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THE EXPRESSIVE CONCEPTION OF NORMS – AN IMPASSE FOR THE LOGIC OF NORMS

The recent development of the ontology of norms has taken a surprising turn. Some writers in deontic logic (or perhaps more appropriately, in the logic of norms) and in the philosophy of law have adopted a conception of norms which stresses a close connection between norms and acts of commanding, and which either abolishes any possibility of developing a logic of norms or leads to a transfer of logical relations and inference operations from the field of norms into the field of descriptive norm-contents, all of which looks rather similar to a proposal made by Jørgen Jørgensen in the thirties.[1]

[1] J. Jørgensen, 'Imperatives and Logic', *Erkenntnis* 7, 1937/38, p. 291. "It is not possible to issue a command without commanding something to be done or to express a wish without expressing a wish for something. Any imperative sentence may therefore be considered as containing two factors which I may call *the imperative factor* and *the indicative factor*, the first indicating *that* some thing is commanded or wished and the latter describing *what* it is that is commanded or wished."

"Imperative sentences are not capable of being either true or false. According to the logical positivist testability-criterion of meaning they must therefore be considered meaningless. However, they are nevertheless capable of being understood or misunderstood and seem also to be able to function as premisses as well as conclusions in logical inference.

This puzzle may be dealt with by analysing the imperative sentences into two factors: an imperative and an indicative factor, the first being merely an expression of the speaker's state of mind (his willing, wishing, commanding etc.) and therefore of no logical consequence, whereas the last may be formulated in an indicative sentence describing the contents of the imperative sentences and therefore being capable of having a meaning and of being governed by the ordinary rules of logic.

The ordinary rules of logic being valid for the indicative sentences which can be derived from the imperative ones, and no specific rules for the imperatives being known (unless it should be the rule governing the derivation of the indicative sentence from the imperative one) there seems to be no reason for,

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We remember, of course, criticisms of the imperative theory of legal norms, at least in the writings of Kelsen and Hart.[2] But it seems that now an immediate connection between norms and acts of will has gained the assent of many philosophers of a positivist vein: there is no imperative (or norm) without an act of commanding (positing a norm).[3] This view is not only a positivist one in a straightforward way; it is also an argument for conceiving norms as not being subject to the qualifications 'true' or 'false'.

The main attempts in this direction include the following.

1. Hans Kelsen's latest work, contained mainly in his posthumously published book *Allgemeine Theorie der Normen*;[4]

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indeed hardly any possibility of, constructing a specific "logic of imperatives"."

Cf. also O. Weinberger, *Studien zur Normenlogik und Rechtsinformatik*, Berlin 1974, pp. 103–110.

[2] H. Kelsen, *Hauptprobleme der Staatsrechtslehre*, Tübingen 1911; *Reine Rechtslehre*, 1st ed., Leipzig-Vienna 1934; 2nd, Vienna 1960; H. L. A. Hart, *The Concept of Law*, Oxford 1961.

[3] Kelsen says in *Allgemeine Theorie der Normen*, ed. K. Ringhofer, R. Walter, Vienna 1979, p. 3, appealing to a note by Dubislav in which he speaks of the impossibility of an imperative without an imperator: [..."Unbegriff eines Imperativs ohne Imperator", Dubislav (1937), p. 335]. "Um vorhanden zu sein – das heisst, um zu *gelten* – muss die Norm durch einen Willensakt gesetzt sein. Keine Norm ohne einen normsetzenden Willensakt oder – wie man diesen Grundsatz zumeist formuliert: Kein Imperativ ohne einen Imperator, kein Befehl ohne einen Befehlsgeber".

[4] H. Kelsen, *Allgemeine Theorie der Normen*. His views have been deeply influenced by Karel Engliš [cf. K. Engliš *Mala-logika*, Prague, 1947; *Das Problem der Logik*, Vienna 1960; 'Die Norm ist kein Urteil', *ARSP* 50, pp. 305–316 and O. Weinberger, *Die Sollsatzproblematik in der modernen Logik*, Prague 1958; *Studien zur Normenlogik und Rechtsinformatik*, Berlin 1974. He has been informed about the main ideas of Engliš concerning the impossibility of the logic of norms through F. Weyr who was a close friend of both Kelsen and Engliš, and through my book *Die Sollsatzproblematik in der modernen Logik*, with which he was acquainted.

Kelsen's transformation from a fervent initiator of the logic of norms into a norm irrationalist has proceeded in a series of consecutive steps.

Cf. O. Weinberger, *Normentheorie als Grundlage der Jurisprudenz und Ethik. Eine Auseinandersetzung mit Hans Kelsens Theorie der Normen*, Berlin 1981, pp. 161–167.

2. Carlos Alchourrón's and Eugenio Bulygin's distinction between the hyletic and the expressive norm ontology and their endeavour to construct an expressive logic of norms;[5]

3. G. H. von Wright's opening lecture to the XIth World Congress of the IVR, Helsinki 1983, 'Is and Ought'.[6]

TWO ONTOLOGIES OF NORMS

Alchourrón and Bulygin (in the following 'AB' for short) maintain that there are just two radically different and mutually incompatible conceptions of norms:

(i) The hyletic view conceives of norms as proposition-like entities; norms are conceptual entities, independent of language. They can be expressed by linguistic means, namely, by sentences having prescriptive meaning. Such sentences – let us call them 'norm sentences' – are the result of a certain operation on (other) propositions.[7]

(ii) For the expressive conception, norms are essentially commands, the result of the prescriptive use of language. The authors (but I believe not all expressivists, e.g. Kelsen) contend that on the semantic level there is no difference between statements, commands, questions, rejections, permissions etc., but, instead, only on the pragmatic level, because norms are nothing but proposi-

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[5] The authors do not use this term, but in effect their analysis aims at this goals even though they speak only of the logic of norm-contents which they conceive of as propositions. Cf. C. Alchourrón, E. Bulygin, *Sobre la Existencia de las Normas Juridicas*, Valencia-Venezuela 1979; 'The Expressive Conception of Norms', in R. Hilpinen (ed.), *New Studies in Deontic Logic*, Dordrecht 1981; E. Bulygin, 'Norms and Logic (Kelsen and Weinberger on the Ontology of Norms)' 1984, pp. 349–371.

[6] Cf. G. H. von Wright, 'Is and Ought', opening lecture of the XIth World Congress of the IVR, Helsinki 1983, forthcoming; and O. Weinberger, 'Is and Ought Reconsidered', *ARSP* 70 (1980), pp. 454–474.

[7] C. Alchourrón and E. Bulygin, 'The Expressive Conception of Norms', p. 96.

tions used in acts of commanding (or in acts of promulgation).[8]

AB's expressive conception of norms is evidently based on the theory of speech acts: prescriptiveness is an illocutionary feature of propositions, as are asserting, asking, etc., but also rejecting and permitting.

In any case, normative propositions, being taken as descriptive, differ from norms (norm sentences): starting from the hyletic conception, AB define normative propositions as "descriptive propositions stating that *p* is obligatory (forbidden or permitted) according to some unspecified[9] norm or set of norms".[10] On the basis of the expressive conception AB define normative propositions as follows: "if *p* has been commanded, then the proposition that *p* is obligatory is true".[11]

AB's distinction between the two norm ontologies is not a fair description of the views actually held by contemporary philosophers, nor does it grasp all essential differences between the different ontologies of norms proposed by them.

Perhaps some authors hold that norms are ideal entities existing *per se*, i.e. conceptual (or platonic) entities existing independently of any language. Perhaps some logicians conceive of norm sentences as the results of an operation on propositions (or rather on descriptive sentences expressing propositions). But not everybody who is not willing to accept a strict connection between norms and acts of commanding (i.e. who does not accept an expressive

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[8] Cf. C. Alchourrón and E. Bulygin, *Sobre la Existencia de las Normas Juridicas*, p. 49. "La nocion de lo normativo esta esencialmente ligada al acto linguistico de prescribir; fuera de este acto no hay ninguna norma."

[9] For me it makes no sense to assert that *p* is obligatory (forbidden, permitted) according to an "unspecified norm or set of norms". Only regarding a *given* norm (or a *given* set of norms) such a statement is meaningful, and its truth depends, of course, on the norms which the statement refers to.

[10] C. Alchourrón and E. Bulygin, 'The Expressive Conception of Norms', p. 96.

[11] Ibid., p. 97.

norm ontology) accepts a hyletic ontology of the kind described by AB. I do not hold such a view myself.

I am strongly opposed to the view that meanings are platonic entities, existing independently of any language. Meaning is an element of a language (or of languages) just as signs are elements of languages.

A linguistic system is a product of our linguistic capacity in both respects, namely: syntactically as a class of signs with the corresponding formation rules for well-formed sign series, and semantically as producing concepts and other "units of meaning" and correlating them to the sign series.[12]

The concept of meaning should not be restricted to criteria for determining objects, i.e. to features of possible objects which are used to refer to real or ideal objects. If we want to analyse the whole field of thought – including practical discourse, the interplay of questions and answers, and the great variety of speech acts – then we must overcome the reistic conception of semantics which restricts the concept of meaning of a sign to designators. There are sign series which do not characterize any objects; particularly, questions, exclamations, norm sentences. Therefore it would make no sense, e.g., to define a concept of the following kind: "All the X which satisfy the question 'Will it be raining tomorrow?'"

We may argue that the very same unit of meaning may be expressed in different languages, and that, therefore, meaning should be conceived of as something existing beyond languages. I believe that the fact of interlinguistic synonymy does not prove in any way the language-independent existence of meanings, i.e., their existence as platonic entities. If some sign series in different languages – say of the languages $L_1, \ldots L_n$ – have the same

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[12] This consideration concerns, of course, only interpreted languages. Abstract languages do not determine the meaning associated to the sign series, but they represent a general framework for different interpretations, i.e., for the correlation of different systems of meaningful elements to the well-formed formulas.

meaning (are identical in meaning), then the respective interlinguistic meanings are not yet proven to be language-independent. Rather, I suggest, they are concepts gained by abstraction based on the equivalence relation of synonymy from a set of languages $L_1, \ldots L_n$, embracing some sign series having the same meaning.

It is important to understand that meanings are not preformed and objectively given entities, but constructs of our intellect which produces concepts and other meaningful structures from the languages which underlie our reasoning and discourse. And there are various ways to create such linguistic (conceptual or meaning) systems. This is, in my opinion, the real sense of the so-called 'principle of tolerance',[13] and its foremost philosophical and methodological consequence.

To conceive of norms as the results of an operation on propositions may lead to misunderstandings. We should deal with the relation between descriptive sentences (and propositions as their meanings) on one side, and norm sentences (and norms as their meanings) on the other, on two levels, namely, on the level of elementary sentences and on the level of complex sentences. On the level of elementary sentences, there is a coordination of content (i.e. of descriptions of states of affairs) between descriptive sentences and norm sentences. But the notion of an operation on propositions could evoke the idea that a proposition is, so to speak, contained in the norm sentence. This is, in my opinion, an erroneous conception. And from a strictly logical point of view, the notion of an operation calls for a determination of the set of objects which are the results of the operation (in this case we should say explicitly that this is not a set of propositions, but a set of norms).

Even AB's definition of the expressive ontology is not univocal and free of problems. It is clear that all expressivists hold that norms are created through acts of commanding (or promulgation).

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[13] Cf. R. Carnap, *Logische Syntax der Sprache*, Vienna 1931, 1968, p. 45. "In der Logik gibt es keine Moral".

If this notion is conceived very broadly, so that any institutionalizations of normative rules are cases of commanding, then this view is rather plausible. But the essential differences in the views of expressivists are revealed by the following two questions:

(i) What is the content of acts of commanding? Do these different speech acts have a specific content expressed in sentences of a different meaning? Or are they only specific speech acts – kinds of use – of a propositional content, such that all speech acts (assertions, commands, questions etc.) have exactly the same content, namely certain propositions?

(ii) What are the consequences of acts of commanding? Does commanding *p* produce the effect that *p* ought to be, but nothing else, or does it generate a realm of ideal normative entities with some kind of inner logical relations and consequence relationships? (Even AB's conception that there is a set of propositions which is the set of the consequences of the commanded contents, namely the normative system, is of this kind; as a matter of fact it actually provides in some roundabout way for a logic of norms!)

All this reveals such far-reaching differences among the expressive conceptions that I cannot accept AB's characterization of this ontology of norms as a well-defined class of norm ontologies.

If we define commanding in a very broad sense as the bringing about of a norm, then I am an expressivist myself. Kelsen and I would hold that a command has a specific nonpropositional content; AB hold that there is only one kind of content of speech acts, whether asserted, asked, or whatever else. Kelsen denies that a command has any consequences as he conceives of norms as strictly bound to real acts of commanding;[14] AB and I – even if

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[14] He is even surprised that norms are valid if the act of commanding does not exist anymore. Cf. H. Kelsen, *Allgemeine Theorie der Normen*, p. 187f. "Eine Einschränkung dieses Grundsatzes [namely of the principle that no norm does exist without an actual act of will whose meaning it is; O.W.] ist nur insofern gegeben, als das Sollen, das der Sinn eines auf das Verhalten eines anderen gerichteten Wollens ist, die Norm, gilt das heisst: vorhanden ist, auch nachdem der Willensakt, dessen Sinn sie ist, nicht mehr vorhanden

on different logical grounds – conceive of norms as having logical consequences such that not only the contents of valid imperatives, but also the contents deduced from valid normative premises are valid.

These considerations prove, in my opinion, that AB's systematization of norm ontologies does not work, i.e. that the two kinds of ontologies are neither mutually exclusive nor do they grasp the essential differences between the different theoretical views in this area.

It seems that the authors have no strong preference for one or the other ontology. The paper from 1983 is an attempt to show that the expressive ontology of norms can be taken as a basis for the resolution of the pressing problems of practical discourse and lawyer's reasoning, together with some ideas of speech act theory and a suitable conceptual apparatus for logical analysis (namely, the concept of a normative system, the idea of rejection, the notion of permissive acts, etc.). I believe that AB's attempt is illuminating, but I doubt that it is successful. It is, indeed, of considerable interest to analyse the possibilities and implications of an expressive logic of norms (s.v.v. actually in AB's terminology: a logic of commanded propositions), notwithstanding the fact that their presupposition that speech acts of different kinds (assertions, commands, questions etc.) always have merely propositional content and differ only pragmatically, but not in meaning, is, in my opinion, basically mistaken.

VARIETY OF SPEECH ACTS AND IDENTITY OF MEANING?

The technique of AB's expressivist analysis of norms is based on some surprising suppositions:

(a) Norms are results of a prescriptive use of language.

(b) There is, on the semantic level, no difference between assertions, commands, questions, rejections, permissions etc.,

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ist; und das Vorhandensein eines Willensaktes ist, seiner Natur nach, auf die kurze Zeitspanne seiner Setzung beschränkt."

because they all have as their content nothing else but propositions.

(c) Differences between statements, commands etc. exist only on the pragmatic level, namely in the different speech acts (i.e. different kinds of use of propositions).

(d) These pragmatic differences (illocutionary indications) are irrelevant from the semantical and logical point of view.

Let us first consider the general conception of speech acts and illocutionary force in AB's interpretation. As we are now not dealing only with norm ontology, but with the general conception that speech acts differ only on the pragmatic level (i.e. in illocutionary force), not in meaning (because their meaning is always a proposition), the difficulties of this conception in all fields of application are equally relevant for our argument.

It is, of course, true that the illocutionary force of a given series of signs may vary between different situations, depending on its use, but from this fact it does not follow that different speech acts – or their contents – never differ in meaning, and that the contents (or meanings) of all speech acts are of the same kind, namely: propositions.[15]

It is easy to prove that logical relations are not only determined by the propositional content of speech acts, or as we may say more adequately, that not all speech acts are utterances of propositions. If AB were right in their conception of speech acts, then the contradiction between the propositions 'p' and '$\sim p$' would bring about:

(i) the contradiction between assertions: '$\vdash p$'/'$\vdash \sim p$';
(ii) the contradiction between commands: '$!p$'/'$!\sim p$';
(iii) the contradiction between prescriptive rejections: '$¡p$'/'$¡\sim p$';
(iv) the contradiction between (positive) permissions: 'Pp'/'$P\sim p$';
(v) the contradiction between questions: '$?p$'/'$?\sim p$'; etc.

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[15] The fact that a sign series can be used in different pragmatic roles is very important for my own conception of norm sentences.

I doubt whether (iii) can be conceived of as a contradiction at all, but in any case the permission of p and the permission of $\sim p$ do not constitute any contradiction but are perfectly compatible. Their conjunction is often defined as 'indifference'. Nor am I sure whether the concept of contradiction is applicable to questions: '$?p$' ('Is it the case that p?') and '$?\sim p$ (Is it the case that non-p?') cannot be mutually contradictory, as both questions concern the very same state of affairs; e.g., 'Is it the case that it is raining'/'Is it the case that it is not raining?' are questions applicable to the same situation, and both may be answered by the same sentence 'It is raining'.

If we have a set A which may be the set of

(i′) asserted propositions,
(ii′) commanded propositions,
(iii′) rejected propositions,
(iv′) permitted propositions,
(v′) asked propositions,[16]

then we can always find the corresponding set of consequences $Cn(A)$. The interpretation of the role of $Cn(A)$ is different in the cases (i′) through (v′), but at least in cases (iv′) and (v′) it is rather strange. In the case of permission one indifferent state of affairs (namely the permissions 'Pp' and '$P\sim p$') would entail that everything is permitted. If somebody asks 'Is it raining?' and 'Is it not raining?' then he is – in AB's teaching – not only guilty of having told a contradiction, but he has also presented all possible questions.

We see that the presupposition criticized here clearly leads to unacceptable consequences.

The authors deal with the sets of propositions which are asserted, commanded, ..., as distinct sets and it is, of course, necessary to distinguish them carefully. In any process of communication,

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[16] This expression sounds strange; it would be clearer to call this set 'set of propositions correlated with questions'. Our languages are not adapted to AB's strange conception of speech acts. This fact is, of course, no valid argument against their theory.

every participant must be informed about the character of the set of propositions under consideration. This indication, namely that the respective set is a set of commanded (and not of asserted, permitted, etc.) propositions – and analogously in the other cases of pragmatic use – is relevant information; I would say, information determining the meaning of the set under consideration. Unless the participant in the communication situation is aware of the kind of use (the character of the respective speech acts or the illocutionary role of the set of propositions), the set of propositions carries no meaningful information at all. Can we hold the view that this element, essential for determining the meaning (and the role) of the set of propositions, is semantically irrelevant? This would be rather absurd.

AB's presupposition implies that the same logical relations and the same entailments hold among assertions (or statements), commands, questions etc.,[17] and as this is manifestly not the case, this linguistic theory, and the logic based upon it, seems to me disproved.

The proposed theory is unsatisfactory for another reason as well, namely for the reason that it is in principle incapable of explaining the meanings of very important types of sentences; e.g., questions of the type "Who did it?", as there is no proposition corresponding to this question;[18] or hypothetical norm sentences ('If it is raining, stay at home'; 'If you have money, you are allowed to buy the book').[19]

There is no proposition corresponding to a hypothetical norm sentence which could be used for promulgating such a norm; and even a pair of propositions – one for the antecedent and one for

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[17] In the realm of the logic of norms 'ought' and 'permitted' would exhibit the same logical relations (e.g. 'Pp' and '$P{\sim}p$' should be as inconsistent as '$!p$' and '$!{\sim}p$'), and no logical relation between 'ought' and 'permitted' would exist (e.g. from '$!p$', 'Pp' would not follow).

[18] 'X did it' is not a proposition, but a propositional function.

[19] Hypothetical norm sentences as the basic structure of legal rules are, of course, so important that a norm theory which is not able to deal with them is hardly of any interest.

the consequent – would not do. The pair as a whole should then be commanded and the consequent should be regarded as 'conditionally commanded' (as having normative meaning, I would say). And the set of all commanded propositions should embrace propositions, pairs of propositions, etc. It seems impossible to me to find an acceptable way out of this mixture of propositions of different types (or pseudopropositions, as the propositions corresponding to the consequents of hypothetical norm sentences should be distinguished as having a normative role). To deal with a set of antecedent propositions and a set of consequent propositions is of no help either, as the normative conditional expresses a relation of just one element of the set of antecedents to one element of the set of consequents, and *modus ponens* type consequences cannot be established by a relation between the two sets.

THE EXPRESSIVE LOGIC OF NORMS

AB say explicitly that there is no room for a logic of norms, but they admit a logic of norm propositions.[20] It is not quite clear how to understand this thesis. If Rex has commanded p, then p is an element of A, namely, of the set of commanded propositions. But AB speak of normative propositions in another sense even in the context of the expressive conception. "Normative propositions are related to the norms in the following way: if p has been commanded, then the proposition that p is obligatory is true".[21] Here the proposition 'p is obligatory' seems to be conceived of as the normative proposition, whereas the commanded p is a proposition simpliciter, used as command ($!p$). I have no doubt that the view really intended by the authors is that

(a) the commanded set A is the set of propositions describing states of affairs which are used in the commanding acts;

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[20] C. Alchourrón and E. Bulygin, 'The Expressive Conception of Norms', p. 101.

[21] Ibid., p. 97.

(b) the normative system is the set of all consequences of A; and

(c) all elements of the normative system are equally commanded contents.

These stipulations yield not only a way to implicit commands, and to derived commands, but, in fact, also to inferred norms. Not only the contents of commands (or promulgated norms) are commanded (or we may say, are the contents of valid norms), but also all the implications of these contents. This procedure leads, indeed, to a form of the logic of norms, though an incomplete one.

To speak of a "non-psychological sense of implicit commanding"[22] – as the authors do – is not enough. The nonpsychological conception of commands, namely, the conception of the contents of commands as ideal entities comprising their logical relations, is a necessary step on the way to logical analysis, but beside this recognition we must see that the procedure introduced by AB is a kind of technique to analyse norm-logical relations and norm-logical inferences. This theory is, of course, only a very small part of the logic of norms (as inferences of the *modus ponens* type and subsumptive conclusions are not available), and it is a logic of norms with questionable consequences. ('$!(p \vee q)$' follows from '$!p$' – Ross's paradox; and from '$!(p \,\&\, q)$' there follow '$!p$', '$!q$'.)

Normative rejection is a type of normative act. Normative rejection, by itself, yields a set of rejected propositions. Only on the basis of a special stipulation can the act of normative rejection prevail over the act of commanding. The inconsistency between '$!p$' and '$\mathrm{i}p$' is not an inconsistency within a single set of propositions; therefore it is not determined by propositional logic. Rather, it is an additional stipulation of AB's logic of norms and thus they obviously do not follow their own program of building up only a logic of normative propositions.

AB introduce (strong or positive) permission as another special

[22] Ibid., p. 103.

kind of normative act, namely, the permissive use of propositions. The set of commanded propositions and that of permitted propositions have to be unified so that, if 'p' is a member of the permitted set, then '$\sim p$' shall be eliminated from the commanded set. But in my opinion this is also a special rule of normative logic and not an operation justified by means of propositional logic.

I can see no reason why the operation of "subtraction" should not be performed in the opposite direction. Explicit (strong) permission may be eliminated (derogated) by the corresponding prohibition. In any case, the fact that the contents of two kinds of acts (i.e. of two uses of propositions) contradict each other, is not a relation which can be expressed within the logic of propositions: it depends on the indicator determining the character (and I believe the meaning) of the speech acts. It is a logical relation, or more strictly speaking, a norm-logical relation, because it is determined by normative indicators and their mutual relationships.

AB succeed in explaining some incompatibilities on the basis of the notion of contradiction of propositional logic, namely the contradiction '$!p$'/'$!\sim p$'.[23] But other kinds of incompatibilities are stipulated without any justification from the field of propositional logic: '$!p$'/'ip' (command and rejection of the same content); '$!p$'/'$P\sim p$' (command and permission of opposite contents).[24]

AB's theory of norms is therefore, in my opinion, an expressive logic of norms, but not a logic of normative propositions as the authors contend.

THE NONPSYCHOLOGICAL SENSE OF ACTS

AB introduce the notion of a nonpsychological sense of assertion and, respectively, of commanding. This idea deserves more detailed consideration. They characterize this concept of acts (or of

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[23] But they do not explain the compatibility of 'Pp'/'$P\sim p$'.

[24] Other kinds of incompatibilities are not mentioned in AB's paper, e.g., 'If p, then q should be'/'If p, then $\sim q$ should not be', and they are hardly definable in AB's theory.

contents of possible acts, as I would rather say) by two features:

(a) If a sentence p is asserted (or commanded), then all sentences with the same meaning are asserted (commanded) implicitly; their example reads: 'John kissed Mary' – 'Mary was kissed by John'; and

(b) all consequences of assertions (commands) are asserted (commanded) as well.

Basically, I agree with the authors' conception, and I am convinced that only on this basis the logic of norms and their logical analysis becomes possible. We must analyze the content of (possible) acts detached from the acts themselves.[25] But then we cannot deny the existence of logical relations between the contents of acts – may they be acts of assertion or normative acts, i.e. acts of commanding, permitting or rejecting. All the operations must be conceived of as taking place in the realm of idealized entities, i.e. entities taken in a nonpsychological sense.

If AB followed their nonpsychologistic stipulation there would be no difference between our standpoints, beside the problems arising from their thesis that there is no difference in meaning (and therefore in logical relations and operations) between assertions, commands, permissions, rejections etc., because all of them have the same kind of content (namely, propositions). This conception was criticized in the preceding paragraph. But even if AB were right in this presupposition – which I have denied – they should acknowledge a form of logic of norms as an immediate consequence of the nonpsychological sense of commanding and of introducing the concept of normative system which leads to derived obligation (i.e. to inferred norms). To make implicit commands explicit (or better, to command what has already been commanded implicitly) means nothing else but to establish normative conclusions, and this is, in my opinion, part of the logic of norms.

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[25] Cf. E. Husserl, *Logische Untersuchungen*, Tübingen (1901), vol. I.

NORMS AND TIME

There are objects which are absolutely timeless, and other objects to which we may meaningfully ascribe a temporal determination. For example, it makes no sense to ascribe temporal coordinates to numbers. We may also say that propositions are timeless, and AB contend the same concerning normative propositions. (I would prefer to say norms as linguistic entities.)

If we conceive of norms as being related to social reality, that is, as institutional facts, then the problem of temporal determination becomes meaningful and relevant in practice. Institutionalized norms come into being, and their validity may also eventually come to an end.

All analyses in which time is taken into consideration concern sets of norms which are ordered in a temporal series. The growth of the set of norms through successive acts of commanding also has the character of a temporal series of sets of norms. A set of norms can be constituted by a set of commands *uno actu*, but any change of a norm or of a set of norms – the addition as well as the subtraction of norms – produces a temporal series of normative systems. Norms as facts are not timeless even if they do not change during the period in question. The change of a normative system in time depends on the rules of the dynamics of norms. Therefore I cannot accept AB's view that there is a fundamental difference between the addition and the subtraction of norms:[26] both are changes in a set of norms, and both are established by the rules of change.

REJECTION, DEROGATION, PERMISSION

One of the most interesting and subtle parts of AB's paper, 'The Expressive Conception of Norms', is the analysis of these three concepts.

Rejection is introduced as a special kind of a normative speech

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[26] C. Alchourrón, E. Bulygin, 'The Expressive Conception of Norms', p. 101.

act. AB distinguish between descriptive and prescriptive rejection. Prescriptive rejection is the rejection of explicit or implicit commands. Acts of rejection of a certain kind, namely, of commands or assertions (perhaps also of permissions etc.), constitute a set of rejected propositions. According to AB, the normative rejection of p does not presuppose that p is an element of a set of previously commanded propositions. We may also reject nonexisting normative propositions, and we may reject in advance propositions which could be commanded in the future. By an act of rejection the rejected proposition is not automatically eliminated from the set of commanded propositions, but the operation of elimination is effected by a rule of preference. There is a conflict (a kind of incompatibility) between the command of p and the rejection of p.

Rejection is without doubt a relative notion. It makes sense only in relation to a set of propositions under consideration. Rejection refers to a certain set of propositions, and this set must be characterized by its pragmatic (illocutionary) role, even in AB's teaching, because otherwise the distinction between descriptive and prescriptive rejection could not be maintained.

AB treat normative rejection only as referring to commanded propositions, but I believe that in a system which deals with permissive acts and introduces the concept of a set of permitted propositions, the rejection of permissions should also be taken into consideration. We should even raise the question whether the rejection of a rejection makes sense, and, if it does, we should explain how it should be treated.

In my opinion, it is neither useful nor consistent with our linguistic intuition to relativize rejection only to a set of propositions together with its illocutionary indication, but not to a specific commanded (or permitted) content. It is, of course, logically possible to define rejection in such a way that rejection in advance, and even the rejection of propositions which will not even be commanded in the future, becomes possible. But is it reasonable to conceive of rejection in this way? An act of rejecting p does not prevent a future act of commanding p, nor does it exclude the validity of such a future command. In the usual

terminology, we would say in such cases that p is explicitly permitted, rather than that p is rejected. In my opinion it is reasonable to use the customary terminology, as can be shown by the following considerations. If rejection amounts to the elimination of the rejected content from a given set of propositions – and, at least in connection with the rules of preference, this is the main role of the acts of rejection – then the rejection of propositions which do not belong to the set in question is void and ineffective even against future acts of commanding. It does not preclude the validity of future commands. It may lead to an inconsistency in the system, if the principle of *lex posterior* is not institutionalized, or it has no effect at all, if the principle of *lex posterior* is presupposed (because the later command is a *lex posterior*) in relation to the preceding rejection. Rejection in advance may have an effect only on the basis of certain hierarchical rules (rules of preference). But not every normative order contains hierarchical rules. If they are accepted, they do not only prevent the efficacy of future commands of the rejected content, but prevent also the validity of all future normative acts which are in conflict with higher-order norms.

Rejection is based on the dynamic conception of the normative order; it is meaningful only if we take into consideration changes of the order over time, i.e. if we conceive of the order as a temporal series of normative systems.

The act of rejection is by itself not an operation, as no speech act is, but rejection provides an input for the operation of elimination on a dynamic system of norms (a system of normative propositions, according to AB's view). This elimination is determined by the rules of preference which may differ in different systems. But I would stress the thesis that according to the dynamic view of normative systems, there is a fundamental preference rule which is valid (in some sense) for all systems, namely, the priority for the *lex posterior*.

Logically there is, of course, the possibility of petrifying a given normative system, i.e. excluding any change of the order, but normative orders as political institutions involve the idea of evolu-

tion through acts of creating or transforming valid norms in the flow of time, i.e. they contain some kind of rule preferring later normative regulations.

It is not easy to grasp AB's conception of derogation, because (a) their semantics attaches meanings only to propositions, and (b) in some places they identify derogation with rejection, not with the elimination of norm-contents,[27] and also explicitly accept Kelsen's conception of conflicting norms expressed in his papers,[28] even though Kelsen's opinion on derogation distinctly differs from their views.

According to Kelsen, derogation is the effect of norms of a special kind: the effect of a derogative norm is the elimination of a previously valid norm from a normative order. Derogation as elimination does not produce, but abolishes conflicts, whereas AB's rejection of 'p'(' ¡$\sim p$') leads to a conflict, if the normative system concerned embraces 'p'('!p'). According to Kelsen, a derogated norm ceases to exist; it is no longer a norm of the system, and no normative determination survives if a norm has been derogated.

AB say that "When lawyers speak of a derogation there is a rejection of a norm-content",[29] and they hold that the elimination is determined by rules of preference, the status of which is left unclear. Are they norms – as in Kelsen – or methodological rules or something else?

In AB's conception, derogation concerns the set of commanded normative contents A (why not also the set of permitted contents?) or the set of consequences $Cn(A)$, whereas Kelsen relates derogation to a given norm-content. AB's view leads to a very complicated theory according to which the system resulting from a rejection may be logically indeterminate.

It seems important to me to distinguish clearly (following Kelsen in this issue) between (a) the mere elimination of a norm

[28] H. Kelsen, 'Derogation', in *Essays in Legal and Moral Philosophy*, ed. O. Weinberger, (Dordrecht, 1973), pp. 261–275 and 'Law and Logic', ibid., pp. 228–253.

[29] Ibid., p. 105.

[which may state an obligation or a permission] and (b) the creation of a new norm to the effect that a so-called material derogation takes place. In case (a), there is no norm left after derogation, but in case (b), the ought-norm '$!p$'('Op') is derogated by a norm of explicit permission 'Pp' or the permissive norm 'Pp' is derogated by the ought-norm '$!\sim p$'('Fp'). Only in the latter case may derogation bring about inconsistencies because a conflicting norm may come into being in the future.

According to AB's expressive conception, the notion of permission can be analysed in two ways, both of which are based on their concept of rejection and lead to nearly identical results.

(i) We may introduce a special kind of permissive use of propositions. This entails the existence of 'negative permission' (i.e. the absence of prohibition) and of 'positive permission' (i.e. the derogation of a prohibition).

(ii) Commanding as well as permitting are conceived of as forms of promulgation, namely of a mandatory or of a permissive norm. In this case, AB distinguish 'weak permission' (i.e. the absence of prohibition) from 'strong permission' (i.e. the promulgation of a permissive norm).

I have some difficulties in understanding this difference: in AB's theory promulgation is nothing but a way of using a proposition. Permissive use is either the use of a sentence having a permissive meaning (this assumption contradicts AB's theory) or it is a use which cannot be distinguished from the rejective use. Therefore AB's conclusion "Strong permission proves to be the same as positive permission"[30] is not surprising.

In AB's theory the question arises why some kinds of acts are conceived of as normative acts. I am of the opinion that the authors do not give a complete list of normative speech acts,[31] nor do they explain the features which distinguish normative acts from others.

I believe that the class of normative acts can be defined only if we take into consideration the different meanings of the contents

30 Ibid., p. 119.

31 They do not mention rejection of permission and rejection of rejection.

of acts, but not if we presuppose as AB do that all speech acts have the same kind of content, viz. propositional content.

I would like to put forward another terminology and a different conception of derogation and permission.

Derogation is the elimination of norms expressing an 'ought' (obligation) or a 'may' (permission) from a normative order. Elimination is effected through normative acts of derogation, or results from the existence of conflicting norms (and thus from certain acts of normative promulgation) in accordance with the dynamic rules of the system. Derogation is relative to a certain norm of a given normative order. If a derogative norm states that the obligation (the permission) p is derogated but the order does not contain the norm in question, the act of derogation is either senseless or void. Either of these stipulations is possible.

My analysis substantiates the following conclusions:

(i) The thesis of the semantical and logical irrelevance of the norm-indicator (normative operator) is disproved.

(ii) Logical relations and logical inference are, even in AB's theory, based on the idealization (or a nonpsychological view) of the contents of acts, i.e., they are obtained only by transcending the expressive conception in the strict sense which ties normativity to the actual existence of normative acts.

(iii) The relations which AB accept as valid are not only relations among propositions, but also relations among different sets of propositions in different pragmatic roles, and the pragmatic (or illocutionary) character of the set determines these relations. Therefore it is not true that the authors provide only a logic of normative propositions.

(iv) The authors have presented very interesting analyses of the problems of rejection, derogation and permission, but their results are vitiated by the untenability of the underlying ontology of norms which was criticized above.

(v) Any derogation depends on extra-logical rules which establish a preference ordering of validity in relation to time. Not only can permission derogate prohibitions, but an explicit permission can also be derogated by a subsequent prohibition.

(vi) Explicit permission should be distinguished from derogation, though the meaning of permissive norms can be defined on the basis of their derogating capacity with respect to ought-sentences.

GENERAL REMARKS ABOUT PERMISSION

Recently AB have published a new important paper on the problems of permission which is not explicitly based on the expressive conception of norms.[32] AB provide a convincing analysis of the views of von Wright, Ross, Raz, Opałek, Woleński, and of some conceptions expressed in my earlier papers.[33] I do not intend to defend here the theses which I presented in these papers, but I shall try to give a short account of my present views concerning permission and permissive sentences. I believe that we are now in a position to overcome the muddle concerning permissive sentences in the early development of deontic logic.

I shall start with some basic clarifications.

1. The field of the prescriptive language and of norm-logical inquiry is primarily concerned with 'ought', not with permission. Only ought-sentences, but not permissive sentences, can take over a regulative role. Regulation means determination (i.e., elimination of some possibilities), but any form of behavior is compatible with every permission and no permission can be in conflict with any other permission. Only ought-sentences are directives for action; therefore a purely permissive system would not constitute a normative order at all.

2. It is important to introduce permissive sentences as a special

[32] C. Alchourrón and E. Bulygin, 'Permission and Permissive Norms', in W. Krawietz, H. Schelsky, G. Winkler, A. Schramm (Hrsg.), *Theorie der Normen. Festgabe für Ota Weinberger zum 65. Geburtstag*, Berlin 1984, p. 349–371.

[33] O. Weinberger, 'Fundamental Problems of the Theory of Legal Reasoning', *ARSP*, 58 (1972), pp. 305–336; 'Der Erlaubnisbegriff und der Aufbau der Normenlogik', *Logique et analyse*, 16 (1973), pp. 113–142; 'Normenlogik und logische Bereiche', in: A. G. Conte, R. Hilpinen, G. H. von Wright (Hrsg.): *Deontische Logik und Semantik*, Wiesbaden 1977, pp. 176–212.

kind of norm sentences. Permissive sentences may be posited in acts of willing, or, as we may also say, they are established and promulgated in the same way as ought sentences (e.g., as the content of legislative acts fulfilling the conditions for due creation of law).

3. Permissive sentences as a kind of normative sentences may have different pragmatic functions in different contexts, analogously to the different pragmatic roles of ought-sentences; in particular, they may be used in acts of promulgation as well as in speech acts which inform about the normative situation without creating norms. I do not accept the doctrine of the duality of descriptive and prescriptive 'ought', nor do I accept the analogous duality of descriptive and prescriptive permission.[34] Instead, I conceive of the logic of norms as concerned with norm sentences expressing 'ought' or 'permission', notwithstanding the fact that there may also be descriptive sentences about a normative order or about norm sentences. These sentences contain ought-sentences or permissive sentences in indirect speech, and the truth of these descriptive sentences is determined by the validity of the respective norm-sentences in the normative system under consideration.

4. The distinction between open and closed normative systems is of crucial importance for the analysis of permissive sentences. A system NS is closed if and only if all obligations which are valid in NS are consequences of the explicitly stated norm-sentences. The system is an open system if and only if there may also be obligations or prohibitions which are not explicitly stated by the given norm sentences. In the case of a closed system, the set of normative sentences gives complete information about the 'oughts' which hold in the system, whereas an open system admits of deontically undecided states of affairs.

5. If we accept the idea that permissions are not regulative norms, and therefore can only play a secondary role in the field of prescriptive thought and discourse, we have the task of explaining why such normative sentences are needed.

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[34] O. Weinberger, 'Is and Ough Reconsidered'.

The Descriptive Concept of Permission

We may even discuss the question whether speaking about the permittedness of p is not only a reflection of the fact that we do not find a prohibition of p in the normative system under consideration. An expressivist who restricts prescriptive discourse to commands may define permission as a descriptive notion by taking 'p is permitted' to mean exactly the same as the assertion that p is not forbidden in the system in question. In this case permission sentences may be treated as descriptive sentences about a normative system NS. There are, indeed, two different kinds of such descriptive permission sentences:

(i) the statement that p is permitted in NS means that p is definitely allowed in NS because there is no prohibition of p in NS and NS is known to be a closed system, or

(ii) the statement that p is permitted in NS does not guarantee that p is definitely allowed, because NS is an open system so that we cannot be sure that the explicitly commanded duties (including consequences of explicit commands) express all duties valid in the normative order NS.

In closed systems, but only in such systems, is permission of p in this reflexive sense a consequence of the absence of a prohibition of p, and vice versa: if p is permitted in NS, then p is not forbidden in NS. But reflexive permission in an *open system* does not justify the conclusion that, if there is no explicit prohibition of p (i.e., if there is only a reflexive permission in an open system – weak reflexive permission), then p is definitely not forbidden in NS.

The Normative Concept of Permission

There are strong reasons for introducing another, viz. a normative concept of permission.

(i) The practice of normative discourse usually contains explicit acts of permission which assume, as I will show, important pragmatic roles (cf. (ii)–(v) below). Therefore the language of the logic of norms should give a rational reconstruction of such sentences.

(ii) Permission sentences may restrict prohibitions (i.e. restrict

the realm of applicability of ought-sentences) or state exceptions to more general prohibitions. (In these cases there is, of course, always the possibility of determining exactly the same normative situation without using permission sentences, because the insertion of additional conditions may serve the same effect.)

(iii) Permission sentences play an important role in the language of dynamic systems of norms: They can express a derogation (or partial derogation) of previously existing duties (obligations or prohibitions). But this relation is a symmetric one. Permission sentences may be used to derogate ought-sentences in the dynamic perspective (if they allow what has been previously forbidden), and ought-sentences may be used to derogate previously valid permissions.

(iv) In open normative systems, permission sentences are tools for removing uncertainty concerning the permittedness of states of affairs which are neither explicitly characterized as obligatory nor as forbidden.

(v) In hierarchical systems, explicit permission is a tool for guaranteeing some kinds of normative freedom. Qualified permissions can be derogated only by means of suitably qualified acts.

(vi) Permission sentences may be used to inform about what is permitted in NS, because

(a) the normative system embraces an explicit permissive sentence 'p is permitted', or

(b) such a sentence can be deduced from the norm sentences of the normative system (e.g. from 'p is obligatory').

Thus, the concept of 'explicit permission' can be conceived of in two different ways, namely, (α) as given, if NS contains a sentence stating explicitly that p is permitted, or (β) as valid, if the sentence 'p is permitted' is deducible in NS. The latter view is of course more useful.

Reflexive permission does not entail, at least not in general, explicit permission. Only in a closed system NS can the absence of the prohibition of p justify the conclusion that p is permitted in NS, because the closure of NS entails the rule that what is not explicitly forbidden in NS is allowed.

(vii) Deliberations about what is permitted are important for determining the range for action within the frame of a given normative system.

If we accept the view that permissive sentences should be introduced into prescriptive language, then we must find some method of defining the meaning of '*p* is permitted', and also state its relationship to ought-sentences.

We may define the meaning of '*p* is permitted' by means of the notion of derogative force. If the sentence '*p* is permitted' is used as a tool of derogation (elimination) or exclusion of ought-sentences, then we may say that '*p* is permitted' is a normative sentence which excludes the norm 'not-*p* ought to be'.

The conflict (logical exclusion) of '*p* is obligatory' ('~*p* is forbidden') and '~*p* is permitted' ('*p* is permitted') is a mutual one. If '*p* is permitted' belongs to NS and '~*p* is obligatory' is used on the basis of a derogation rule (i.e. following the rule 'lex posterior derogat legi priori') with derogative force, then '*p* is permitted' is eliminated from NS; and vice versa: if '*p* is forbidden' ('~*p* is obligatory') holds in NS, then the norm '*p* is permitted' eliminates the previously valid 'ought'.

The definition of the notion of permission by means of the derogative capacity of permission sentences does not prevent the existence of conflicts in normative systems; on the contrary, this definition is the logical reason for the conflict between '*p* is permitted' and '*p* is forbidden'.

It would be misleading to conceive of the relation between prohibition and permission as a relation of interdefinability. The derogative capacity used in the definition of permission is not a logical negation. In open systems – and most normative systems are open systems – there is no equivalence between the validity of the permission of *p* and the absence of the prohibition of *p*. Besides, interdefinability would be possible only in consistent systems. The apparatus of norm sentences as a presupposed linguistic system for the logic of norms and for prescriptive discourse should be defined in such a way that even inconsistent normative systems should be expressible by means of it.

Generally, we assume that any norm sentence is deducible in an inconsistent normative system (ex falso quodlibet; from logically impossible premises anything follows). The corresponding rules concerning descriptive language are evidenced by the fact that '$F \supset q$' and '$(p \,\&\, \sim p) \supset q$' are tautologies and thus an impossible premise such as '$p \,\&\, \sim p$' yields all possible consequences 'q'. An analogous dictum concerning norm sentences and normative inconsistency can be substantiated only if we introduce into the logic of norms analogous sentence structures (i.e. a conditional of the type 'If $(p \,\&\, \sim p)$, then q should be') and rules (i.e. a *modus ponens* type rule).[35]

Note on AB's Distinction between Descriptive and Prescriptive Permission

AB distinguish a prescriptive and a descriptive concept of permission, where descriptive permission is a strong permission '$Ps_\alpha p$' (if 'Pp' is deducible from the set of norms α) or weak permission '$Pw_\alpha p$' (if 'Fp' is not deducible from the set of norms α). Prescriptive permission and prescriptive prohibition (obligation) are interdefinable. "The prescriptive concepts are interdefinable: the formulae 'Fp', '$O\sim p$' and '$\sim Pp$' express one and the same norm. The same is true of 'Pp', '$\sim Fp$' and '$\sim O\sim p$'."[36] Strong descriptive permission '$Ps_\alpha p$' and 'Fp' are not interdefinable. In complete (I would say closed) and consistent systems the distinction of strong and weak permission vanishes.

Do 'Fp' and '$\sim Pp$', and respectively '$\sim Fp$' and 'Pp', really express one and the same norm? The existence of the norm 'Fp' in the system NS (or in $Cn(\alpha)$, as AB write) guarantees that p is not permitted only if NS is consistent. The permission of p in NS does not exclude that p is forbidden, because NS may be inconsistent. Therefore, the interdefinability of 'P' and 'F' presupposes that there are only consistent systems. If NS is an open system, and 'p

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[35] Cf. O. Weinberger, 'Ex falso quodlibet in der descriptiven und in der präskriptiven Sprache', *Rechtstheorie*, 1975, pp. 17–32.

[36] C. Alchourrón and E. Bulygin, 'Permission and Permissive Norms', p. 353.

is permitted' ('Pp') is not derivable in NS [$Pp \notin Cn(\alpha)$], then the sentence 'p is permitted' should not be interpreted in the sense that p is definitely allowed. We see that the openness prevents the interdefinability of permission and obligation ('ought') even if they are regarded as prescriptive concepts.

'$Pw_\alpha p$', weak descriptive permission, is defined as the absence of 'Fp' from the system; therefore '$Pw_\alpha p \equiv \sim F_\alpha p$'. '$Pw_\alpha$' must not be interpreted in the sense of 'definitely permitted' if NS is an open system. Strong descriptive permission is not guaranteed by $Fp \notin Cn(\alpha)$, because the system may be inconsistent. The absence of Fp (descriptive prohibition) is not guaranteed by the existence of 'Pp' in NS, for the same reason.[37]

AB are right in contending that the possibility of inconsistent and incomplete systems makes it necessary to distinguish different kinds of permission. But I believe that it prevents interdefinability in the descriptive as well as in the prescriptive sense, as descriptive normative sentences only mirror the prescriptive relations; otherwise they would express false propositions.

BULYGIN'S DEFENCE OF KELSEN

Bulygin's defence of Kelsen's ontology of norms is half-hearted and not very effective. It is more like a corrective reconstruction than a real defence of the main theses of Kelsen's posthumously published book. I believe that the main theses of Kelsen's *Allgemeine Theorie der Normen* are:

(i) There is no norm without somebody who commands that another person should behave in a certain way.

(ii) The act-relative definition of a norm: a norm is the content of an actual act of commanding.

(iii) There are no logical relations in the realm of norms, and

[37] This argument is not correct as has been pointed out by AB in their paper, 'Pragmatic Foundation for a Logic of Norms' (forthcoming in *Rechtstheorie*).

norms cannot be elements (i.e. premises or conclusions) of logical inferences.

Bulygin rejects two of these three main theses of Kelsen's ontology of norms, one implicitly, namely Kelsen's act-relative definition of the concept of a norm which is incompatible with Bulygin's expressive logic of norms, and the other explicitly, namely, Kelsen's thesis that norms cannot have logical consequences and that there are no logical relations among them. Notwithstanding Bulygin's explicit contention that there are no logical relations and inferences in the realm of norms, his theory leads inevitably both to the definition of logical relations (incompatibilities) and to inferred obligations. By introducing the concept of a normative system he accepts as obligatory what is inferred from the (content of) commands; not only the contents of actual commands but also all their implications are commanded; there is no difference between what is explicitly commanded and what is commanded because it is deduced from given commands (from their contents). In fact, Bulygin's analysis contains the same criticism of Kelsen as mine, only based on another (in my opinion, inappropriate) logical technique. Only the inference of a *modus ponens* type is not discussed by Bulygin, which is a defect and not an advantage of his theory insofar as it aims at being a corrected Kelsenian theory. Concerning incompatibility in the realm of norms, Bulygin's stipulations introduce different kinds of incompatibility: '$!p$'/'$!{\sim}p$'; '$!p$'/'$\mathrm{i}p$'; '$!p$'/'$P{\sim}p$'.

Unfortunately Bulygin does not explicitly state his opinion about Kelsen's new definition of a norm which is the third main issue of Kelsen's late work (see (ii) above). The discussion of Kelsen's concept of a norm would clarify how far an expressivist may go. He may hold that norms come into being only through acts of commanding, but in any case their existence is to be understood as the existence of ideal entities which inevitably means that norms exist with all their logical relations and consequences.

Bulygin is right in saying that Kelsen probably would have had corrected some inaccuracies in the book if he had had the time

for it. I expressed the same idea in my critical work.[38]

A complete defence of Kelsen should embrace a detailed analysis of the relevance of his late ontology of norms to the fundamental ideas of the Pure Theory of Law. There are at least the following questions: How could we define the unity of the legal order if there were no logical relations in the field of norms? How could Kelsen retain the thesis that secondary norms (in Kelsen's terminology this means norms of behaviour) are superfluous as it is a consequence of norms concerning sanctions? How could we explain the theory of norm-dynamics without deductive relations in the field of norms? How could we define material derogation and the related notion of a hierarchy of norms without the concept of norm-logical incompatibility? How could we save the theory of the basic norm if, following the new definition of the norm as the meaning (Sinn) of a real act of commanding, the *Grundnorm* is, indeed, not a fictitious norm as Kelsen contends, but no norm at all?

An effective defence of Kelsen should harmonize the new ontology of norms with the *Reine Rechtslehre*. Bulygin does not even try to provide such a harmonization.

SOME REMARKS CONCERNING MY CRITICISM OF KELSEN'S LATER WORK

Bulygin is shocked by the fact that I refer to Kelsen's refutation of the logic of norms and his "proof" of the impossibility of logical relations and of deduction in the realm of norms as "Nor-

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[38] Cf. O. Weinberger, *Normentheorie als Grundlage der Jurisprudenz und Ethik. Eine Auseinandersetzung mit Hans Kelsens Theorie der Normen,* Berlin 1981, pp. 5–9, especially the following passage: "Ich könnte mir allerdings vorstellen, dass die Untersuchung der Konsequenzen der neuen Theorie für die von Kelsen früher vertretene Reine Rechtslehre stellenweise zu einem neuen Überdenken der Grundlagenfragen geführt hätte. Vielleicht hatten diese Untersuchungen sogar zu einer Revision einiger Thesen der allgemeinen Normentheorie geführt" (p. 6).

menirrationalismus". I must confess that I am not able to find another appropriate term. But I deplore the fact that in our linguistic practice the terms 'rational' and 'irrational' have acquired also an evaluative meaning which makes it impossible to use the term 'irrationalism' without a suggestive side effect. This disqualifies the term for an impartial scientific discussion. I apologize for my use of the term, but I have no means of expressing my ideas without it. So I can only ask the reader to cancel any evaluative connotation from the word 'Normenirrationalismus'.[39]

I believe that Kelsen is more consistent in denying the existence of logical relations in the field of norms entirely than AB are, who, on the one hand, hold the same thesis, but on the other hand introduce logical relations into the normative field, namely inconsistencies between normative acts or their results (their contents). Some of these inconsistencies are justified in AB's theory by propositional logic, but others are not justifiable in this way, e.g. '$!p$'/'$P{\sim}p$' or '$!p$'/'$\mathrm{i}p$'. It seems to be a contradiction within AB's theory that they explicitly deny that there are valid normative inferences and at the same time introduce the concept of a normative system in terms of which they can discuss inferred obligations and permissions.

Bulygin does not seem to realize the important difference between the logical (analytical) and the factual unsatisfiability of norms. This difference is not even practically irrelevant. The method of justification is different in the two cases. A man who would try to make experiments to prove that '$O(p \,\&\, {\sim}p)$' ['$!(p \,\&\, {\sim}p)$'] is satisfiable (or not satisfiable) is deranged; a man who tries to satisfy the norm 'Find a method of preventing cancer' is by no means irrational. Bulygin's example about the legislator

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[39] My use of the term 'irrationalism' as a qualification of Kelsen's norm ontology and his disproof of the possibility of a logic of norms has been motivated by a hand-written note of Kelsen's friend and my highly esteemed teacher František Weyr on a manuscript of mine concerning Engliš's proof of the impossibility of a logic of norms which reads "iracionalita vůle" (irrationality of willing).

who wants to place a subject into a predicament shows just the opposite of what he tries to prove. It defines a situation where it is reasonable, given the goal of the legislator, to establish incompatible norms, but his system is nonetheless logically unsound, namely inconsistent. Logical inconsistency is not a matter of pragmatic usefulness.

Strangely enough, Bulygin is not willing to acknowledge the logic of norms but does nothing except establish rules of incompatibility and various patterns of inference in the normative realm. AB distinguish explicitly normative acts from declarative ones, but they do not discuss the question why '!', 'i', '*P*' are signs of normative acts in opposition to '⊣' and '⊢'. The net result is that AB work with a differentiated semantics just as I do, but they believe that these differences concern merely the normative acts, not their contents.[40]

Ontology is not descriptive, but stipulative.[41] The ontology of norms has as its objective the justification of possibility of an appropriate logic of norms, not that of making it impossible. Therefore I try to introduce a complex semantics embracing two basic categories of sentences: theoretical (or descriptive) sentences and practical sentences.[42]

It is true that in my book on Kelsen's ontology of norms *Normentheorie als Grundlage der Jurisprudenz und Ethik*, I give no explicit argument (beside linguistic practice, common

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[40] Unfortunately, Bulygin's quotation from p. 97 of my *Normentheorie als Grundlage der Jurisprudenz und Ethik* is incorrect. The parenthetical remark italicized by Bulygin reads in the book "(und in AS wahr)", but not "(und ist wahr)". The difference is of some importance: to say that a proposition is true in a given system is justified if we assume that the system is based on the convention of uttering statements (Behauptungskonvention), but it is misleading to ascribe truth to a proposition in a sense not relativized to the system.

[41] Cf. O. Weinberger, 'Freedom, Range for Action, and the Ontology of Norms', forthcoming in *Synthese*.

[42] Ch. Weinberger and O. Weinberger, *Logik, Semantik, Hermeneutik*, Munich 1979, p. 109.

sense, intuition and the prevailing understanding in the realm of normative discourse) for this view. But meanwhile I have found an argument which seems suggestive to me, namely, the fact that the structure of the information processes governing decisions and actions needs two kinds of information, one of which is expressible in theoretical, and the other in practical sentences.[43]

Norms and norm sentences are linguistic entities in the same sense as propositions and descriptive sentences. For both fields – for norms as well as propositions – a nonpsychological analysis is possible and also necessary for the explication of logical relationships.

Norm sentences, i.e. sequences of signs expressing norms, may have different pragmatic roles (illocutionary forces): they may be means of commanding or of establishing a norm (promulgation), or of giving information about the 'oughts' or permissions valid in a certain system. Logical relations and operations for norm sentences are independent of the additional pragmatic function which may or may not accompany them. The logical consequences of a norm sentence *N* contained in a promulgation act are exactly the same as the logical consequences of a speech act of using the sentence *N*, e.g., to inform some students about the valid law.

In a process of communication, the *communicatum* must be understood as normative information. If we conceive of this communicatum as strictly bound to the act of commanding (permitting, rejecting) as Kelsen does, then there is no logic of norms at all; but if we conceive of the *communicatum* as a sign correlated to an ideal entity – the meaning of the sign – then logical relations become discernible. I believe that there is a distinct field of practical sentences with specific logical relations and operations. AB try to reduce them to relations and operations in the field of propositions but, alas, neither successfully (see the counter-intuitive implications discussed above) nor consistently (as not all

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[43] The terminology which distinguishes between theoretical and practical sentences was proposed by G. Kalinowski; cf. G. Kalinowski, *Etudes de logique deontique*, Paris 1972, p. 19.

of their rules are justified by propositional logic, cp. the incompatibility of '$!p$'/'$P \sim p$').

In fact, the realm of the logic of norms does not comprise only normative propositions, but is a complex system of ideal objects, the set of norm sentences[44] and the set of descriptive sentences.

Finally I would like to add that I consider Kelsen to be one of the most important analysts of law and practical philosophical discourse. He is a perfectly consistent thinker, one of the most important and clearest in history. But this fact contrasts strongly with his restricted views on the structure and possibilities of deductive logic.

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[44] The set embraces elementary norm sentences, complex norm sentences with normative compounds, and complex norm sentences with mixed components.