

JUDICIAL REASONING AND THEORETICAL REASONING

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As a consequence of the expressly given norms, given either for the group or for two litigants, the judicial thinking activity elaborates new normative propositions, to which it attributes binding force. Is the process by which new normative propositions are elaborated, and to what degree, the same as that followed for the elaboration of new enunciative propositions?

The elaboration of new norms. Normally, the judicial thinking activity arrives at only one normative proposition for two litigants. But we must keep in mind that rather unexpected situations are to be found at times when operating with a legal system:

a) At times, as a consequence of a norm or set of norms given for the group, and as long as we remain within the legal order as a set of expressly given norms, we can legitimately elaborate two or more narrower propositions of the same range and field of application, among them two of necessity contradictory, all of them apt to be legitimately given binding force. A special case is that in which norms give rise to the so-called penumbra zones, because sometimes we find it impossible, when using such norms, to reach a qualification beyond dispute.

b) At times, to lead us to the elaboration of a norm for two litigants, two or more norms are given in the legal order commanding different results. Even contradictory norms can be found.

c) In the conflict of laws, when both legal orders have a norm directing the application of the other legal order, the possibility is given to reach the decision according to either of them, as long as we circumscribe ourselves to the legal orders in case.

d) Through reasoning by analogy we are always enabled, as long as we circumscribe ourselves to the legal order, to pro-

ceed to the elaboration of two contradictory normative propositions. To affirm the analogy is to choose one of such propositions, in a more or less free decision. This is exactly what happens when definitely reaching a decision in the preceding cases.

To account for the above possibilities let us look into the sequence in time of the norms of any legal order. We immediately notice a certain contingency, suggesting the lack of any connections pertaining to the norms, that the normative thinking activity shall necessarily follow. In effect, norms follow one another in time, many of them having exceptions of one range or another, qualified by distinctions, particularizations, exceptions to the exceptions, even contradictory norms. The sequence is such that in most occasions we would have been unable to predict which norms were to follow other norms, or, having succeeded in such a prediction, would have felt that it was due to influences coming from outside the legal order. It is as though there are always an infinite number of possible norms, only one of them in each case becoming an effective norm because of influences emanating from outside the legal order.

If our reasoning is correct, the category or categories upon which the normative thinking activity operates happen to grant the normgiver some latitude, enabling him to introduce his preferences when elaborating norms. As such a categorial background is properly to be characterized as having a dialectical structure, we conclude that the category or categories that have been used as a background for the elaboration of the normative propositions finally prevailing is dialectically structured, and that the normative thinking activity operates thereon. Such categorial background is always there, as something behind every norm, explaining precisely the possibilities of the normative thinking activity, making us fully aware of our inability to dispose of them, and accounting for such inability. Through the penumbra zones, through the articulation of the analogical reasoning, for instance, we can see the categorial background.

Trying to account for the already observed limitations, we

note that the choices already made happen to control to various degrees the subsequent decisions, that is, the possibilities of the normative thinking activity. Of course, in a beginning where there are no norms, as the possibility of choice is not limited by them, the normative thinking activity operates unobstructed by them on the categorial background; and there would have been no limits at all had it not been for the influences coming from outside the legal order. Precisely, the circumstance that preferences once made control to some extent explains that there have always been limits to the possibilities of making choices.

We may realize now, concerning the occasions when the normative thinking activity has made a preference, that such a preference has been made operating anew on the categorial background, in combination with a non-absorbing control of the norms, since, deliberately or not, the normgiver had not barred access to the categorial background.

We realize also that, consequently, the normative thinking activity always in part follows the norms in their articulation, and always in part operates on the categorial background in a different equation depending upon the case, even when the normative thinking activity, convinced that it only has in mind the norms themselves, affirms that only one normative proposition can be legitimately elaborated as norm; since the decision not to get inspiration from outside the legal order can only be a decision reached after taking into account what we think justice demands.

The elaboration of new enunciative propositions. For the enunciative propositions to be true, the elaborating enunciative thinking activity must follow the connections between the things investigated. The goal always is to elaborate true propositions. Let us here elaborate two types of things:

a) Things that appear to us, at times with little certitude, to be entirely alien to any categorial background with dialectical structure, and to any influence on them of our thinking activity. Our following the connections between these things is always hindered to some degree by the enunciative propositions previously elaborated.

b) Things elaborated by our thinking activity at least operating upon a category with dialectical structure, things which our enunciative thinking activity retains the faculty to influence. There are such things, therefore to be properly called things of culture. For instance, what we have been thinking about their relative importance has been giving them their relative importance. As to these things, the process for the elaboration of true enunciative propositions, i.e., that reproduce the connections in which they are, cannot but partly operate on the categorial background, exactly as to the part of them elaborated on the category, and partly with subservience to the already elaborated enunciative propositions, in its articulation, in the proportion of the more of the former the less of the latter, and viceversa. Access to the category is thus hindered, although, in the degree to which we are operating on the categorial background, we are not really obtaining any new knowledge, but a continuing reelaboration of the things themselves. Because of this, in a world where there were no other thinking activities doing the same, the knowledge we think we arrive at could not possibly be erroneous; that is, because we have been contributing to the reelaboration of the thing, because we are reelaborating it when trying to know it. As to those things entirely elaborated on a categorial background with dialectical structure, the elaboration of new enunciative propositions thereon takes place entirely on such background.

Conclusions. 1. The elaboration of true enunciative propositions about things unaffected by our thinking activity, not taking place on any categorial background with dialectical structure, has nothing to do, in a beginning where there are no enunciative propositions dealing with them, with the elaboration of new normative propositions. This is what leads a number of thinkers to affirm that there is a special logic for the law, perhaps using other words to the same effect. The more the process of this elaboration operates with subservience to enunciative propositions previously elaborated, the more it becomes increasingly like the process followed for the elaboration of normative propositions; and is identical with it when

both are subservient only to propositions previously elaborated.

2. The process for the elaboration of true enunciative propositions about the things alluded to in b) is one and the same with the process followed in the elaboration of normative propositions. This identity covers the process of elaboration of enunciative propositions on these things to the degree in which they are elaborated on a categorial background with dialectical structure.

3. In those cases where both processes are not one and the same, there is a circumstance tending to make the elaboration of enunciative propositions resemble more and more the elaboration of normative propositions, namely, the circumstance that probably there is no elaboration of enunciative propositions that is initiated only because of the will of only enunciating. This permanent intent of serving finalities that go beyond that of only to know, is apt to result particularly rewarded in those cases where the enunciative thinking activity influences the object.

4. In the elaboration of enunciative propositions, provided preferences are made in the degree they are made, the thinking activity is not inspired by what we think justice demands, as is the case of elaboration of normative propositions, but by what we think other demands, mainly esthetical, and thereafter, demands of convenience, success, etc. In spite of identity to the degree there is identity.

5. Other problems concerning the relationship between judicial reasoning and theoretical reasoning, arising by asking if they have or not the same logic, if the same logic is applicable to both or not, or the same dialectic, or whose logic is dialectic, etc., have a solution which depends on the previous decision of how we are to use such words, or of the more or less rigid consequence with which we put on one side the normative propositions, and, on the other, the enunciative propositions, or of the decision more or less rigidly followed to call or not to call norms the recommendations that arising from the sciences integrate what we call the applied sciences.