

Playing with Philosophical Puzzles: What Happens when Legal and Moral Norms face Jørgensen's Dilemma

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ABSTRACT

This article aims to evaluate the relations between law and logic concerning the particular aspect of the creation of a norm. It is commonly accepted among lawyers that the “new” norm is generated via a practical syllogism, constituted by a general norm and the corresponding fact as premises, generating as the conclusion the individual norm regarding that fact, for instance: “You should follow your promises”, “This is a promise of yours”, “Therefore, you should follow this promise”. While the validity of such an argument is evident, there is, surprisingly, no logical justification for the application of the rule of inference to norms (which are not true or false). This is a philosophical puzzle named after Jørgen Jørgensen, coined by Alf Ross in the 1940s, which in the 1970s received an original answer from the jurist Hans Kelsen, based on the notion of a “modally indifferent substrate”. With this notion, Kelsen intends to show that the abovementioned dilemma is actually an illusion. Our aim is to show that Kelsen's treatment only solves the issue at the legal normative level; the problem still remains on a moral normative level and concerning regular imperatives.

Keywords: legal philosophy, logic, morals, Jørgensen's dilemma, Hans Kelsen.

Introduction

The relation between the fields of logic and law is confirmed by a long history of connections that appear to originate in the Roman law tradition. The confluences that were established, together with the many conflicts still to be solved from both perspectives, led to the establishment of a third field, namely, legal philosophy. This hybrid discipline collects concepts from both original fields and deals with the theoretical problems that neither of them can—separately—give a full and convenient treatment. One of these “unsolved problems” is the following philosophical “puzzle”: if we accept that legal or moral norms cannot be treated like common true/false statements, then they cannot be part of the so-called practical syllogisms, like those considering decision-making. It remains that we tend to accept as valid arguments of the follows type:

- (1) Every Brazilian citizen must pay her taxes.
- (2) I am a Brazilian citizen.
- (3) Therefore, I must pay my taxes.

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Not only does this argument seem to be valid, but the truth of the conclusion seems to be inevitable, once we agree with the premises. But, if we cannot treat imperatives (1) and (3) as regular propositions like (2), then the argument cannot be the object of propositional logic.

This puzzle was pointed out by Jørgen Jørgensen in 1937, and was afterwards named after him—by Alf Ross in 1944. Both authors attempted to provide a solution to the problem, albeit unsuccessfully. Later, in 1979, Hans Kelsen offered a solution based on his concept of a modally indifferent substrate (henceforward to be designated as “MIS”). According to him, the MIS is the content of the norm, which is not itself true nor false, but can only get “dressed up” in the prescriptive mode—when it constitutes a valid norm—or in the descriptive mode—when it constitutes a true or false statement.

In the following sections, we aim to take possession of the Kelsenian concept of MIS in order to introduce a revised conception of the deontic logic approach, based on the philosophical commitment according to which Kelsen’s solution to the dilemma actually only prevails on a juridical level, so that the dilemma still remains unsolved when dealing with moral norms or simple imperatives or commands. Our criticism of Kelsen’s approach will indicate that the problem of the practical syllogism is still an open question in the field of practical philosophy.

Jørgensen’s Dilemma

Deontic logic, as proposed by von Wright (1951), does not give a sufficient account of the legal consequences of dealing with norms in a “mechanical” manner. Given the narrow scope of the logical treatment of juridical prescriptions, authors like Hans Kelsen felt motivated to explain the dynamics of the legal field without trespassing the limits of the “purely” juridical scope. Kelsen was famous for demanding a “pure” theory of Law (1989 [1960]), attacking the introduction of any element coming from outside the legal domain in order to explain legal procedures and legal concepts. Kelsen even denies that the notion of “justice” has any relevance for the definition of what a legal norm is, for instance. This fact has attracted a lot of criticism, in particular concerning the methods of legal positivism as they were applied by Kelsen. But here we should notice that an important consequence for the Kelsenian “purist” view is the denial of logic as a means for the application of law. Let us try to understand what this means for us here.

According to legal positivism, the creation of a particular norm for a specific case in a court is actually the application of

a general norm written down in a formal document such as a statute or a Constitution, for example. Only the Law itself can generate legal norms. The justification for normative validity (the validity of a norm is the very existence of such a norm in the legal system; it’s the notion indicating that the norm is binding for its addressees, and has nothing to do with logical validity) is based on the existence of a prior, more general, already valid norm. This process, even if it faces some internal problems,² preserves the methodological commitment to the purity of legal theory.

Following the process of justification, what happens in the court when a case is judged could be represented by a structure very similar to what Aristotle called a *practical syllogism*. For Aristotle, there was no important difference between a practical and a theoretical syllogism. Let us observe the explanation given by Broadie (1968, p. 26):

In De Anima 434a15–20 Aristotle says of the practical syllogism: ‘The one premise or judgment is universal and the other deals with the particular (for the first tells us that such and such a kind of man should do such and such a kind of act, and the second that this is an act of the kind meant, and I am a person of the type indicated).’ We are not in this passage given a description of the conclusion of the practical syllogism; but it is clear from several passages, (e.g. De Motu Animalium 701a28–33 and Nic. Eth. 1147a25–30), that the conclusion is to be construed as an action. For example, in De Motu 701a20–24 Aristotle writes ‘I need a covering and a cloak is a covering, I need a cloak. What I need, I ought to make; I need a cloak, I ought to make a cloak. And the conclusion ‘I ought to make a cloak’ is an action. [...] That the action is the conclusion is quite clear’.

The problem of the logical treatment of imperatives has evolved since von Wright, and can be more efficiently answered by adopting other, more refined and formally developed “versions” of logic. However, legal norms are not simple imperatives. The bindingness of a legal norm cannot be grasped by any logical tools currently at hand. This was precisely the obstacle noticed by von Wright (1957, p. vii) himself:

Another application is to the logical study of the norms (normative discourse). This latter study is important to ethics and the philosophy of law. But it must be pursued

² The process of searching for the justification of a norm’s validity has to end at some point. One might say it stops when we arrive at the Constitution of a country, but even the Constitution will be valid only if supported by a prior already valid norm. And as for the legislator of the Constitution, from where does she acquire her authority to elaborate the constitutional norms? Kelsen will answer that we should presuppose a higher norm, a fictive basic norm, which does not exist in the same way that ordinary norms do, but whose validity is only fictional. Thus, the basic norm is a methodological device to be presupposed as if it were a valid norm in order to enclose the positive legal system.

with much more refinement than in my first paper (here republished) on deontic logic. Philosophically, I find this paper very unsatisfactory. For one thing, because it treats of norms as a kind of proposition which may be true or false. This, I think, is a mistake. Deontic logic gets part of its philosophic significance from the fact that norms and valuations, though removed from the realm of truth, yet are subject to logical law.

So, let us regard Jørgensen's puzzle as composed of legal norms instead of ordinary imperatives, in order to better understand the difficulty in dealing with the rational evaluation of legal norms.

In the Criminal Code of Canada (1985), we read the following legal norm, concerning the case of abortion: "Every female person who, being pregnant, with intent to procure her own miscarriage, uses any means or permits any means to be used for the purpose of carrying out her intention is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years." Exceptions to this law are detailed shortly after in the Code. Even if the phrase is not formulated as an imperative, i.e., even if it simply declares that the practice of abortion is punished by imprisonment, it does not describe a fact, but prescribes something that ought to happen (imprisonment) if the crime has taken place (the abortion). Now imagine a female person—let us call her "Laura Palmer"—has been accused with sufficient evidence of undergoing an abortion. This fact allows us to formulate the statement "Laura Palmer has procured her own miscarriage by an act of abortion." It seems very straightforward to derive that "Laura Palmer ought to be sent to prison for a term not exceeding two years." These three elements form our instance of a practical syllogism composed by a general norm as major premise, a fact as minor premise, and an individual or particular norm as a conclusion.

Now we can consider why we cannot evaluate such an "argument" in the same way we are used to proceeding in cases of "regular" syllogisms. First, let us note that the general norm is valid for two reasons: first, because its content is based on the content of a more general valid norm; and second, because it was enacted by a legal authority, namely the legislator. It represents what Kelsen calls the meaning of an objective act of will: the legislator expresses her will that something ought to be the case, and the positive norm is the meaning, the sense of that objective will. The same will happen to the individual norm. Its content is based on the content of the general norm, and it represents the meaning of the objective act of will of the judge. The "objectivity" is due to the fact that the legal authority in question has no interest in the case, it is a "neutral" third party.

So, if the logical rules are able to deal with the subsumption demanded by the first reason explained above, there is no way logic can grasp and offer a treatment of the second reason. There enters the methodological "purity" expressed by

Hans Kelsen. If the practical syllogism could still be logically treated when it involves simple imperatives (where truthiness is artificially identified with the performance of the imperative—"Close the door!" will be "fulfilled" when the door is closed), this still could not be achieved in the juridical level.

Actually, Jørgensen (1937) himself and Alf Ross (1944) after him have already tried to give an account of how the puzzle can be so overwhelming in the various instances of the practical syllogism.

As Cabrera (1999, p. 207) points out, the main problem concerning Jørgensen's dilemma does not concern the fact of deriving norms from facts (or indicative sentences), but consists in logically deriving one norm from another. Jørgensen is aware of the impossibility of treating norms like true/false statements, so he will present the notions of indicative factor (the specific content of the norm, which has a propositional feature, and thus may be treated with some logical tools) and imperative factor (the expression of the subject's state of mind: the act of commanding, the act of giving an order) of a norm. Contrary to Kelsen's modally indifferent substrate, which we will encounter below, the indicative factor can be perfectly treated logically, and the conditions for understanding the syllogism would depend on the translation of the imperative factor to the indicative, where we could apply the rules of logic, mainly the rule of inference. Once the conclusion is achieved, we could translate the statement back to its imperative factor, with the individual norm.

This translation would be made possible by a link between the truthiness of a statement and the verification or satisfaction of the imperative. Alf Ross, however, claims that the logical aspect of the imperatives in the practical inference concerns not the satisfaction or the verification, but the "subjective validity" of those imperatives. In this case, says Ross (1944, p. 38), "[a]n imperative is said to be valid when a certain, further defined psychological state is present in a certain person, and to be non-valid when no such state is present." That is to say that we would be able to apply the logic indirectly to imperatives when in some determined intentional psychological state justifying or motivating the imperant's will in creating the norm.

Kelsen, in turn, provides a more thorough explanation of why the puzzle amazes us. He says that the derivation seems inevitable because we are actually considering only the content of the norms, which he calls the modally indifferent substrate (MIS). The content itself is still not true or false, it is indifferent, something like "having an abortion," in our above-mentioned example. It can be "dressed up" in the normative or prescriptive mode when we have a valid law about abortion, or in the descriptive mode when we have a true/false statement about abortion. In the first case, however, for the prescription to be a binding valid norm, it still has to be enacted by a legal authority as the meaning of her objective act of will.

The neutrality of the content with respect to the form is what allows us the mobility between the two fields—is and ought—which are separate and isolated from each oth-

er, as the naturalistic fallacy points out. However, the notion of MIS allows us a much more fluid exchange between the two fields, since the neutrality of the content does not work against the methodological abyss instantiated by the naturalistic fallacy. In this sense we believe that a dialog can be implemented between the two fields, encouraging their approximations, without neglecting their mutual autonomy.

Moral Norms in Jorgensen's Dilemma

In the previous section, we saw that the "conclusion" of the practical syllogism, which in the legal context is an individual norm, actually needs to be *created* or enacted by an authority, more than just derived from the premises by anyone. Kelsen provides this account of the problem in a book called *General Theory of Norms*, indicating that his positivistic approach must prevail not only for positive law, but also for positive morals or even religious systems, such as Catholicism, for example. Actually, most of Kelsen's (2001 [1979], p. 254) examples come from a religious field:

For example: Paul comes home from school and says to his father: 'My classmate Hugo is my enemy, I hate him.' Thereupon, Paul's father addresses an individual norm to him: 'You are to love your enemy Hugo and not hate him.' Paul asks his father: 'Why am I to love my enemy?', that is, he asks why the subjective meaning of he's father's act of will is also its objective meaning, why it is a norm binding on him, or—and this is the same question—he wants to know the reason for the validity of this norm. Whereupon his father says: 'Because Jesus commanded "Love your enemies".' Paul then asks 'Why is anyone to obey the commands of Jesus?'; that is, he asks why the subjective meaning of Jesus's act of will is also its objective meaning, why it is a valid norm, or—and this is the same question—what is the reason for the validity of this general norm. The only possible answer to that is: Because as a Christian one presupposes that one is to obey the commands of Jesus.

It is precisely regarding this aspect, namely the fact that the positive moral field receives the same treatment as the positive legal field, that we attack Kelsen's approach to the practical syllogism. We understand that the notion of MIS does not operate in the field of moral norms or simple imperatives in the same way as it does in the legal field. Therefore, Kelsen's answer to Jorgensen's dilemma only partially goes through (that is, it only concerns the juridical level).

Similarly to the example of the Canadian Criminal Code, let us now provide and analyse an example of a moral practical syllogism. We can stick to Kelsen's own example

about "loving our enemies." Then our major premise would be represented by the general moral norm (1) "Everyone should love their enemies" (to be read as "if x is my enemy, then I should love x"). Let the fact in question be (2) "John is my enemy," which is the minor premise. Therefore, the conclusion has to be (3) "I should love John." According to the procedure of justification of positive norms, (1) is provided by the "legislator" and present in some kind of "official" document, which would be, respectively, God and the Bible. Premise (2) does not face further problems either, since it is simply the fact under consideration. Now, trouble comes with the conclusion (3). Since it is an individual norm, it should, more than being supported by (1), also be the meaning of an objective act of will. In law, that objective act of will comes from the figure of the judge, but in morals there is no neutral "third party" enacting the individual norms. Each of us is responsible for the subsumption of the individual norm under the general moral norm we all understand. The act of will generating the norm in the conclusion is therefore always subjective.

Concerning the "objectiveness" in question, Beyleveld and Brownsword (1998, p. 118) make this prudent observation:

As we understand Kelsen, he is not saying [...] that a norm is objectively valid (that an 'ought' has an objective meaning) on condition that everyone agrees that the behavior prescribed ought to be done. It is not a consensus of wills that converts a subjective 'ought' into an objective 'ought'. He is saying that to regard a norm as being objectively valid is (that is, means) to regard what the norm prescribes as binding upon all whose behavior (actual or potential) is being addressed by the norm regardless of whether anyone (including the person who is doing this objective regarding) wishes this behavior or not (that is, regardless of whether anyone wills this 'ought' in the subjective sense).

The definition of "norm" is indeed linked to the concept of a command or an order, but with the important detail that this order must come from an authorised person, as an expression—mostly in the form of an imperative—of a will. Since this will must come from a person authorized by the law or morals itself, there is always a strict relation between the legal (or moral) production and the legal (or moral) power. According to Bobbio (2008), to enact a norm is always to be able to do so, and the authorisation comes from no one but the law (or morals) itself. This shows the importance of the fact that methodological procedures for managing relations between legal or moral norms, which handle a variety of possible legal or moral affairs, must always come from the system itself—something that also illustrates the constant concern with preserving the principle of "purity".

So, the problem here is that the practical syllogism seems very much more acceptable in the moral field than in the ju-

ridical field. The MID still explains how we move between fields of is and ought without falling prey to the naturalistic fallacy, since we are only considering the neutral content of norms and statements by acts of thinking, and not acts of will. The point is that, concerning moral norms, we are capable of creating our own individual norms by acts of subjective will. The problematic aspect is that this subjectivity will prevent the norm from being a valid norm, i.e., from being binding or obligatory for the addressee; that is, moral norms would be nothing more than commands, prescriptions, or orders without validity (in the legal, not logical, sense of the term). This problem is a huge gap in Kelsen's theory, as we can see (2001 [1979], p. 27):

This is the only way in which the command of a highwayman can be distinguished from that of a moral or legal authority. Generally: not every Ought which is the meaning of an act of will is a binding norm. For instance: I can will 'Everyone is to marry upon reaching a certain age'. That is not a binding norm for there is no norm of a positive moral or legal order which empowers me to posit such a norm. The Ought in this case is only the subjective meaning of my act of will, and not its objective meaning. It is only when the Ought has an objective meaning, and so expresses a command, that there exists a duty (i.e. a binding norm).

The problem we are pointing to is: how does the individual moral norm acquire its validity if there's no authority to enact an objective act of will? If we cannot answer this question, we are not able to distinguish between a moral norm and an ordinary order or command. According to this view, the practical syllogism remains out of the scope of Kelsen's treatment when it involves moral norms instead of legal norms, and Jørgensen's dilemma remains unsolved.

Final remarks

The main objective of this article was to compare how moral and legal positive norms behave in the so-called practical syllogism. The appearance of inevitability coming from examples of this kind of argument contrasts with the fact that we actually have no grounds to treat norms and imperatives like we treat statements, that is, according to truth values. This strange fact was characterised as a philosophical puzzle, made famous in the name of the first author to ever notice it, Jørgen Jørgensen.

After Jørgensen himself and Alf Ross (Richard Hare also made a contribution to this discussion in 1972, but Kelsen demonstrated that his treatment was similar to—and as wrong as—Jørgensen's), Kelsen gave the most detailed and complete account of the problems in dealing with the

practical syllogism. His approach, based on the MIS notion, provides a reasonable treatment of the puzzle inside the legal scope, demonstrating the fact that we are able to move between indicative and normative fields since we are only considering the neutral content of norms and statements. Afterwards, knowing the content to be placed in the conclusion, we are able to "dress" this content (not translate it!) in the normative mode, thanks to an objective act of will coming from a legal authority, i.e., a judge.

However, in the moral field, we lack this final step. There is no authority to provide the validity of the individual moral law. In the moral field, we can say that "we are our own judges", who have to evaluate the general norm according to the different cases we deal. Consequently, individual norms have no binding power, no validity, and cannot differ from a simple command. This represents a huge flaw in a moral theory, namely not being able to differentiate a moral norm from an ordinary order. Another negative consequence is the fact that, even nowadays, the only reaction we can have in face of the troublesome cases of a practical syllogism like Jørgensen's dilemma seems to be plain rational discomfort.

References

- BROADIE, A. 1968. The Practical Syllogism. *Analysis*, **29**(1):26-28. <https://doi.org/10.1093/analys/29.1.26>
- BOBBIO, N. 2008. *Direito e Poder*. São Paulo, Ed. UNESP, 304 p.
- BEYLEVELD, D.; BROWNSWORD, R. 1998. Methodological Syncretism in Kelsen's Pure Theory of Law. In: S. PAULSON; B. PAULSON (eds.), *Normativity and Norms*. Oxford, Clarendon Press, p. 113-146.
- CABRERA, C.A. 1999. Imperativos y lógica en Jørgen Jørgensen. *Isegoría*, **20**:207-215. <https://doi.org/10.3989/isegoria.1999.i20.101>
- CRIMINAL CODE OF CANADA. 1985. Available at: <http://laws-lois.justice.gc.ca/eng/acts/C%2D46/>. Accessed on: 28/11/2016.
- HARE, R.M. 1972. *The Language of Morals*. Oxford, Oxford University Press, 208 p.
- JØRGENSEN, J. 1937. Imperatives and Logic. *Erkenntniss*, **7**(1):288-296.
- KELSEN, H. 1989 [1960]. *Pure Theory of Law*. Berkeley, University of California Press, 356 p.
- KELSEN, H. 2001 [1979]. *General Theory of Norms*. Oxford, Clarendon Press, 465 p.
- ROSS, A. 1944. Imperatives and Logic. *Philosophy of Science*, **11**(1):30-46. <https://doi.org/10.1086/286823>
- VON WRIGHT, G.H. 1951. Deontic Logic. *Mind*, **60**(237):1-15. <https://doi.org/10.1093/mind/LX.237.1>
- VON WRIGHT, G.H. 1957. *Logical Studies*. London, Routledge and Kegan Paul, 195 p.

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