SOME REMARKS ON THE RELATION BETWEEN "LAW" AND "LOGIC

H. J. VAN EIKEMA HOMMES

In this paper I consider "law" to be the normative juridical aspect of our experiential world. This aspect functions as a fundamental *modus quo* of our experiential world and may never be mistaken with concrete rules, things, societal relations etc. A concrete juridical rule does not only function as a law in the juridical aspect, by which it is qualified as a *juridical* norm, but it functions in the symbolical aspect as well in so far as the rule is a syntactical proposition. Likewise, it functions in the logical aspect, in so far as it contains logical characteristics which enable us to distinguish it logically from non-juridical rules as well as all other things.

In this paper "logic" also refers to a fundamental aspect or *modus quo* of our concrete experiential world. This aspect may be described as *the fundamental mode of analytical distinction.*

Both the logical and the juridical aspect contain a *norm-side* and a *factual side.* That is to say: there are *logical norms* which are applicable to *logical facts* (logical *propositions*). In the light of the *logical norms* the logical facts (propositions) can be considered to be *logically correct* or *incorrect.*

The same distinction must be made in the juridical aspect. There we find *juridical norms* in the light of which juridical facts (e.g. human acts) can be evaluated as juridically correct (lawful) or incorrect (unlawful).

Now the question arises, how logical propositions, which are regulated by logical norms, can be directed to juridical norms and facts. For if the juridical aspect differs from the logical aspect, how can they be connected so as to allow a logical statement ("Urteil") to have a juridical content? This is a meaningful question since it concerns the problem whether the logical aspect and the logical axioms or postulates implied

in its norm-side, can exist in complete isolation from the non-logical states of affairs of our experiential world, or whether they must, instead, be considered as intrinsically connected with these non-logical states of affairs. If the latter is the case, as I am convinced it is, then the logical aspect can only reveal its own irreducible meaning and structural order in the inner connection with all the other aspects and with concrete things. Only when we accept this inner coherence of the logical aspect with the whole of our experiential world, can we explain the fact that we can logically distinguish non-logical (e.g. juridical) norms and facts. Implied herein is the thesis that *only non-logical things, symbols, norms, etc. can be logically analyzed.* This is confirmed by the fact that even modern symbolic logic, which has reached such a high degree of abstraction, presupposes symbols which, as such, are of non-logical character. (If they were not of non-logical character, they could not be distinguished). The widely accepted thesis that mathematics can be based on pure logic is untenable. Logical unity and multiplicity presupposes an originally mathematical unity and multiplicity. "Pure logic" cannot be.

I wish to restrict my remarks as to the relation between "law" and "logic" to the logical aspect of concrete juridical rules and do not now deal with the logical aspect of statements about juridical norms by people not juridically competent to make legal rules, people who do not stand within the sphere of legal practice and, consequently, do not give legal form to rules. In other words, we are interested in the logical aspect of positive legal rules, not in the logical aspect of legal theory.

A *coherence* of "law" and "logic" presupposes the structural *difference* between logical and legal norms. This difference may never be disregarded. Such disregard constitutes a shortcoming of all sorts of "Begriffsjurisprudenz" which take the thesis that the nature of law is logical as their point of departure. On the other hand, "law" and "logic" do display an inner connection making it possible for us to speak of "juridical logic".

At the outset we must acknowledge that, as far as their logical aspect is concerned, concrete legal rules are *propositions.* To that extent they can and ought to be subjected to the logical norms of identity, contradiction, excluded middle, etc. This is the case within the legal reasoning in a judicial determination of sentence. The judge must subject the considerations which found his sentence to the requirements of logical consistency; he must avoid logical contradictions, etc. The High Court of the Netherlands acknowledges these requirements in stating that a judicial sentence can be annihilated if it is logically contradictory.

The same requirements obtain for legislation. A legal rule, which declares a certain act to be forbidden and permitted at one and the same time is nonsensical.

But the application of logical norms is possible only in so far as it harmonizes with the legal rule's juridical meaning since the latter plays the qualifying role in the concrete rule giving such a rule its quality as *legal* rule. *Whereas the logical norms presuppose the non-logical states of affairs in our experiential world, the application of logical norms to legal rules as far as their logical aspect as propositions is concerned must be made subservient to the juridical meaning of these rules.* If, *in abstracto,* there is a logical contradiction between a higher and a lower legal rule within a certain legal system that displays an inner juridical unity, it may quite well be possible to harmonize both rules *in concreto* by legal interpretation. Such interpretation must ascertain the legal meaning of both rules as well as their inner juridical harmony. It means that *in concreto* only the juridical meaning is relevant, and that the logical norms may be applied only within the boundaries indicated by the juridical meaning of the rules. The same is to be said with regard to the juridical principles of *lex posterior derogat priori* and *lex specialis derogat generali.* They determine the juridical framework within which logical norms may function.

I think this is the theme of the conception of *deontic logic* defended by *Alf Ross.* His thesis that the "internal negation" is not equivalent to the "external negation" in deontic logic even though it is equivalent in so-called indicative speech (de-

noting factual situations), can be readily understood when one remembers the typical, non-logical character of (legal) norms. See his *Directives and Norms*, (1968), p. 139 ff.

This is also the position maintained by *Georges Kalinowski* in his book *Introduction à la logique juridique*, (1965), p. 139 ff., There he points out that the so-called "logical" methods of interpreting legal rules (*a pari ratione, a contrario sensu, a fortiori ratione (a minori ad maius* and *a maiori ad minus)*) must be subservient to "extra-logical" legal norms and principles. "Car c'est en obéissant aux règles extra-logiques de la prudence juridique que l'interprète du droit, avant de suivre les règles logiques correspondantes, sous-entend dans le texte interprété en cas d'argument *a maiori ad minus* la clause "au maximum", ... (p. 170).

If one loses sight of this relation between "law" and "logic", one falls into logicistic traps ("pièges du logicisme"), which are senseless from the juridical point of view. Of these, I will mention two examples.

1) The first concerns the well-known thesis that what has not been legally forbidden, is legally permitted. On the basis of this "logical" principle some have gone so far as to conclude that a legal system cannot contain gaps, while others have employed this thesis to conclude that juridical permission is nothing but a dependant reflex of obligatory norms. What has not been seen, however, is that the thesis itself makes sense only within special *juridical* spheres where it is a *juridical principle* that makes this thesis valid. A case in point is the modern penal law of states as it is founded on the fundamental principle *nullum crimen* (nulla poena) *sine praevia lege poenali*. So one may say that what is not legally forbidden in virtue of penal law is penologically permitted. This conclusion might not be valid beyond the field of penal law.

2. A second logicistic trap is instanced by the thesis that an imperative presupposes a permission. This thesis does not make sense because a legal imperative precludes the lawful option to do or not to do the action, an option inherent to legal permission.

If this conception concerning the relation between "law" and "logic" is correct, viz. that "logic" refers to the logical aspect of concrete propositions and rules which relate to non-logical states of affairs, then it is incorrect to restrict "logic" to propositions with "truth-value". This led to the dilemma of Jörgensön. That dilemma is based on incorrect presuppositions. "Logic" concerns the logical form of propositions concerning non-logical states of affairs. Therefore, a proposition which contains a norm (the directive proposition) is as much subject to logical norms as is a so-called indicative proposition. In both cases, the application of logical norms must be subservient to the extra-logical meaning of the propositions.

Free University, Amsterdam