Law and Philosophy Library

Ota Weinberger

Law, Institution and Legal Politics

Fundamental Problems of Legal Theory and Social Philosophy

Kluwer Academic Publishers

OTA WEINBERGER

University of Graz, Austria

LAW, INSTITUTION AND LEGAL POLITICS

Fundamental Problems of Legal Theory and Social Philosophy

KLUWER ACADEMIC PUBLISHERS

DORDRECHT / BOSTON / LONDON

Library of Congress Cataloging-in-Publication Data

Weinberger, Ota.
Law, institution, and legal politics : fundamental problems of legal theory and social philosophy / by Ota Weinberger.
p. cm. -- (Law and philosophy library ; v. 14)
Includes bibliographical references (p.).
ISBN 0-7923-1143-4 (HB)
1. Sociological jurisprudence. 2. Jurisprudence. 3. Legal positivism. 4. Justice. 5. Law--Philosophy. I. Title. II. Series.
K370.W445 1991
340'.115--dc20 91-7704

ISBN 0-7923-1143-4

Published by Kluwer Academic Publishers,
P.O. Box 17, 3300 AA Dordrecht, The Netherlands.

Kluwer Academic Publishers incorporates
the publishing programmes of
D. Reidel, Martinus Nijhoff, Dr W. Junk and MTP Press.

Sold and distributed in the U.S.A. and Canada
by Kluwer Academic Publishers,
101 Philip Drive, Norwell, MA 02061, U.S.A.

In all other countries, sold and distributed
by Kluwer Academic Publishers Group,
P.O. Box 322, 3300 AH Dordrecht, The Netherlands.

English translation of: Ota Weinberger,
Recht, Institution und Rechtspolitik;
Stuttgart, Franz Steiner Verlag Wiesbaden GmbH, 1987.

Printed on acid-free paper

Printed in the Netherlands

FOREWORD

It gives me great pleasure to offer this foreword to the present work of my admired friend and respected colleague Ota Weinberger. Apart from the essays of his which were published in our joint work *An Institutional Theory of Law: New Approaches to Legal Positivism* in 1986, relatively little of Weinberger's work is available in English. This is the more to be regretted, since his is work of particular interest to jurists of the English-speaking world both in view of its origins and in respect of its content.

As to its origins, Weinberger war reared as a student of the Pure Theory of Law, a theory which in its Kelsenian form has aroused very great interest and has had considerable influence among anglophoone scholars - perhaps even more than in the Germanic countries. Less well known is the fact that the Pure Theory itself divided into two schools, that of Vienna and that of Brno. It was in the Brno school of František Weyr that Weinberger's legal theory found its early formation, and perhaps from that early influence one can trace his continuing insistence on the dual character of legal norms - both as genuinely normative and yet at the same time having real social existence. Here, the Brno approach to legal theory has in its content an interesting affinity with British work in the Hartian style, although each appears to have developed quite independently of the other; the former, certainly, had temporal priority, but was of relatively little general influence owing to the relative isolation of Czechoslovak scholarship through the War years and under various periods of repressive communist rule thereafter.

Ota Weinberger has had great scholarly achievement through many works published variously in Czech and in German. His achievement is the more remarkable for the adversities he has suffered, as a survivor both of the nazi concentration camps (he is of Jewish family origin) and of the years of stalinism and repression in Czechoslovakia, which he left at the time of the crushing of the 'Prague Spring'. The circumstances of his life are no doubt partly responsible for the focussing of his earlier publications very considerably on logical studies, with special reference to the problems of norm-logic; in such fields one effectively eludes the censor's interference, since after all there is a limit to the intelligence and understanding of censors. However that may be, the very substantial contribution of Weinberger to the development of norm-logic and deontic logic is undeniable and a contribution which one can welcome as heartily as one deplores the possible underlying causes of his delayed opportunity to contribute also at the level of substantive value theory and studies in the normative politics of law.

That logical studies can have profound significance for legal theory is in any event a point which his work (together with that of others) has put well beyond doubt. In the present volume, chapter III deals with this issue. The setting is in Weinberger's theory of action, also discussed in chapter II. Action is here represented as behaviour guided by thinking, while thinking itself is defined as a processing of information. Fundamental to practical (action-guiding) thought are goals and values, and therefore fundamental to the analysis of practical thought

must be some sort of formalisation of teleological reasoning. One of the author's most significant contributions has been his attempt to develop a 'formal teleology' (the special subject-matter of the present chapter II); this is distinct from deontic logic, which formalises the treatment of norms as possible action-guiding thought contents. It is here that their character as *practical* and *normative* is identifiable (see chapter III).

The other main point of Weinberger's 'institutional legal positivism' (a point which we fully share, as our *Institutional Theory of Law* makes clear) is that norms also have a real existence as 'thought objects', belonging among the 'institutional facts' of our social existence. The stress upon the institutional character of legal norms marks his own highly original development of the general themes inherited from Weyr and other teachers and colleagues. His account of the basic elements of this institutional approach is the opening chapter of the present book, where the thesis is advanced that a legal system is both a system of norms and a part of social reality. This may seem to involve a confusion of 'ought' and 'is'; for how can one assert the being-in-existence of a legal 'ought' without illegitimately leaping the is/ought gap? The answer offered avoids some of the notorious difficulties into which Kelsen found himself driven farther and farther; it achieves this by insisting on the necessity to pursue our understanding of normativity through action-theory, while also keeping in view the functional links between normative judgement and actual social processes.

These are the themes of Part A of the book, dealing with theoretical foundations. If the theoretical position is well grounded, one thing which has to follow from it is that there can after all be greater common ground between legal theory and the sociology of law than is sometimes supposed either by legal theorists or by sociologists. Part II pursues this thought by offering a series of studies in legal theory and the (theoretical) sociology of law. Here, chapter IV explores the ontological insights of institutional theory, reflecting from an 'internal point of view', or at least in the perspective of a hermeneutic understanding, on the idea of the 'binding quality' or 'validity' of legal norms which are in force somewhere. Chapter VI applies the formal-teleological account of action to some problems in criminal law. Chapter VII examines and defends the sense of 'legal positivism' upheld by the Weinberger version of the 'Institutional Theory'. Here I have to confess that my own recent work may have somewhat distanced the MacCormick version of the theory from the arguably more robust rejection of cognitivism on which my colleague builds. However that may be, it remains for both of us fundamental that our approach to the theory of institutions and of law is a normativist one. The contrast between this and certain sociological approaches is made plain by the critique of Helmut Schelsky's sociological theory in chapter VIII - not that our theory is anti-sociological; on the contrary, we think that a sociological approach to law has also to be normativist in the relevant sense.

Weinberger's disbelief in an objective realm of values directly discoverable by some form of cognition (his noncognitivism) does not for him entail any kind of ethical or political irrationalism or even nonrationalism. Far from it - he considers the rational analysis of problems in legal politics quite possible; and

not only possible, but one of the most important tasks for jurisprudence. The point of his noncognitivism is that values cannot be the subject of pure cognition, but depend finally on the value-stances to which we ultimately commit ourselves. There is nothing in this which denies or belittles the possibility of reason in practice as a means for rational analysis of policy pursuit and normative evaluation. All this becomes very clear from chapters XI and X, which constitute the concluding Part of the book.

I have very greatly valued the warm association which has arisen between Ota Weinberger and myself since we first discovered, at the IVR Congress in Basel in 1979, how remarkable a parallelism of views we had together arrived at albeit each working quite independently of the other. Our sense of this was reinforced at other conferences in Helsinki and Edinburgh in the following months. But the project of bringing our work together for joint publication, first in German and later in English, came about entirely through the generosity and goodwill of my senior colleague. In acknowledgement of that indebtedness, and in salutation of a major scholar, I have great pleasure in offering these few words as prefatory remarks to this distinctive and distinguished book. My pleasure is the greater for the fact that two Edinburgh friends, Anne Bankowska and Ruth Adler, untertook the first stages of the preparation of the present translation, which has now been brought to completion by other hands.

Neil MacCormick

AUTHOR'S PREFACE

The legal-philosophical conception developed simultaneously by D.N. MacCormick and myself will be referred to as 'Institutional Legal Positivism'. This theory rests on a number of simple basic ideas which, nevertheless, have not altogether unimportant consequences for the treatment of crucial fundamental questions of jurisprudence. The law is, on the one hand, a social reality, on the other, a system of norms. This situation results in the problem of the specific mode of existence of normative regulatives - especially of the legal system - as integral parts of social reality. This problem - it might be condensed into the question "How is the existence of the legal 'ought' (the legal norms) to be explained without infringing the semantic distinction between 'is' and 'ought'?" - is rendered more accessible to a solution if the law is seen from an action-theoretical perspective and the institutions are regarded as the social structures where the functions of normative provisions and actual social processes combine.

Institutional Legal Positivism provides a theoretical basis for the norm-logical and the dogmatic analyses of the law as well as for the study of legal phenomena from the socio-legal point of view. It is a positivist theory in as far as it rejects the possibility of establishing "proper" law purely on the basis of cognition and without the intervention of volition based on evaluation. It distinguishes between law and morality as between two separate normative systems which, nevertheless, combine in determining human behaviour. From its point of view a rational analysis of legal-political problems not only appears possible, but it is seen as one of the major tasks of jurisprudence.

In a book written by MacCormick and myself we introduced the program and the basic characteristics of this theory in its chronological development.[1] Now this theory has to be developed and its theoretical foundations as well as the legal-philosophical implications have to be extended. The work that has been collected in this volume serves this purpose. It contains papers from three areas: In Part A the theoretical foundations of Institutional Legal Positivism are expounded; in Part B contributions to legal theory, legal sociology and general sociology are brought together; and, finally, in Part C two papers dealing with legal politics and the theory of justice are presented.

Some chapters were published earlier (see "Original Sources", pp. 289 f.); Chapters I and II were written for this volume. As a result of the chapters having appeared as separate treatises certain repetitions cannot be avoided; this particular defect of this book is compensated by the advantage that all chapters can be read independently and in any order. Those wishing to gain a clear picture of the legal-philosophical conception as advanced in this volume are advised to pay special attention to Part A.

---

[1] D.N. MacCormick/O. Weinberger, *An Institutional Theory of the Law. New Approaches to Legal Positivism*, Dordrecht 1986; German version: the same, *Grundlagen des Institutionalistischen Rechtspositivismus*, Berlin 1985.

In Chapter I of Part A "Building Blocks of Institutional Legal Positivism" the fundamental characteristics of an institutional legal theory are outlined. Under the heading "Towards a Formal-Teleological Theory of Action" Chapter II deals with a specific approach to the concept of action and with the methods of analyzing action. I regard this approach as an integral part of Institutional Legal Positivism in the same way as the norm-logical conceptions presented in Chapter III of Part A ("The Significance of Logic for Modern Legal Theory"). In other words, all the fundamental philosophical elements of the normative institutional theory of law are discussed in Part A. The four chapters of Part B, on the other hand, select only some specific problems of legal theory and legal sociology; they are intended to demonstrate the theoretical applicability of the normative institutional conception to jurisprudence and sociology. Part C is meant to show that institutional jurisprudence is capable of treating legal-political questions on a non-cognitive basis and of making a contribution to the theory of justice. In this context I should also like to mention that not all the theses presented here with reference to the problem of justice are inevitable implications of Institutional Legal Positivism.

Some knowledge of how Institutional Legal Positivism evolved will, I believe, facilitate the reader's access to this theory and to this book. I shall, therefore, outline briefly the development of this conception from my own subjective perspective.

MY PATH TO NORMATIVIST INSTITUTIONALISM

While it is of considerable interest to me personally to cast my mind back over the path on which I reached my present legal-philosophical stance for the reader wishing to understand and assess my teachings the systematic explanation of the foundations and of the building-blocks of my theory will be of greater importance than the autobiographical perspective of its genesis.[2] I shall, therefore, give only a brief account of the developmental phases of my conceptions allowing far more room for setting out and discussing the basis and the fundamental philosophical conceptions on which the theory rests.

It would be wrong to assume that the author knows the developmental history of his thoughts with clarity and certainty and that he is consequently able to present it authentically and without inner doubts. In reality, an autobiographical account of this kind is a reconstruction in retrospect in the course of which we cannot by any means be certain whether we are judging correctly what the vital steps of the development were and what influences were at work. I would want my retrospective review to be understood as a hypothetical reconstruction, as a subjective image of myself which I myself don't regard as more than approximately valid.

The milieu in which I grew up was of the kind that was likely to induce a tolerant and undogmatic attitude to life as well as democratic convictions. My

---

[2] A detailed autobiographical account is contained in vol. I "Problemas abiertos en la filosofía del derecho" of the periodical *Doxa - cuadernos de filosofía del derecho*, 1984, pp. 257-263.

youth was spent in Brno a town where several languages were spoken and where the separate groups of the population coexisted without strict segregation. I did not enjoy any systematic religious education nor did my upbringing instil any national or ideological prejudices in my mind. The spreading nationalist movements were alien to me.

I am a doubter by nature and the childhood question "why?" has continued to determine my attitudes in adulthood. In the course of my studies I have always been particularly interested in problems of methodology and the connections linking separate elements of substantiation.

Moral questions have always been a major concern and stimulus for me. Doubts and inner uncertainties in the moral sphere lead me to pursue rational analysis to the furthest limits of the practical sphere. I believe in the power of reason. Rational analysis has a place also in practical philosophy; nevertheless, I have never thought that we can gain answers to moral problems simply by the use of rational analysis.

František Weyr, the founder to the Brno school of pure jurisprudence[3], not only stimulated my interest in the structural theory of the law; it was as a result of his question whether there are inferences with normative members that I became aware of the problems of the normative logics which have occupied me ever since. Even as a student I had an ambivalent attitude to pure jurisprudence: while appreciating structural theory and accepting non-cognitivism I object to the exclusion of sociological considerations.

It was also through the Brno school that my attention was drawn to teleology (*Karel Engliš*, *Jan Loevenstein*[4]) as well as to the connection between the teleological and the norm-logical approach.

While I have never been a faithful adherent of any one philosophical school the influences of *Kant*"s philosophy and of the kind of program of logical analysis that was evolved by Neo-Positivism are unmistakable. The fact that I studied Marxism and dealt with different elements of this system has also left its mark on my thought processes. I have firmly refused to regard cognition and thinking as processes doing no more than reflect reality. *Hegel*"s dialectics which are not greatly improved by being reversed in accordance with the Marxist recipe have been the object of my severe criticism.[5] I have rejected the thesis that the material aspects of life (economics) ultimately determine everything, pre-

---

[3] See V. Kubeš/O. Weinberger, *Die Brünner rechtstheoretische Schule (Normative Theorie)*, Vienna 1980.

[4] K. Engliš, Nástin národohospodářské noetiky [Outline of the Noetics of the National Economy], *Sborník věd pravních a státních*, Prague 1917, pp. 274-300, 1918, pp. 29-55. J. Loevenstein, *Velká teleologie. Konstrukce hospodářské noetiky* [Comprehensive Teleology. Model of a System of Economic Noetics], Prague 1933.

[5] O. Weinberger, Der Relativierungsgrundsatz und der Reduktionsgrundsatz - zwei Prinzipien des dialektischen Denkens. Eine logisch-methodologische Studie, *Rospravy ČSAV*, 75/H. 5, Rada SV, Prague 1965; the same, Dialektik und philosophische Analyse, in: E. Topitsch (ed. with P. Payer), *Logik der Sozialwissenschaften*, 10., revised edition, Königstein/Ts. 1980, pp. 278-309.

ferring a conception of mutual effects.[6] I have been unable to accept the largely repressive Marxist conception of the law resulting from the theory of the class-struggle in both state and law.

For some years, especially during the second world war, I thought a great deal about the fundamental problems of the normative logic. In retrospect I greatly value the fact that I was not able to draw on a specific training in logics for my reflections at that time; it meant that I was able to analyse the problems without bias and without being weighed down by the prevalent views. At the same time, the fact that I later engaged in the study of logic (gaining even the *venia docendi* for this subject) was of equal importance for my intellectual development. I was then able to work with a certain professional competence in the field of normative logic and to base my advocacy of the potential existence of and need for this logical discipline on theoretically founded arguments.[7]

In view of the fact that the entire structural theory of the law is based on norm-logical connections my view of the need for a genuine normative logic to exist side by side with the logical systems of the descriptive language represents the aspect of my approach to jurisprudence that integrates all others.

Under the influence of the methodological distinction between *de lege lata* and *de lege ferenda* considerations I have called for two areas of the normative logic to be evolved in order to deal with two kinds of substantiating relations within which norms exist: (i) the theory of the structure of norms and of norm-logical inferences, (ii) the norm-logical theory of substantiation (which has to elucidate the form of these argumenations).[8]

My first and, in my view, my crucial step toward normative institutionalism was achieved by the realization that we have to distinguish clearly between regarding the norm (a) as an ideal entity and (b) as a social fact.[9] Logical relations and norm-logical deductions can only be dealt with in the realm of ideal normative entities. The social existence of norms, on the other hand, has to be regarded as a sociological fact which can be indentified only empirically. This juxtaposition of the two approaches to norms leads to the task of explaining the nature of the social existence of norms and the functions norms have in social reality. Normative institutionalism tries to provide an answer to this problem.

---

[6] O. Weinberger, Rechtstheorie jenseits von Idealismus, Realismus und Materialismus. Ein Plädoyer für den normativistischen Institutionalismus, in: K.A. Moltnau (ed.), *Materialismus und Idealismus im Rechtsdenken. Geschichte und Gegenwart*, *ARSP*, Supplementa No. 31/1987, pp. 16-26.

[7] O. Weinberger, *Die Sollsatzproblematik in der modernen Logik*, Prague 1958; republished in: the same, *Studien zur Normenlogik*, Berlin 1974, pp. 59-186.

[8] See O. Weinberger, Zwei Bereiche der Normenlogik, in: the same, *Studie zur Normenlogik* (Czech), Prague 1960, German version in: Studien zur Normenlogik und Rechtsinformatik, *op. cit.*, p. 17 ff.

[9] O. Weinberger, Die Norm als Gedanke und Realität, *ÖZÖR* 20, pp. 203-216 (English version "The Norm as Thought and as Reality", in: N. MacCormick/O. Weinberger, An Institutional Theory of Law, *op. cit.*, p. 31-48.

Where these problems are dealt with explicitely this happens as a rule under the heading "legal validity". None of the current theories of validity appeared satisfactory to me. I rejected the theory of the fundamental norm on the basis that the existence of a social reality cannot be proved sufficiently by mere assumption, and the approach of legal realism was unacceptable because it excludes or, at least, suppresses the normative element. The introduction of natural law as an element in the substantiation of validity in the manner of various theories concerning the justification of legal validity appeared to me to be inappropriate on account of the fact that it is possible for an "immoral" law to be valid due to the vagueness of the moral criteria for the substantiation. Only the functional connection between the norm and social processes and institutions appears to me to be a suitable criterion to determine the validity of social norms.

The normative institutional conception took shape when I encountered and examined *Searle*'s theories. *Searle* undertook the much-discussed attempt to prove on the basis of analysing promises - of the promissing-game, as one might say - that ought-conclusions can be derived from purely descriptive premisses.[10] He returned to the problem in his book "Speech Acts"[11] where he demonstrated that the deduction of the ought-conclusion can be inferred from the constitutive rules of the promissing-game. In doing so he himself has, in my view, provided the crucial argument for the refutation of the proof he offers for his claim that "ought" can be inferred from "is". Despite the fact that they also take the form of definitions in the promissing-game in a certain sense - constitutive rules comprise, in fact, the general norm "Anybody receiving the promise from person *P* that *P* is going to do *A* has the right to demand from *P* that *A* ought to be done". Consequently, we are not dealing with the deduction of an ought-consequence from purely indicative premisses. From the critique of *Searle*'s theory I moved on to the more general question what kind of connection there is between institutions and norms (or practical informations in general). These investigations resulted in normative institutionalism. In sharp contrast to some other institutional theories which tend on the whole to be anti-normative in their approach normative institutionalism advocates the thesis that institutions always contain a core of practical informations.[12]

The substantiation of this conception rests on action-theoretical reflections. I regard action as behaviour determined by information; the nature of the action reflects the structure of the information processes determining the action. The processing of the information determining the action inevitably contains descriptive as well as practical informations. Institutions as frameworks for

---

[10] J. R. Searle, How to derive "ought" from "is", *The Philosophical Review* 1964, pp. 43-58.

[11] J.R. Searle, *Speech Acts. An Essay in the Philosophy of Language*, Cambridge 1969.

[12] D.N. MacCormick/O. Weinberger, *An Institutional Theory of Law: New Approaches to Legal Positivism*, Dordrecht/Boston/Lancaster/Tokio 1986; German version: the same, *Grundlagen des Institutionalistischen Rechtspositivismus*, Berlin 1985.

action, therefore, necessarily comprise practical informations, especially normative regulatives.[13]

At the same time as developing the normative conception of the institutions I have presented a conception of the theory of action which was motivated by other problems in addition to those arising from legal theories. I have described it as the "formal-finalist theory of action".[14] This theory of action and the normative theory of the institutions are closely bound up with each other.

My approach to the problems of the theory of action was determined by two factors[15]: (i) as a logician I was very critical of attempts to substantiate principles of justice on a purely formal basis; (ii) as a result of action-theoretical considerations I came to the conclusion that our actions are always determined by considerations of utility as well as of justice, and that the analysis of justice has essentially a critical function; it is not its task to present social-political programs, or to come up with generally applicable criteria for social justice - as *Rawls* believes.[16]

ACKNOWLEDGEMENTS

I should like to express my thanks to my colleagues, Professors Dr.Dr. Peter Koller, Dr. Alfed Schramm and Dr. Peter Strasser for their help with the corrections of the book, to Mrs. Gabriela Taucher for her care in the preparation of the German manuscript. My thanks also go to the *Österreichischen Fonds zur Förderung der wissenschaftlichen Forschung*, which has funded part of this work and supported the publication of both books (the translation as well as the original edition) and to the *Landesregierung of Steiermark* for providing financial support for the translation. The translation into English was undertaken with great care and sensitivity by Dr. Christiane Brown and by Mag. Christine Peutsch-Moore. It incorporates some preparatory work by Dr. Ruth Adler and Mrs. Anne Bankowska. I wish to express my gratitude to Dr. Dorothea Mayer-Maly for the extraordinary care, skill and knowledge she proved in preparing the camera-ready manuscript of this book.

---

[13] O. Weinberger, Eine Semantik für die praktische Philosophie, in: R. Haller (ed.), *Beiträge zur Philosophie von Stephan Körner, Grazer Philosophische Studien* 20, 1983, pp. 219-239.

[14] O. Weinberger, *Studien zur formal-finalistischen Handlungstheorie*, Frankfurt a.M.-Bern/New York 1983.

[15] O. Weinberger, Analytisch-dialektische Gerechtigkeitstheorie. Skizze einer handlungstheoretischen und non-kognitivistischen Gerechtigkeitstheorie, in: I. Tammelo/A. Aarnio (eds.), *Zum Fortschritt von Theorie und Technik in Recht und Ethik, Rechtstheorie*, Supplementary vol. 3, 1981, pp. 307-330; the same, Jenseits von Positivismus und Naturrecht, in: *Contemporary Conceptions of Law - 9th World Congress (Basel 1979), ARSP* Supplementa, Vol. 1, Part 1, pp. 43-56.

[16] J.R. Rawls, *Eine Theorie der Gerechtigkeit*, Frankfurt a.M. 1975 (Engl. original 1971).

TABLE OF CONTENTS

A. THEORETICAL BASES