativism, as positivists are supposed to indulge in, but also to a sort of logical relativism that prevents any attempt to speak harmoniously of law's rationality? Is it true, as Opałek affirms that "die Ergebnisse der logischen

[13] *D. Makinson,* General theory of cumulative inference, paper presented to the second international workshop on non-monotonic reasoning, Grassau 1988.

[14] Op. cit., p. 35.

Operationen, in ihrer Anwendung auf deontische Sätze, sind gewiß zufriedenstellend, wenn man annimmt, daß es sich um modale Sätze handelt, die man deontische Sätze zu nennen vereinbart. Sie sind aber nicht zufriedenstellend, wenn man die allgemeinen Intuitionen der natürlichen Sprache im Hinblick auf das Funktionieren der normativen Begriffe berücksichtigt".[15] But, then, what to think when it is taken into account that logics were built for the purposes of a scientific endeavour where "normative concepts" are differentiated from the notion offered by the "general intuitions of natural languages" and that now, at the end of our tether, it is concluded that those logics are not satisfying because they do not answer to the exigences of natural languages for which they were not fashioned? Must we still regard with reverence the time-honoured distinction between science and opinion?

[15] *Opałek* (note 3), p. 170.

V. Ontologie versus Soziologie des Rechts?

André-Jean Arnaud
Legal Grafting as a Formal Problem in a Structural Perspective 395

Vincenzo Ferrari
Rechtssoziologie gestern und heute 405

Tomasz Gizbert-Studnicki
The Non-Linguistic Concept of Norm and Ontology 423

Ota Weinberger
Der semantische, der juristische und der soziologische Normbegriff 435

Kenneth I. Winston
Reflections on Model Institutions 455