DEVELOPMENTS

Conference Report - Pointed Reasoning on Normativity: Young Researchers in Legal Philosophy Meet in Würzburg

By Matthias Goldmann[*]

"For, he reasons pointedly, that which must not cannot be:" the last two lines of a famous poem by Christian Morgenstern[1] bring the crux of normativity to the point: what is the relationship between facts and norms? The research of the past decades has increased rather than reduced the complexity of this fundamental question for legal theory. First of all, the relationship between facts and norms is still less than clear. Hans Kelsen had argued that facts and norms were to be clearly separated,[2] but once the *Grundnorm* (basic norm) had turned out to be fictitious, the search for an appropriate description of the relationship between facts and norms began anew. Positivists after Kelsen based normativity on different facts, such as social acceptance[3] or social discourse.[4] Secondly, research on new modes of governance, in particular in the fields of European and international law, has revealed that behaviour can be influenced by "soft" norms and non-normative forms of governance just as much as by "hard" law.[5] These results prompted some to consider legal normativity a matter of degree instead of an on-off issue.[6]

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[1] CHRISTIAN MORGENSTERN, DIE UNMÖGLICHE TATSACHE (1909), english translation: MAX KNIGHT, THE GALLOWS SONGS. CHRISTIAN MORGENSTERN'S GALGENLIEDER. A SELECTION (1964)

[2] HANS KELSEN, REINE RECHTSLEHRE (2nd ed.,1960), english translation: PURE THEORY OF LAW (1967)

[3] HERBERT LIONEL ADOLPHUS HART, THE CONCEPT OF LAW (1961)

[4] JÜRGEN HABERMAS, FAKTIZITÄT UND GELTUNG 359-60 (4th ed., 1994). English translation: BETWEEN FACTS AND NORMS (William Rehg trans., 1996)

[5] *See further* Christoph Knill and Andrea Lenschow, *Compliance, Competition and Communication: Different Approaches of European Governance and their Impact on National Institutions*, 43 JOURNAL OF COMMON MARKET STUDIES 583 - 606 (2005).

[6] In international law, the debate triggered by Prosper Weil's seminal article, *Towards Relative Normativitiy in International Law?*, 77 AMERICAN JOURNAL OF INTERNATIONAL LAW 413-442 (1983) is legendary. This view finds support in legal theory, see further KLAUS F. RÖHL, ALLGEMEINE RECHTSLEHRE 67 (2nd ed., 2001). For the position that the normativity of international law is relative, *see*

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With these and many more questions open, the irony of Morgenstern's poem appears as a promising strategy for inducing pointed reasoning on normativity: irony makes the problem comprehensible and un-demonizes such an immense issue like normativity that affects the self-understanding of the entire discipline. The poem was therefore a perfect lead-in for the conference on normativity convened by the forum of young German-speaking researchers in legal philosophy (*Junges Forum Rechtsphilosophie*, JFR) in Würzburg from 27 to 28 September 2006. The JFR is an informal group founded at the beginning of the 1990s as a platform for exchange and discussion.[7] It is closely associated with the German section of the "Internationale Vereinigung für Rechts- und Sozialphilosophie," and the papers of its annual conference are regularly published in a supplement to the *Archiv für Rechts- und Sozialphilosophie* (Archive for Legal and Social Philosophy).[8]

What is the nature and origin of normativity? Is legal normativity rational in light of the fundamental indeterminacy of legal texts, and how can fundamentally indeterminate legal texts be operationalized? Which extra-legal normativities determine, or should determine, the course of legal scholarship? The following is a selection of questions raised by the contributions that went straight to the core of the problem of normativity.

A. The Nature and Origin of Legal Normativity

Sabine Müller-Mall (Göttingen), the youngest and only female contributor, started with the quest for the nature of normativity. The observation that normativity is – in various languages – often associated with "force" (e.g. "entry into force," "legal force," etc.) led her to draw an analogy between legal normativity and physical force. Surprising at first sight, she justified the analogy by the similar difficulties of measuring legal normativity and physical force: only the effects of the former on human behaviour and only the effects of the latter on physical bodies can be empirically observed, not the phenomena themselves. Further, just as physical force

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further Ulrich Fastenrath, *Relative Normativity in International Law*, 4 EUROPEAN JOURNAL OF INTERNATIONAL LAW 305-340 (1993); Anne Peters and Isabella Pagotto, *Soft Law as a New Mode of Governance: A Legal Perspective*, EUROPEAN COMMISSION, FRAMEWORK PROGRAM 6: NEW MODES OF GOVERNANCE PROJECT, Paper No. 04/D11 (2006), available at: http://www.eu-newgov.org/datalists/deliverables_detail.asp?Project_ID=04 (last visited February 2007).

[7] The website of the forum is available at: http://www.rechtsphilosophie.de/jungesforum.html (last visited February 2007).

[8] The papers from the 2004 conference can be found in OBJEKTIVITÄT UND FLEXIBILITÄT IM RECHT (Carsten Bäcker and Stefan Baufeld eds., 2005). The papers of the 2005 and 2006 conference are forthcoming in the same series.

prompts a counterpoise, so the behavioural effects of norms have an impact on their normativity: the famous normative force of the factual.[9] Drawing on the analogy she therefore defined legal normativity as "the ability of norms to impact on reality." This ability had its origin in the statal power by which the norm is created and enforced: just as physical force is believed to transform energy into movement, normativity seems to provide the link between the authority of the state and individual behaviour. As unorthodox as Müller-Mall's analogy appears, so graphically does it illustrate the functioning of normativity, and in particular that normativity is not a binary matter, but one of degree, something too often believed to be "logically" impossibe.[10] There seems to be little reason why the different ways in which norms can be enacted and enforced, as well as the different repercussions on norms of the factual world, should not be seen as amounting to different degrees of normativity.

B. Indeterminacy: The Vice of Legal Normativity

Not only the relativity, but also the indeterminacy of the law gives rise to serious concerns. If legal argumentations need to rely on value judgments because of the indeterminacy of the law, are they rational at all? And does not the indeterminacy of the text of legal norms suggest that the normativity of the law is just a fiction?

Gerhard Seher (Jena) pointed out that value judgments are an indispensable element of legal argumentations. In the eyes of the proponents of critical rationalism, the resulting contingency undermines the rationality of legal argumentations.[11] Indeed, as Seher elaborated, legal argumentations are considerably contingent: when interpreting a norm, preference must be given to one of several possible interpretative results, which necessitates a value-based decision. Further, legal scholarship has the task of developing recommendations for policy-makers and courts, which always involve considerable contingency. In light of this, the postulate of critical rationalism to abstain from value judgments in legal scholarship seems unrealistic. Rather, an upright identification of value judgments in legal argumentations would be necessary to counterbalance the resulting contingency.[12] With this qualification, legal argumentations could still be

[9] GEORG JELLINEK, ALLGEMEINE STAATSLEHRE , 337 (3rd ed., 1914)

[10] *See supra,* note 6.

[11] *See further* HANS ALBERT, KRITISCHER RATIONALISMUS (2000).

[12] *See further* Eric Hilgendorf, *Das Problem der Wertfreiheit in der Jurisprudenz*, in DIE WERTFREIHEIT IN DER JURISPRUDEN, 1-32 (Lothar Kuhlen ed., 1999).

considered rational, as they could be called into question in inter-subjective discourse. If optimal results are unavailable, why reject the second best solution?

But the indeterminacy of language leads to a further pitfall: given that the text of a legal norm is fundamentally indeterminate, is it possible to pretend that the meaning of the norm is "recognized" in the process of norm application? Or, is the meaning of the norm constructed in this process, rendering the normativity of the norm previous to the application fictitious? These were the questions of a debate between Stephan Meyer (Erfurt) and Ralph Christensen (Mannheim) that crowned the meeting. Meyer assumed the role of the enlightened traditionalist: he fully recognized the indeterminacy of legal texts and rejected the idea that the text of a norm puts objective limits on the interpretation of a norm.[13] Nevertheless, he argued that to abandon the idea of the process of norm interpretation as one of norm *recognition* and not of norm *constitution* would be equal to abandoning the idea of the normativity of the law. It would be meaningless to assume that only the text of a norm, and not the norm itself, would be "valid" *ab initio*. Not the text as a linguistic phenomenon, but the content of the text conveys normativity. Therefore, legal scholarship should uphold it as an axiom that a legal norm exists and is valid from its enactment, and not only constituted in the process of norm application. In the sciences, the idea that objects have a real existence had not been given up in spite of the discovered epistemological difficulties. The same rationale should be applied to the law: the difficulties in determining the content of a norm should not lead to the assumption that the norm does not exist prior to the process of application and interpretation.

However, some doubts arise as to whether it is possible to compare a physical object, like a chemical molecule, with a legal norm, i.e. a specific reading of an authoritative text. Unlike the chemical molecule, the reading of the text is man-made, just as the atomic model by which the chemical molecule is described. There is thus a categorical difference. The logical consequence of this insight would be to give up the idea of the *recognition* of norms in the process of their application and to admit that norms are *constituted* only in the moment they are interpreted and applied to real-life situations. This is the central thesis of the methodology developed by Christensen and his academic teacher Friedrich Müller.[14] Drawing in particular on the writings of Robert B. Brandom,[15] they argue that the judge creates

[13] A thoughtful study, however, recently tried to claim that the text of norm constitutes an objective limitation to the meaning. *See* MATTHIAS KLATT, THEORIE DER WORTLAUTGRENZE (2004). Forthcoming english translation: MATTHIAS KLATT, MAKING THE LAW EXPLICIT (2007).

[14] FRIEDRICH MÜLLER AND RALPH CHRISTENSEN, JURISTISCHE METHODIK (vol. 1, 9th ed., 2004).

[15] ROBERT B. BRANDOM, MAKING IT EXPLICIT (1994).

the norm in the process of applying the norm by selecting one out of several possible interpretations. But would this not put the judge in the place of the democratic legislator? And would it not mean a carte blanche for arbitrary decisions? In the eyes of Christensen, these difficulties become manageable by the duty of the judge to give rational reasons for his decision, to indicate why alternative readings are less convincing, to demonstrate that the chosen reading of the text is in line with preceding decisions, or, if not, to indicate the grounds for the divergence. Evidently, the model seems designed for the common law, as it relies on *stare decisis* and other distinctive characteristics. However, a fresh look at the practice of civil law jurisdictions might reveal that they do not function all that differently either. Does this model leave much from law as a normative discipline, or does it reduce the normativity of the law to social science, as Meyer argued? Possibly, but this might be preferable to a methodology based on the premise that "that which must not can not be."

C. The Normativity of Legal Scholarship

Legal scholarship is based on the normative premises which characterize contemporary thinking. While the contribution by Martin Hochhuth (Freiburg) questioned the postmodern critique of modern normativity, Malte-Christian Gruber (Frankfurt) ventured into the challenges to legal normativity created by the findings of the neurosciences.

The normative premises of modernity, like an optimistic belief in technical and moral progress, the centrality of the subject, and critical epistemology, are certainly determinative for modern legal scholarship. It is not only the catastrophes of modernity like the World Wars or the Holocaust that have exposed this normativity to the critique of postmodern scholars, who reject in particular the modern narrative of continuous progress. In this respect, Hochhuth argued, the postmodernist critique only repeated the concerns of earlier critics of modernity like Nietzsche, Benjamin or Heidegger. However, the critique had been carried too far: the proponents of postmodern transgressions underrated the ability of "modern" discourse to integrate critique and grow by it. Postmodern *déconstruction*, characterized by a certain fuzzyness and the replacement of rationality with aesthetics as the guiding discoursive principle, did not produce new insights that are intersubjectively verifiable. Hochhuth concluded that postmodern scholarship constituted, by and large, an erroneous continuation of modern scholarship, as it did not take seriously enough the critical potential of modern discourse. The lively discussion triggered by this presentation revealed that postmodern scholarship might be too multi-faceted to be lumped together. For example, the perfectly rational style of Martti Koskenniemi, Karl-Heinz Ladeur, Thomas Vesting or

Gunther Teubner, to name just a few legal scholars who have been styled or who have styled themselves as postmodernists, is very different from the enigmatic style of Jacques Derrida or Michel Foucault. Naturally, the question of whether the rejection of some central elements of "traditional" modern normativity, while maintaining the style of rational argumentation justifies the label "postmodern," defies an objective answer.

Neuroscientists and their findings have moved the intellect - and sometimes the temper - of legal philosophers mainly through the debate about determinism. That they might provide legal scholarship with other insights, too, which touch upon the normativity of modernity, was the subject of the presentation by Malte Gruber. As a social construct, the normativity of modernity is only indirectly affected by the determinism debate, which primarily affects individual behaviour and not social processes. However, neuroscientific findings might constitute arguments in the normative discourses of society, including legal philosophy. Gruber argued that the quality of such findings justified a greater role for neurosciences in the debate. For example, some animals are neurologically much more human than generally admitted in such discourses. Also, the finding that the use of certain technical tools like computers leads to a neurological "embodiment" of the tool should make lawyers rethink normative questions which might be very profane, such as the legal consequences of a loss of the tool.

To make it explicit: the selection of the contributions presented here in more detail does not have a normative spin. To the contrary, the contributions of Norbert Campagna (Luxembourg), who developed a theory of arrogation, justification and acceptance of power as a middle course between contractualist and natural law theories for legitimizing public power; Rainer Keil (Heidelberg), who drew on his intimate knowledge of Kant's work in support of his thesis that law is an "idea", not just a "notion" in Kant's work; Andreas Popp (Passau), who shed light on the epistemological dimension of an ordinary criminal judgment; and Hans Michael Heinig (Heidelberg), who demonstrated the need for a sound normative theory of the social state, were valuable not least for demonstrating the dimensions of the topic of the conference. Although not all fundamental questions of normativity raised at the beginning of this conference report were settled in a definite way, which had hardly been expected, the presentations succeeded in satisfying the desiderata for legal philosophy set out by Eric Hilgendorf (Würzburg) in his opening address: to discuss issues of great actuality and to leave the ivory tower, to get in touch with the interests and problems of the rest of the discipline. A point of critique would only be the small number of female contributors. In this respect, the narrator in Morgenstern's poem was obviously wrong: not all which cannot must not be.