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Intricacies, Fallacy and Madness of Legal Deduction[1]

I. Introduction

There is a dream, an eternal desire – and how passionately it is pursued and adored by lawyers, judges, academics, politicians and subjects of the law – that the law and legal outcomes can be certain and reliable as if they were the output of a digital machine, as if they were the very result of pure logic or mathematical calculus.

The cornerstone of that dream is the so-called legal deduction, i.e. the method of reasoning allegedly derived from formal logic or its cognates. Legal deduction fanatical believers hold that it generates infallible and certain outcomes, provided its premises are true or valid. In other words, according to them, if one cannot challenge any of these premises, he/she has to accept the inferred conclusion under the threat of being irrational or insane. Knowing the contents of the premises of legal deduction, we are thus supposed to be able to precisely predict the results of this reasoning, which flow here directly from the very scheme of involved inference. As a corollary, we may thus metaphorically regard judges as the only mouthpieces of the statutes or mere executors of the will of the legislator that is expressed in the formulations of canonical text.

Notwithstanding its undisputable theoretical charm, legal deduction understood in the above-mentioned way is nothing more than a fallacy, a window dressing discernible with a naked eye for at least every experienced practitioner.[2] That main cause of the illusory character of deductive

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[2] As Karl Nickerson Llewellyn aptly noted: 'If rules were results, there would be little need of lawyers". See Karl Nickerson Llewellyn, *The Bramble Bush. The Classic Lectures on the Law and Law School. With a New Introduction and Notes by Steve Sheppard,* Oxford University Press: New York 2008, p. 11.

legal reasoning comprehended as such lies in the very medium in which law is articulated. The canonical texts (texts of legal acts), statutory rules derived from such texts, are composed of terms and expressions belonging to natural language, the language which – apart from that its primary function is to enable people communication between them, not to be a carrier of legal mandates –is by its nature imprecise and to a considerable extent context dependent. (Incidentally, the same applies to deductive reasoning from precedential rules, i.e. the rules derived from judicial precedents). Moreover, the minor and the major premises of legal deduction belong to two different words and the operations upon then – only for this reason – cannot be done in any mechanical way. Even more importantly, as I shall try to demonstrate in this paper, legal deduction is not only a harmless fallacious philosophical idea of some legal theorists. It also has a substantial, pernicious side effect. This effect is so serious that, so to speak, legal deduction might drive us, i.e. if we believe in its infallible and uncreative nature, to real madness.

II. The Scheme of Legal Deduction

Specifically, the workings of legal deduction are often presented in the form of the so-called legal syllogism. According to such a syllogism, a legal rule (norm) serves as the major premise, the facts of the case at hand serve as the minor premise, and the legal consequence for that case constitutes the very conclusion.

A rule/norm which plays the role of the major premise of a legal syllogism can be regarded as a general expression which, in generic terms, indicates what one ought to do or ought not to do in a certain type of circumstances. For instance, it tells us that if anyone causes damage, she or he ought to pay compensation that is sufficient to cover the damage. Sometimes, especially in criminal law, such a general expression indicates what should be done with someone when he/she behaves in a particular way, e.g. if one kills another person unless it is not expressly permitted by a law, he/she should go to prison for ten years. The rule/norm which constitutes the major premise in a legal deduction is derived from a canonical text, i.e. text of a statute, regulation, constitution, etc; but equally well it may be the rule of judicial precedent, the so-called *ratio decidendi*, ruling or holding, only if we understand the general expression of above-presented nature under these notions.

The facts of the case at hand, which form the minor premise, are all elements of the factual setting of that case, i.e. the details of the events and persons which were present in a case to which we want to apply deductively the rule/norm that constitutes the major premise.

The conclusion in a legal syllogism amounts to the legal consequence or consequences for the case at hand, which – as is deemed by its most keen proponents – infallibly (logically) stems from

the major and minor premise, provided these promises are valid/true. That is, in order for this inference be valid, a rule (norm) which forms the major premise has to be an operative law (law that is binding/in effect), and the facts of the case at hand which constitute the minor premise have to be such that actually occurred or at least are proven or posited to be such.[3]

[3] On legal deduction see: Aleksander Peczenik, *On Law and Reason*, 2nd ed., Springer: 2009, pp 14-15; Steven J. Burton, *An Introduction to Law and Legal Reasoning*, 3rd ed., Wolters Kluwer: Austin 2007, pp 43-58; D. Neil MacCormick, *Rhetoric and the Rule of Law : A Theory of Legal Reasoning*, Oxford University Press: Oxford 2005, pp. 32-48, see also pp 49-77; D. Neil MacCormick, *Legal Reasoning and Legal Theory*, Oxford University Press: Oxford 1978, pp 19-72; Ruggero J. Aldisert, *Logic for Lawyers : A Guide to Clear Legal Thinking*, 3rd ed., National Institute for Trial Advocacy: 1997, pp 53-88; Martin P. Golding, *Legal Reasoning*, Broadview press: Peterborough 2001, pp 39-42; Bartosz Brożek, *Rationality and Discourse : Towards a Normative Model of Applying Law*, a Wolters Kluwer business: Warszawa 2007, pp. 39-54; Jerzy Wróblewski, *The Judicial Application of Law*, Kluwer Academic Publisher: Dordrecht 1992, pp 30-35, see also pp 229-232; Scott Brewer, Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy, Harvard Law Review no. 109 (1995-1996), pp. 930-931 and footnote 13 on these pages; Rupert Cross, *Precedent in English Law*, The Clarendon Press: Oxford 1968, pp 176-181; Rupert Cross and James W. Harris, *Precedent in English Law*, 4th ed., Oxford University Press: Oxford 1991, pp 187-192; Sharon Hanson, *Legal Method & Reasoning*, 2nd ed., Cavendish Publishing Limited: London 2003, pp 215-217.

As for the notion of a legal norm (rule) see: Alf Ross, *Directives and Norms*, Routledge & Kegan Paul: London 1968, pp 78-138; Frederick Schauer, *Playing by the Rules : A Philosophical Examination of Rule-Based Decision-Making in Law and in Life*, Clarendon Press: Oxford 1991, pp 1-37; George C. Christie, *Law, Norms & Authority*, Duckworth: London 1982, pp 2-27; Hanson, pp. 210-213

On deduction (syllogism) in general see: John Stuart Mill, *A System of Logic, Ratiocinative and Inductive* : Being a Connected View of the Principles of Evidence and the Methods of Scientific Investigation, 8th ed., Harper & Brothers: New York 1882, pp. 126-157, Thomas Fowler, *The Elements of Deductive Logic*, 10th ed., The Clarendon Press: Oxford 1895, pp. 85-109.

As to human rule-based reasoning in psychology see: Steven A. Sloman, *Two Systems of Reasoning*, [in:] *Heuristics and Biases. The Psychology of Intuitive Judgment*, eds. Thomas Gilovich, Dale W. Griffin and Daniel Kahneman, Cambridge University Press: Cambridge 2002, pp 381-383 and Lance J. Rips, *The Psychology of Proof : Deductive Reasoning in Human Thinking*, The MIT Press: Cambridge 1994.

III. The Fallacy of Legal Deduction

1. Uneven Nature of the Premises

The main reason why legal syllogism does not work in the way its most faithful believers wish lies in the uneven nature of premises of this syllogism. One may easily notice that the major premise is here distinctly different from the minor premise, being of utterly another kind, what in turns makes the whole reasoning – from the very beginning – logically fallacious.

Namely, deductive reasoning is a powerful device in environment in which no-one can question whether a phenomenon (entity) mentioned in the major premise is the same as the phenomenon mentioned in the minor premise. This is the case in the world of digits or numbers, as is the world of IT science, logic or mathematics. There, indeed, deduction comes to the fore, taking the place of a Queen method, the method we must pay our respects in salience. But if there is even a slight whit of doubt as to whether an object mentioned in the major premise is the same entity as an object that forms the minor premise, the whole infallibility of deductive inference immediately collapses.

In legal syllogism, doubts of the above-mentioned sort are the order of the day. The major premise of a legal syllogism is, by definition, articulated in general terms of language. The minor premise, in turn, is made up of the raw facts of the case at hand as they are, and thus is anchored in a different ontological world. To employ legal deduction in practice we have to transfer this premise to the world of the major premise, to which aim, we must make a great leap from that which is real and specific to that which is abstract and general. This hidden step of legal deduction is its crucial point and, at the same time, its weak point since it is far from being mechanical, logical, automatic and so on. Instead, it is in essence creative and may be done in different ways by different people. As a result, the same factual situation may be translated into different linguistic terms and phrases, and which version to choose will often remain an open question.

At this juncture, one may claim that legal deduction actually works the other way round – i.e. that we do not describe here the case at hand in terms of general language but seek in this case whether it involves the phenomenon mentioned in the major premise. This being the case, it makes no difference as to the fallibility of legal deduction. Ascertaining whether a generic phenomenon specified in the major premise exists in the concrete case at hand is still a creative and subjective task, having nothing in common with logic and mathematics.

2. Indeterminacy of Linguistic Meaning

The above-highlighted cause of fallacy of legal deduction as logical type of inference is merely a prelude to the problems that arise here. The meaning of words and phrases used in the major premise which indicate the circumstances in which one ought or ought not to behave in a certain way are imprecise in and of themselves. These words and phrases are part of the natural language which is life, changing and by no means determine. Such basic causes of the latter, such as vagueness, ambiguity and the open texture (the intrinsic possibility to became vague in future even if being determined at present) of language terms are commonly recognized and thoroughly analyzed and hence not worthy of detailed explanation in this paper.[4]

But I wish to turn to another feature of language – its terms – that inevitably lead to imprecision, namely words, phrases, or even whole sentences which are to a high degree contextually dependent. The meaning of a separate word as well as a group of words hinges on the circumstances in which they are uttered. Without knowing what these circumstances are, we may have serious difficulty in understanding them, let alone successfully communicate with each other.

Naturally, such context dependence concerns also words used in major premise in legal syllogism. Take as an example a norm/rule: the dogs are not allowed. What does mean the word: the dogs therein: a) the dogs who are living animal (all of them or only small or big, dangerous or cute, etc), b) the dogs which were alive but now are stuffed, d) the dogs which are child toys ('teddy bears'), e) the items of a food which full name is hot dog, f) the artificial hot dogs (such toys), f) or may be all of them?

Interestingly, well-known and highly elaborated attributes of language such as those mentioned above are of no use here. What is the core meaning of the word: dog? And what is the penumbra (fringe) of this word? All of the enumerated instances of dog seem to be from the linguistic point of view 'core' dogs. Similarly, choosing between the foregoing meanings can hardly be facilitated by recourse to some general rule, for instance, one giving priority to the most common or the most typical meaning. One must admit that it is difficult to ascertain whether a dog is usually small or big or whether it is used more to denote child toys than barking living animals.

[4] As for the attributes of such terms present in natural language as ambiguity (equivocation), vagueness (the division between core and penumbra (fringe)) and open–texture see, for instance, Frederick Schauer, *Thinking Like a Lawyer : A New Introduction to Legal Reasoning*, Harvard University Press: Cambridge 2009, pp. 18-23; Schauer, Playing…, pp. 31-37; Burton, p. 52; Brewer, p. 993-994; Brożek, pp. 25-28; Douglas Walton, *Informal Logic : A Pragmatic Approach*, 2nd ed., Cambridge University Press: Cambridge 2008, pp. 290-293, 300-305, 321-325.

Everything becomes at once much clearer when we know the context. It is thus of the utmost importance whether the rule banning dogs is that which is posted on the door of an restaurant or at the entrance of a bus, or on the front of the house of a family which has just lost their beloved dog and miss him so much that they do not wish to have contact with anything that can be associated with dogness.

Without knowledge of the context, the meaning of a sentence is often totally obscure. Conceive of another example, the rule which states that people who are tall cannot go in. What does 'tall' mean here? We may indulge in discussion as to what is a core meaning (probably men above 190 cm), and what is a penumbral one (probably men below 190 cm and above 170). But, consider that this rule is painted in front of the entrance to a coal mine which is open for visitors despite the fact that the mine shafts are exactly 172 cm high. Now, you at once know that 'tall' means everyone who cannot easily enter and move in that coal mine, i.e. most likely anyone higher than 165 cm. The context brings the meaning of a linguistic expression and any set of general rules or knowledge of statistical usage can hardly change that. The meaning of language terms is above all not core and penumbral, not common or uncommon, not even intentional or unintentional, the meaning is above all just contextual.

3. Malleability of Context in Law

Bearing in mind that it is the context in which these expressions are used which has crystallized the meaning of expressions present in language, we may look with more scrutiny at what constitutes context in law. The context invoked against the background of the examples presented in the above-section corresponds to the kind which I will call direct. It is always important but if the meaning is to a great extent contextual, why not also take into account a broader context?

Turning to the example of the rule imposing a ban on dogs, we know that when it occurs in the context of a bus or a restaurant it is about dogs who are living animals, not dogs which are toys. Yet is it also addressed to guide dogs or such small dogs that one may freely place them in a coat pocket?

The meaning of legal precepts is indeed context dependent but this context is direct as well as indirect. As far as the latter is concerned, we may regard the purposes and values that the rule whose meaning one seeks to ascertain serves and protects. But such an indirect context can comprise also the goals and values which in general prevail in the society in which a given rule is to be observed, or the stance of the legislator or the governmental agencies in this respect. Thus a guide dog can be in the advanced example considered as not being a dog although no-one of sound

mind would claim that guide dogs are not dogs in the common linguistic usage. The same applies to the tiny dogs one is able to keep in a pocket and which cannot bite anyone and pose no danger to passengers.[5]

This indirect context is, however, not only very broad but also malleable. It may comprise a variety of values, goals, politics and aims that in addition can be of a different level of generality. Moreover, they can also contradict each other and, as a result, such a context may blur its lines and elements, presenting itself as heterogeneous, indistinct and to some degree amorphous construct.[6]

4. A pragmatic element

There is, however, something more about the context in law, namely in ascribing the meaning to terms used in legal rules (norm), one is fully aware that the effect of such activity will have a direct influence on that which is ordered, permitted or forbidden in the eyes of law. That is, he or she is alert that ascertaining such meaning is not a linguistic game, but communing with the very law and its effect on peoples' properties, freedoms, rights or even their life and limb. The pragmatic consequence of a meaning one chooses forms an additional element in the context of the wordings of each legal rule (norm), being an inextricable part of that context.[7]

Furthermore, not only is it a very important marker which helps us in clearing the obscure meaning of the terms and expressions of legal rules but also is a factor which creates an independent meaning of such terms and expressions. The question is why linguistic categories and subcategories should be the same in law and in natural language, why do not change or transcend the linguistic meaning if the exigencies of the case at hand call for that, and so on.

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[5] As regards such a broad context in law, using the example of imposing a rule about speed limits on someone escaping a murderer who is shooting at her from his vehicle or a police officer chasing a fleeing terrorist, see Cass R. Sunstein, Commentary on Analogical Reasoning, Harvard Law Review no. 106 (1992-1993), pp. 755-756.

[6] Incidentally, such a broader (indirect) context also makes the law different from sport games; cf. Fernando Atria, *On Law and Legal Reasoning*, Hart Publishing: Oxford 2002, pp. 6-9 (who underlines the differences between the law and sport games which lies in not sharing the complete insulation of law from moral considerations, whilst insulation is a feature of such games).

[7] Concerning the interesting observation that the legal syllogism is not about a factual conclusion as in the case of a usual syllogism but about the conclusion which can be fully intelligible only by reference to legal rules, see Cross, p 177, Cross and Harris, p 188.

Anyhow, the pragmatic element in legal context is very strong and prominent. Legal decision makers, as human beings, are not in a good position to ignore the consequences of their judgments.[8] Clinging to the example with a rule denying an allowance to dogs, the pressure of the need to take into account such consequences is strong enough to make it conceivable that a bus driver, John, when asked by a lady whether she can get in with her dog who is so miniscule that it can be kept in a jacket pocket can angrily answer that she should not bother him since what she has is not a dog at all. Or, the other way round, our John may here find himself under pressure to consider a lion to be a dog. That a lion is normally not a dog will be of no significance to him when some lunatic tries to enter the bus with the former on a leash!

IV. Madness

The broad malleable context involving a pragmatic element makes the outcome of legal deduction uncertain and dashes all hopes in the infallible nature of this kind of legal reasoning. But in fact it brings something more; it causes serious mental problems on the part of the reasoners, not least those who believe in its unerring character.

Those who are supposed to reason deductively from legal rules (norms) are in constant dilemmas as to which meaning they should ascribe to the terms or sentences the legal rules are composed of. They have to decide which parts of the broad context are to be taken into account each time. Our bus driver, John, can be certain that that a dog toy should not be regarded as kind of a dog which is not allowed according to the rule banning the dogs, but he may have some doubts whether guide dogs can be permitted since they can bite severely as well as making a lot of noise and thus being dangerous and bothersome for passengers to the same extent as other dogs which are living animals. Similarly, pocket dogs may seem suspicious to him. Nonetheless they are very small and cannot cause serious damage, they biologically are still dogs. Knowing that he has exempted such dogs from the banning rule, some people may protest that he violate this rule or even worse they may try to persuade him that their own bigger dogs are gentle too and thus should also be allowed to enter the bus.

[8] As for examples in which people, when resolving abstract tasks, including ones with syllogism, have difficulty in disrespecting their beliefs respecting reality and in fact often prefer these beliefs to conclusions that are more logically compelling see Sloman, pp. 384-389.

On pragmatism in law see Richard A. Posner, *How Judges Think*, Harvard University Press: Cambridge 2008, pp 230-265.

That is a real madness. The more logic we seek here, the more certain (predetermine) the outcome we strive for, the greater the madness. No logical rule can solve the dilemmas involved and bring the right answer. Some other processes taking place in the human mind are needed to yield a conclusion of legal deduction. And these processes do their work more or less fruitfully, utilizing divergent resources such as the information that people kept in their long- and short-term memories. The reasoner's beliefs, preferences of values and aims, expectations towards the law as such and many other similar factors are processed so that the legal rule (norm) may be applied to the case at hand. But there is no logic at the centre of these operations. Unless leading one to madness, the logical modes of inference can only play a subsidiary role here, if any.

Moreover, the madness I refer to here is not connected with the conflict between law and justice. All non-logical operations that legal deduction involves and requires aim to reach a conclusion which would be within the boundaries of operative law. Even more, the actor who employs legal deduction strives to come precisely there where the legal rule, which forms the major premise, orders him/her to arrive at.[9] The problem is, however, that this actor simply cannot – because of the broad and blurred context –ascertain what the law really demands for the case at hand; all the more so with any high degree of certainty.

V. Is context dependence in law really inescapable?

One can counter that – to save legal deduction from its falsehood – we can just stick to the linguistic meaning of the terms used in the major premise while assessing whether the phenomenon described in this premise is present in the case at hand, and not pay attention to any other factor. That is, one may insist that the linguistic layer should be decisive regardless of its absurdity in the light of the context in which one makes use of legal syllogism. Thus the ban on dogs would mean the ban of all dogs, whether they are living animals (big or small, dangerous or gentle) or stuffed items, toys, types of food and so on.

Leaving aside the question of whether such a ban also encompasses the hot dogs in one's stomach or dogs painted on skirts as well as the question of the vagueness of language terms, I shall only point out that assuming such a position, legal rules (norms, provisions) would have to be very

[9] As Posner aptly remarks, '[t]he business of judges is enforcing the law. If you do not like enforcing the law, you are not going to self-select into the judiciary, or if you somehow find yourself a judge (maybe you didn't know what being a judge was like or what you are like), you are likely to quit. When a judge does bend a rule to avoid an awful result, he does not feel that he is engaging in civil disobedience, he thinks the rule does not really compel the awful result.' See Posner, p. 213.

specific and casuistic (envisaging the most ridiculous exceptions like those mentioned above) lest the law and its application would not be totally absurd in their consequences. As a result, these rules/norms would be so lengthy that no-one could learn them or even keep them in mind for a longer while, a feature which makes them completely unmanageable for human beings. The same goes for the deductive operations based upon them.

Divorcing the meaning of the terms and expressions used in the major premises of legal deduction from their direct and indirect context leads to the kind of nonsense legal addressees and decision-makers would never accept.[10] Law is not a province of the linguist but of highly skilled and well-paid agents such as judges, advocates or governmental and municipal officers.

What is, however, vital is that the reasoners in law can – and in fact actually do so – accept some degree of absurdity in the outcomes of legal deduction that are grounded in the linguistic meaning of the terms and phrases used in the major premise. The desirability or acceptable degree of this absurdity is, however, far from being fixed and – be that paradoxically or not – only constitutes one more element of the context in which legal deduction operates. This indefinite degree of welcomed (or at least allowed) absurdity brings nothing more than one additional dilemma owing to which legal deduction is responsible for leading people who want to reason in law logically/mathematically to sheer lunacy.

VI. Conclusions

Legal deduction cannot be deemed to be a kind of purely logical inference. The reasons for this are manifold, but the most important is that the meaning of the terms and phrases used in legal texts is by definition context dependent, similarly as the meaning of expressions that are present in ordinary language. This context in law – involving the divergent and sometimes countervailing factors on an uneven level of generality – is in addition much more unclear and malleable than context in daily conversations, a feature which only makes the outcomes of legal deduction even more uncertain and value-laden. Separate persons who employ this type of reasoning may thus reach different conclusions for the same case at hand. Even more importantly, the context and pragmatic aspect of the applications of legal rules in concrete instances may lead deductive reasoners in law to

[10] For an example of the absurdities that legal deduction can lead to cf. Posner, pp. 214-215. (It involves the consideration whether the legal rule forbidding the knowing possession of child pornography is to be applied to law enforcement officers who seize such pornography in order to prosecute child pornographers on the basis that this rule contains no exception overtly legalizing the seizure).

the very madness, i.e. at least insofar as these reasoners try to manage the dilemmas flowing from this context by recourse to logical rules and other infallible types of inference.

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The Abstract:

This article demonstrates the fallacy of legal deduction as a method supposed to guarantee the certainty and predictability of the law. The Author asserts that legal deduction is in fact not of a logical nature. Their premises are of an uneven character or else one of them must be created in a non-mechanical way. This in turn makes legal deduction, comprehended its mode of inference as infallible, provided its premises are true/valid nothing more than misunderstanding and fallacy. In addition, in this paper, the outcomes of legal deduction are shown to be highly dependent on the direct and indirect context under the threat of their being utterly absurd. Since the lack of fixity and clarity, these contexts, however, may lead one to madness, i.e. at least unless she or he abandons the idea that only logical types of inferences govern legal deduction and are solely responsible for its outcomes.