

(UN)CHAINING PROMETHEUS: IS LAW AN APPLICATIVE MODEL?*

*PROMETEO DESENCADENADO:
¿ES EL DERECHO UN MODELO APLICATIVO?*

Imer B. FLORES**

Resumen:

En este artículo el autor cuestiona si el derecho es un modelo aplicativo o uno argumentativo. Así, critica la idea que reduce equivocadamente el derecho y la educación jurídica a la enseñanza-aprendizaje de un modelo aplicativo, el cual caracteriza como acrítico, pasivo, recreativo, y lo confronta con uno argumentativo, el cual concibe como crítico, activo y creativo. Para tal propósito, revisa, de un lado, las críticas que Duncan Kennedy formuló acerca de la educación jurídica y su rol en la reproducción de la jerarquía y, del otro, las características de la teoría estándar de la argumentación jurídica, desde los clásicos que distinguieron entre lógica analítica y dialéctica y al interior de la última entre tópica y retórica, hasta nuestros contemporáneos, sin olvidar los movimientos anti-formalistas.

Palabras clave:

Educación jurídica, metodología jurídica y teoría del derecho, modelo argumentativo, teoría estándar de argumentación jurídica, Duncan Kennedy.

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IMER B. FLORES

Abstract:

In this article the author questions whether the law is an applicative or an argumentative model. Hence, he criticizes the idea that mistakenly reduces law and legal education to the teaching-learning of an applicative model, which he characterizes as a-critical, passive and re-creative, and confronts it with an argumentative one, which he conceives as critical, active and creative. For that purpose, he revises, on one side, the critiques that Duncan Kennedy formulated on legal education and its role in the reproduction of hierarchy; and, on the other, the characteristics of the standard theory of legal argumentation, from the classics that distinguished between analytical and dialectical logic and within the latter between topic and rhetoric, to the contemporaries, including the anti-formalist movements.

Keywords:

Argumentative Model, Standard Theory of Legal Argumentation, Legal Education, Legal Theory, Legal Methodology, Duncan Kennedy.

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*Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy. A Polemic Against the System* (1983)*

Any lawyer has built up, through education, training, and experience, his own sense of when an interpretation fits well enough to count as an interpretation rather than as an invention.

*Ronald Dworkin, *Justice in Robes* (2006)*

(UN)CHAINING PROMETHEUS: IS LAW AN APPLICATIVE MODEL?

SUMMARY: I. *Introduction*. II. *The Critique of Legal Education and the Reproduction of the Hierarchy*. III. *From Application to Argumentation*. IV. *Theory of Legal Argumentation*. V. *Conclusion*. VI. *Bibliography*.

I. INTRODUCTION

Breaking the chains that have law and legal education bounded to a traditional model and the necessity of unleashing all its potential, is part of the wider call for breaking the walls, which, by the by, has proved to be more than a great metaphor since it is actually possible to do it as it has been manifest after twenty-five years of the fall of the wall in Berlin. And so, after inquiring about the relationship between legal education and legal philosophy for some time now, I have come to terms with the discussion on whether law can be characterized as an applicative model or as an argumentative one.¹ Hence, I intend to critique the idea that mistakenly reduces law and legal education to the teaching-learning of an applicative model — uncritical, passive and re-creative— instead of an argumentative one —critical, active and creative.

First and foremost, let me advance that, little over one century ago, in 1910, Roscoe Pound —Dean of Harvard Law School and the leader of the Sociological Jurisprudence— invited to teach not only “law in books” but also “law in action”.² However, most legal profes-

¹ See Imer B Flores, ‘¿Es el derecho un modelo aplicativo?’ in Juan Federico Arriola Cantero & Víctor Rojas Amandi (cords), *La filosofía del derecho hoy* (Por-rúa 2010); and ‘The Legacy of Ronald Dworkin (1931-2013): A Legal Theory and Methodology for Hedgehogs, Hercules, and One Right Answers’ (2015) 9 *Problema*. *Anuario de Filosofía y Teoría del Derecho* (forthcoming); see also ‘Langdell v. Holmes: On Legal Education and the Legal Profession’ (2004) 3 *De Legibus*. *Review of the Harvard Law School Association of Mexico* 13; ‘Unchaining Prometheus: The Struggle for Legal Philosophy (*vis-à-vis* Legal Education)’ in Imer B Flores & Gül-riz Uygun (eds), *Alternative Methods in the Education of Philosophy of Law (and the Importance of Legal Philosophy in the Legal Education)*. *Proceedings of the 23rd IVR World Congress Law and Legal Cultures in the 21st Century: Diversity* (Franz Steiner Verlag & Nomos 2010); and ‘The Struggle for Legal Philosophy (*vis-à-vis* Legal Edu-cation): Methods and Problems’ (2012), 5:1 *Mexican Law Rev* 125.

² Roscoe Pound, ‘Law in Books and Law in Action’ (1910) 44 *American Law Re-view* 12.

IMER B. FLORES

sors and scholars tend to ignore the invitation and have been teaching law in books only —or at least mostly. It seems like despite law’s practical nature there is a strong tendency to believe that it can only be learned in books, not in action. One of the very few exceptions, of those who did take seriously the invitation, include both Jerome Frank and Karl N. Llewellyn —leading representatives of the Legal Realist Movement and of the creation of legal clinics— and more recently Duncan Kennedy —professor at Harvard Law School and one of the main representatives of the Critical Legal Studies Movement and of the critique of legal education.

In that sense, I pretend to revisit the critiques that Kennedy elaborated regarding legal education and its role in the reproduction of hierarchy. Additionally, I will insist that law is and must be properly understood as an argumentative model, regardless of appearing to be reduced to a mere applicative one, especially in the context of the great codifications from Justinian to Napoleon; and, hence, its teaching-learning must be done according to its argumentative nature, not merely applicative. Accordingly, we will revisit some of the central aspects of legal argumentation, from the appearance with Aristotle, next to the traditional rational logic, *i.e.* analytical logic, of the non-traditional one, *i.e.* dialectic logic, which comprises both topic and rhetoric, to recent times with Neil MacCormick, Robert Alexy, and Manuel Atienza, who had developed what represents a standard theory of legal argumentation, which has its roots not only in the anti-formalist movement of Rudolf von Jhering but also in the works of Luis Recaséns Siches, among others. And, finally, we will explicit our main conclusions.

II. THE CRITIQUE OF LEGAL EDUCATION AND THE REPRODUCTION OF THE HIERARCHY

Some thirty-three years ago, in 1983, Duncan Kennedy published —or to be more precise self-published— as a pamphlet a “little red book” in a clear allusion to the book of maxims of Mao —Máo Zédōn or Mao Tse-Tung— and in which he advanced his polemic against the dominant system of legal education and its role in the repro-

(UN)CHAINING PROMETHEUS: IS LAW AN APPLICATIVE MODEL?

duction of the existing hierarchy.³ In this book, he accentuates that in the prevailing learning-teaching model: “The actual intellectual content of the law seems to consist of learning rules, what they are and why they have to be the way they are... The basic experience is of double surrender: to a passivizing classroom experience and to a passive attitude toward the content of the legal system.”⁴ Besides, he emphasized the existence of a paradox:⁵

Law students sometimes speak as though they learned nothing in school. In fact, they learn skills, to do a list of simple but important things. They learn to retain large number of rules organized into categorical systems (requisites for a contract, rules about a breach, etcetera). They learn «issue spotting», which means identifying the ways in which the rules are ambiguous, in conflict, or have a gap when applied to particular fact situations. They learn elementary case analysis, meaning the art of generating broad holdings for cases, so they will apply beyond their intuitive scope, and narrow holdings for cases, so that they won't apply where it at first seemed they would. And they learn a list of balanced, formulaic, pro/con policy arguments that lawyers use in arguing that a given rule should apply to a situation, in spite of a gap, conflict or ambiguity, or that a given case should be extended or narrowed.

Moreover, he highlighted that these capacities in spite of not been evident “have real social value; they are difficult to acquire; and one can't practice law effectively without them. But they are nowhere near as inaccessible as they are made to seem by the mystique of legal education. By mystifying them, law schools make it seem necessary to restrict them to a small group, presumed to be super-talented.”⁶ In that sense, law is taught and learned as if it was something completely technical that only few “chosen” or “illuminated” can understand whereas it remains completely unintelligible to the rest of the mortals. Nevertheless, in reality, legal education is limited

³ See Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy. A Polemic Against the System* (Afar 1983).

⁴ Ibid 5-6.

⁵ Ibid 15.

⁶ Ibid 49.

IMER B. FLORES

or restricted to the teaching-learning (and, thus, to the recreation) of the existing rules, and the (prior) responses given by others. This explains how legal education not only reproduces the existing hierarchy but also re-legitimizes past decisions and reinforces the *statu quo*. Actually, as Kennedy pointed out: “Legal education is a product of legal hierarchy as well as a cause of it.”⁷ What’s more, his proposal can be summarized as follows: “A more rational system would emphasize the way to learn law, rather than rules, and skills, rather than answers”.⁸

III. FROM APPLICATION TO ARGUMENTATION

Although the idea of law as something to be applied (strictly) and so recreated by a purely deductive mode of reasoning has been unpopular for some time now, it seems that most legal professors and scholars keep teaching law as already settled and not as a matter to be settled. In my opinion, it is imperative to insist in the importance of rejecting any definition of legal interpretation that portrays itself as capable of providing automatically in an uncritical, passive or re-creative fashion the one and only meaning or sense of any norm to be applied, as well as the unique right answer to the case at hand.⁹ This assumption did reinforce the view of law as an appli-

⁷ Ibid 71.

⁸ Ibid 30; see Duncan Kennedy, ‘A Left Phenomenological Critique of the Hart/Kelsen Theory of Legal Interpretation’ in Enrique Cáceres *et al.* (eds), *Problemas contemporáneos de la filosofía del derecho* (UNAM 2005).

⁹ Let me clarify that, following Ronald Dworkin, I am confident that there are right answers in law and even the one right answer to each legal question. Moreover, the right answer is not and cannot be known *ex ante* to be merely applied but *ex post* after it has been argued for. See Ronald Dworkin, *Talking Rights Seriously* (Harvard University Press & Duckworth 1977; 2nd edn ‘with an ‘Appendix: Reply to Critics’, Harvard University Press & Duckworth 1978) 279: ‘My arguments suppose that there is often a single right answer to complex questions of law and political morality. The objection replies that there is sometimes no single right answer, but only answers; ‘No Right Answer?’ in PMS Hacker & J Raz (eds), *Law, Morality and Society: Essays in Honour of H. L. A. Hart* (Oxford University Press 1977) 84; ‘Is There Really No Right Answer in Hard Cases?’ in *A Matter of Principle* (Harvard Univer-

(UN)CHAINING PROMETHEUS: IS LAW AN APPLICATIVE MODEL?

cation model, with one and only preconceived answer to any legal question.¹⁰ The oddity of this assumption is clear; especially, since there are several methods of legal interpretation, which due to the different and sometimes incompatible theoretical compromises do not reach necessarily the same conclusion.

Since legal interpretation cannot be reduced to a mere applicative declaration —uncritical, passive and re-creative— of the one and only meaning, it is necessary to acknowledge it as an argumentative attribution —critical, active and creative— of a plausible sense among an infinity of possible ones. In short, legal interpretation consists not in a mere declaration of a pre-established meaning of the applicable norm, which leads automatically to its application (internal justification), but in the attribution of sense to a given norm to be applied, which requires a further argumentation to be justified (external justification).

Once the traditional conception of legal interpretation as mere application is displaced by an alternative conception as argumentation, it is clear that the applicative model must yield to the argumentative one. Analogously, in legal education we must stop teaching-learning law as an application model, which contains beforehand the preconceived solution to any legal problem waiting to be declared —or more precisely re-declared. Rather we must start teaching-learning law as an argumentative model, which creates a solution to the problem at hand by attributing meaning or sense to a norm. Since the different methods of interpretation provide distinct meanings or senses, it is the argumentation that must provide the criteria to opt for one of them, by convincing or persuading of the correctness or not of the contending claims for and against; in the quest of the one right answer that trumps the rest.

Furthermore, it is imperative to reject the notion, according to which the judge can legislate, *i. e.* create or change, as long as the “judicial legislation” is exceptional or interstitial. On this regard, let me

sity Press 1985); and ‘Objectivity and Truth: You’d Better Believe It’ (1996) 25 Philosophy and Public Affairs 87, 136; see also Flores, ‘The Legacy of Ronald Dworkin (1931-2013)...’, (n 1).

¹⁰ See Flores, ‘Langdell v. Holmes...’ (n 1).

IMER B. FLORES

bring to mind Oliver Wendell Holmes Jr.'s confession: "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially".¹¹ Similarly, H.L.A. Hart insisted, following Holmes, that due to the "open texture" of language and according to him of law as well, the judges must exercise their discretion by assuming the role of the legislative to create or change the law: "the open texture of law leaves a vast field for a creative activity which some call legislative".¹²

However, Ronald Dworkin pointed some problems with this idea, because it allows the judge to legislate and even worse to do it *ex post facto*, amounting to a violation not only of concrete principles, such as division or separation of powers and the prospectivity (or non-retroactivity) of the law, but also of more general principles, such as legal certainty and security, legality, normativity, and so on.¹³

What's more, it will suffice that the "judicial legislation", instead of being something exceptional or interstitial, becomes the general rule to proof its illegitimacy as a "judicial usurpation" as Lon L. Fuller pointed out, constituting an impermissible invasion of the legislative function, since the judge is entitled to complement the legislator not to supplant the legislature. In Fuller's voice "The correction of obvious legislative errors or oversights is not to supplant the legislative will, but to make that will effective".¹⁴

It is worth to mention that, in the past, in England, the judges did perform a highly creative task to the extent that the Parliament was

¹¹ *Southern Pacific v. Jensen*, 244 U.S. 205, 221 (1917).

¹² HLA Hart, *The Concept of Law* (Oxford University Press 1961) 200. See HLA Hart, 'American Jurisprudence through English Eyes: The Nightmare and the Noble Dream' in *Essays in Jurisprudence and Philosophy* (Oxford University Press 1983) 128: 'Though [Holmes] proclaimed that judges do and must legislate at certain points, he conceded that a vast area of statutory law and many firmly established doctrines... were sufficiently determinate to make it absurd to represent the judge as primarily a law-maker. So for Holmes the judge's law making function was 'interstitial'.

¹³ See Ronald Dworkin, 'The Model of Rules' (1967), 35 *University of Chicago Law Review* 14 (reprinted as 'Model of Rules 1' in Dworkin, *Talking Rights Seriously* (n 9).

¹⁴ Lon L Fuller, 'The Case of the Speluncean Explorers' (1999) 112 *Harvard Law Review* 1859.

(UN)CHAINING PROMETHEUS: IS LAW AN APPLICATIVE MODEL?

responsible of checking the executive function rather than of exercising a properly legislative one. Nowadays, in both Common Law and Civil Law countries, the adjudicative (or judicial) function is creative, not in a strong sense as coextensive with legislation, but in a weak sense of creating: (1) an individual norm, *i. e.* a particular and concrete norm, following the interpretation of the general and abstract norm(s) created by the legislator, as well as of the criteria or precedents of other judges and legal officials; and (2) a criteria or precedent of interpretation for future cases, through their rulings that include a *ratio decidendi* or even an *obiter dicta*. In a nutshell, the adjudicative or judicial function is more an interpretative-argumentative product rather than inventive-legislative, as Dworkin puts it: “Any lawyer has built up, through education, training, and experience, his own sense of when an interpretation fits well enough to count as an interpretation rather than as an invention”.¹⁵

Likewise, I will like to insist that law has always been an argumentative model, regardless of being considered for some time, especially in the context of the great codifications, from Justinian to Napoleon, as a mere applicative one.

Let me clarify that the *Corpus Iuris Civilis* comprised: the *Codex Iustinianus* (or Code of Justinian); the *Digesta* (or Digest); the *Institutas* (or Institutes); and the *Novellae Constitutiones* (or New Constitutions). It is also worth to note that the *Digesta*, also known as *Pandecta* and as *Iuris enucleati ex omni veteris juri collecti*, was commissioned to seventeen jurists lead by Tribonian with the task to compile the more relevant and significant decisions of the thirty-nine leading roman jurists of all times. For that purpose, the commission revised for three years their legal decisions and writings to extract a collection of the maxims that they have established and that were followed at that time.

Certainly the Roman jurists did not resolve the case at hand by means of a mere application —or at least did not limit themselves to the application— of pre-established or preexisting rules, and much less were expecting that those coming after them will pretend that it was possible to apply them automatically or mechanically. Rather

¹⁵ Ronald Dworkin, *Justice in Robes* (Harvard University Press 2006) 15.

IMER B. FLORES

they did resolve the case at stake via the argumentation following not only the reasoning of the parties but also their own and by creating an individual norm, *i.e.* ruling, which was once a criteria or precedent to be follow in like cases that must be solved alike, but that through the codification appeared to be a rule in itself.

My hunch is that neither the emperor that promulgated the code nor the jurists commissioned to do the codification considered law as an applicative model, but limited themselves to systematize the maxims contained in such decisions to serve as a guiding criteria or precedent for future cases, but that after a while became considered as the law itself. Actually, as the *Digest* contemplates: *Non ex regula ius sumatur, sed ex iure quod est regula fiat.*¹⁶ Notwithstanding, the problem is that with the codification, the legal operators, instead of having to argue for and against the case, limited themselves to quote the already pre-established or preexisting maxim and ask it to be applied.

In a similar fashion, the *Code civil des Français*, well-known as Code of Napoleon or Code Napoleon, was commissioned to five jurists, under the lead of Jean-Jacques-Régis de Cambacérès, Duke of Parma, and included Félix Julien Jean Bigot de Préameneu, Jacques de Malleville, Jean Étienne Marie Portalis, and François Denis Tronchet. The commission had the double task to put an end to the prevailing legal structure of the *ancien régime* and to give rise to the rebirth of the French state by compiling in a single document all the knowledge of the French legal tradition: the French-German law of the north and the Roman law, based in the *Corpus Iuris Civilis* but complemented with the commentaries of the glossators of the south. A titanic endeavor realized paradoxically in only four months.

It is also clear that regardless of the intentions of the French emperor, the members of the commission neither conceive the code nor the law as a merely applicative model, and much less do they pretend it was perfect, but perfectible as any other human endeavor. On this regard, Cambacérès affirmed: "It is impossible that the Civil Code contains the solution to all the questions that may arise."¹⁷ For

¹⁶ *Digest* 50, 17, 1.

¹⁷ Cambacérès: '*Il est impossible que le Code civil contienne la solution de toutes les questions qui peuvent se présenter*' (The translation is ours).

(UN)CHAINING PROMETHEUS: IS LAW AN APPLICATIVE MODEL?

that reason, in addition to the general disposition that entitled the judge, in the case of insufficiency of a given law, to interpret the law and even to integrate a norm analogically by applying a existing rule (*analogia legis*) or by appealing to general principles of fairness and justice (*analogia iuris*), they did include a part —section or chapter— including the principles related to the interpretation (and to the integration) of the law. Moreover, the Council, presided by Napoleon himself, suppressed this part before presenting it to the General Assembly.

Among the considerations that might have influenced such decisions, we must explicit that since the law emanates from the general will (*volonté general*) represented in the Legislative Assembly it cannot be subordinated to the particular will of a judge. Keep in mind, that in the *ancien regime*, the judge tended to protect the interest of the nobility and of the sovereign, *i.e.* the monarch, who personified the State, as Luis XIV's motto suggests: *L'État, c'est moi*. This consideration is founded in Charles Louis de Secondat, Barón de la Bréde and Montesquieu's characterization —or depiction— of the judges in his famous *The Spirit of the Laws* as the *bouche de la loi*: "The judges of the nation are not, as we have said, nothing more than the instrument that pronounces the words of the law, unanimated beings that cannot moderate the force and less de rigor of the laws".¹⁸

To the extent that for Napoleon the *Code* was nothing but perfect, a sign of excessive trust in the French rationalism that enable him to consider it as "the most pure exercise of reason", and that any deforming interpretation of it may endanger his general project of bringing order in both the internal and the external. What's more, it is said that, facing an eventual interpretation of his code, he did claim *mon Code est perdu*. Something to be believed at face value if we recall his thoughts contained in *Le mémorial de Sainte-Hélène*: "My Code simply put will do a greater good to France that all the previous laws... My truth glory is not in winning forty battles; Waterloo

¹⁸ Charles Louis de Secondat Barón de la Bréde et de Montesquieu, *The Spirit of Laws* (first published 1750; Thomas Nugent trans, Hafner Press 1949).

IMER B. FLORES

will eclipse the memory of many victories. What cannot be erase, what will eternally live, is my Civil Code”.¹⁹

The tension between the strictly legal aims of the *Code* and the political ones was solved in favor of the latter. With that, instead of an authentic exegesis, *i. e.* critical and complete interpretation of the text, following the *École de la Exégèse* what prevailed was the mere paraphrase of the wording of the law (text) to apply it (almost) literally or textually. In that sense, the Exegetic School presupposes that the legal norm constitutes a hypothesis that the judge applies as a general and abstract rule to a particular and concrete case, by subsuming automatically or mechanically (particular and concrete) facts in (general and abstract) norms to reach a conclusion, which deductively determines the legal consequences applicable to the case at hand. This deductive mode of legal reasoning has been characterized as the “continental conception of the law”, also known as “Napoleonic conception of law”, and as a consequence to a form of legal education that conceives law as something already given (in the code or written law) and that it is sufficient to apply it.

In other words, the applicative model is very limited because it may be helpful in describing law in a partial way from the perspective of the adjudicative function in Civil Law countries but not in the Common Law ones and by failing to explain the law in a more integrative form by including or incorporating the legislative function.²⁰ What’s more the applicative model fails for two further reasons: on one side, when it suggests that the legislator only creates law, whereas the judge as a general rule applies the law and as an exception creates it, especially when filling a gap; and, on the other, when it supposes that legal operators limit themselves to offer evidences and proofs of their claims to the judge who will apply them fittingly,

¹⁹ Napoleón quoted by Emmanuel de las Cases, *Mémorial de Sainte-Hélène. Journal of the Private Life and Conversations of the Emperor Napoleon at Saint Helena*.

²⁰ See Imer B Flores, ‘The Quest for Legisprudence: Constitutionalism v. Legalism’, in Luc J Wintgens (ed), *The Theory and Practice of Legislation: Essays on Legisprudence* (Ashgate 2005); ‘Legisprudence: The Forms and Limits of Legislation’ (2007) 1 *Problema. Anuario de Filosofía y Teoría del Derecho* 247; ‘Legisprudence: The Role and Rationality of Legislators —vis-à-vis Judges— towards the Realization of Justice’ (2009) 1:2 *Mexican Law Review* 91.

(UN)CHAINING PROMETHEUS: IS LAW AN APPLICATIVE MODEL?

when in reality they argue to convince and persuade the judge of the correctness of their claims trusting that he will not only apply the law but also do justice (according to law) as Pound pointed out.²¹

IV. THEORY OF LEGAL ARGUMENTATION

Aristotle in his *Treatise of Logic*, well known as *Organon*²² distinguished between two kinds of reasoning: (1) *analytical or apodictic reasoning*; and, (2) *dialectical or epagogic reasoning*. Both kinds are based in a syllogism, *i. e.* a sentence that, once certain propositions are stated, concludes necessarily with a different proposition from the already stated ones, by means of the propositions themselves. The former reasoning is incontrovertible, irrefutable and undeniable; it is simply out of question, because they are certain and already proved to the extent that the syllogism is formed by primitive and truth propositions, or else to propositions that own their certainty to primitive and truth propositions, and as such are object both of the *First Analytics* or *Analitica primera* as a theory of deduction or syllogism; and, of the *Second Analytics* or *Analitica posteriori* as a theory of demonstration or proof.²³

On the contrary, the latter reasoning is not incontrovertible, irrefutable and undeniable, but controvertible, refutable and deniable; it cannot be out of question, because they are neither certain nor proved but probable, since by definition the conclusion follows from propositions which are merely probable and as such are subject of the *Dialectics*, which comprises: (1) *Topic* as the art of finding the common places or topics —*topoi*— contained in the premises that lead into conclusions that ground a claim; and (2) *Rhetoric* as the art of convincing and persuading of the correction of the premises and conclusions that ground a claim.

The analytical reasoning, both in the form of the deductive syllogism and of the deductive demonstration or proof, constitutes a

²¹ See Roscoe Pound, *Justice According to Law* (Yale University Press 1951).

²² Aristotle, 'Organon' in Richard McKeon (ed), *The Basic Works of Aristotle* (Random House 1941).

²³ *Ibid* 188.

IMER B. FLORES

central part in the formal or traditional logic. So, from two premises (*protesis*) one necessarily arrives to a conclusion. Actually, the meaning of the word ‘conclude’ is “deduct or derive a judgment from other propositions, including judgments”. Since the conclusion claims a concept —the predicate— of another concept —the subject— it is indispensable to ground the claim to have a third concept (*meson, medius terminus*) which connects logically the first two (*extremi*). For example:

All human beings are mortals
Socrates is a human being
∴ Socrates is mortal

The concept “human being” is the *meson* or *medius terminus*, and the concepts “Socrates” and “mortal” are the two *extremi*. In this way, with the help of the middle concept “human being” it is possible to subsume the subject “Socrates” in the predicate “mortal”. Certainly, the great force and value of the syllogistics, as well as its flaws and limits, rely on this brute or crude fact: the analytical reasoning is true because the conclusion is —and can be— deduced or derived necessarily from the premises.

Nevertheless, to point out the flaws and limits of the formal or traditional logic, it is imperative to recall Rudolf von Jhering, who in his *Scherz und Ernst in der Jurisprudenz* puts the *Begriff Jurisprudenz* in its place, by pointing out the scope and limitations of the *Conceptual Jurisprudence* or *Jurisprudence of Concepts* as developed uncritically by the rest of the disciples of Friedrich Karl von Savigny. They claimed that from something as abstract as legal concepts it was possible to capture —and even exhaust— the essence of law and of the legal relations that it pretend to regulate, to the extent that it will suffice to apply them almost automatically or mechanically. Moreover, ever since the appearance in Germany of the *Review of the Historical School* in 1815 it was clear that the law regulated legal relations, but in a more concrete way as expressed by the *volkgeist* or spirit of the people as national or state law, in this case, German law, but contrasted with the more sophisticated version of the law available at that time, *i. e.* Roman law.

(UN)CHAINING PROMETHEUS: IS LAW AN APPLICATIVE MODEL?

On this regard, Jhering in his famed essay “On the Heaven of Legal Concepts. Fantasy”,²⁴ denounced the excess of conceptualism and in his famous books *The End of Law* (or *Law as a Means to an End*)²⁵ and *The Struggle for Law*²⁶ developed a different philosophical conception of law, known as *Teleological Jurisprudence* and also as *Jurisprudence of Interests*, more argumentative than applicative.

In a nutshell, Jhering claimed that law and its application is not an end in itself but a means to reach another ends, including interests, purposes and values, to the extent that argumentation is essential to law and its application to guarantee an adequacy of the means to ends, as well as of their consequences and functions, which most of the time are implicit rather than explicit. Actually, he advanced, in 1858, with the publishing of the second volume of his *Geist des Römischen Rechts. Auf den Verifchievenen gtufen feiner enwidlung*.²⁷

The law exists to be realized. The realization is the life of law, and the truth of law itself. What does not happen in reality, what does not exist other than in laws and on the paper, is just a ghost of the law, mere words and nothing else. On the contrary, what is realized as law is law, even though it is neither written in the laws, nor the people and the science have gained knowledge of it yet.

²⁴ See Rudolf von Jhering, ‘In the Heaven for Legal Concepts: A Fantasy’ trans. Charlotte L. Levy (1985) 58 Temple L Quarterly 799. (Some selections appeared for the first time translated into English in Morris R Cohen and Felix S Cohen (eds), *Readings in Jurisprudence and Philosophy of Law* (Little, Brown and Co & Prentice-Hall 1951). See also Felix S Cohen, ‘Trascendental Nonsense and the Functional Approach’ (1935) 35 Columbia Law Review 809; HLA Hart, ‘Jhering’s Heaven of Concepts and Modern Analytical Jurisprudence’ in *Essays in Jurisprudence and Philosophy* (Oxford University Press 1983); and Imer B Flores, ‘Natalie Stoljar’s Wishful Thinking and One Step Beyond: What Should Conceptual Legal Analysis Become?’ (2012) 6 Problema. Anuario de Filosofía y Teoría del Derecho 81.

²⁵ Vid. Rudolf von Jhering, *Law as a Means to an End* (Isaac Husik trans, Boston Book Co. 1913).

²⁶ Vid. Rudolf von Jhering, *The Struggle for Law* (John J. Lalor trans, Callaghan and Company 1915).

²⁷ Rudolf von Jhering, *El espíritu del derecho romano en las diversas fases de su desarrollo* (Enrique Príncipe y Satorres trans, Comares 1998) 533 (the translation is ours).

IMER B. FLORES

It is neither, thus, the abstract content of the laws, nor the justice written on the paper, nor the morality of the words, which decide the value of a right; the objective realization of law in the life, the energy through which what is known and proclaimed as necessary is followed and executed, here lies what consecrates the law its truth value.

Similarly, it was Luis Recaséns Siches, who emphasized the limits of the formal and traditional logic, which he recasts as mathematical logic, as applied to law, by recognizing next to a *rational logic*, with premises and conclusions proved, *i.e.* certain and true, as in $2 + 2 = 4$, a *reasonable logic* (or *logic of the reasonable*), with premises and conclusions probable, *i.e.* uncertain, but not necessarily false, like in the case of extending the explicit prohibition to enter into the subway or train with a “dog” to a “bear”.²⁸

The explanation is quite logical: it is clear that from a formal or traditional logical perspective, there is no way in which the species “bear” can be included into the one of “dog” to apply to the former the norm explicitly destined to the latter: “it is prohibited to pass with dogs”. Nevertheless, from a non-formal or non-traditional, *i. e.* material, logical point of view, it can be argued that the existing reasons to prohibit passing with “dogs” are equally applicable to the “bears”.

Certainly, someone can claim that in the event of the legislators wanted to prohibit passing with “bears”, they should have included them next to “dogs”, or else, introduce a more ample or generic formula such as “animals”, “animals with certain size”, “dangerous animals” or “animals that may affect the passengers and their well being”. Additionally, the judge may claim that these formulas not only are already implicit but also provide the rational behind the prohibition applicable to the case of “dogs”. If there is an identical reason

²⁸ The example is borrowed from Gustav Radbruch, who apparently took it from Leon Petrasyski, see Luis Recaséns Siches, *Tratado general de filosofía del derecho* (Porrúa 1959) 645-647; see also Imer B Flores, ‘The Problem about the Nature of Law *vis-à-vis* Legal Rationality Revisited: Towards an Integrative Jurisprudence’ in Wil Waluchow & Stefan Sciaraffa (eds), *The Philosophical Foundations of the Nature of Law* (Oxford University Press 2013) 118.

(UN)CHAINING PROMETHEUS: IS LAW AN APPLICATIVE MODEL?

—and even more reasons— between the cases of “dogs”, “bears” and other “animals”, the formula must be applicable to them.

Actually, the formulas “animals” and “animals with certain size” are not that fortunate. The first one is a vague expression that will appear to be equally applicable not only to dogs and bears but also to any animal from an ant to an elephant, including spiders and tigers. The second one, although “of certain size” will be helpful to reduce the vagueness from all animals to animals of certain size, is still a vague expression that will appear clearly applicable to larger dogs, such as Great Danes, and not to smaller ones, such as Chihuahuas. On the contrary, the formula “dangerous animals” is fortunate despite being still a vague expression since it provides a justification not only for the prohibition of those animals that may affect the passengers and their well being for posing a real or eminent threat due to the fact of being intrinsically perilous and representing a risk by creating conditions of incommmodity, insalubrities, and insecurity, but also for the exception to the rule, *i. e.* the case of service dogs, including assistance dogs for blind people, which *per definitio* do not pose such a threat due to the fact of neither being dangerous nor representing a risk to their well being. Actually, in the case of the service dogs, they are instrumental not only for guaranteeing it but also for enabling blind people to use the subway or train.

For example, their reasoning might be the following:

Provided that it is forbidden to pass to the subway or train with dogs, which constitute a danger or represent an unnecessary risk to the well being of the passengers.

The passing of any animal, like a dog, which constitutes a danger or represents an unnecessary risk to the well being of the passengers, is and must be equally forbidden.

Therefore, we can conclude:

∴ If bears and any other animals constitute a danger or represent an unnecessary risk to the well being of the passengers their passing is and must be forbidden.

IMER B. FLORES

Thus, we can also conclude:

∴ If there is a certain class of dogs, such as service dogs, including assistance dogs for the blind, and other sorts of animals, that do not constitute a danger or represent an unnecessary risk to the well being of the passengers their passing is and must be allowed.

As you can see the previous example reinforces the idea that law cannot be a mere applicative model but an argumentative one. Since it is necessary to provide further reasons to ground the claim that the norm is applicable or not, and even that it is the general rule or the exception to it which is the applicable to the case at hand. In addition, we are not certain that the legislator considered prohibiting passing with any dog, including assistance or service dogs, or else permitting passing with the bear, but it is probable that the legislator when establishing the prohibition was thinking it very likely that people will attempt to pass with a dog and that it was very unlikely to do it with a bear, assuming that he even considered it as a possibility. Moreover, in case of considering the cases of assistance and service dogs, and of bears, the most probable thing is that the legislator will permit the former and prohibit the latter.

At last, in order to reiterate what we have been arguing, I will allude to Manuel Atienza, who uses *The Purloined Letter* of Edgar Allan Poe, to prove the limits of the analytical or rational logic. In the case at hand, the head of the police commits a fallacy and falls into what is a pseudo-reasoning, which seems to be a valid reasoning but is not:²⁹

All poets are imbeciles
The minister is a poet ∴
The minister is an imbecile

However, this reasoning begins with an openly false premise, *i. e.* “All poets are imbeciles”. It is evident that from the fact that a person is a “poet” it does not follow that he is an “imbecile” or vice versa.

²⁹ See Manuel Atienza, *Las razones del derecho. Teorías de la argumentación jurídica* (UNAM 2003) 8-12.

(UN)CHAINING PROMETHEUS: IS LAW AN APPLICATIVE MODEL?

This is a clear example of what Aristotle labeled as an “apparent syllogism”, *i. e.* a “contentious or eristic syllogism”, which derives conclusions of premises that appear to be proved or at least probable, but which are not; to the extent that they appear to conclude something but in fact do not conclude anything, and that as such are studied in the *Sophistical Refutations* as the theory of the fallacies.

In between the truth propositions that can be derived validly from an analytical or apodictic reasoning and the openly false that constitute a contentious or eristic reasoning, there are probable propositions that are neither true nor false, but that constitute a dialectical or epagogic reasoning, *i. e.* a reasoning on the merely probable, intended to convince or persuade about the material correction of the common places or topics, premises and conclusions as well. As you can see, legal argumentation benefits not only from the proved reasoning of the analytical logic, but also from the probable reasoning of the dialectical logic. It is clear that the analytical and dialectical logic are central to law, in general, and to legal argumentation, in particular.

In that sense, it is not surprising that the legal logic, or more properly the general logic as applied to law, has become increasingly popular, ever since its reappearance in mid-twentieth century. On the one hand, the analytical logic reappeared when Eduardo García Máynez taught a course that will lead to an article and to his *Introducción a la lógica jurídica (i. e. Introduction to Legal Logic)*,³⁰ which was published, in 1951, the same year that Georg Henrik von Wright and Ulrich Klug published their first articles and books on deontic or modal logic and legal logic,³¹ and even before authors such as Georges Kalinowski.

On the other hand, the dialectical logic emerges when Chaïm Perelman —jointly with Lucie Olbrecht-Tyteca— published first, in

³⁰ See Eduardo García Máynez, ‘El principio jurídico de razón suficiente’ (1950), 46 *Revista de la Escuela Nacional de Jurisprudencia* 21; and *Introducción a la lógica jurídica* (Fondo de Cultura Económica 1951).

³¹ See George Henrik von Wright, ‘Deontic Logic’ (1951) 60 *Mind* 1; *An Essay in Modal Logic* (North-Holland Publishing Company 1951); and Ulrich Klug, *Juristische Logik* (Springer Verlag 1951).

IMER B. FLORES

1950, an article on logic and rhetoric, and later, in 1958, a book,³² in which they advanced the new rhetoric, at the same time that Stephen E. Toulmin published his *The Uses of Argument* and where he enhanced his inductive logic,³³ and well ahead of the prudential logic of Kalinowski, the reasonable logic of Recaséns Siches, and the topic of Theodor Viehweg, among others.

In the case of legal argumentation it results that the reasons in favor and against are not exclusively formal but material as well. In the process of reaching a legal solution to a legal problem, it is not enough to apply the existing solutions but to create new solutions to the problems at stake. In that sense, it is a common place to locate, following Neil MacCormick, the particular legal argumentation within general practical argumentation,³⁴ which includes axiological, deontological and teleological reasons about the material correction and validity of the argument itself.

Furthermore, the legal argumentation is developed within an institutional context and comprises institutional reasons, *i. e.* dependent on such context, also know as “authoritative reasons”. For instance, a court is bounded by its previous rulings; lower courts are bound to follow the criteria or precedent of upper courts; and judges are bounded by the legislative enactments. Although institutional arguments and authoritative reasons, *i. e.* reasons provided by an authority, have an especial place in law, its role is not exclusive. Hence, its must neither be overstated nor understated. The fact that these reasons are provided by an institutional authority is not enough to justify its application to the case at hand, and hence additional reasons are required. These are interpretative arguments and comprehend a great variety of classes or types of reasons: *a) linguistic*, appeal to natural or technical language to favor one interpretation over another one to solve a problem of ambiguity or vagueness

³² See Chaïm Perelman and Lucie Olbrecht-Tyteca, *The New Rhetoric. A Treatise on Argumentation* (John Wilkinson and Purcell Weaver trans, University of Notre Dame 1969).

³³ See Stephen E Toulmin, *The Uses of Argument* (first published 1958; 2nd edn, Cambridge University Press 2003).

³⁴ See Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford University Press 1978).

(UN)CHAINING PROMETHEUS: IS LAW AN APPLICATIVE MODEL?

in law; *b) logic-systematic*, affirm that law considered as a system, *i. e.* as a unitary and coherent whole, cannot admit either antinomies (principle of non-contradiction) or gaps (principle of completeness) to the extent that all cases are and must be solved; and *c) logic-dynamic*, argue that since law is in constant movement it is and must be concerned with the adequacy of means to ends, the resolution of conflicts of rules and collisions of principles, and even the ethical justification of any decision.

On the one hand, logical-systematical reasons include: authoritative reasons, such as the *res judicata* and *stare decisis* principles; historical reasons, either originalist or evolutionist; conceptual and contextual reasons, from the explicit and express it is possible to deduct and even infer something implicit or tacit, *v. gr.* from “formulated norms” to “derived norms”; analogical reasons, following the *ubi eadem ratio iuris, ibi idem iuris dispositio* principle, to solve antinomies and fill in the gaps; and conflict of laws reasons, such as hierarchy, retroactivity, specialty, territoriality, among others.

On the other hand, logical-dynamical reasons include: axiological, deontological, teleological, and even pragmatic reasons helpful not only to measure the efficacy of means to ends, including its economic efficiency and sociological effectiveness, but also to justify ethically a decision as the correct, fair or just. By the by, it offers further reasons not only both to maximize a rule and minimize other in case of conflict, and to optimize principles in case of collision by balancing them, but also to justify the application of the exception to the general rule as long as they are more beneficial following the *pro homine*, *pro personae* and even *pro reo* principles.

V. CONCLUSION

To conclude I will like to insist that law is not an applicative model but an argumentative one. In that sense, its teaching-learning cannot be reduced to the recreation or reproduction of the preexisting rules and responses, much less of a mere application of the general and abstract norm to the particular and concrete case at hand, through mechanical subsuming facts into norms, to derive a certain conclusion and legal consequences. Although the deductive syllo-

IMER B. FLORES

gism is widely used, since all legal operators, including the legislator and the judge, have to ground their claims. It is clear that the formal logic serves to derive a valid conclusion from the premises, but it does neither show how someone has reached such premises nor that it is its inescapable conclusion, as Holmes warned:³⁵

You can give to any conclusion a logical form. You always can imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of exact logical conclusions.

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³⁵ Oliver Wendell Holmes Jr, 'The Path of Law' (1997) 110 *Harvard Law Review* 991, 998 (first published 1897).

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