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Differing Mentalities of Civil Law and Common Law? The Issue of Logic in Law

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У розмові «правило» і «норма» здебільшого вживаються як синоніми. Насправді вони можуть вказувати на одне й те саме, але з різних точок зору: «правило» вказує на те, що наявний нормативний припис, а «норма» — на логічно осмислене концептуальне втілення такого припису. Тому що норми передбачають аксіоматичний ідеал концептуалізації та логізації права, вони присутні лише у романо-германських правових системах, де вони формують догматику права (навпаки, у англо-американському праві присутні здебільшого казуальні зразки). Норма є, звичайно, логічно завершеною, а правило — пропозицією. Відповідно, реконструкція може також виявити, що насправді жодна з норм чи декілька норм виражаються певним правилом.

Ключові слова: правило, норма, концептуалізація, логізація, догматика права

Rule / Norm. From the wide range of linguistic expressions and other objectifications used in the direction of behaviour[1], the dilemma of rule and/or norm is not a scholarly issue in a direct sense. It can be derived neither from the historical etymology of the relevant words nor from investigations into the history of ideas that inspire or merely match one or another language use. Clear-cut distinctions of meaning regarding these two terms are not specified either according to various historical periods or the historical cultures of law and legal thought, which have developed diversely so far. Although their regular usages may be different when compared to each other, in most attempts at a theoretical definition they are still decisively referred to as synonyms[2], that is, as concepts able to substitute nearly completely for one other[3]. Therefore, which usage is preferred by which language and

[1] *Kazimierz* Opalek Theorie der Direktiven und der Normen (Wien & New York: Springer 1986) 178 pp. [Forschungen aus Staat und Recht 70] lists on p. 88 norm, rule and principle, alongside persuasion, wish, proposal, request, supplication, advice, warning, recommendation, and encouragement, as directions of behaviour. In such a broad sense, see Mihály Szotáczky 'A normák eredete és funkciója' (Genese und Funktion der Normen) in Tanulmányok Szamel Lajos tiszteletére ed. Antal Ádám (Pécs 1989), pp. 227–238 [Studia Iuridica auctoritate Universitatis Pécs publicata 118].

[2] "The rule is a synonym for «norm» or «directive» taken as the declaration of a prescriptive function". J[erzy] W[róblewski] 'Règle' in Dictionnaire encyclopédique de Théorie et de Sociologie juridique dir. André-Jean Arnaud (Paris: Librairie Générale de Droit et de Jurisprudence 1988), p. 346. An even simpler solution is proposed by The Philosophy of Law An Encyclopedia, I–II, ed. Christopher Berry Gray (New York & London: Garland Publishing 1999) [Garland Reference Library of the Humanities 1743], with the entry 'Rule' referred to but speaking about nothing but 'Norms' eventually.

[3] This is illustrated by the way how in case even of an otherwise minutely precise author—e.g., Marijan Pavcnik 'Pravno pravilo' Zbornik znanstvenih razprav [Ljubljana] (1995), No. 55, pp. 217–240 and 'Die Rechtsnorm' Archiv für Rechts- und Sozialphilosophie 83 (1997) 4, pp. 463–482 —, one term is simply replaced by the other when changing between languages.

culture depends for the most part on mere habits of parlance. However, these habits may then—through the latent creative (socially constructive) force of the more or less consolidating use of language—become organised into certain blocks, and these blocks may from then on, in their own manners and ways, generate additional meanings with specifications according to context that may, for their own part, also eventually lead to a separation providing some basis for added theoretisation.

Origins and Contexture. The term 'rule' ['règle', 'regel', 'regola', 'regla'] originates from the Latin 'regula', while 'norm' stems from Latin 'norma' as used to denote a tool applied by masons and carpenters in ancient Rome to draw a straight line. In its present sense, 'norm'—as mostly seen in its derivatives 'normal, 'normality', etc.—is a product of 19th-century development, differentiating and homogenising human conditions, social processes and attitudes of production by adjusting them to previously set standards. To denote 'standard', the term 'norm' was first used in pedagogy and then in health care, and later on, during the same century, it was also extended to standardisation in production and technology, isolating, defining, combining and re-organising industrial processes as a series of patterns[1].

Let us mention, as an illustrative example of incidentalities in the history of the use of words, that in its original meaning, 'rule' once served to express some basic wisdom or adage, summarising the versatility of Roman jurists indefatigably searching for the principles of a justifiably right solution —instead of the causal succession meant by the expression of "if […], then […]", implying conditional repetition firstly describing and, then, partly prescribing those facts which may in their conceptual generality constitute a case and, partly, also ascribing a sanction to them[2].

According to its philosophical definition, a rule is a "formula indicating or prescribing what is to be done in a certain situation", noting that its prescriptive use affords a criterion with selective force, and that no such use shall be overshadowed by those recently spreading constative uses that are—mostly as connected with the senses of 'regular/irregular' or 'regularity', etc.—worded as if they were merely descriptive[3].

On the other hand, a norm is the "concrete type or abstract formula of what has to be done, at the same time including a value judgement in the form of some kind of ideal or rule, aim or model"; we should note that norms are mostly formulated to express some logical thought or act of will, free representation or emotion, or ideal of beauty[4].

[1] Cf., e.g., Georges Foucault Surveiller et punir Naissance de la prison (Paris: Gallimard 1975) 318 pp. [Bibliothèque des histoires], p. 186 and Georges Canguilhem Le normal et le pathologique 4e éd. (Paris: Presses Universitaires de France 1979) 224 pp. [Quadrige], p. 175.

[2] For more details, see, by the present author, A jogi gondolkodás paradigmái 2nd ed. [of Lectures on the Paradigm of Legal Thinking, 1996] (Budapest: Akadémai Kiadó 2004) 504 pp. on pp. 33–34.

[3] *André* Lalande Vocabulaire technique et critique de la philosophie [1926] (Paris: Presses Universitaires de France 1991), pp. 906–907. According to Ota Weinberger's similar formulation—'The Role of Rules' Ratio Juris 1 (December 1988) 3, pp. 224–240, especially para. 1, p. 225 et seq., "Rules are advice to be used in determining action."

[4] *M[ichel] T[roper]* & D[anièle] L[ochak] 'Norme' in Dictionnaire encyclopédique… [note 2], p. 691.

While norm is a "synonym of »rule«" (with the latter regarded as somewhat "more general"[1] or "more wide and generic"[2]), it is remarkable that in everyday usage a rule is still primarily an explicit or posited formulation as the in-itself neutral and historically accidental outcome of some 'rule-enactment' or 'regulation', while a norm is either the logical (logified) form of the above or the logical (normative) prerequisite of an act of regulation itself.

This explains why 'rules' may either be from experience[3] or govern a game, e.g., of the law [Spielregeln & Rechtsregeln]. All of this is unproblematic in so far as we are interested in them as the manifestation of, or access to, something. As to its apparent pair, 'norms' enter the scene when the rule's intended or probable notation becomes problematic and requires further investigation in a way that, proceeding from the rule as the presentation of something made accessible to us, we start searching for an identifiable message by means of the former's logical (etc.) analysis.

It is surely not by mere chance that we can hardly speak of 'creation of norms'; and we only speak of 'provision of norms' when we intend to emphasise either the field as being "normed" (ordained under regulation) or the artificiality of that regulation. Notwithstanding, present-day literature suggests as a logical proposition the idea that a norm can be separated out of a rule by its mere linguistic formulation. Actually, however, it is not the rule but the norm that is considered, as well as treated, in an onto-epistemological (and psychological and logical, etc.) perspective in order to be able to interpret it both as an enunciation and as the contents of denotation (inherent, among others, in a psychologically examinable act of will)[4].

The above seems to be substantiated by the fact that while in the English language, for instance, historical dictionaries specify more than twenty entries of meaning and fields of application for the single word 'rule', each of these is still related exclusively to the availability or prevalence of a given measure of behaviour, either indicating or merely carrying and/or enforcing it, without any of them claiming even incidentally that the rule itself can serve as the denotatum (with the objectification itself or its communication embodying this very measure either through its textuality and grammatical make-up or owing to the logical interrelationship among its elements)[5]. Moreover, the pervasive strength of the English lan-

[1] *E.g., J.-F. Perrin* 'Règle' in Archives de Philosophie du Droit 35: Vocabulaire fondamental du droit (Paris: Sirey 1990), pp. 245–255.

[2] *Patricia* Borsellino 'Norms' in The Philosophy of Law An Encyclopedia, pp. 596–598, especially on p. 596.

[3] Ibid.

[4] *For the former,* see, above all, Carlos E. Alchourrón & Eugenio Bulygin Normative Systems (Wien & New York: Springer 1971) xviii + 208 pp. [Library of Exact Philosophy 5], and, for the latter, Hans Kelsen Allgemeine Theorie der Normen (Wien: Manz 1979) xii + 362 pp., passim, especially paras. 1–10, and explicitly para. 1, passage III.

[5] *The Compact* Edition of the Oxford English Dictionary Complete Text Reproduced Micrographically, I–II (Oxford: Oxford University Press 1971), pp. 2599–2600. In incidences far away in the past, such examples may affirm this: "Þ eos riwle" [Ancren Riwle a (1225) {2 (Camden Soc. 1853)}] or "Þ e pope […] forsook Þ e rule of Þ e olde tyme" [John de Bartholomeus (de Glanvilla) Trevisa Polychronicon Randulphi Higden (tr. 1387), VII, 431 {Rolls series 1865–1867}] (original edition of the Oxford English Dictionary, p. 881, column 3 and p. 882, column 1, respectively). Against the historically established use, it is exclusively the modern (and, in a linguistic sense, rarer) professional usage that can attribute the word such a meaning: "Either according to the rules of the common law, or by the operation of the Statute of Uses." Penny Cyclopædia of the Society for the Diffusion of Useful Knowledge (1842), XIX, 379/2 (Oxford English Dictionary, p. 882, column 2).

guage mentality is shown by the fact that not even the amazingly late and slow spread of the word 'norm' provoked any change. That is, in English, until linguistic analysis grew into the main trend of moral philosophising in the first decade of the 20th century, the word 'norm' had exclusively been used to refer to some standard, pattern or measure made available, and by no means in order to imply that the standard, pattern or measure itself could have been embodied (objectified) by it in such a way that one, and exclusively one, single correct meaning could be extracted from such an embodiment[1].

In language use, we do not to talk about 'logic of rules' instead of 'logic of norms'. In no way in everyday practice do we equate the two terms with each other. Only a 'logic of norms' can be thought of, while accepting in advance that nothing but linguistic propositions conceived of (or prepared so as to serve) as logical units can be subjected to either a logical operation or any genuine linguistico-logical analysis.

With Varied Denotations. All this may lead us to the conclusion that in actual practice and according to a nominal definition, 'rule' and 'norm' denote the same thing, the former being considered from the point of view of making it accessible (communicable) as a message and the latter from that of logic, of internal coherence and consequentiality of contents. Yet regarding either their genus proximum or differentia specifica, we have to realise that both their conceptual volume and their extension will be different. For no norm can be found in a rule, although the mental reconstruction of its message may generate one. Or a rule may refer to a norm by forecasting the chance that a norm can be reconstru(ct)ed through—and as mediated by—it. For in itself, rule is but a specific linguistic expression, while in logic the norm states an abstract logical relation. They have in common the fact that neither of them can stand by itself. A rule may come to being if thematised (expressed, declared, posited, etc.) as such, and a norm, if a logical form is given as a result of mental operations in an intellectual (re)construction. Notwithstanding all this, they are not related as to form and content to one another. Moreover, they are not co-extensive. After all, rules differing by language, culture, structure and expression (etc.) may be logified as expressing the same norm and the same rule (in case of intentional or unintentional ambiguity, or because of the omission of punctuation or misprinting, etc.) may serve to reconstruct differing norms.

Norms Exclusively in Civil Law Rechtsdogmatik. In terms of what has been said above, it is the norm that has become the cornerstone of theoretical system-construction in our continentally rooted Civil Law, based upon the axiomatic inclination to logification. It is by no mere chance that the construction of Kelsen's Pure Theory of Law is founded on the Grundnorm, as it builds the derivation of validity throughout the entire prevailing law and order on either direct logical or indirect lin-

[1] It is to be noted that, from 1676 on, the word appeared in the form of 'norma/normae', always italicised as a borrowance from the Latin, and started to spread as 'norm' only from 1885, albeit between 1821 and 1877 mostly in pairs of synonyms such as, e.g., 'norm or model', 'norm and measure' or 'norm or principle'. Ibid., p. 1942 (p. 207, column 3).

guistic (conceptual) inference [Ableitung]. Accordingly, the norm is conceived as a logical unit that has been generated through logical reconstruction and can be subject to further logical operations. Therefore, it is by no means chance either that both the need for and the conceptual performance of a doctrinal study of the law—with the call for a meta-system strictly conceptualised and rigidly logified upon the law (taken as a thoroughly consistent body of text as concluded from its elements[1])—were formed in the Civil Law[2]. (It is to be noted, too, that a theory of norms serving as a Rechtsdogmatik can be erected with no concept of rule implied[3] and a theory of rules dedicated to the law's phenomenal form can also be built up on the exclusive basis of norm-concepts[4]).

On the other hand, the Common Law culture—which, instead of striving either for an exhaustive conceptual representation and textual embodiment (objectification) of the law or to re-establish it according to axiomatic ideals, and also instead of reducing security in law to logical deducibility from previously set propositions, rather focusses on social directness, the rectifying medium of everyday experience and feedback drawn from dilemmas of decision on the level of common sense as organically rooted in tradition, as well as the force of social continuity able to provide a framework for both preservation and renewal in the law—does speak in terms of rules as an exemplification of the law, that is, as an accidental manifestation and incidental actualisation in situations when one has to declare what the law is[5].

[1] Cf., by the author, 'The Quest for Formalism in Law: Ideals of Systemicity and Axiomatisability between Utopianism and Heuristic Assertion' Acta Juridica Hungarica 50 (2009) 1, pp. 1–30 {& <http://www.akademiai.com/content/k7264206g254078j/>} {an abridged version as 'Heuristic Value of the Axiomatic Model in Law' in Auf dem Weg zur Idee der Gerechtigkeit Gedenkschrift für Ilmar Tammelo, hrsg. mit Raimund Jakob, Lothar Philipps, Erich Schweighofer & Csaba Varga (Münster, etc.: Lit Verlag 2009), pp. 119–126 [Austria: Forschung und Wissenschaft – Rechtswissenschaft 3] }.

[2] The predominance of the analytical method in applied legal philosophy and the thoroughly constitutionalised doctrine of the law in recent decades may suggest a greatly changed trend today. However, the preference for analysis comes from an external interest and the elitist free thinking development of constitutionalism achieved by the US Supreme Court with academic assistance (i.e., by non-elected fora) has not yet exceeded the impact once exerted by the German doctrine on English legal thought during the second half of the 19th century, which may have enriched the Common Law in both theoretical interpretability and conceptualisation without, however, disassociating it from its own traditions.

[3] Kelsen supplies an illustrative example by avoiding the use of 'rule' (except as an element of the term 'rule of law' with 'rule' meaning just domination or control) in his final theory of norms [note 11].

[4] See below, note 20.

[5] This is well illustrated by literature which, historically drawing from the classical heritage of Jewish and Roman Law to span up to the Anglo–American approach, uses exclusively the term of 'rule' as a phenomenal designation. Cf., e.g., Derek van der Merwe 'Regulae iuris and the Axiomatisation of the Law in the Sixteenth and Early Seventeenth Centuries' Tydskrif vir die Suid-Afrikaanse Reg (1987) 3, pp. 286–302; Georges Kalinowski 'L'interprétation du droit: ses règles juridiques et logiques' Archives de Philosophie du Droit 30: La jurisprudence (Paris: Sirey 1985), pp. 171–180; Michael Clanchy 'A Medieval Realist: Interpreting the Rules at Barnwell Priory, Cambridge' in Perspectives in Jurisprudence ed. Elspeth Attwooll (Glasgow: University of Glasgow Press 1977), pp. 176–194; I. D. Campbell 'Are the Rules of Precedent Rules of Law?' Victoria University College Law Review 4 (1956) 1, pp. 7–27; Metthew Jackson 'Austin and Hart on Rules' Edinburgh Philosophy Journal (March 1985), pp. 24–26; Irene Merker Rosenberg & Yale L. Rosenberg 'Advice from Hillel and Shammai on How to Read Cases: Of Specificity, Retroactivity and New Rules' The American Journal of Comparative Law 42 (1994) 3, pp. 581–598; Cathy A. Frierson '»I Must Always Answer to the Law…« Rules and Responses in the Reformed Volost Court' The Slavonic and East European Review 75 (April 1997) 2, pp. 308–334. In contrast, even in hypothetical situations when

Yet, if a rule is unconceptualised (without ever being conceptually related, analysed and/or classified), that is, if neither logical conceptualisation nor any systemic idea stands behind the practical act of denomination[1], then it is to be doubted whether a Rechtsdogmatik can ever be erected upon such a scheme. For no doctrine can be built without norms[2].

If and in so far as the norm is a logical unit, the rule is a kind of proposition. As to their environment, norms may stand both on their own and in a systemic context. On the other hand, rules do presuppose principles, standards and policies that can, without being rules themselves, demarcate the sphere of the rules' relevance or applicability[3].

It is for the "scientific" methodology of the doctrinal study of the law to answer how and to which depth the unlimited (and in principle also illimitable) demand for logical correlation, consequence and coherence may (if at all) be complemented with axiologically founded teleological considerations. Therefore, the introduction of either broader (socially sensitive) definitions (in confronting, e.g., free law to exegesis) or brand new aspects (in, e.g., teleological interpretation) in an established discourse in the Civil Law may equally induce debates shattering normativism's basic claim. By contrast, the ascientific approach to law in the Common Law may openly admit that law can only cover the field of practical reason in which sober everyday considerations are used to being given preference.

some normative staff is expressed in a logifying context, one can mostly encounter a norm-concept. Cf., e.g., Wolfgang Fikentscher Methoden des Rechts IV: Dogmatischer Teil (Tübingen: J. C. B. Mohr 1977), ch. 31, para. VIII: 'Die Fallnorm' and, in a particularly telling context, Wilfried Hassemer 'Über nicht-juristische Normen im Recht' Zeitschrift für Vergleichende Rechtswissenschaft (1984) 1, pp. 84–105.

[1] Cf., by the present author, 'La Codification à l'aube du troisième millénaire' in Mélanges Paul Amselek org. Gérard Cohen-Jonathan, Yves Gaudemet, Robert Hertzog, Patrick Wachsmann & Jean Waline (Bruxelles: Bruylant 2004), pp. 779–800 {& 'Codification et recodification: Idées, tendances, modèles et résultats contemporains' in Studia Universitatis Babes–Bolyai Iurisprudentia, LIII (iulie–decembrie 2008) 2 [La recodification et les tendances actuelles du droit privé Balti, 9–12 octombrie 2008], 11–29 & <http://studia.law.ubbcluj.ro/articole.php?an=2008>} or as 'Codification at the Threshold of the Third Millennium' Acta Juridica Hungarica 47 (2006) 2, pp. 89–117 {& <http://www.akademiai.com/content/cv56l91505t7k36q/fulltext.pdf> and in Legal and Political Aspects of the Contemporary World ed. Mamoru Sadakata (Nagoya: Center for Asian Legal Exchange, Graduate School, Nagoya University 2007), pp. 189–214}.

[2] Such a conclusion is facilitated by the unclarified English word usage and also by the fact that, instead of doctrinal study, it was the attempt at an axiomatical foundation of sciences—e.g., Georg Edward Moore Principia Ethica (Cambridge: At the University Press 1903) xxvii + 232 pp. [cf., by the author, Lectures on the Paradigms of Legal Thinking (Budapest: Akadémiai Kiadó 1999) vii + 279 pp. [Philosophiae Iuris], p. 120]—that became instrumental in developing the linguistic analysis of law in the Common Law world. This very fact has anticipated English legal analysis as not being based on the actual law but on sample sentences hypostatised by authors or—as the early criticism of Herbert Lyonel Adolphus Hart's The Concept of Law (Oxford: Clarendon Press 1961) viii + 263 pp. [Clarendon Law Series] had shown—although the analysis is presented in a sociologising manner, yet it is actually constructed without any factual coverage whatsoever. Cf., by the author, 'The Hart-phenomenon' Archiv für Rechts- und Sozialphilosophie 91 (2005) 1, pp. 83–95. For an exemplary elaboration, see Geoffrey Samuel Epistemology and Method in Law (Aldershot & Burlington, VT.: Dartmouth 2003) xv + 384 pp. [Applied Legal Philosophy].

[3] Practically the entire oeuvre of Ronald M. Dworkin—starting from his paper on 'The Model of Rules' University of Chicago Law Review XXXV (1967)—serves just the explication of this.

Ambivalence in Language Use. In sum, the dilemma of "rule and/or norm" carries the marks of ambivalence inherent in coupling linguistic conventionalisation with attempts at theoretical (logifying and analytical) system-building. (As a merely practical outcome, it is to be noted that albeit Hungarian language usually refers to legal rules, yet once they are subject to a conceptual operation in doctrine, they are treated as legal norms[1]).

In the final analysis, both can be used as conceptually justified in their own place and within their own context, respectively. For language is used instrumentally and according to established habits, while concepts are formed as mental representations according to homogenising requirements set up by the given theoretical outlook[2].

All in all, we have thereby justified the moment of identity, ambivalence and duality inherent in the terminological dilemma of "rule and/or norm". Despite any remaining conceptual uncertainty, we may find it fortunate that the scholarship that developed in both German and Hungarian language cultures belongs to the orbit of Civil Law, which differentiates between the mere act of signalling the fact that there is a normative message made available and the logically processed conceptual embodiment (objectification) of such a message.

[1] E.g., Vilmos Peschka Die Theorie der Rechtsnormen (Budapest: Akadémiai Kiadó 1982) 266 pp. theorises upon norms exclusively, after an obviously similar solution was already resorted to by László Asztalos in his Polgári jogi alaptan A polgári jog elméletéhez [A fundamental doctrine of the theory of civil law] (Budapest: Akadémiai Kiadó 1987) 277 pp.

[2] Also cf. Norberto Bobbio 'Norma' in Novissimo digesto italiano XI (Torino: Utet 1964); Alf Ross Directives and Norms (London: Routledge & Kegal Paul 1968) ix + 188 pp. [International Library of Philosophy and Scientific Method]; Robert Alexy 'Rechtsregeln und Rechtsprinzipien' in Conditions of Validity and Cognition in Modern Legal Thought ed. Neil MacCormick, Stavrou Panou, Lombardi Lauro Vallauri (Stuttgart: Steiner 1985), pp. 13–29 [Archiv für Rechts- und Sozialphilosophie, Beiheft 25]; Georgio Robles 'Was ist eine Regel?' in Vernunft und Erfahrung im Rechtsdenken der Gegenwart ed. Torstein Eckhoff, L. Friedman & Jirky Uusitalo (Berlin: Duncker & Humblot 1986), pp. 325–338 [Rechtstheorie, Beiheft 10]; E. Wiederin 'Regel, Prinzip, Norm: Zu einer Kontroverse zwischen Hans Kelsen und Josef Esser' in Untersuchungen zur Reinen Rechtslehre Ergebnisse eines Wiener Rechtstheoretischen Seminars 1985/86, hrsg. Stanley Paulson & Robert Walter (Wien: Manz 1986), pp. 137–166 [Schriftenreihe des Hans Kelsen-Instituts 11]; Jerzy Wróblewski 'Legal Rules in the Analytical Theory of Law' Studies in the Theory and Philosophy of Law [Lódz] 2 (1986), pp. 91–110; J. Combacau 'De la régularité à la règle' Droits 3 (1986), pp. 3–10; F. Kratochwil 'Rules, Normes, Values, and the Limits of »Rationality«' Archiv für Rechts- und Sozialphilosophie LXXIII (1987) 3, pp. 312–329; S. A. Landers Rules and the Concept of a Rule in Law and Legal Theory (Godstone: White Swan House 1991) 459 pp.; G. Kucsko-Stadlmayer 'Rechtsnormbegriff und Arten der Rechtsnorm' in Schwerpunkte der Reinen Rechtslehre hrsg. Robert Walter (Wien: Manz 1992), pp. 21–36 [Schriftenreihe des Hans Kelsen Instituts 18]; C. R. Sunstein 'Problems with Rules' California Law Review 83 (1995) 4, pp. 953–1026; A. H. Goldman 'Rules in the Law' Law and Philosophy 16 (1996) 6, pp. 581–602.