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Remus Titiriga

Legal reasoning and argument.
A handbook



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1. THE STRUCTURE OF LEGAL NORMS¹

The legal norms are the “elementary particles” of the legal order expressed as linguistic sentences (“legal sentences”²). The essential characteristics of complete legal norms are that they are *generally addressed* norms, they are expressed in a legal sentence as a *conditional normative proposition* (describing in its factual part the conditions under which they are to be applied), the legal sentence contains an *should-be* order, and their legal sanction *prescribes* a particular human behavior (*legal consequence*).

1. General addressees of the legal norms.

Legal norms can be applied to different target groups. They can oblige citizens, legal persons, courts, or authorities. Many legal sentences are addressed to citizens (norms of behavior) and authorities or courts (norms of decision-making). Such legal norms are, therefore, doubly targeted. In each situation, the rule of generality applies³.

2. Factual part within the norm (Tatbestand).

These normative facts describe the situation in which the legal norm is intended to apply. The ordinary course of judicial activity is to find the legal normative facts which can subordinate the case presented to the court. If such a subordination is possible, the legal consequences can be taken directly from the applicable legal norm. In applying a legal norm to an actual situation that fills these normative facts, one speaks of the

¹ Bernd Rüthers, *op. cit.*, ch § 4. The legal norm, pp. 57 ff.

² The legal sentences and norms will be considered synonyms from now on.

³ Section 823 Paragraph 1 of the German Civil Code (BGB) tells every citizen to pay compensation for certain damages caused illegally and culpably. For the perpetrator, the regulation is a norm of behavior; for the injured party, it is a norm of entitlement that promises him compensation. For the courts, it is a decision-making norm: the courts are instructed to award damages to the injured party who is suing if the facts of the case are met.

subsumption of the actual situation under the norm (Latin: *subsumere* = to subject).

3. A “should-be” order.

Legal norms are orders that cause specific behavior on the part of their addressees and are intended to control events within their scope of application. Many legal sentences clearly express this “should be” aspect, e.g., §1601 BGB: “Direct relatives are obliged to provide each other with maintenance”. With other legal provisions, that only happens indirectly⁴.

All should-be arrangements can be traced back to three basic types: commandments, prohibitions, and permissions, which are primary forms of “deontic operators”.

4. A legal consequence order.

Legal norms stipulate a legal consequence when an offense is fulfilled, such as an obligation to pay compensation (§ 823 Para. 1 BGB), a penalty (§ 242 StGB), or a transfer of rights (§ 929 BGB).

Classically, the legal consequence of a norm is a sanction. If one looks more closely at the rules of criminal law, one can see that they, without exception, prohibit specific human actions by threatening punishment if they are violated. More generally, these norms require their addressees to act in a particular way. They demand a human act (action or omission) and impose a sanction if that demand is violated. Therefore, such penal rule can be divided into two different norms: a “primary” norm that regulates interpersonal behavior and a (“secondary”) sanction norm that instructs a legal protection body, namely the judge, to respond with a sanction, namely a penalty, on violations of the primary norm.

⁴ Section 223 I of the Criminal Code (StGB): “Anyone who physically abuses another person or damages their health will be punished with a prison sentence of up to five years or a fine”. This statement is entirely in the form of a factual statement. The word “should” does not appear. However, this norm cannot be understood as describing facts. It does not say that everyone who commits bodily harm will be punished, in the sense of the physical law of gravity that a stone taken from the earth will fall back.

Instead, the statement aims to achieve two things: firstly, it wants to determine that people should not physically hurt each other, and secondly, it wants to appoint a judge to punish people who violate this commandment. Cf. Zippelius Reinhold, *Legal Methodology*, 6th edition, 1994, pp. 3.

2. EXPANDING THE LEGAL NORM

Many legal norms do not correspond to the structure mentioned above or contain only some of its essential elements.

For example, the consumer definition in Section 13 BGB⁵ is an incomplete legal sentence. The rule contains neither a should-be order nor a specific legal consequence. The definitional norm of Section 13 BGB only applies in addition to specific consumer protection norms.

That clarifies that an entire legal norm is rarely contained in just one legal sentence or paragraph. Paragraphs that do not stipulate any legal consequences are supplementary provisions for determining a complete norm as the basis for claims.

“Basic normative facts” and types of supplementary provisions.

The term supplementary or auxiliary provisions refers to dispositions that supplement or specify the normative facts as a basis for claims, objections, or defenses. Such provisions are found in the general part of a law or the general provisions of a regulation.

a) Definitional norms.

Definitional norms describe elements of the normative facts essential for completing several legal norms. Only the connection between the definitional norm and other regulations results in the complete regulation. Their function is for a law, such as the BGB, to uniformly determine and specify the content of a normative word to be used several times⁶.

b) Legal references.

Like definitional norms, legal references are a statutory technique to avoid repetitions. The reference can be made to another norm, i.e., to its

⁵ Civil Code (BGB) § 13 Consumers: „A consumer is any natural person who concludes a legal transaction for purposes that cannot primarily be attributed to their commercial or independent professional activity”.

⁶ Section 90 of the German Civil Code (BGB) states: “Things within the meaning of the law are only physical objects”. The definition of § 90 BGB has significance for § 985 BGB, which regulates the owner’s right to return, and for § 823 I BGB, which grants the owner a claim for damages.

normative facts and legal consequences (legal essential reference), or only to its legal consequences (legal consequences reference). Regardless of the type, the legislature always declares with a legal reference that the normative facts described in the reference are to be treated in the same way as the normative facts of the provision to which the reference is made. That is, therefore, a legislative form of analogy.

c) Legal fictions.

The legislature can also use legal fiction instead of a reference. The law deliberately equates two unequal normative facts to achieve desired legal consequences. The word “applies” can be used to recognize fiction⁷.

d) Legal presumptions.

Irrefutable presumptions (the ones that cannot be reversed) are another legislative means of treating two situations identically. The proximity to fiction becomes clear because the legislature often uses the word “applies” to express an irrefutable presumption.

Examples:

According to Section 612, Paragraph 1 BGB, for service and employment contracts, remuneration is deemed to have been tacitly agreed if, under the circumstances, such services are usually provided only in return for a payment. Here, the law “irrefutably presumes” that a remuneration agreement has been agreed. The employer owes the remuneration regardless of whether it was agreed.

According to Section 1566 of the German Civil Code (BGB), the breakdown of a marriage is irrefutably presumed if the spouses have lived separately for a year and both want a divorce or if they have lived separately for three years.

⁷ Suppose a bathing regulation was formulated like this:

§ 1: The bathing establishment is divided into a men’s and a women’s section.

§ 2: Only women are permitted to enter the women’s section.

§ 3: The lifeguard is considered a woman within the meaning of § 2. This § 3 leads to the same code of conduct as the sentence: “The lifeguard is also allowed to enter the women’s section”. One could have formulated it in § 2: “Only women and the lifeguard are permitted to enter the women’s section”. Cf. Zippelius, pp. 29.

The legal definition, reference, fiction, and irrefutable presumption are all legislative devices that connect different normative facts with the same legal consequence. Therefore, such auxiliary norms are interchangeable.

e) Exceptions or restrictive legal norms.

The basis of a claim in Civil law gives those who can rely on it a subjective right. Restrictive rules limit such permissions. In Civil law, a distinction is made between objections considered by the court without further addition and objections that the court considers only after they have been expressly asserted by a party to a lawsuit.

Restrictive legal sentences contain an adverse order (“does not apply” or “is excluded”), which can only be understood in conjunction with a previous positive order. The reason for the legislature to proceed in this way may be that the inclusion of all restrictive features in the normative fact of the positive order would result in a sentence that would be too cumbersome, unpleasant, or even incomprehensible.

Legal impeding objections represent exceptions to the basis of the claim, and that claim is stopped. That is the case, for example, if a claim violates laws or morality (§§ 134, 138 BGB). Objections that destroy rights cause a claim to be lost; the objections give the opposing party the right to refuse the requested service. Such legal destructive objections include termination or withdrawal. Another objection is based, for example, on the statute of limitations of Section 273 of the German Civil Code (BGB).

For an example of establishing the complete norm in a given case, see Annex 1.

3. APPLYING THE NORM TO A CASE⁸

Applying the law involves deriving and justifying an individual case judgment from the legal system. The legal practitioner must make a decision. Like every other rule user, he must justify why applying the rule to the individual case produces a concrete result.

⁸ The developments here follow Ruthers, marge 657.

1. Comparing back and forth the facts and the norm

Norm and fact have a mutual relationship only bridged by applying the law. The norm takes a particular form for the case; the case is seen in the light of the norm. If a life situation has become a case due to a legal conflict, the lawyer trying to find a solution is not only thinking from the facts but from the norm, too.

The legal practitioner, before he begins to search, tentatively assigns the dispute or the facts to a specific area of law (civil, public, or criminal law) and often to a sub-domain (law of obligations, public building law, protection of honor, environmental law, etc.). The application of the law begins with a legally relevant fact of life (“being”) related to a complex of norms (“ought”). The legal practitioner checks whether and how his “problem” is regulated within a sub-domain of the legal system.

A characteristic of applying the law is the “wandering back and forth”⁹ of the gaze between life circumstances and the norms. It first determines the selection of the legal norm(s) that may “suit” the facts of the case. It then makes it possible to eliminate those who prove to be inapplicable (for various reasons). Ultimately, the wandering gaze between the facts of life and the norms is the decisive means of assigning the dispute to the relevant norms.

This comparative assignment of reality and norms takes several steps:

- Fact-finding: The life situation to be assessed must be recorded (“determined”). For this purpose, it is put into a linguistic form suitable for applying the law, which we call “fact”. At the beginning of the fact-finding process, a previously established “basic question” determines the selection of the relevant actual elements from a larger context. Examining the facts is often preceded by an answer to a (hypothetical) legal question.

- Finding the relevant legal norm(s): The legal norms relevant for assessing the facts of the case must be consulted. The legal practitioner does not examine an individual norm. He seeks the answer to his dispute from the overall legal system.

⁹Engisch, *Logical Studies on the Application of Law*, 2 (1960), pp. 14 ff.

- Subsumption under the legal norm: It must be checked whether the facts meet the requirements of the relevant norms. This test is called “Subsumption” (see below).

- Statement of the legal consequence(s): If the life process (“fact”) meets the requirements of the relevant norms, the ordered legal consequence must be stated unless other norms of the overall legal order (e.g., constitutional norms) conflict with it.

Examining the relevant legal facts tells the legal practitioner which elements of life are essential and which are not. The formulation of the actual facts, and even their determination, is usually related to the normative facts of the relevant legal provisions.

Example: In a collision between a cyclist and a pedestrian in a pedestrian zone, the lawyer will consider the facts of Section 823 Paragraphs 1 and 2 BGB and its requirements when recording and determining what happened.

4. THE SUBSUMPTION

Subsumption (from Latin sub, under, and sumere, to take, Participle II sumptum, occasionally written subsumption) is the process of subsuming one concept under another. In jurisprudence, the term is understood as applying a legal norm to a situation in life (“case”), i.e., subordination of the factual situation to the requirements of the norm.

We saw that legal norms regularly break down into a normative fact part and a legal consequence part. The normative facts usually consist of several elements (e.g., “foreign”, “ownership”). If the necessary facts are available, then the corresponding element of the offense is fulfilled. If all elements of the offense are given, the legal consequence occurs.

Example:

Applying the law means finding the appropriate legal provision for each case. The lawyer then has to apply this (general) legal provision to the concrete case, examining whether the facts match the abstract conditions named in the provision.