

## WHAT IS LEGAL LOGIC?\*

By Ch. Perelman\*\*

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That the question what is legal logic should still arise today appears paradoxical, for law is after all one of the oldest of human disciplines and logic has in the twentieth century become one of the most developed of the disciplines of contemporary philosophy. Yet comparison of a number of recent works dealing with the subject, all of which, not being without merit, have enjoyed a measure of success, is enough to show that the problem exists and is even strongly disputed.

Of four such works,<sup>1</sup> two—those by E. Levi and K. Engisch—do not use the word "logic" in their titles, though they deal with legal reasoning and legal thought. The other two, on the contrary, expressly purport to deal with legal logic. Strangely enough, however, their authors explicitly deny the specific existence of such a discipline, whereas Levi and Engisch underscore, without any hesitation, the specific nature of legal reasoning and the existence of a particular logic, legal logic.

Thus in the first paragraph of his work, where Klug attempts to define the concept of legal logic, he states that it comprises the study of the rules of formal logic as used in the judicial application of rules of law (p. 6); that legal logic is therefore practical logic, consisting of the application to law of the rules of pure or theoretical logic which is general logic (p. 7).

It also follows, in line with this conception, that judicial reasoning must consist of a process of inference in conformity with rules of logic.

"Stets wird argumentiert, d.h. es wird gefolgert. Dabei wurden allerdings die in Betracht Kommenden logischen Gesetze bisher nur unbewusst oder zumindest unreflektiert benutzt" (p. 7).

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<sup>1</sup> Edward H. Levi, *An Introduction to Legal Reasoning* (1961 ed.), Karl Engisch, *Einführung in das Juristische Denken* (3rd ed. 1964), Ulrich Klug, *Juristische Logik* (3rd. ed. 1966), Georges Kalinowski, *Introduction à la logique juridique* (1965).



So also Kalinowski, who in his early studies and under the influence of the traditional conceptions of contemporary logicians began by denying the existence of a specific legal logic,<sup>2</sup> though he admitted that for centuries the techniques of legal interpretation were—by metonymy or analogy—called “legal logic”, has suggested<sup>3</sup> that this expression should be reserved to

“la partie de la logique qui examine du point de vue formel les opérations intellectuelles du juriste ainsi que leurs produits mentaux”.<sup>4</sup>

As in the case of Klug, legal logic is for Kalinowski merely *formal* logic applied to “concepts, divisions, définitions, jugements et raisonnements juridiques”.

It is probably because of the now generalized practice of identifying logic with formal logic<sup>5</sup> that Levi and Engisch, when dealing with what is *traditionally* termed legal logic, prefer to avoid the use of the word “logic” in the title of their works. Thus, Levi concludes his study by saying: “Legal reasoning has a logic of its own. Its structure fits it to give meaning to ambiguity and to test constantly whether the society has come to see new differences or similarities”.<sup>6</sup> According to him legal logic is in the main essentially a process of reasoning by means of examples, seeking to arrive at rules from the treatment of particular cases and applying them to new cases whose similarity to or difference from the cases previously decided would be demonstrated.<sup>7</sup>

Similarly for Engisch, “Die juristische Logik ist eine materiale Logik, die Besinnung wecken soll auf das, was zu tun ist, wenn man in den Grenzen in denen das überhaupt möglich ist, zu wahren oder wenigstens ‘richtigen’ juristischen Urteilen gelangen will”.<sup>8</sup> For him, legal logic is a material, specific logic; but in order not to set himself against current usage which for more than a century has identified logic with formal logic, he prefers to speak of “legal thinking”.

But must the expression “legal logic” be avoided, or must it be given, when used, the meaning of “formal logic applied to legal reasoning”?

Let me begin by stressing the strange use to which the expression “legal logic” was put in this last sense. Would it occur to anyone to speak of chemical logic or biological logic when logic is used in chemistry or in biology? Why then speak of legal logic with regard to the use of formal logic in law? Does the structure of the syllogism or of the principle of transposition vary when

<sup>2</sup> G. Kalinowski, “Y a-t-il une logique juridique?” (1959) *Logique et Analyse* 53.

<sup>3</sup> *Introduction à la logique juridique* 3.

<sup>4</sup> *Ibid.* 7.

<sup>5</sup> Cf. Ch. Perelman, “Logique formelle, logique juridique” (1960) *Logique et Analyse* 226-30.

<sup>6</sup> E. Levi, *op. cit.* 104.

<sup>7</sup> *Ibid.* 1-2.

<sup>8</sup> K. Engisch, *op. cit.* 5.



the terms or propositions replacing the variables are borrowed from law, chemistry or biology?

What really has occurred is a trick of legerdemain. For centuries methods of reasoning particular to law have been known and elaborated in works entitled "legal topics" or "legal logic".<sup>9</sup> As the actual reduction of logic to the theory of formal proof recognizes no logic other than formal logic, it was necessary when using the expression "legal logic" to ascribe to it a meaning consistent with this conception of logic but which, be it noted, has little in common with its usual meaning. In order, however, to permit this innovation, the attempt had to be made to show that the modes of reasoning which concern not the structure of premises and conclusions but their *substance*—such as reasoning by *analogy*, *a pari*, *a fortiori*, *e contrario*, *a maiore ad minus*, *a minori ad maius*, *ad absurdum*—may be usefully analysed with the help of formal logic.<sup>10</sup> Kalinowski is more careful in this respect and confines himself to presenting *a fortiori*, *a minori ad maius*, *per analogiam* and *a contrario* arguments as purely logical.<sup>11</sup> But all these analyses destroy the specific nature of legal logic and the reasons for teaching this discipline to future jurists.

In point of fact, what is specific in legal logic is that it is not a logic of formal demonstration but a logic of *argumentation* which uses, instead of analytical proofs which are compelling, dialectical proofs (in the Aristotelian sense of this distinction) which aim at convincing or at least persuading the audience (in this case the judge) to arrive at a solution of and determine a legal controversy.<sup>12</sup>

Judicial decisions, with their findings and grounds, constitute ideal texts the analysis of which will provide the arguments proper to legal logic. A moment's thought is enough to establish that here is not a case of theoretical reasoning, where starting from true premises one reaches, by means of the laws of logic a conclusion equally true, but a *decision* which the judge justifies on stated grounds, including the reasons which have enabled him to set aside the parties' objections to his findings.

In ascertaining the elements properly belonging to legal logic we shall not dwell on the probative elements which determine the judge's conviction as to the facts. In principle, the judge proceeds like any other person who tries to establish a historical truth. Where he differs from the historian is that precise rules lay the burden of proof upon one of the parties, as well as limit the admissibility of evidence in various ways. For instance, certain facts, such as adulterine filiation, may be proved only by certain persons, and documentary

<sup>9</sup> Cf. Theodor Viehweg, *Topik und Jurisprudenz* (3rd ed.) 1965.

<sup>10</sup> Cf. U. Klug, *op. cit.* 97-141.

<sup>11</sup> G. Kalinowski, *op. cit.* 162-71.

<sup>12</sup> A. Giuliani, "La logique juridique comme théorie de la controverse" (1966); *Archives de philosophie du Droit* 87-113, and *La controversia* (1966).

evidence is required to establish the creation or variation of a number of legal obligations.

We shall deal with legal logic in connection with the techniques which permit the facts to be qualified and subsumed under legal norms and the legal consequences to be drawn from them. The judge has recourse to legal logic where called upon to choose the law applicable—particularly where the choice of the rule poses a legal problem because of the existence of a number of competing rules or by reason of lacunae in the law or when the law requires interpretation to determine the scope of its application.

The oldest of the specific areas of legal logic opposes the letter to the spirit of the law. One can immediately see that here it is not a case of formal logic at all, since what is involved is the meaning to be attributed to one of the premises of the legal reasoning. Otherwise the question whether the law should be interpreted according to its letter or to its spirit can receive no universally valid answer.<sup>13</sup>

All problems of qualifying the facts, which may even include recourse to fictions in order to extend or restrict the scope of the law's application, pertain to legal logic. Let us note that these problems of qualification, whether in Continental or in Anglo-American law, imply a recourse to the *rule of justice* which ordains that essentially similar cases should be dealt with in similar manner.<sup>14</sup> But when are cases essentially similar? In order to adjudicate in the matter recourse must be had to legal "topics" or modes of reasoning which make it possible to sustain judicial decisions. Reasoning will be done *a pari*, *a fortiori* and *a contrario*, the terms of the law and its finality will be invoked, the intention of the legislature, public welfare and such notions as equity, municipal or international public policy will be introduced and such doctrines elaborated as misuse of right or evasion of the law. If we admit that the status and capacity of a person are regulated by his national law, what are we to do when certain provisions of foreign legislation are opposed to internal public policy? To what extent, in such cases, can we reject the foreign law?

May a Moroccan citizen marry a second wife in Belgium, although not divorced from his first wife, because his national law authorizes polygamy? The answer is clearly that he cannot, as bigamy is a crime which the Belgian celebrating official must not abet. But if a Moroccan citizen reaches Belgium accompanied by his two wives, must he be charged with bigamy? May his first wife claim dissolution of the second marriage on the ground of bigamy? Here again the answer is in the negative, although bigamy is a punishable offence. Supposing our Moroccan is out of work and entitled to unemployment benefits, may he claim an allowance for both his wives and for their issue from

<sup>13</sup> See my "Judicial Reasoning" (1966) 1 Is. L.R. 373 at 376-77 for examples. For a profound study of the question cf. *Le Fait et le Droit*, Travaux du Centre National de Recherches de Logique (1961).

<sup>14</sup> See "The Rule of Justice" in Ch. Perelman, *The Idea of Justice and the Problem of Argument* (1963) 79-87.



the marriages? It is when faced with questions of this nature that one must have recourse to legal logic and to all the arguments which it allows to elaborate. These may be strong or weak, but in no case will they provide a formally correct process of reasoning whose conclusion, starting from uncontested premises, forcibly imposes itself.

Legal logic provides us with arguments of a general or particular nature, applicable in legal disputes. The rhetorical tradition and that of the Topicists describe them, according to their range and their area of application, as *general cases* and *specific cases*. A number of general legal principles set out such cases whose application is sometimes limited to certain branches of the law but which may also be applicable to a great number of legal systems. The argument by analogy, for example, will more easily be admitted in civil than in penal law, and in the latter, will meet less opposition when it operates in favour of the accused rather than against him. The role and applicability of certain types of reasoning may depend upon tradition or the *milieu*, which admits or rejects certain types of reasoning, or which restricts or extends their field of application.

In particular, recourse will be had to legal logic in the case of antinomies, lacunae, conflicts of rules of law and incompatibility between rules applied to the solution of antinomies. The prevailing solution will sometimes be the result of our appreciation of the consequences in terms of justice or public welfare, or of the choice of one or another technique of reasoning. It may thus happen that a decision does not result from the primacy accorded to one rule over another, but that an appreciation of the consequences will urge that one rule may be preferred to another. Moreover, numerous theories and judicial constructions have been elaborated for the sole purpose of avoiding the application of legal rules in cases where they would lead to unacceptable consequences.

"False antinomies" result from the jurisprudential creation of an antinomy when the application of a rule leads to consequences which contravene a principle of natural equity. "False lacunae" derive from a restrictive interpretation of a rule in cases where its literal application would lead to a decision whose consequences are considered socially or morally inadmissible. It is with these situations in mind that the thesis of juridical existentialism could be defended, a thesis according to which decisions are not made on the basis of general rules, but it is the consideration of every concrete case, with all its attending particular circumstances, which allows the applicable rules to be ascertained.<sup>15</sup>

No doubt, there is a certain measure of exaggeration in this last view, since it is of paramount importance in any legal order that essentially similar cases should be treated in similar manner. Only when it becomes necessary

<sup>15</sup> Cf. Georg Cahn, *Existentialism and Legal Science* (tr. George H. Dendal) (1967) 115-20.

to determine how far a case is essentially similar to recognized precedents must we have recourse to juridical "topics", i.e. to all the considerations usually taken into account when interpreting and applying the law. These will consist of grounds whose pertinence and importance have not been neglected by former judges in the determination of the choice and field of application of legal rules, and which may not be ignored except for reasons which appear more important and justify a reversal of case law.

In all this reasoning one can trace the characteristic features, not of the formal impersonal demonstration whose course is independent of its subject matter, but argumentation the unfolding of which is a function of the audience, of its standpoints and reactions. The parties' arguments provide the judge with the grounds on which he will base his decision, choosing those he deems best for his immediate purpose, for the judges of higher instance who may have to pass his decision under review, for the parties who will have to abide by the judgment and for public opinion which may otherwise demand legislative modification of the law.

Legal logic is logic which allows the determination of a dispute in which contending submissions confront each other and where at every stage pro and con are not in a position of equality, as presumption may operate in favour of one or the other side, the burden of proof lying on the side seeking to rebut the presumption. This give and take of argument and counter argument is concluded by the decision of the judge who determines which arguments must prevail. The judgment rendered—together with its *ratio decidendi*—is now binding as law and takes its place in the legal order to the elaboration of which it contributes. It will be sufficient thereafter to refer to the precedent in order to support a decision, any person who seeks to upset case law having to advance the grounds which, in his opinion, should prevail over those previously accepted.

It is this give and take of arguments, which involves partisan attitudes, value judgments, their relevance or irrelevance in a given situation, the compass of their generalization and of their inclusion in a legal system, which characterizes legal reasoning. Legal logic emerges from an analysis of judicial controversies, from their classification, explanation, schematization. The results of this labour will not be a theory of formal demonstration, requiring only compliance with its operative rules to yield a conclusion correctly deduced, but in a theory of argumentation and controversy in which the force and relevancy of the grounds will be evaluated by a judge, trained in a fixed tradition to whose elaboration he contributes by his judgments and the reasons therefor.

