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NORMS AND LOGIC

Kelsen and Weinberger on the Ontology of Norms

I

Kelsen's *Allgemeine Theorie der Normen*[1] is not only a remark-
able intellectual achievement for a man of his age (he was still
working on the book when he died at 91), but also a highly
stimulating contribution to normative theory. This posthumously
published book awoke considerable interest among legal philo-
sophers and deontic logicians; the very fact that such an out-
standing philosopher as Ota Weinberger has dedicated a whole
book to Kelsen's last work is extremely eloquent.[2] This interest
is mainly due to the fact that Kelsen changed many of the views
that he defended for more than fifty years and this change con-
cerns some fundamental problems regarding the nature of norms
and their relation to logic.

Weinberger's approach to this last state of Kelsen's philosophy
is very critical. He maintains that Kelsen's position leads to an
irrationalism regarding norms (Normenirrationalismus); that it is
incompatible with the main tenets of the Pure Theory of Law
as an analytical "Strukturtheorie", and that it lacks any philo-
sophical basis.[3]

Though it is true that there are several obscure and even in-
compatible points in Kelsen's book (which is hardly surprising
in an unfinished work), I do not share Weinberger's pessimism.

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[1] Kelsen, *Allgemeine Theorie der Normen*, (New York: Wien, 1979).
[2] Weinberger, *Normentheorie als Grundlage der Jurisprudenz und Ethik*,
(Berlin, 1981).
[3] Weinberger, *Normentheorie*, p. 168: "...ich habe zu zeigen versucht, dass
der Normenirrationalismus einer philosophischen Grundlage entbehrt."

I shall try to argue in this paper that Kelsen's ideas can be given a perfectly coherent interpretation and though they differ strongly from those maintained by Weinberger, they certainly do not lack a philosophical basis, nor do they lead to any sort of irrationalism.

The main thesis of Kelsen's late philosophy and consequently the main target of Weinberger's attack is the contention that norms are not subject to laws of logic, i.e. that there are no logical relations between norms. This tenet is supported by two reasons: (i) norms are neither true nor false and as logical relations of entailment and contradiction are defined in terms of truth, no logical relations obtain between norms; (ii) norms are closely connected with certain actions, i.e. those of commanding, or more generally, of prescribing. This connection is so strong that there can be no norm without the corresponding act and as there are no logical relations between acts, there are no such relations between norms.

Weinberger accepts that norms lack truth values, but in his opinion this fact does not preclude the possibility of logical relations between them, and he rejects Kelsen's definition of norms in terms of acts. Here, I think, lies the main source of their differences; they start from different ontological presuppositions concerning norms.

In a joint paper with Carlos E. Alchourrón,[4] we maintained that there are two opposed views on the nature of norms and that a great many philosophic disagreements among deontic logicians are due to different ontological assumptions. We christened these two views the hyletic and the expressive conception of norms. It seems to me that the controversy between Kelsen and Weinberger fits admirably well into these two categories; Weinberger being a typical representative of the hyletic conception, whereas Kelsen can be regarded (and I shall try to sustain this claim here) as a clear expressivist.

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[4] C. E. Alchourrón and E. Bulygin, 'The Expressive Conception of Norms' in R. Hilpinen (ed.), *New Studies in Deontic Logic*, (Dordrecht: D. Reidel, 1981.)

II

Most philosophers agree that norms can be analyzed into two components: a descriptive and a normative component. Philosophers do not quite agree on how to characterize the descriptive component, though for the most part it is treated as a kind of description of a state of affairs or an action.[5] There is no major controversy about this, in spite of the fact that different authors use different names: e.g. phrastic (Hare), norm-content (von Wright, Weinberger), sentence-radical (Stenius), topic (A. Ross), modal indifferenzierter Substrat (Kelsen), etc. More serious problems arise as soon as we turn to the normative component: here two conflicting views can be discerned which give rise to two radically different conceptions of norms.

For the *hyletic conception* the normative component forms part of the conceptual content of a norm; it is an operator that operating on a descriptive sentence yields a normative sentence. A norm is the meaning of this new (normative) sentence in the same sense in which a proposition is regarded as the meaning of a descriptive sentence. The peculiar thing about normative sentences (*Normsätze* in Weinberger's terminology) is that they have a *prescriptive meaning*: they do not say that something is the case, but that something ought to (or may) be the case.

Many philosophers are reluctant to accept the very notion of a prescriptive meaning; they tend to regard it almost as a contradiction in terms. So they give an alternative account of the normative component not in terms of the meanings of linguistic expressions, but in terms of illocutionary force,[6] i.e. in terms of what is done with an expression. Norms, in this conception that we called *expressive*, are not meanings of a special kind of sentences, but the result of a certain type of action performed by a speaker, i.e. the

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[5] Instead of a proposition the descriptive component has also been interpreted as a name of an action or a verb phrase: cf. von Wright 1951 and von Wright 1973.

[6] About the distinction between meaning and force see Austin, *How To Do Things With Words*, (Oxford, 1962).

action of prescribing (commanding, prohibiting or permitting). The difference between an assertion, a question, a command or a conjecture does not lie in the meaning of the sentence used, but in the different use of one and the same sentence. So it is a certain use of language, that is, the so-called prescriptive use which gives rise to norms. Therefore the prescriptive component is not an operator, but a mere indicator of the force of an expression, i.e. of the action performed by the agent who uses the expression in question.

Following the convention adopted in Alchourrón-Bulygin[7] I shall use 'Op' and '$!p$' as symbolic expressions for norms in the hyletic and the expressive conception, respectively. It is important to emphasize that 'O' is a quasi-propositional operator,[8] whereas '!' is an indicator of the illocutionary force or as Reichenbach would put it a sign "acting in its pragmatic capacity".[9]

The expressive conception of norms precludes the very possibility of a logic of norms: if normativity consists in a certain use of language and norms are expressions of illocutionary acts, then there are no logical relations between norms. In other words, the expression '$!p$' cannot be negated, nor can it enter into logical relations with similar expressions.[10] But this does not necessarily lead to any form of irrationalism. Though there is no logic of norms, there is a logic of norm propositions, i.e. propositions about the normative status of certain actions or states of affairs according to a given normative system.

III

Weinberger's starting point is the distinction between two types

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[7] Alchourrón and Bulygin, 'The Expressive Conception of Norms'.
[8] I call this operator quasi-propositional for the meaning of 'Op' is not a descriptive proposition, but a prescriptive, proposition-like entity.
[9] Reichenbach, *Elements of Symbolic Logic*, (New York, 1947) pp. 336 ff. Weinberger uses both signs 'O' and '!' as operators; this is why I substitute 'Op' for his sign '$!p$' even in quotations.
[10] Cf. Reichenbach, *Elements*, p. 342.

of sentences: *Aussagesätze*, which are descriptive or declarative sentences expressing propositions, and *Normsätze* (normative sentences) the meaning of which is not a proposition but a norm. This distinction is a semantic one; the difference lies in the meaning of the sentences, normative sentences being endowed with a specifically normative or prescriptive meaning. So Weinberger's *gnoseologisch differenzierte Semantik*, i.e. the distinction between *Aussagesätze* and *Normsätze*, rests on the assumption that there are prescriptive meanings. No justification for this assumption is offered in his book; he simply assumes that we can understand normative sentences and that this fact shows that they have prescriptive meaning. Moreover he reads into Kelsen the same assumption:

Die Norm wird aus sprachlichen Äusserungen verstanden, sie ist der Sinn von Willensakten, weil dieser Sinn aus der Aktäusserung verstanden wird, nicht aus der Interpretation des Aktes als einer Tatsache.[11]

And he adds as a criticism of Kelsen's insistence in the inseparability of act and norm:

Mann kann normative Sätze sehr gut verstehen, auch wenn kein ihnen entsprechender Willensakt vorliegt... Jedenfalls kann das Sinngebilde der Norm ohne existenten Willensakt zum Gegenstand der Betrachtung gemacht werden....[12]

Weinberger's interpretation of Kelsen's definition of a norm as "Sinn eines Willensaktes" entails a commitment to the hyletic conception of norms, which I think to be contrary at least to the spirit of Kelsen's theory. No doubt, Kelsen's definition is rather obscure and can give rise to various interpretations. However, I am inclined to think, contrary to Weinberger, that the term 'Sinn' does not refer in this context to the meaning of a linguistic expression, but to its force, i.e., to the illocutionary act performed by the speaker. That the terms 'meaning' and 'Sinn' are often used in this peculiar sense is a well known fact, already noticed by Austin.[13]

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[11] Weinberger, *Normentheorie*, p. 117.
[12] Ibid.
[13] Austin, *How to Do Things With Words* (Oxford, 1962), p. 100.

In which sense Kelsen actually intended to use the term 'Sinn' is hard to say; but I am not so much interested in finding out Kelsen's actual intentions, as in giving a coherent interpretation to his main ideas. And *one* way, though perhaps not the only one, of making Kelsen coherent is to take 'Sinn' to mean force and not meaning.

In any case Weinberger's argument that we can understand normative sentences does not prove that there is such a thing as a prescriptive meaning. The term 'understand' is certainly ambiguous: it can refer not only to meaning, but also to force, as when somebody says: "I understand that he wants to command me to do something, but I do not understand what it is, for I do not know his language." The first occurrence of 'understand' makes reference to the illocutionary force (in this sense we can understand what X does, without knowing the language used by X); the second refers to the meaning and here the knowledge of the language is essential. So even if we can, in some sense, understand that an expression uttered on a certain occasion is a command (or a question), this does not prove that there are prescriptive meanings and hence, that there are normative sentences as a semantic category distinct from the ordinary sentences expressing propositions.

On the other hand, it is not enough to postulate prescriptive meanings in order to ensure the possibility of a logic of norms. Certainly, whereas the expressive conception precludes such a possibility, for the hyletic conception the question remains open. But it is by no means obvious that it should receive an affirmative answer. There are considerable difficulties inherent to the very notion of a prescriptive meaning which must be overcome first.

One main problem concerns the meaning of logical connectives, such as negation, disjunction, etc. They are usually defined in terms of truth (e.g., by means of truth tables). As normative sentences lack truth values, logical connectives must have a different meaning when used in prescriptive discourse. It is far from clear what the meaning of expressions like '$Op \lor Oq$' or '$\sim Op$' as normative sentences would be.[14]

Weinberger does not even mention this problem in his book on Kelsen, though he admits elsewhere that the negation of a normative sentence is quite different from the ordinary (propositional) negation.[15] Indeed, it is so different that it scarcely deserves the name of negation at all, for it is not an operation that would lead from a norm to another norm: '$\sim Op$' does not express a norm, but the derogation of a norm.[16]

So it seems that for Weinberger there is no operation of negation in the realm of norms, analogous to propositional negation. But then it is not clear what disjunction or conjunction of norms could possibly mean and how they are related. De Morgan's laws would obviously not hold, nor many other laws of propositional logic. One begins to suspect that a normative logic without negation would look extremely queer.

<div align="center">IV</div>

Another not less difficult problem is how to define the concepts of logical implication (entailment) and logical incompatibility (contradiction) between norms. I shall consider these two problems separately, beginning by the latter.

Weinberger's characterization of logical incompatibility between norms does not seem to me quite satisfactory. He tries to shape a concept of normative inconsistency in close analogy to the notion of contradictory or inconsistent propositions.

Now, two propositions 'p' and '$\sim p$' are inconsistent because, for logical reasons, both cannot be true (for the corresponding

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[14] Cf. the discussion of this problem in von Wright 'Problems and Prospects of Deontic Logic' in Agazzi (ed.), *Modern Logic – A Survey*, (Dordrecht, 1977) and 'Norms, Truth and Logic' in Martino, (ed.), *Deontic Logic, Computational Linguistics and Legal Information Systems*, (Amsterdam, 1982).

[15] Weinberger and Weinberger, *Logik, Semantik, Hermeneutik*, (München, 1979) pp. 121–122.

[16] Weinberger, *Logik*, pp. 121–122. Cf. von Wright, *Norm and Action* (London, 1963) pp. 138–139 about the requirements the concept of negation should fulfil.

facts or states of affairs cannot obtain).[17] It is exactly in this point,
however, where there is no analogy to norms. In the first place,
the incompatibility between 'Op' and '$\sim Op$', which one would feel
inclined to take as the analogon to 'p' and '$\sim p$' is not even men-
tioned by Weinberger, probably because this would not be a case
of incompatibility of *norms*. As already mentioned, '$\sim Op$' is not a
norm. So the only case of incompatibility discussed by Weinberger
is 'Op' and '$O\sim p$'. Now in what sense can these two norms be said
to be inconsistent? Clearly not in the same sense as 'p' and '$\sim p$',
for norms are neither true nor false. Nor would it do to say that
these two norms cannot both be obeyed or satisfied (at the same
time) for logical reasons. This is certainly true, but the impossibil-
ity of satisfaction is due to the fact that the propositions 'p' and
'$\sim p$' (i.e. the contents of the two norms) cannot both be true;
so we are faced here with inconsistency of norm contents and not
of norms. This inconsistency of norm contents entails the im-
possibility to satisfy both norms, but it does not follow from it,
that the norms 'Op' and '$O\sim p$' are inconsistent as well. Therefore
if the alleged contradiction between 'Op' and '$O\sim p$' would only
mean that the two norms cannot be satisfied for logical reasons
(i.e. independently from any experience), this would be just
another way of saying that the propositions 'p' and '$\sim p$' are
contradictory, that is, there would be nothing else but inconsisten-
cy between (descriptive) propositions.

Weinberger seems to agree with this when he says that "...the
incompatibility of ['Op' and '$O\sim p$'] does not follow from the
impossibility alone that the two states of affairs (p, $\sim p$) be
facts...".[18]

What else can the alleged inconsistency of 'Op' and '$O\sim p$'
consist in? They are not incompatible in the sense that they
cannot coexist in one and the same system or code of norms,
for there is no such impossibility. As a matter of fact a legislative

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[17] Weinberger, *Normentheorie*, p. 70.
[18] Ibid. "Die Unvertraglichkeit von ['Op' und 'O' 'p'] folgt nicht allein
aus der Unmöglichkeit, dass beide Sachverhalte (p, p) Tatsache sind."

authority may enact both norms and in such a case both would be valid, i.e. belong to the same system. Weinberger admits this, but such an enactment would lead in his opinion to a "logical defect of the system": "... die gleichzeitige Geltung beider Soll-sätze in ein und demselben Normensystem ist ein *logischer* Mangel des Systems."[19]

No doubt it would be a defect, but why call it logical? Weinberger makes a distinction between factually and logically unsatis-fiable norms:

Faktisch unerfüllbare Sollsätze zu statuieren, kann nicht zielführend sein; es ist daher unpraktisch, Unrealisierbares als gesollt zu setzen – doch ist dies keineswegs unsinnig (logisch widersinnig). Gleichzeitig unverträgliche Normen zu setzen, ist aber unsinnig und aus rein logischen Gründen abzu-lehnen.[20]

I see no difference between the two situations from a practical point of view: in both cases the norms are unsatisfiable and so unpractical, unless what the legislator wants is just to put the norm-subject into a predicament.[21] The fact that in one case un-satisfiability is factual and in the other logical seems to be irrelevant to the practical reasonability of the two norms.

Yet Weinberger insists that though two incompatible norms like 'Op' and '$O{\sim}p$' may be members of one and the same system, this would be a logical deficiency "by virtue of a rule".[22] Now what is this rule that turns the coexistence of the two norms into a logical defect of the system?

According to Weinberger, it is the prohibition to enact in-compatible norms, which he calls the "normenlogisches Wider-

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[19] Ibid.

[20] Ibid.

[21] Cf. Anscombe's example discussed in von Wright, 'Deontic Logic', *Mind* 60 (1951): 1–15 and 'Deontic Logic Revisited', *Rechtstheorie* 4 (1973): 37–46.

[22] Weinberger, *Normentheorie*, p. 70: "...es geht um eine Regel, die sich speziell auf das Sollen bezieht."

[23] Weinberger, *Normentheorie*, pp. 69–70: "...man kann das Verbot, unverträgliche Normsätze in *einem* System zu setzen, als 'normenlogisches Widerspruchsprinzip' oder 'normenlogisches Konsistenzpostulat' bezeichnen."

spruchsprinzip" or "normenlogisches Konsistenzpostulat".[23] And
this prohibition is analogous to the prohibition to assert contra-
dictory propositions:

> Das Gemeinsame beider Unverträglichkeitsrelationen – der zwischen Aus-
> sagen und der zwischen Normen – ist nur die Erfahrungsunabhängigkeit
> und die Tatsache, dass in beiden Fällen das logische Postulat gilt, nicht beide
> Sätze zugleich zu setzen (in einem System anzuordnen, bzw. zu behaupten).

It is more than doubtful that there is such a logical rule, even in
the case of descriptive sentences. Logical rules have nothing to do
with actual assertions; they refer to contents of possible asser-
tions, i.e. propositions. So a rule to the effect that one should
not assert inconsistent propositions would be a pragmatical rule
governing some sort of rational behaviour concerning acts of
assertion. The *rationale* for such a rule would be the logical rule
defining inconsistency: it is because two inconsistent propositions
cannot both be true that one should not assert them, provided one
wants to assert true propositions only. One could also say that it is
a technical rule stating that if one does not want to make false
assertions, then one should not assert inconsistent propositions.
In any case, we must first define inconsistency and only then are
we in a position of formulating the rule prohibiting the assertion
of inconsistent propositions and not the other way round. It
would be extremely strange to say that two propositions are in-
consistent because there is a rule prohibiting us from asserting
them. Yet this is exactly what Weinberger says in relation to
norms: they are inconsistent because there is a rule prohibiting
us from enacting them. There seems to be no other ground for his
"Konsistenzpostulat", but the fact that these norms are unsatis-
fiable. So after all, unsatisfiability of norms is the only reason
for calling them inconsistent and this is not an altogether satis-
factory reason, as Weinberger himself admits.

It seems that there is no sufficiently strong analogy between
the inconsistency of propositions and the alleged incompatibility
of norms. Though the coexistence of 'Op' and '$O\sim p$' would
certainly be undesirable and unpractical, this alone does not
justify calling them logically inconsistent.

V

My next step will be to discuss Weinberger's foundation of the relation of deducibility or entailment between norms. These problems are of course related to each other.

The main reason adduced by Kelsen in support of his contention that there are no logical relations between norms is the lack of truth values, but he also explores some other properties of norms that could play an analogous role in the realm of norms and so be used for the foundation of a logic of norms, viz. validity and efficacy. His conclusion is that none of these properties bear sufficient analogy to truth in order to justify the existence of logical relations.

Though Weinberger agrees with Kelsen that norms lack truth values, he thinks that validity can play a similar role to truth. One of Kelsen's arguments against validity as a possible bearer of logical deducibility is that validity means the same as existence and so there are no invalid norms. This contention is very dubious. Weinberger points out rightly that if "validity" means membership of a system of norms and "existence" is understood as relative to a system, then to say that there are no invalid norms is certainly true, but not very illuminating, to say the least. If on the other hand we understand by "existence" the performance of an act of prescribing, then the existence of invalid norms is clearly possible; the same is true if by "existence" of a sentence is meant that this sentence (be it descriptive or normative) is a meaningful element of a language.[24]

According to Weinberger Kelsen's mistake is to compare validity with truth, instead of comparing it with assertion. Here he believes to find a concept which is common both to norms and propositions and which can be used as a basis for logical deducibility.

Eine Parallele zwischen der Geltung der Norm und der Geltung der Aussage, lässt sich durch folgende Festsetzung konstruieren: 'Die Norm N gilt (in NS)'

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[24] Weinberger, *Normentheorie*, pp. 95–97.

heisst 'N ist Bestandteil des Normensystems NS'; 'Die Aussage A gilt' heisst
'A ist Bestandteil eines Aussagesystems AS *(und ist wahr)*'. [Italics mine] Es
lässt sich also ein Oberbegriff finden, der die gemeinsame Setzung von Prämis-
sen aussagenden und normativen Charakters zulässt.

I have emphasized the phrase "und ist wahr" because it shows
clearly an asymmetry between norms and assertions even in Wein-
berger's own formulation: to be valid a descriptive sentence must
not only be asserted (i.e. a member of an assertion system),
but also true, whereas there is no such requirement in the case of
norms.

Nevertheless Weinberger believes that it is possible to give a
definition of logical deducibility for norms in terms of validity.
What is essential for it is, in his opinion, the existence of a hereditary
property (Erbeigenschaft), but this need not be truth.

Die Konzeption einer 'Erbeigenschaft' des Folgerns für Normsätze (Normen)
bzw. die Konstruktion einer solchen Eigenschaft für beide Satzkategorien
ist ebenfalls durchführbar. Auf seiten der Prämissen kann Setzung (Voraus-
setzen) für Aussagesätze 'als wahr gesetzt', für Normsätze 'als gültig gesetzt'
bedeuten; auf seiten der Konklusionen kann von 'als wahr begründet' bei
Aussagesätzen und von 'als gültig begründet' bei Normsätzen gesprochen
werden.[25]

In the first place, clearly not every hereditary property regard-
ing a relation makes this relation a logical one, and I do not think
that Weinberger would subscribe to such a bold contention. Only
certain hereditary properties like truth give rise to the logical
relation of deducibility. The question is whether validity can play
a similar role in respect to normative sentences. I am inclined to
think that the answer should be negative, if by 'validity' we
understand – as Weinberger explicitly does – the membership in
or the belonging to a system. In this sense 'The norm N is valid in
the system NS' means 'N belongs to NS'. But then we have no
criterion for distinguishing between logical and nonlogical or
ad-hoc rules of inference, for all of them fulfil Weinberger's

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[25] Ibid., p. 122.

requirement: all of them preserve validity and so validity is hereditary in relation to them. But Weinberger quite explicitly rejects certain rules of inference like 'Op, so O$(p \lor q)$' or 'O$(p \& q)$, so Op'.[26] What are the grounds for this rejection? These rules certainly preserve validity, yet they are rejected as logical rules of inference, so this is not a sufficient condition for being a logical rule, not even for Weinberger himself. He rejects them on certain intuitive considerations, but he does not make explicit the criterion he uses, which is not the one he states officially in his book.

Moreover, though Weinberger does not give an explicit definition of 'normative system', he probably has in mind a Tarskian concept of a system, as a set of sentences that includes all its consequences. This means that the notion of a system already presupposes a set of rules of inference (which define the notion of consequence). But then to say that the rules of inference preserve the property of being valid (i.e. being a member of the system) is vacuous, for it is analytic regarding the notions of system and validity. Nothing of the kind is the case regarding truth: to say that rules of inference preserve truth is far from being analytic, because truth is defined independently from the notion of a system. So here too the analogy between propositions and norms breaks down.

VI

It was not my intention to argue that the hyletic conception of norms — of which Weinberger is perhaps the most conspicuous and lucid representative and which for a long time was also shared by Alchourrón and myself — is wrong and that there is no possibility of construing a genuine logic of norms.[27] What I wanted was to

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[26] Cf. Weinberger 'Normenlogik anwendbar im Recht; *Logique et Analyse* (1970), p. 102 ff., and Weinberger – Weinberger, *Logik, Semantik, Hermeneutik*, p. 106.
[27] Though I am becoming increasingly skeptical about the hyletic conception now.

point out some difficulties in Weinberger's argumentation in favour of the hyletic conception, in order to show that it is by no means as obviously the correct one as a hurried reader of Weinberger might suppose. At the same time I wanted to show that Kelsen's late philosophy, or to put it more cautiously, that the expressive conception of norms is not as hopeless as Weinberger presents it.

There is no doubt that if norms are closely linked to types of acts, then no logical relations obtain between them and no logic of norms is possible. But this does not lead necessarily to irrationalism. There are several other ways of building a logic related to norms which are compatible with the expressive conception. One such way has been proposed recently by G. H. von Wright. It consists in interpreting deontic logic as a logic of (rational) norm giving.[28] Another attempt to overcome irrationalism without postulating normative meanings is to construe a logic of normative propositions, i.e. propositions to the effect that such and such state of affairs (or action) is obligatory, prohibited or permitted according to a given set of norms.

A normative system, according to this conception, would not be a system of norms, but a system of norm contents, i.e. propositions descriptive of certain states of affairs or actions. A proposition, once commanded, is regarded as obligatory as long as the command is not withdrawn or cancelled. So all propositions commanded by a certain authority or set of authorities form the *commanded set*. If all logical consequences of the commanded set are regarded as obligatory too (and this means that they are regarded as implicitly commanded), then we obtain a normative system, which is the set of all consequences of the commanded set.

In order to give an account of the derogation or cancellation of norms, we need to introduce the *act of rejection* as a special

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[28] von Wright, 'Norms, Truth and Logic' in Martino (ed.), *Deontic Logic, Computational Linguistics and Legal Information Systems*, (Amsterdam, 1982).

illocutionary act different from commanding or prescribing, which leads to the elimination of certain propositions from the commanded set, according to certain rules.[29] Then the concept of permission can be defined in terms of derogation, an idea that is also shared by Weinberger.[30]

In this way an expressivist can give an account of the temporal existence of norms in terms of acts of commanding and acts of rejecting certain propositions (norm-contents).

A logic of norm propositions would then be a logic of propositions to the effect that certain other propositions belong or do not belong to the commanded set, or (which is the same) that they are obligatory, prohibited or permitted (in relation to a set of norms). Such propositions are true or false and so they can enter into logical relations.

I shall not try to develop a logic of this kind here, but there is one point which deserves close attention. It is the relation between general and individual norms and, in particular, the relation between a general law and a judicial decision.

Kelsen maintains, on the one hand, that no individual norm can be derived by logical means from a general norm and, on the other hand, that an individual norm like the sentence of a judge can be justified by a general norm. In order to account for this second fact he introduces the notion of correspondence (Entsprechung). But what does 'correspondence' mean in this context? According to Weinberger it can only be understood as the logical relation of deducibility: a norm is justified by another norm if and only if it is logically derivable from the second. But then there are logical relations between norms after all, so it sounds as a lack of coherence in Kelsen's theory.

It is true that much of what Kelsen actually says on this topic is rather confused, as for instance his theory of recognition (Anerkennung) of valdity, which as Weinberger rightly points out

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[29] Alchourrón and Bulygin, 'Expressive Conception of Norms.'
[30] Weinberger and Weinberger, *Logik, Semantik, Hermeneutik*, p. 128.

is inconsistent with the main tenets of the Pure Theory of Law. But I think that these inconsistencies are mainly due to the fact that Kelsen has not had enough time to harmonize his new ideas with the old ones and thus they are more verbal than substantial. In particular, I believe it possible to give a coherent account of the problem of the relation between a general law and a judicial sentence in terms of the expressive conception of norms. I would even venture the hypothesis that the difference between the hyletic and the expressive conception on this point is not as radical as Weinberger believes it to be. All or nearly all that he has to say on this topic can also be said, though in a different language, by an expressivist like Kelsen.

Indeed Weinberger does not maintain that the judicial decision (as a certain act of the judge) can be logically derived from the general norm; this would be absurd and Weinberger clearly rejects such an interpretation: "Die normenlogische Deduktion is nicht Erzeugung einer Norm – und wird von niemanden so verstanden...".[31] What can be derived according to Weinberger is the content of the act of the judge and this content is an individual norm.

For an expressivist the situation is rather similar. If norms depend on acts of prescribing, then clearly there is no logical entailment between a general and an individual norm (e.g. between the act of the lawmaker and the act of the judge). But there may be a logical relation of deducibility between the contents of those two acts, with the only difference that by 'content' is meant here a proposition, whereas for the hyletic conception it would be a norm.

Let us illustrate this with an example. Suppose the legislative authority issues a general norm to the effect that all landowners should pay a special tax. The proposition commanded by the lawmaker (i.e. the content of this norm) is that all landowners pay a special tax and so it is true that all landowners are under an obligation of paying the tax (or as we might also say, ought to pay

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[31] Weinberger, *Normentheorie*, p. 109.

it). Now from 'All landowners pay the tax' it follows that the landowner A pays the tax, so the proposition 'A pays the tax' belongs to the commanded set and therefore it is true that A is under an obligation to pay his tax. This shows that Weinberger is right in asserting that a general norm by virtue of its very meaning (or rather of the meaning of its content) concerns all who happen to be its addressees, in our case landowners, and creates an obligation for all of them. But this is not yet the end of the matter.

Though, being a landowner, A is under an obligation of paying his tax, it may very well happen that he does not pay it in due time and so he does not fulfil his obligation. In this case he can be brought before a court. Now the norm that regulates the activity of the judge does not prescribe him to sentence all landowners who do not pay their taxes, i.e. all those regarding whom it is true that they ought to pay the tax and did not do it in due time, but rather it prescribes to sentence all those regarding whom it has been *proved in court* that they ought to pay and did not pay the tax. ('Proved in court' is an abbreviation for a rather complex procedure of a judicial process.) Once it has been proved in court that the landowner A did not pay his tax, it is true that the judge ought (or is under an obligation) to sentence him either to a fine or to prison, as the case may be. This is so because the proposition that the judge sentences A belongs to the commanded set (being a consequence of the explicitly commanded proposition that landowners, regarding whom it has been proved in court that they ought to and did not pay, are sentenced by the judge). So if the judge issues a norm sentencing A, this norm is justified by the general norm concerning the duties of the judge, and this means that its content (which is a proposition) is logically derivable from the content of a general norm.

The existence of two parallel and related sets of norms, which may be called the primary and the secondary system,[32] addressed

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[32] Cf. Alchourrón and Bulygin, *Normative Systems*, (New York: Wien, 1971), p. 148.

to the population in general (or a subclass of it) and to the courts, respectively, is an important feature of our legal orders. The two systems are related in the sense that the secondary or the judge's system presupposes the existence of the primary or the subject system and so they belong to different levels. This gives rise to some interesting situations which might seem paradoxical. For instance, it may be true that A ought to pay his tax and that he did not pay it and yet the judge ought not to sentence him (if e.g. it has not been proved in court), and vice versa, it may be true that the judge ought to sentence A for not having payed his tax, though it is not true that he did not pay it. It sounds even more paradoxical in case of penal law: it may be true that A ought to be sentenced to prison and yet the judge ought not to sentence him, and conversely, it may be true that the judge ought to sentence A to prison and at the same time it is true that A ought not to be imprisoned.

The air of paradox vanishes once we distinguish clearly between the primary and the secondary system and keep in mind that the fact that a proposition has been proved in court does not entail its truth. Legal proof is very different from scientific proof, for 'proof in court' does not mean a complete proof, but rather a certain finite procedure which tends to establish whether the proposition in question is true or not, but must come to an end in a given time. So it ends up in a decision based on the existent and often rather scarce evidence. There is no wonder that a court sometimes decides a proposition is true when it is in fact false and vice versa.

Take the famous case of Dmitri Karamazov. He did not kill his father and so, according to the penal law, he ought not to be punished. But there was a certain amount of evidence against him and the jury decided that he had killed his father. Once this decision had been taken, the judge was under an obligation to sentence him to prison. So he did and his decision was perfectly lawful, i.e. it was justified by the law of procedure, though not by the penal law.

But, one could ask, what is the point of saying that according

to penal law Dmitri ought not to be sentenced if the sentence was lawful and he was sent to Siberia? There are at least two important points (though they are perhaps irrelevant to Dmitri's personal fate). First, what has to be proved in court is determined by penal law and not by procedural norms; and secondly, the fact that the sentence of the judge, though lawful, is not justified by penal law enables us to say that it was wrong, that a judicial mistake had been made in the case of Dmitri Karamazov. To say this would not make sense if there were only norms addressed to the judge and no 'substantial' laws. This shows, by the way, that those theories that tend to interpret all legal norms as directives addressed to the courts[33] are deeply mistaken. They lead not only to a distortion of the function of the law, but also to a highly inconvenient limitation of the expressive capacity of legal language.

I hope that this picture of judicial decisions and the underlying general norms shows that the existence of logical relations between norm-contents averts the peril of irrationalism and makes it possible for an expressivist to give an account of all the relevant facts, though in a different language. This confirms my impression that there is no crucial test that would allow us to decide between the two conceptions. And so Weinberger's contention that Kelsen's late philosophy is definitely wrong-headed is at least exaggerated.

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[33] A. Ross, *On Law and Justice*, London, 1958.