Aleksander Peczenik

Law and Philosophy Library 8

On Law and Reason

Preface by Jaap C. Hage

Springer

Aleksander Peczenik

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Springer

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ISBN 978-1-4020-8729-5 e-ISBN 978-1-4020-8730-1

Library of Congress Control Number: 2008931006

Printed on acid-free paper

9 8 7 6 5 4 3 2 1

springer.com

Preface to the second edition of Aleksander Peczenik: On Law and Reason

Aleksander Peczenik unexpectedly died in 2005 at the age of 68. At that time, he was still very active both as the chairman of the IVR (International Association for Philosophy of Law and Social Philosophy) and as a scientist.

During his prolific scientific career, Peczenik wrote several books, and it is a hazardous enterprise to pick out one of them as the most important one. If this hazardous enterprise needs to be undertaken, however, *On Law and Reason* would be a responsible choice. In this book Peczenik has tried to bring together many strands of his thought on the nature of legal justification and on the nature of law. Therefore it is a fitting tribute to the scientist Aleksander Peczenik that this work appears in a second edition. The publication of this second edition gives a new public the opportunity to get to know the insights of Peczenik about legal reasoning. What would in the eyes of Peczenik probably be more important is that the public could also learn about Peczenik's continuous strive for better insight that is illustrated by the main text and by the numerous asides interwoven throughout it.

On Law and Reason first appeared in 1989 as an extended and improved version of the Swedish work *Rätten och förnuftet*. It also builds on earlier work with Aarnio and Alexy and on his book *The Basis of Legal Justification*. In this sense it is the synopsis of a line of research that has extended over at least a decade. However, Peczenik would not have been himself if this synopsis would have meant the end of his intellectual efforts in this domain. New developments in the field of logic that fitted well with what he had tried to express with less sophisticated logical means sparkled his enthusiasm and inspired him to new work in which these developments were incorporated.[1] Aulis Aarnio, with whom Peczenik cooperated for a long time in run up to *On Law and Reason*, wrote a lucid preface to the first edition of this work, in which he situates it in the intellectual setting that prevailed when the book appeared. I will not attempt to redo what Aarnio already did in a satisfactory way.

[1] In particular A Peczenik, 'Jumps and Logic in the Law', in H Prakken and G Sartor (eds), *Logical Models of Legal Argumentation*, Dordrecht: Kluwer Academic Publishers 1997, 141–174 and JC Hage and A Peczenik, 'Law, Morals, and Defeasibility', *Ratio Juris* 13 (2000), 305–325. An updated recapitulation of his views can also be found in A Peczenik, *Scientia Juris. Legal Doctrine as Knowledge of Law and as a Source of Law*, vol. 4 of 'A Treatise of Legal Philosophy and General Jurisprudence', Dordrecht: Springer 2005.

Instead I will try to point out how Peczenik's thoughts developed after the first edition of *On Law and Reason*, taking in new scientific insights, but without abandoning what he wrote in this important book.

'*This is an outline of a coherence theory of law. Its basic ideas are: reasonable support and weighing of reasons. All the rest is commentary.*'

These words at the beginning of the preface should be taken very seriously.
The first thing to notice is that Peczenik's theory is a *coherence theory*. This means that Peczenik rejected the idea of foundations that are beyond discussion. Everything may be doubted, including the ideas that everything may be doubted and that coherentism is the way to deal with these doubts. This willingness to draw everything into a reasonable discussion was a central feature of Peczenik's scientific work, but also very characteristic for his personality. Although Peczenik would have been prepared to discuss the desirability of this constructive criticism, he might have found it impossible to abandon it, because this attitude was so characteristic for the person Peczenik.

A proper understanding of Peczenik's approach to coherentism requires that one distinguishes between what Raz called *epistemic* and *constitutive coherentism*.[2] In epistemic coherentism, coherence is treated as a test whether something qualifies as knowledge of some object domain. In constitutive coherentism, coherence is treated as a characteristic of a domain. Applied to the law, the distinction would boil down to it that according to epistemic coherentism, a theory of the law can only count as knowledge of the law if it is (sufficiently) coherent. According to constitutive coherentism coherence would be a characteristic of the law itself, and not merely of knowledge. A typical example of constitutive coherentism applied to the law would be Dworkin's theory of law as integrity.[3] For constitutive coherentism, the traditional epistemic literature on coherence[4] would be irrelevant, because it dealt with a different matter.[5]

Peczenik would disagree, however. He adhered to epistemic work on coherence to develop a theory about the nature of the law. His theory is, as he stated himself in the preface, *a coherence theory of law*, not of knowledge of the law. In *On Law and Reason* he did not elaborate this theme, but in a later paper[6] the issue was addressed explicitly. There Peczenik wrote that '... the law is what the most coherent theory *of everything* says it is' (italics added - JH). Here the traditional order of ontology and epistemology is turned around. According to this traditional order, first we have a reality and second and derived we have theories about reality, which

[2] J Raz, 'The Relevance of Coherence', in J Raz, *Ethics in the Public Domain*, Oxford: Clarendon Press 1994, 277–326.

[3] R Dworkin, *Law's Empire*, London: Fontana 1986.

[4] E.g. L Bonjour, *The Structure of Empirical Knowledge*, Cambridge: Harvard University Press 1985 and K Lehrer, *Theory of Knowledge*, 2nd ed., Boulder: Westview Press 2000.

[5] Raz, *The Relevance of Coherence*, 279.

[6] A Peczenik and JC Hage, 'Legal Knowledge about What?' *Ratio Juris* 13 (2000), 325–345.

under ideal circumstances amount to knowledge. Reality does not depend on our knowledge of it, while knowledge does depend on reality. For the law, this traditional order is turned around: first we have knowledge, or – probably better - a justified theory, and second and derived we have the object of this theory. The nature of legal reality depends on our justified theories about it, rather than the other way round. Although this is not explicitly dealt with in the paper in question, I think that this reversed order has to do with the fact that the law is part of social reality, and that in the case of social reality, the facts depend – in a very complex way - on our views about them, rather than the other way round.

A consequence of Peczenik's coherentism is that he needed a criterion for coherence. For the rather complicated theory exposed in *On Law and Reason*, Peczenik used the results of a paper he co-wrote with Alexy.[7] Although he never abandoned the views expressed there, he was quite enthusiastic about the implications of the view that a good coherent theory would be a theory of *everything*. 'Everything' does not only include all traditional objects of knowledge, such as the physical world and its laws, but also the social world, the realm of the ought, including morality, and – what is for the present purposes the most relevant – the standards for theory adoption and rejection. If a coherent theory includes these standards, coherence requires that it also includes those additional beliefs that should rationally be adopted, and that it does not include those additional beliefs that should rationally be rejected. This implies that the standards for belief adoption and rejection need no more be part of a specification of coherence, but can be left over to the coherent theory itself. The only remaining demand for coherence is that a coherent theory includes everything that should, according to this theory itself, be accepted, and does not contain what should, according to this theory itself, be rejected.[8] Although this abstract view on coherence does not take away the difficulties of specifying what should be accepted, it moves these difficulties from the definition of coherence to the specification of a coherent theory. In his last book, Peczenik seemed to adopt this view by stating that '... Alexy-Peczenik coherence criteria appear to be a part of the acceptance set of a juristic theory of law rather than a general philosophical theory of coherence'.[9]

A crucial aspect of Peczenik's coherentism is the view that coherence is based on reasonable support and the weighing of reasons. When Peczenik wrote *On Law and Reason* the paradigm of rationality was still the deductively valid argument. The problem with these arguments is that the strength of the argument chain is inversely correlated with the plausibility of the premises. For instance, the argument:

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[7] R Alexy and A Peczenik, 'The Concept of Coherence and its Significance for Discursive Rationality', *Ratio Juris* 3 (1990), 130–147.

[8] JC Hage, 'Law and Coherence', *Ratio Juris* 17 (2004), 87–105.

[9] *Scientia Juris*, 147.

All thieves are punishable
John is a thief

John is punishable

is impeccable from the logical point of view. However, the first premise is likely to be false. Although *in general* thieves are punishable, not *all* thieves suffer from this liability. To say it simply, the first premise is stated too strongly, with as consequence that it is not true anymore. However, this strong premise is necessary to make the argument leading from the premise that John is a thief to the conclusion that John is punishable deductively valid. If the first premise is replaced by

In general thieves are punishable

the conclusion that John is punishable does not follow deductively but 'only' defeasibly. This talk about defeasible reasoning has now become more fashionable in legal theory, but when *On Law and Reason* was published, the application of so-called non-monotonic logic (the kind of logic most suitable to deal with defeasibility) to legal reasoning was still in its infancy. Peczenik was one of the first to emphasize that legal arguments support their conclusions, but that they are usually not valid according to the standards for deductive logic. One reason for this is that many arguments provide reasons for their conclusions, but that these reasons still have to be balanced against other reasons, pleading against the same conclusion.[10] Another reason is that rules are often 'overinclusive'[11] and that their consequences should not apply in all cases that fall strictly spoken within their scope.

The idea that legal reasoning is defeasible was already a central feature of *On Law and Reason*. When the logical tools to deal with defeasible reasoning became more widely available in the nineties, Peczenik immediately embraced them[12] and put them to use to say in a more modern terminology what he had already said before, namely that in the law arguments support their conclusions without guaranteeing their truth.[13] *On Law and Reason* is a book much too rich to discuss all its details, or even all the topics addressed in it. I can only urge the reader to look for himself how Peczenik elaborated the idea that the law is coherent and based on reasonable support and the weighing of reasons. Not necessarily because the reader should adopt all the views exposed in the book. That would even be against its spirit. If Peczenik were still alive, he would encourage the reader to develop his own ideas, in dialogue with what he wrote about these subjects. And then the reader should communicate his newly developed ideas to others, in order that they might continue this process of reasonable development of theories about the law and thereby also the law itself.

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[10] This is the insight used by Dworkin to specify legal principles (as opposed to rules: R Dworkin, *Taking Rights Seriously*, London: Duckworth 1977, 24) and by Alexy to specify the operation of human rights (R Alexy, *Theorie der Grundrechte*, 3e Auflage, Frankfurt: Suhrkamp 1996, 71f).

[11] F. Schauer, *Playing by the Rules*, Oxford: Clarendon Press 1995, 31f.

[12] See in particular the papers mentioned in note 1.

[13] Actually this has not only to do with the defeasibility of legal arguments, but also – as Peczenik recognized - with the provisional nature of their premises.

Preface

This is an outline of a coherence theory of law. Its basic ideas are: reasonable support and weighing of reasons. All the rest is a commentary.

I am most grateful to many colleagues for extensive discussions and criticism concerning various ideas presented in this book, in particular to Aulis Aarnio, Robert Alexy and Horacio Spector. Others to whom I am indebted for comments are more numerous than it would be possible to mention here. I will do no more than to record my gratitude to the readers of the publisher whose penetrating remarks helped me to reorganise the manuscript.

A Scandinavian reader must be informed that the present book constitutes a modified version of my Swedish work *Rätten och förnuftet*. However, the content has been radically changed. I hope that the alterations make the main point of the work clearer. Especially, the key sections 2.3, 2.4, 3.2.4, 5.4, 5.8 and Chapter 4 are entirely new.

The book contains extensive examples of legal reasoning and reports of various moral and legal theories. Though relevant, this material could make it difficult for the reader to focus attention on the main line of argument. To avoid this, a smaller printing-type size has been chosen for such a background information.

Lund, 18 May, 1989 **Aleksander Peczenik**

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Introduction

Aulis Aarnio

In his book "Juridikens metodproblem" (Methodological Problems in Law), Aleksander Peczenik describes the concept of "neorealism" with the help of six criteria: (1) research in jurisprudence should utilise varied disciplines in law, philosophy and the social sciences; (2) these varied and multifaceted disciplines can and must be utilised particularly effectively in an analysis of the fundamental legal concepts (for example "valid law"); (3) the analysis should be deliberately neutral in respect to philosophical conflicts; (4) this type of analysis should be adapted to numerous examples of the use of concepts in law; (5) the author uses such an analysis as the point of departure for a description of established rules of legal interpretation and calls this "practical jurisprudence"; and (6) the analysis can also be used in a comparison between legal research and the established scientific disciplines.

The author calls jurisprudence that meets the conditions described above "juristic theory of law". It is "juristic", since it is based on legal research, and it is "theory" because it is more general and analytical than ordinary legal research. "Neorealism" is another term for this juristic theory of law. However, Peczenik does not approve of the view of Legal Realism which demands that legal research must avoid all loose and "metaphysical" concepts. It is the task of neorealism to specify what is valuable in legal research and alive in legal practice. Neorealism is constructive and not, as classical Legal Realism, destructive.

Since over ten years, Aleksander Peczenik has modified his theories in many ways. Yet, the basic attitude is the same as in the beginning of the 1970s. Also today, Aleksander Peczenik can be characterised as a neorealist. In the following, I shall seek to provide a general description of the legal, jurisprudential and philosophical background which renders Peczenik's neorealism understandable from another point of view than that he himself uses. My perspective is to a large extent that of a collaborator, as I have had the privilege to work together with Peczenik for almost fifteen years. This fact has both advantages and disadvantages for the present introduction. The advantage is that it makes it possible to "see" through Peczenik's conceptual apparatus, which is both technical and complex. Because of this, it is easier than it might otherwise have been to understand the sound basic ideas which colour his entire theoretical system. On the other hand, it is precisely this closeness as a collaborator that is a source of weakness. The introduction can, in this sense, become subjectively coloured.

A. Peczenik, *On Law and Reason*.

2. The purpose of this introduction is the following. First, I shall briefly define the concept of legal dogmatics and then I shall use this definition to analyse certain basic elements in the very complicated phenomenon known as legal interpretation. This will lead us to fundamental problems concerning legal truth and in legal knowledge. It is not possible to understand neorealism without entering into these cornerstones of Peczenik's world of ideas.
3. In the ordinary legal usage, the term "legal research" refers to at least four different types of scientific activity. We can distinguish between the history of law, the sociology of law, comparative jurisprudence and legal dogmatics. Of these, the last two are close relatives. The difference lies in the object of the activity: comparative law describes, analyses and explains legal norms in force in other countries, while legal dogmatics concentrates on a particular legal order. Sociology of law has a special position in the family of legal disciplines. It is not particularly interested in the interpretation of legal norms in force; instead, it concentrates on certain regularities in legal society, for example in respect of the behaviour of people, or the effects legal norms have in society. Sociology of law uses special research methods (empirical, statistical etc.). This means that there is a clear line of demarcation between legal dogmatics and sociology of law. On the other hand, sociology of law is closely related to history of law. The latter uses, in many respects, the same methods as does the former: it describes, analyses and explains historical material in the same way as does the sociology of law - or at least it can do so. The difference between the two disciplines lies in the object of inquiry. History of law is interested in the past, while the sociology of law focuses on the present society.

From the point of view of our analysis, the difference between sociology of law and legal dogmatics is central. Legal dogmatics is a typical interpretative discipline. It uses facts provided by sociology of law, but the interpretation itself has a non-empirical nature. According to normal usage, legal dogmatics has two functions: to interpret and to systematise legal norms. In Peczenik's book, systematisation is dealt with only as an implicit condition for legal interpretation.

On the other hand, legal dogmatics is legal dogmatics precisely due to the fact that it interprets and systematises legal norms. Legal dogmatics has this specific role in the division of labour in society. No other discipline offers practical legal life the same information. It is not, for example, the function of sociology of law. Systematisation in different areas (family law, other civil law, criminal law, and so on) is a necessary tool for all legal interpretation. As I shall argue later on, systematisation is the theoretical aspect of legal dogmatics. Systematisation plays the same role in legal dogmatics as the theoretical social sciences in sociology. From this point of view, legal interpretation is the practical aspect of legal dogmatics, and it is primarily directed towards practical goals. Interpretation can be compared to empirical research in the social sciences.

Theory and practice work together in all fields of science. Theoretical structure, by necessity, influences practice. Theoretical concepts, theories and so on are tools