

ISSUES ON CONCEPT OF LAW: OVERSTATEMENT OF IMPORTANCE OF LOGIC AS SHORTFALL OF LAW

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The article analyses logical application of legal norms and concept of law, seeking to show that in analysing and applying legal norms more significance should be attached to other factors than simple application of hypothetical syllogism. It also contains the analysis of the implications of logic in application of precedent. Further the article addresses problems of logical thinking: rather often, logic is used as a tool for abuse of law; logic also restricts a comprehensive interpretation of law through historical, theological, comparative and other methods, and precludes a flexible application of legal principles. These propositions are viewed from the perspective of today's relevant social issues and legal reasoning.

Introduction

In legal proceedings a judge is required to adopt a just and fair decision; however it is not always agreed what decision is just and fair. First of all, a decision should be reasoned, supported with legal and factual arguments. There are several ways of legal reasoning, e.g. deductive reasoning where a court deduces from certain propositions other propositions which constitute the judgement of the court, or analogous reasoning where the court relies on the precedent created in the past and applies such precedent to a specific current situation. It is agreed that a court judgement has to be logical, nevertheless, in practice a judge most often faces the cases where the facts and circumstances of a dispute are obscure or the law is ambiguous and expressed in the terms of worthiness. Such complex cases require a judge to

choose an appropriate line of reasoning. Yet, the requirement for a judgement to be logical remains.

The appreciation of logical interpretation lies in the development of Western cultural thought and its tendency to formalize. The origin is often linked to the birth of contemporary European legal culture. Certain features of logical reasoning are related to the codification of law in the Roman and Byzantine Empires, the formation of theological position in the philosophy. Eventually, logic has become a tool for development and control of the public thought. Logical reasoning has become dominant¹.

In a democratic society the legislative, executive and judicial powers are separated, so a judge may not create a new legal norm. Strictly observing the principles of logic, a judge must apply to the dispute relations the legislator's formulated legal norm, i.e. he legitimates his decision as a judge. Consequently, even though conceiving that a judge's decision is affected by a number of external factors, the requirement of the logic-based legal reasoning traditionally remains as a standard or goal².

It is not the aim of this paper to deny the logic-based interpretation of law, the more so that such interpretation is undoubtedly in line with the principle of legal certainty and is indispensable in a democratic society. Moreover, logical interpretation is very significant now because it helps to resolve a multitude of uncomplicated cases quickly. However, the meaning of logic and logical thinking is made absolute applying them too widely.

Logic and application of legal rule

Traditionally, a judge is required to apply a legal norm based on logic and supported with various arguments: this secures the impartiality of a judge, legal certainty, and non-trespassing of the sphere of the legislator. In decision-making a judge must determine the facts and apply a legal norm. Thus, a judge's decision-making process is theoretical, leaving no space

¹ C. Varga, *The Nature of the Judicial Application of Norms* // C. Varga. *Law and Philosophy*, Selected Papers in Legal Theory, Budapest 1994, p. 308;

² S. J. Burton, *An Introduction to Law and Legal Reasoning*, Toronto 1985, p. 2-9;

for his individual experience, rationality and personal values. A judge's work is cognitive when he is establishing facts, and logical – when he applies a legal norm. All these circumstances must secure the impartiality and objectivity and, besides, they imply that in each situation there is only one possible fair solution³. Consequently, logic encourages a judge to look for a sole fair decision forgetting about the existence of other legal values.

A judge employs deductive legal reasoning deriving from certain propositions other propositions. Such way of thinking can be formalised as a syllogism: a legal norm is used as a major premise of syllogism and the fact in a case is used as a minor premise of syllogism, and on this basis the conclusion is drawn.

Nevertheless, it is obvious that deductive thinking has certain shortcomings. Syllogism never specifies that its premises are correct. The basic problem how to find a proper major premise is to duly establish the applicable legal norm. In a complicated case it is not so easy to establish the applicable law, in particular if the language of the law is unclear or ambiguous or if a judge has to deal with the problem of competing rules or to apply analogy. Legal text also has such quality that many terms have to be defined in order to apply the text duly and, accordingly, to determine the applicable legal rule. For example, the fact whether in a specific situation a party acted as a professional or not will have to be assessed by the court and an applicable legal norm will have to be determined. Thus, a judge will have to find the connection between an abstract situation mentioned in the legal norm and a specific real situation. A logical syllogism which formally helps to draw the conclusion will be of little assistance to a judge in most cases⁴.

Further, it is to the same extent important to duly establish the facts in the case in order to use them properly in applying a legal norm (i.e. to establish properly a minor premise). It is a judge's prerogative to assess the sufficiency of evidence in order to establish certain facts and deny other facts. The rules of logic, formalising legal norms and facts in the form of syllogism cannot help in this case either. Yet, these are one of the basic actions a judge performs in order to resolve the dispute. The mode of establishing and assessing the facts will be predetermined by a judge's experience, pragmatism, rationality, values, etc.

³ Varga, *op. cit. (supra, n. 1)*, p. 295;

⁴ Burton, *op. cit. (supra, n. 2)*, p. 41-57, 68;

It is also important that logic does not help a judge to interpret the values entrenched in laws. Logic does not provide any means enabling to weigh these values. Deductive reasoning can be useful in simple cases dealing with simple facts and an obvious legal norm. However, logic is of little help in complex disputes and proceedings which require wide discretion of the court in assessing the facts. Yet, the key criteria in resolving such disputes obviously come not from the sphere of logic it comes from the court that would rely on the sense of justice which is innate in each human-being.

Naturally, the question arises why such overestimation should be given to logical thinking if it is only a fiction and veil of lawfulness; it is much more important that the court would rely on the sense of justice which is innate in each human-being.

One of the reasons, as already mentioned in the preamble, is to ensure non-interference of a judge into the legislator's area and adoption of an impartial decision. A litigating person who is interested in the outcome of the proceedings expects that a judge will be objective and apply the law properly. The general public wants a court decision to be a lawful and legitimised exercise of the State authority. The traditional concept of lawfulness understands this as formalism in dispute resolution. Legal formalism says that a decision in each case is prompted by law and logic, and not by values of a judge⁵. Yet, the representatives of legal positivism do not deny that a court judgement in certain cases is predetermined by moral beliefs and social policy. Legal positivism only denies that a judge should rely on moral values or social policy criteria when establishing the position of the existing law. However, if the law fails to provide the answer to the question arising in the case, then a judge can rely on other than legal criteria.

However, even on theoretical level such interpretation is not fully correct. In such a case law becomes only a logical concept: application of law encompasses classification, systemisation and making of conclusions, where judge's job is administration of law and not doing justice. A judge has to apply legal norm in an individual case. It is impossible to create such system of law where each situation of life would be discussed. Legal formalism does not eliminate the distance between an abstract rule and a specific situation. In dealing with a specific

⁵ Burton, *op. cit.* (*supra*, n. 2), p. 167-183;

problem, a judge has to cope with all shortcomings of legislature, collisions and lacunas in law. True, it performs a certain function of control: limits discretion of a judge, protects from expressly unlawful decisions; however, it cannot be made absolute⁶.

Further, it should be noted that court judgements are not unpredictable. In majority of cases, even in complex situations a lawyer can use the doctrine, precedents and etc., while a judge can take a responsible and fair decision. Criticism in this case goes to the treatment of logical interpretation of law as absolute, and not to conflicting legal rules as such. A judge should understand that beside empirical verification and logical deduction still exist a number of other possibilities of rational reasoning and substantiation the search of which is one of his underlying duties. Reasoning means an effort to pass, through rational considerations, from actually existing opinions and provisions to universally acceptable conclusions.

There exist certain substantial values: life (and health), knowledge, behaviour, sense of aesthetics, sociality (friendship), pragmatism and religion. However, at this stage we still cannot decide about the difference between what is right and what is wrong. We can only decide what is conceivable and what is not. These essential values are based on experience and dialectical arguments.

Moral assessment is necessary to define law in general and a specific legal system or statute. Such interpretation of law requires analysis, interpretation and assessment. Consequently, less space is left here for logical thinking, while the key criterion is reliance on essential values which cannot be logically explained – they arise from our experience.

Limits of logical thinking in applying case-law

It is important to consider the relationship between logic and case-law. Though a precedent as a source of law is more often relied on in common law states, it is nevertheless also important in other (continental European States) practice where conforming to laws and existing judicial practice courts follow the established precedents.

⁶ C. Varga, *Heterogeneity and Validity of Law: Outlines of an Ontological Reconstruction* // C. Varga. *Law and Philosophy*, Selected Papers in Legal Theory, Budapest 1994, p. 209-215;

When applying this method a judge performs the following actions: 1) analyses the current dispute; 2) analyses the created precedents; 3) analyses similarities of *ratio decidendi* of the current dispute and the previously created precedent; 4) decides whether these similarities are essential; 5) takes a subjective decision.

However, such analogous legal reasoning and rules of logic fail to solve the essential problem – how to decide whether similarities between two situations (i.e. the dispute to be resolved and the precedent) are so important that a dispute must be resolved in the same manner or should be treated differently.

A judge can rely on the precedent where the situations of the case and the precedent are similar enough and *vice versa*.

Similarities and differences between two situations are considered bearing social aspect. When dealing with this issue a judge considers the ethical side, i.e. whether the society wishes the situation to be resolved identically or differently. A judge must motivate why he has chosen one or another decision and why he has applied or not applied the precedent. The court uses the criteria of ethics, justice, social policy and common sense in order to justify the reliance or non-reliance on the precedent. The situation will be even more complicated if the court resolves that it is necessary to create a new or replace the existing precedent as a result of the changed circumstances of life. A court judgement should take into account social policy, public interest and be pragmatic, realistic, etc⁷.

Theoretically, the situation may occur when the formed precedent is similar to a legal norm to the greatest possible extent: i.e. all the facts to be established in the case in order for a precedent to be relied on are indicated therein. However, such situation is not realistic⁸.

The essence of a precedent is to fix and to generalise the rule and ensuing consequences created in a specific case. Future cases will be dealt with by other judges who will

⁷ R. Sartorius, *The Justification of Judicial Decision* // A. Aarnio, D. N. MacCormic (eds.), *Legal Reasoning*, Volume I, Hong Kong, Singapore, Sidney 1992, p. 127-136;

⁸ Burton, *op. cit.* (*supra*, n. 2), p. 36;

have to analyse the conduct of the parties and the existing situation following the sense of justice and to decide whether there are enough important similarities between the existing situation and the precedent to enable uniform treating of the decisions taken.

Another problem arises in cases when courts, due to formed new economic, legal or social situation, resolve to develop law and change the judicial practice. In such event the court follows the sense of justice, rationality, changed social values, pragmatism, experience, and takes into account the likely result of each different instance of interpretation, but logic cannot help here. Conversely, logic does not allow changing the precedent – the greater reliance on logic, the more difficulty for the court to develop law by changing the existing precedents⁹. Such law becomes static, lagging behind the pace of social development.

This problem is not only theoretical. In judicial practice, judges often face the rule that the courts do not rely on the precedent submitted by one of the litigating parties or by the court of lower instance because *ratio decidendi* of the cases is different. Notably, the courts sometimes stating only generally that *ratio decidendi* of the cases is different or providing only brief arguments.

Accordingly, the rules of logic do not resolve the problem peculiar to application of a precedent – how to decide whether differences between two cases are essential or not. In such event, a judge can only follow the general sense of justice, teleological and other ways of interpretation, pragmatism and rationality.

Logic and abuse of right

Logic is a tool for abuse of right. In this case we face not the need to take decisions following the natural sense of justice or the necessity not to forget the essence of law and its principles. Law is a social regulator setting forth a certain order and mutual relations of persons. In case of a dispute, law should tell which of the litigating parties is right. The decision is objectively taken by a judge, but the litigating parties also affect the decision by trying to prove their position. The more complicated the case the less obvious its decision and the greater

⁹ Burton, *op. cit.* (*supra*, n. 2), p. 11-40;

influence of the parties over the decision-making. The lawyer representing a litigating party analyses the situation, finds an advantageous for a client norm and submits the factual circumstances to the court so that from logical perspective the norm would seem the one which logically thinking should be applied to the situation in the dispute. It is the first time when the court views the dispute from the parties' position. Everybody knows the general principle of law *iura novit curia*; however practically in cases, in particular complicated cases, judges fully or partly takes the position of one of the litigating parties. Not every judge would dare relying on the legal principles, sense of justice or rationality. When the dispute is complicated, a judge also faces certain psychological pressure – resolution of the dispute otherwise than according to the logically applied norm would be treated as a judge's incapacity to duly apply the law to the relations of the dispute.

Thus we face the problem of abuse of right. The legal norm has its own purpose, meaning, aim to regulate relations in certain order and set forth priorities. However, in the hands of a professional lawyer, using the principles of logic, a legal norm is being applied mechanically; logic takes no account of the purpose for which this norm was designed, the relations it is aimed to regulate and result sought. Consequently, the broader reliance on the principles of logic the greater difficulty in avoiding abuses of a right.

Logical interpretation and application of legal principles

There are several ways for a judge to interpret the law: systematic, linguistic, comparative, historical, teleological, and other methods. The diversity of ways of interpretation of law proves that sole logical interpretation is not enough for a judge to apply the legal norm and resolve the arising dispute. Each of these methods is being further developed, creating rules for its application and a certain hierarchical system.

The more significance is attached to written law the more valued becomes logical interpretation and *vice versa* – the greater regard to the criteria of ethics and justice the more freedom is left to a judge's discretion The more significance is attached to written law the more valued becomes logical interpretation and *vice versa* – the greater regard to the criteria of ethics and justice the more freedom is left to a judge's discretion and thinking.

Law is a certain system with internal order. Law should give the answer each time when a dispute arises because a judge may not refuse to solve the dispute on the grounds of absence of the legal rule governing the Law is a certain system with internal order. Law should give the answer each time when a dispute arises because a judge may not refuse to solve the dispute on the grounds of absence of the legal rule governing the relations of the dispute. Here lies the main problem of casuistic law. When applying an abstract norm a judge each time explains how it should be understood; he discloses the meaning of the legal norm. This is already subjective as a judge does not logically apply a legal norm but discloses the meaning of an abstract norm. Disclosing the meaning is the process of developing and forming the law because each time the content of a legal norm is dictated by such factors as the attitudes and values of changing society, developing doctrine and changing historical situation.

One should not infer from the previous paragraph that law is totally obscure and a decision taken by a judge is always unpredictable and subjective. The rules of interpretation of law are formulated to enable a court to duly weigh the arguments and disclose the content of the legal norm¹⁰.

Here it is noteworthy to recall Kurt Gödel's formulated theorems to the effect that each good theory contains statements that are *per se* true but will never be proved. According to Gödel's theory, undecidability only implies that the particular deductive system being considered does not prove the truth or falsity of the statement. Of course, the mentioned theorems require exhaustive analysis and are not supposed to be necessarily applied each case when taking a decision; however, in this process, following logic as a guide, one should not forget that logic as an exhaustive system of statements is incomplete.

A judge views the abstract norms of law that dictate various decisions; he has to choose the method and the argumentation line enabling him to take the most appropriate decision in a dispute. When interpreting a legal norm and applying it to a specific situation he employs practical correlations and considerations, not the rules of logic. Logic only provides a tool to correlate two propositions, but, as already mentioned a number of times above, it says

¹⁰ Varga, *op. cit.* (*supra*, n. 1), p. 294-307;

nothing about these propositions. If a judge's experience gained after the first decision prompts that in a newly formed analogous situation another decision is required. Such interpretation compels to admit that judicature is not perfect and there is no sole fair decision. Yet, even without being absolutely perfect a decision is practical¹¹. In each situation all the arguments should be weighed and balanced against each other as well as general rules and legal principles¹².

It is noteworthy that the court's discretion to interpret and construe the law is the broadest in the countries with common law traditions where considerable attention is given to a pragmatic attitude, common sense and practicability. Certainly, this is also acceptable to representatives of continental law. A good example could be EU competition law the formation of which is mostly affected by the precedents created by the Community courts.¹³

Further, interpretation of law secures the existence of law and its development along with the changing society. Law would not exist without interpreting and construing it. It would be static, stiff and hardly applicable in practice, therefore not meeting public expectations.

Law should be interpreted. Legal propositions are interpretations of current judicial practice. According to Dworkin, previous laws and arguments that were relied on by judges in deciding previous cases should be interpreted. In some cases no doubts as to fair interpretation will arise because there will be only one version of interpretation fit for resolution of the dispute.

Dworkin has also indicated the facts of judicial practice which cannot be explained from positions of legal positivism. It is essential, that lawyers discuss even the simplest aspects of the legal system (how to interpret ambiguous laws or how to apply the constitutional provisions directly), and not only the complicated cases of judicial practice. According to Dworkin, there is no simple definition of the law "as it is" and the facts. The law "as it is" and

¹¹ Varga, *op. cit.* (*supra*, n. 1), p. 307-313;

¹² Sartorius. *op. cit.* (*supra*, n. 7), p. 137-140;

¹³ *Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004*, paragraph 1;

the facts do not exist in any form and can be understood only through process of legal thinking and interpretation.

Law is not self evident, it is general in its nature; it should not be applied directly as asserted by positivists – it should be interpreted, explained and construed choosing the most appropriate meaning in terms of justice. Thus, if we view the law and jurisprudence from the position of representatives of the natural law school, in particular modern natural law school, considerably less significance would be given to logical thinking. Natural law representatives leave more space to rationality and a judge's natural sense of justice.

Conclusions

Several conclusions may be drawn from the arguments, presented above:

1. Contemporary jurisprudence should focus on stochastic processes of legal reality and not on strict rules of logic.
2. Rules of logic constitute not the constant regulating principles but hypotheses which can be adjusted.
3. “Standard” logic has low applicability in law where value and justice based, also duly reasoned argumentation prevails.
4. More attention should be given to the analysis of practical functioning of the logical reasoning within the context of associating social rational beings.
5. Likewise logic, legal certainty is only one of legal values which should be balanced against other values.

Bibliography:

1. Allen L.E., Symbolic Logic: A Razor-Edged Tool for Drafting and Interpreting Legal Documents. Yale Law Journal 66, 1957.
2. Burton J. An Introduction to Law and Legal Reasoning, Boston, Toronto, Little, Brown and Company, 1985.
3. Feinberg J., Coleman J. Philosophy of Law, Seventh Edition, Thomson, Wadsworth, 1980.
4. Prakken H. AI and Law, Logic and Argument Schemes. *Argumentation* 19, 2005.
5. Santorius R. The Justification of Judicial Decision // A. Aarnio, D. Neil MacCormic (eds.). Legal Reasoning. Volume I, Dartmouth, Aldershot, Hong Kong, Singapore, Sidney, 1992.
6. Soeteman A. Norm and Logic. Remarks on Logic and Rationality in Normatyve Reasoning, Especially in the Law. Zwolle: Tjeenk Willink, 1991.
7. Varga C. Heterogenity and Validity of Law: Outlines of an Ontological Reconstruction // C. Varga. Law and Philosphy. Selected Papers in Legal Theory, Budapest, 1994.
8. Varga C. The Nature of the Judicial Application of Norms // C. Varga. Law and Philosphy. Selected Papers in Legal Theory, Budapest, 1994.
9. Verheij B. Logic, Context and Valid Inference. Or: Can there be a Logic of Law?, <http://www.jurix.nl/pdf/j99-10.pdf>.