ON LEGAL REASONING AS PRACTICAL REASONING*

Aulis AARNIO

1. General Remarks

In the interpretation and the application of law the practical reasoning can stand out at least in two different meanings.

They are connected to the so-called division between the *context of discovery* and the *context of justification*. The former one of these two concepts refers to the way according to which the solution is reached. The problem then can be put in the form: how the judge or the scholar *made* the decision and -furthermore- *why* he did just such and such a decision? In the context of justification one gives an answer to the question: on which arguments the decision can be *legitimated*?

In this very regard it is possible to speak of practical reasoning in two distinct ways:

(i) The first meaning is connected to the *logic of actions*. Here the - core of the discussion is the well-know concept "practical syllogism" as a mode of this logic.

(ii) The second interpretation to that very concept refers to the *logic of discourse*, for instance, the logic of legal interpretation and/or justification of the interpretation. In this respect one sometimes speaks of theoretical syllogisms.

Later on I first deal with the logic of actions and -to some extent- the theory of actions and human behaviour in general.

Let us suppose the judge J_i who makes a decision D_i at the time t_1. This situation can be seen from two points of view. I call then prospective and retrospective. The judge himself evaluate his decision from prospective aspect, as if he would be asking which solution I have to make. The retrospective aspect refers to a past action, the decision that already has been done. We then are curious to know: *why* the judge J_i came just to this. In the philosophy of action this has traditionally been called the explanation point of view. We give

THEORIA - Segunda Época - Año III
Curso 1987-88, Nº 7-8, pp. 97-107

reasons to the action in order to make it understandable. This explanation is not a causal one. We are not interested, for instance, in the muscular movements in the judge's hands or the molecular events in his brains. For us, the judge is a human being living in society, giving decisions for the society and being responsible of those decisions. Therefore the explanation necessarily is a *teleological* or intentional one. The judge is then considered as an agent that tries to reach certain goals and that has a certain information available. On the basis of these two factors he is trying to find out a means (tool) that would guaranetee to realization of his goals. In this very respect the action of the judge can always been characterized purposive, intentional or teleological.

As is easy to see, we find here the old contrast between the so-called human sciences and natural sciences. In German language this opposition has traditionally been called *Geistewissenschaften* versus *Naturwissenschaften*. In the history of ideas the former one, i.e. the human sciences follow methodologically more the Aristotelian model whereas natural sciences have accepted the Galileian pattern. Here I do not deal with these kind of contrasts in general. My task is more modest. I simply ask, *what is the structure of the practical reasoning if practical reasoning is defined as a teleological one.*

2. Practical Reasoning as a Practical Syllogism

Consider a simple decision-making situation. The agent has two alternative solutions to choose from, S_1 and S_2. On what grounds does he make the choice between the alternatives? It can be assumed that he will first make an attempt to discover those consequences that both alternatives presumably entail. Let us imagine now that the agent deems that decision S_1 entails the consequences p_1 and p_2 i.e. the state of the world m_i and S_2 the consequences q_1 and q_2. Let us call it the state of the world m_j. Of these the agent considers p and p_2 as desirable, as worth promoting. They are desirable states of affairs from the point of view of the agent, they are his goals. If defined in this way, the concepts of 'goal' and 'consequence' are referentially identical. Contentually, however, the element of aiming at achieving a certain state of affairs is always emphasized in the concept of goal. This is, then, how goal is organically connected with the concept of motive (intention).

Decision-making thus proceeds by taking the consequences into consideration. The agent surveys the consequences of different alternative decisions and chooses the alternative that is most likely to lead to the end-state desired. In this way our theory is also supplemented by an important addition, the aspect of *planning*. Decision-making can be understood as a planning of those measures that are most likely to lead to the goals desired.

Planning should be illustrated by the following simplification. Agent A assumes that unless he interferes in the course of events, state of the world m will come about. Let us call this the *agent's prediction concerning the world*. He would himself like to bring about state m_i which differs from state m_j. To bring about the state of affairs m_i desired by him, A must take measures which, in his understanding, will ensure success. What the action will be like will thus depend, besides on the goals, on two kinds of beliefs: (1) on assumptions concerning the counterfactual state (m_j) and (2) on evaluations concerning the path of action. In the event that the belief concerning the means fails, reality will not take shape in accordance with the goals of the agent. We can say: A failed in his attempt.

Schematically seen, the teleological explanation means that a so-called practical reasoning is performed: A acted in this way because he sought to bring about the state of affairs E and because he thought that only by performing T he could bring about the said state of affairs. It is practically necessary that the agent performs the act mentioned, if the premisses concerning the goals and beliefs are valid.

The reasoning can be formulated in a *syllogistic guise*. Here we speak of 'practical syllogism' (as a parallel figure to the inference syllogism). From the point of view of the agent we can express it like this:

A aims at E
A considers that he will not achieve E unless he does T.
So: A undertakes to do T.

In words the practical syllogism can be described, quoting *G.H. von Wright*, as follows: "The starting point, i.e. its major premiss, refers to a matter that is desired, aimed at; the minor premiss associates with this matter an individual act, as a means leading approximately

to the end; the conclusion consists of adopting the means to achieve the end." From the major and minor premisses thus does not only follow a normative instruction (this is how I have to act), but a matter that is part of the world of facts, the fact of undertaking an act. This is exactly where the significance of practical syllogism lies as compared with the so-called inference syllogism. Above we have already noted that describing juridical decision-making by means of the Aristotelian inference syllogism may lead to logical difficulties. The decision itself is not derived from the norm and factual premisses, we only get a normative 'ought to be' or 'ought to do' -sentence as a conclusion. The inference syllogism, therefore, cannot give an answer to the question of why the judge acted as he did. Practical reasoning on the other hand provides the very equipment for this.

Understood in this manner the concept of practical syllogism is in a profound way associated with the problematics of ought and is (Sollen and Sein). Practical syllogism is as if a step indicating how a matter, a 'doing', that is a part of the world of facts may be derived from normative premisses. On the other hand it must be kept in mind that this is no refutation of the so-called Hume's guillotine, the claim that nothing can follow from the world of 'is' that has bearing on the world of 'ought'. Hume was the first who clearly understood this logical difficulty.

In assessing the importance of practical reasoning it is also necessary to take into consideration that it is one of the answers to the old philosophical problem: how is knowledge transformed into human action. This is the basic problem that is found underlying the ideas of Aristotle and, after him, e.g. those of Marx.

Now it can perhaps be noted that *a syllogism never factually leads to undertaking an act but, at most, to a decision to bring about the intended state of affairs.* This is how the matter has been seen by, for instance, Risto Hilpinen, according to whom a decision of this kind, and only this, is identical with the intention of realizing a goal. Hilpinen writes: "If the decision-maker's intention to bring about state os affairs G is expressed in the form 'I_X G' and X's beliefs are correspondingly described by employing operator 'B_X', the syllogism can be presented in the form:

I_X G
B_X (G → D)

X makes the decision D.

In this connection it is perhaps most appropriate (from the point of view of, e.g., the interpretation of the second premise) to interpret 'D' as a state of affairs during the prevalence of which the solution or the deciser's decision can be considered to have been 'realized'. (...) If 'D' is interpreted in the way described above it is natural to consider the decision to accomplish D as the conclusion of the syllogism; this decision can be considered identical with the intention to realize D. Thus the syllogism as a whole can be formalized as:

$A_X G$
$B_X (G \rightarrow D)$

$I_X D$."

To my mind, Hilpinen's formulation of practical syllogism is, however, unsatisfactory. I will try to state the reasons for my opinion.

As was noted above it seems possible to consider the 'undertaking' to perform an act as a conclusion. 'The decision to undertake to perform' on the other hand is an ambiguous notion. A person can at moment t_1 decide to take action only in the future (at moment t_2) or he can decide to take action 'now'.

It is evident that if the former alternative is chosen, the inference ilself is valid (moving only on the level of intentions) but doing does not necessarily result from the premisses. If, on the other hand, we accept my other interpretation ('... decides now to undertake...') it is, to my mind, equivalent in meaning with undertaking an act. It does not make sense to say that a person now decides to perform T and, at the same time, to note that he will not undertake T ('immediately'). The case is analogous with the analysis of 'intending'.

We may best be able to summarize the above if we take an example again. Let us assume that we have as given a certain occasion of behaviour. Person A takes hold of a window handle, turns it clockwise and moves the window on its hinges toward himself until it does not turn any more. On the basis of the description we (obviously) say: A opened a window. We understand A's behaviour as an act (an action

with a result). This was also a completed act; no circumstances obstructive to the result did turn up. Understanding of this kind seems to be a precondition of placing a phenomenon within the framework of explanation. If, however, someone is dissatisfied with our characterization and says that the behaviour has not been correctly understood, we point out for him the premisses from which the behaviour 'follows'. In other words, we explain A's behaviour teleologically. Understanding and explanation 'merge' here in the fact that we give a more detalled description of A's act.

As this is given behaviour, the interfering factors are not of importance in the description. We notice, on the other hand, that practical inference is logically binding only if the act is to be understood. Intentionalistic explanation of a certain action is in a sense conceptual by nature. With the doing itself given we can always construe a certain teleological background for it, premisses of the kind that make final result (the observed behaviour) a logical consequence of these premisses. In fact, it can be said that the most appropriate context of employing practical reasoning is understanding or (ex post facto) explanation. In addition, it is mostly so in practice that an activity or a series of activities is expressly 'ready', given to us, and this we interpret as an act and ask: Why?

3. On the Practical Discourse

The above described explanation can be directed e.g. to the behaviour of the judge. We can produce certain information that tells us *why* the judge behavied just in such and such a way. This is, however, only one possible aspect. Most often our interest of knowledge is directed to legal interpretation. We are not so much interested in judge's behavoiur but the content of the *legal order*. We ask: in which way this statute ought to be interpreted. Or shortly: what is the content of this statute or provision?

Jerzy Wróblewski and, following him, also Robert Alexy have distinguished between the internal and the external justification of an interpretative proposition (or in general of a legal decision). An internal justification (*IN*-justification), according to Wróblewski, means the deriving of the interpretation from the premises in accordance with accepted rules of inference. "The condition of *IN*-justification is the

existence of the rule with which one can test the internal rationality of decision. The validity of the premises is taken for granted", he writes. Schematically presented, the following simple and from syllogistic point of view incomplete formula shows the structure of the internal justification:

$$\frac{\begin{array}{c} MP_1 \ \ldots \ MP_n \\ DI_1 \ \ldots \ DI_n \\ V_1 \ \ldots \ V_n \end{array}}{I_1}$$

An external justification ($\mathcal{EX}$-justification), in turn, receive the following characterization according to Wróblewski: "A decision is $\mathcal{EX}$-justified if its premises are qualified as good"

$$\frac{\begin{array}{c} MP_1 \ \ldots \ MP_n \\ D_1 \ \ldots \ D_n \\ V_1 \ \ldots \ V_n \end{array}}{C = I}$$

Here we can say that premises MP and V are *substantial*. They make the conclusion reasonable, because they give the relevant sources of law and refer to essential background values. On the other hand, symbol D covers the rules and standards of the *reasoning procedure* itself. It covers, first, the standards of legal interpretation (e.g. standards of grammatical interpretation) and, second, the rules and principles of *rational discourse*. The procedure of justification must be not only legal but also rational in the general sense. Then the result is *acceptable*.

The logic of rational discourse finds its kernel just here. What does this rationality mean: First, rationality may refer to the form of reasoning. In that view, logical (deductive) inference is always rational. This made of reasoning follows certain rules, and it is tautological. Every chain of reasoning which goes in a deductive manner from premises to a conclusion is thus rational. This means that the internal justification referred to by Wróblewski is always rational in this sense of the word. Let us call logical rationality simply L-rationality.

This is, however, only one side of communicative rationality. As was noticed above, legal justification is a form of practical discourse. Here, it is not merely a question of the form of reasoning but also

of a *discourse procedure* bound by other than merely logical (deductive) rules. On the basis of Jürgen Habermas' ideas Robert Alexy has pointed out thay rational discourse in legal reasoning is always connected to the external justification. It deals with the procedure through which the premises are justified. This kind of discoursive rationality can be called D-rationality.

Legal reasoning is from that point of view a special case of general practical reasoning. It is special case therefore that the procedure of external justification is not only bound by the rules and principles of D-rationality but, as was pointed out, by the special standards of legal interpretation. These standards make the procedure as legal reasoning. If no legal interpretative standards are followed the reasoning may be rational but not legal (cf. moral reasoning). On the other hand, every external justification in legal cases is based on certain legal material, i.e. on the sources of law. The text of law, drafts of law, precedents etc. give the "legal substance" to the interpretations.

In this regard, a *legal* (external) justification can be described as follows:

1) It is produced by a certain *procedure* that is consisted of (a) special legal procedure of reasoning and (b) general procedure of D-rationality. In other words, it must fulfil the demands of both types of reasoning.

2) The *result* of justification (the interpretation itself) is based of obligatory and permitted source material. It is legal in this very sense.

However, in many case this is not enough. The final result is not acceptable although the procedure is legal and rational and although the legal source material has been used in an optimal way. The reason for non-acceptability in these cases lies on moral ground -or in a more general sense- on *axiological reasons*. The final result cannot be acceptable because it is not in accordance with given axiological criteria. The result is rational (and legal in formal sense) but not *reasonable*. Furthermore, because the result is not acceptable, it is not justified or legitimate in this very sense.

Rational discourse gives thus certain guanratees for justifiability of legal reasoning, but it cannot guarantee the whole justifiability,

i.e. the acceptability. On the other hand, the model of rational legal discourse is an *ideal* by means of which one can *evaluate* the legitimacy of legal interpretations and legal reasoning in general. In this way it also give possibilities to *critizise* the interpretations and interpretative results.

On the whole, this kind of critical activity that also is constructive activity making it possible to develop the legal system, is based on several elements:

(i) The most general precondition for every sound dialogue is the common language of the both parts. They have to commit themselves to the *same intersubjetive meanings* of language. If this is not true, the very basis of human communication and naturally also of understanding of each other is destroyed. Here I only refer to those ideas about language and communication that are the basis of Ludwig Wittgenstein conception.

Summarizing what was said above the reasoning itself must fulfil a set of special preconditions.

(ii) The procedure of reasoning has to follow the rules and principles of D-rationality and also the standards of legal interpretation. By means of the last mentioned standards one can pick out the legally possible alternatives from the set of semantically (linguistically) possible alternatives.

(iii) From the substantial point of view, the doctrine of the sources of law is the most decisive. Every culture has accepted a catalogue of obligatory and permitted sources. That list may vary from the culture and time to another. The interpretation is, however, legal if and only if at least one of the obligatory sources is included in the argumentative background of the reasoning.

(iv) In most so-called hard cases there are other arguments that precisely legal sources involved in the reasoning. The interpreter has to refer also to axiological elements and to social facts. In this way, law and morality on the one hand, and law as well as society on the other, are intertwined with each other. Axiological elements are involved in several respects: the order of preference of the legal sources presupposes evaluations, the analogical inference

is based on evaluative arguments, many types of finalistic arguments refer to evaluations and, finally, certain interpretation situations are directly connected to values. Example: the interpretation of Scandinavian Codes of abortion cannot succeed without a reference to moral criteria. On the other hand, many different fields of law, e.g. labour law, presuppose at least a rough view concerning the mechanisms of society iltself. This means that several kind of social facts are often at least an implicit part of legal reasoning.

If in an optimal case, i.e. in an ideal situation, all these criteria are fulfilled, the external justification can be characterized as optimal one. In such a case, the final result is also as highly acceptable in society as possible. However, all this is only an ideal, an optimal goal. The present society and the present legal community is not at that level and cannot never be. People are people. Yet, also in this case we need measures, we need utopias. They tell us what law and what legal reasoning are as ideas, as such that we hope them to be. Therefore also utopias and ideals are important for the development of society. Only through this ideals we can identify the way that leads us to a better society.

BIBLIOGRAPHY

The text contains references to the following main sources.

AARNIO, Aulis, *On legal Reasoning*. Loimaa 1976.

AARNIO, Aulis, "Philosophical Perspectives in Jurisprudence". *Acta Philosophica Fennica*. Helsinki 1983.

AARNIO, Aulis, *The Rational as Reasonable. A Treatise on Legal Justification*. Dordredcht 1986.

ALEXY, Robert, *Theorie der juristischen Argumentation*. Frankfurt am Main. 1978.

KRAWIETZ, Werner - ALEXY, Robert, (Hrgs.), *Metatheorie juristischer Argumentatio*. Berlin 1983.

PECZENIK, Alexander, *The Basis of Legal Justification*. Lund 1983.

von WRIGHT, G.H., *Explanations and Understanding*. London 1971.

WROBLEWSKI, Jerzy, *Meaning and Truth in Judical*. Helsinki 1983.

***Versión original inglesa de la ponencia presentada en castea las X Jornadas de Filosofía Jurídica y Social (Alicante, 17-19 de Diciembre de 1987), organizadas por el Seminario de Filosofía del Derecho de la Universidad de Alicante y la Sociedad Española de Filosofía Jurídica y Social.**

Universidad de Helsinki