LAWYERS' REASONINGS BASED ON THE INSTRUMENTAL NEXUS OF LEGAL NORMS

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I

In order to answer the question whether a given norm is at given moment a valid norm of some national legal system we must know all the elements of the doctrine of the sources of law accepted in this system (1). Of course we are interested practically only in the study of those ideologies of the sources of law, which have exerted or are exerting a real social influence, especially those which have exerted or are exerting a real influence on the decisions of the organs of the state. Sometimes it may be interesting to discuss some utopian ideology of the sources of law, but it is a task for the historian of political thought. Moreover, sometimes the actual social reality of some legal system (e.g. in time of war or revolution) may be doubtful.

Usually the ideology of the sources of law is not quite clear in its details. Therefore the answer to the question whether a given norm is a valid norm of a given system may sometimes remain undecided. In such a case a "rule of recognition" giving to some organ of the state the competence for conclusive identification of norms being in force in this system is necessary (2).

The fully expanded doctrine of the sources of law of a given system characterizes the social facts which are considered acts of enacting or officially accepting some legal norms (legislation in the widest sense, i.e. authoritative formulation of legal provisions by competent organs of the state, or formation of custom or precedent), and it characterizes, moreover, the elements of legal doctrine of a given country concerning the construction of a system of legal norms on the base of these social facts. If we

(1) A. ROSS, *On Law and Justice*, London, 1958, Stevens & Sons, p. 75.
(2) H.L.A. HART, *The Concept of Law*, Oxford, 1961, Clarendon Press, p. 92.

want to decide whether some norm is a norm of a given legal system, it is not enough to know all the legal texts published in a given country by the organs of the state which receive legislative competence or have the possibility of enacting norms in a sovereign way (3). We must also know: 1) the rules of interpretation of legal provisions, 2) rules of inference, and, last but not least 3) rules eliminating collisions of norms — rules which are admitted by the lawyers of a given country; of course one may observe sometimes some differences between academic doctrine of the sources of law and the doctrine accepted officially.

The rules of inference as an element of ideology of the sources of law concern lawyers' reasoning in which from the premise that some legal norm (or norms), immediately reconstructed according to the rules of interpretation on the base of legal provisions, are in force — one draws a conclusion, that another norm, not formulated in such a way, is a valid norm of a given legal system.

Such rules of inference are sometimes called rules of "juristic logic" but this term is a misleading one (4). Only a small part of these rules is based on the theorems of some formal logic of norms or deontic logic (i.e. logic of propositions characterizing some human act from the point of view of some norm or coherent system of norms as a commanded or forbidden or indifferent act) (5).

All the rules of inference admitted in a given doctrine of the sources of law are binding rules of argumentation in lawyers' disputes about the validity of some norm in a given legal system. These rules are based on some presupposition, generally but often not quite consciously assumed by the jurists, that legal norms are enacted by a "rational legislator", i.e. a fictive person,

(3) Z. ZIEMBIŃSKI, Kilka uwag metodologicznych o koncepcjach źródeł prawa (rés. Quelques remarques méthodologiques sur la "théorie des sources du droit"), *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, nr. 2/1967, p. 87-97.

(4) Z. ZIEMBIŃSKI, La logique et la jurisprudence de demain, *Archives de Philosophie du Droit*, T. XI, La logique du droit, 1966, p. 221-225.

(5) The difference between the logic of norms and deontic logic in such a meaning of a term is theoretically quite evident, but this difference does not have great importance for practical jurisprudence.

an ideal type, satisfying in his activity some rules of behaviour assumed by the jurists (6). Such presuppositions are traditionally disguised in the form of juristical speculations concerning "legislator's will", "intentions" etc.

One supposes that the "legislator" (i.e. "rational legislator") does not enact norms which are incompatible ones with anothers, does not commit a mistake from the praxeological point of view, is always consistent in his evaluations, etc. So one assumes that the "legislator" also accepts some system of the logic of norms, and if he has enacted and not abrogated a norm N_1 he "wants" also the norm N_2 to be in force, provided that the norm N_1 logically implies (of course — in a specific meaning of this term) the norm N_2. The rules of inference based on theorems of the logic of norms are rules giving a very strong argument for accepting the legal validity of norms which are logical consequences of norms formerly recognised as being in force in a given legal system. But the real lawgiver may, of course, enact norms so evidently inconsistent with others, that it is impossible to veil this fact even using the most speculative rules of interpretation of legal provisions. Also the real lawgiver may accept the norm N_1 and explicitly reject the norm N_2, being a logical consequence of the former. So all rules of inference, even the most evident ones, may be applied *only* under the condition that the real lawgiver did not explicitly decide the normative problem in another way.

II

In this paper some specific kind of rules of inference generally accepted by the jurists will be discussed. We will analyse the rules of inference based on the instrumental nexus of legal norms, i.e. on some causal nexus between the realization of one and the realization of another norm.

(6) L. NOWAK, Próba metodologicznej charakterystyki prawoznawstwa, Poznań, 1968, *Prace Wydziału Prawa UAM*, nr. 38, p. 67 and seq. (summ. Essay in the methodological character of jurisprudence).

Let us suppose two norms:

N_1 — S ought to realise the state of affairs A, and

N_2 — S ought to realise the state of affairs B.

If in a given situation the realization of B by S is a necessary condition of realizing A by S, it is impossible to perform the norm N_1 without performing N_2. If such an impossibility is of logical character (the proposition *p* describing the realisation of A logically implies the proposition *q* describing the realization of B) we may say that in some specific meaning of the term the norm N_1 logically implies the norm N_2 (7). But if this impossibility is of causal character, we may say that, in some specific meaning of this term, the norm N_1 instrumentally implies N_2. The performance of N_2 is then causally necessary for the performance of N_1, and if N_1 ought to be fulfilled so N_2 ought to be fulfilled too. So one suppose that if the "rational legislator" "wants" N_1 to be fulfilled, he also "wants" N_2 to be fulfilled.

So we may formulate the first rule of instrumental inference:
(1) If the performance of the norm N_2 is a causally necessary condition of performance of the norm N_1 and if N_1 holds in the given legal system, then N_2 holds also in this system.

If the performance of the norm N_3 is a causally sufficient condition of non-performance of norm N_1, then the non-performance of the norm N_3 is a necessary condition of performance of the norm N_1. So we may formulate the second rule of instrumental inference:
(2) If the performance of the norm N_3 is a causally sufficient condition of non-performance of the norm N_1, then if N_1 holds in the given legal system, N_3 does not hold in this system — and the norm ordering not to perform the behaviour commanded by N_3 holds.

But in legal practice these two rules must be modified in their formulation. Instead of an "objective", "absolute" formulation, we must accept a "subjective", "relative" one. To infer in such a way, one must know the causal nexus between the performance

(7) Z. ZIEMBA and Z. ZIEMBIŃSKI, Some remarks on the consequence relation between legal norms, *Studia Filozoficzne*, numer obcojęzyczny 3, Warsaw, 1966, p. 247.

of the first and the second norm. So we must formulate these rules of inference using not the term "causally necessary (or sufficient) condition" but "causally necessary (or sufficient) condition according to X's knowledge", e.g. the knowledge of the best experts of the matter, the knowledge of the average cultured man, etc.

One may therefore formulate an auxiliary rule of inference, that if everybody is obliged to know legal norms enacted and not abrogated by the "legislator", then everybody also is obliged to know all these causal nexus on which may be based some inference concerning the validity of other norms being in force in a given legal system. Of course such a rule of inference may be considered paradoxical, but this is only a consequence of the (quite specific in its character) duty of knowing the law, as imposed by virtue of the principle "ignorantia iuris nocet". In legal practice one often makes use of this rule of inference, especially in the causes, in which the duties of physicians or technicians are discussed. In our time such a legal duty to have the right knowledge of causal nexus in the field in which we are coming to operate has a particularly great importance.

But this duty has a very vague character. The line of causal descent (8) is modified by the intervention of other persons and of other events, which even on the bases of the knowledge of the best specialists may be qualified as quite accidental. So the application of the above mentioned rules of inference sometimes causes particularly intricate problems in legal practice.

III

One of the presuppositions generally assumed by the jurists about the "will" of a "rational legislator" is the teleological consistency of his orders. So one assumes that if a "rational legislator" commands some act to be performed, the performance

(8) Cz. ZAMIEROWSKI, Causal Nexus, *Studia Philosophica*, Commentarii Societatis Philosophicae Polonorum, vol. III, Cracoviae et Posnaniae 1948, p. 460 and seq.

of this act must be useful to realise some "reasonable" purpose and must tend to cause some real social effects. This presupposition is the base of specific rules of inference.

The first and the second rule of instrumental inference may be applied in every system of norms which supposes the consistent "rational" normgiver as its author or which is based on the consistent system of evaluations that give it an axiological justification. Further rules of this kind find their application only in legal systems or in other systems of norms in which through some conventional acts of one subject (such as enacting a statute or a by-law, performing some act-in-the-law, etc.) some duties for another subjects are created or actualized (made mature) (9).

In such a system there are not only norms commanding or forbidding in a simple form the realization of some action, but also norms of competence commanding the addressee (i.e. a person subjected to the competence of another person) to do or not to do something when this other person (i.e. a person receiving a competence to perform in a due way a given conventional act), especially a competent organ of the state, makes use of his competence. Perhaps it will be useful to distinguish between two types of norms of competence:

1° norms conferring the competence to enact legal norms and create in this way new legal duties: "If L enacts (in a due form... etc.) a norm N, then S ought to behave in a way ordered by the norm N" — and:

2° norms conferring the competence ("power") to perform some legal act (act-in-the-law) making mature the potential duty of S, formerly established: "If in a given legal system holds the norm: if K (in a due form... etc.) performs the legal act C_0 then S ought to do (forbear) A, and if K (in due form... etc.) performs C_0 — then S actually ought to do (forbear) A".

The performance of a conventional act, as well as the performance of some ordinary psychophysical acts, may be commanded or forbidden or indifferent (not forbidden and not commanded) by the norm.

(9) A. Ross, *Directives and Norms*, Routledge and Kegan Paul, London, 1968, p. 118 and seq.

In the text of a statute we often find only provisions which may be interpreted as norms commanding some subject to perform such conventional acts, as e.g. to enact a by-law, to adjudicate upon a case, etc. In such a situation one applies such a rule of instrumental inference:

(3) If in a given legal system holds the norm N_1 commanding some subject (organ of the state) to enact some norms for a given addressee (characterized in a general or individual way), so the norm N_2 commanding this addressee to behave in a way ordered by norms enacted (in a due way... etc.) by such a subject holds also in this system.

Mutatis mutandis we may formulate the corresponding rule of inference concerning the norms commanding some subject to perform some act-in-the-law: If the norm N_1 commanding some subject K to perform some act-in-the law (actualizing some legal duty of person S) holds in a given system, then the norm N_2, commanding S to realize this duty when the given act is performed by the subject K, holds also in it.

The order to make use of competence implies the competence, but of course the norm commanding the subjection to the competence does not imply that making use of this competence is obligatory for the subject receiving such a competence.

The instrumental nexus of norm commanding to make use of competence and of norm conferring such a competence is not so evident as in the case of the first or the second rule of instrumental inference. The base of this nexus is not a simple physical necessity of performance of N_2 for the performance of N_1, but the social necessity of obtaining an obedience to N_2, if the performance of N_1 would be socially effective. It would be not "rational" to command to make use of the nonexisting competence, i.e. to perform an act without social effects.

The instrumental nexus between the norm commanding someone to perform some action and the norm commanding others to realize the state of affairs, in which such an action would be effective or even in which only such an action would be possible, may be intricate. Therefore in reference to such a situation the rules of instrumental inference of norms are often very vague and contestable; e.g. one assumes generally, that if

S ought to realize the state of affairs A, the other subject R is obliged to help S in realizing A (even if this assistance is necessary) only when such an assistance is explicitly commanded by the particular norm. On the other hand, it is forbidden to impede someone in performing his legal duty, but this problem is regulated by some other norms of legal system.

The specific problem arises in the situation when the norm of higher level in a given legal system commands some subject (organ of the state) to enact an implementing order for the purpose of executing the general directives, e.g. of a statute. The executive organ is then obliged to enact a set of norms which are necessary to provide facilities for the realization of actions commanded by this statute. If the norm of higher level, e.g. a norm of Constitution or of ordinary statute, commands to perform some conventional act C_0, so some norm of an implementing order must prescribe the way of performing such an act, especially the procedure of doing it: it is impossible to issue writs of election without voting regulations; it is impossible to organize the induction without rules concerning the organization of recruiting boards or to take the doctor's degree when there are no rules (or custom) concerning the procedure of doctorship. Such situations cause the real "gaps in the law" and contradict the presupposition of praxeological consistency of the legal system [10].

On the other hand if a norm of a statute commands someone to perform the simple psychophysical action which may be effectively realized only when some other subjects realize the necessary facilities for performing it, then the implementing order must command them to realize such necessary facilities, or such a norm could not to be fulfilled.

So we may formulate the following rule of instrumental inference, which concerns the duties of an executive organ and may be considered to be a modification of the first rule:

(4) If the norm N_1 commanding some organ of the state to enact an implementing order for the purpose of executing some legal act of higher level holds in a given system, then the norm N_2

[10] Z. ZIEMBIŃSKI, Les lacunes de la loi dans le système juridique polonais contemporain et les méthodes utilisées pour les combler, *Logique et Analyse*, nr. 33, 1966, p. 41.

commanding this organ to enact such norms which are (in such or other way) necessary to enable the addressees of the norms of the first act the performance of their duties also holds in this system.

Of course this second norm is often unrealized by the organ of the state, causing the "gaps in the law" or the physical impossibility of realization of imposed duties.

IV

There are many variants of rules of inference based on instrumental nexus of the legal norms. We have discussed only a few, having quite different force as an argument in lawyers' reasonings. Sometimes also in a given situation the various rules of this kind are discordant in their consequences.

The theory of rules of instrumental inference is to be constructed. But it is not a psychological theory concerning the factual reasonings of some persons, nor the theory of using the theorems of some formal logic of norms. The rules of this kind are the elements of juristical doctrine of the "rational legislator" and serve to construct such a methodological fiction. One must be aware also of the ideological function of the doctrine of the "rational legislator" which provides facilities for ascribing to such a fictive person all the evaluations and intentions of the interpreters of "his will".

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