"Professor Fisher's analysis reveals the rationality, or rather the lack of it, of current environmental decision-making. It also provides the evidence for an environmental grundnorm to guide legal reasoning. Without it, political and legal decision-makers will not be able to achieve ecologically sustainable development. A timely book on a hugely important issue."

- Klaus Bosselmann, Professor, University of Auckland, New Zealand

"I am afraid that an endorsement of this kind, however condensed and packed with praise, cannot do justice to Doug Fisher's latest book. A respected and seasoned environmental law scholar, Fisher skilfully reminds us that law is about language and that language is the point of commencement of legal reasoning, also in environmental law and governance. Importantly, language and legal argumentation and reasoning will play a determinative role in our efforts to achieve sustainability. The book's detailed account of the different forms of legal argumentation; the methodology of legal decision-making; and the connection between law, language and legal reasoning in international environmental law and governance, is an invaluable resource for scholars of legal hermeneutics, international lawyers generally, and specifically, for environmental lawyers."

- Louis J. Kotze, North West University, South Africa

Legal Reasoning in Environmental Law provides a comprehensive review and analysis of the range of legal reasoning processes to support the understanding, interpretation and application of international, regional and national rules of environmental law.

The book considers how rules for environmental governance are designed to accommodate the various competing interests within each of the private and public sectors and also between the two sectors. The author then examines how decisions in particular cases reflect the sources of these rules together with their form, structure and language. He exposes the ways in which reliance upon an extensive range of legal reasoning processes are used to justify the particular decision by interpreting and applying these rules to the case in question.

Much has been written about legal reasoning and about environmental law but relatively little about the relationship between the two. This book will strongly appeal to legal scholars for its analysis of intellectual processes, and to legal practitioners for its exposition of how decisions are made.

Douglas Fisher is Professor of Law at Queensland University of Technology, Australia.
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Preface

Environmental law, international and national, sets standards for the current use and for the future development of natural resources and for the protection of the environment. These standards are in the form of rights, duties and liabilities and structured as legal or paralegal rules and as rules of competence or rules of limitation. All of these are expressed in language. Each of the elements of this normative structure performs a different function. For example:

• statements of rights of sovereignty or property
• statements of values, policy, strategy, priority or direction
• statements of formality or substance
• obligations of procedure or process
• obligations of conduct, behaviour, performance, methodology, outcome or result.

Their sources are international agreements, international customary law, principles of international law, practice, constitutions, legislation, common or civil law. Some are protectable rights or enforceable obligations: others are influential or informative. The function of judicial institutions varies from adjudication, judicial review to disposition.

What nation states, national institutions and human beings do or how they engage in decision-making is the result of the processes of reasoning undertaken by them. These processes are in turn a reflection of this complex normative and determinative structure. The processes of legal reasoning may be formal – deductive, inductive or analogical logic – or substantive – deontic or dialogical logic. The solution to the legal issue may be found internally in the text of the legal instrument or externally in the material circumstances of the issue or both.

This book analyses the structure, form and language of a selected number of international and national legal instruments and reviews how an illustrative range of international and national judicial institutions have responded to the issues before them and the processes of legal reasoning engaged by them in reaching their decisions. This involves a very detailed discussion of these primary sources of international and national
environmental law with a view to determining their jurisprudential architecture and the processes of reasoning expected of those responsible for implementing these architectural arrangements. This book is concerned not with the effectiveness or the quality of an environmental legal system but only with its jurisprudential characteristics and their associated processes of legal reasoning.
1. Law, language and reasoning

INTRODUCTION

The doctrines, principles and rules of the law as an intrinsically intellectual discipline created by humans are expressed through the medium of language. Language is the link between these doctrines, principles and rules and the intellectual processes of humans. The justification for the activities and behaviour of humans and for their decisions emerges from the reasoning processes undertaken by humans and expressed through the medium of language. Where do nature, the natural environment and their associated natural resources fit within this paradigm? More specifically, what forms of reasoning support the application of the doctrines, principles and rules of the law in the context of sustainable environmental governance? A simple question but with no simple answer.

The complexity of legal reasoning is matched only by the complexity of the evolving structures for environmental governance at international, regional and national levels. Much attention has been paid over the years to an analysis of the techniques of legal reasoning. The jurisprudence of environmental governance is a relatively new phenomenon and only recently has attention turned to an analysis of the techniques of legal reasoning in relation to environmental governance. Is environmental governance different from other governance arrangements? Does it present any particular challenges for legal reasoning? Do the legal arrangements for environmental governance display any structures that are unique linguistically, grammatically, procedurally or substantively? The subject matter of this analysis is environmental governance. It is thus appropriate to commence with a brief review of the nature of legal arrangements for environmental governance as they are emerging in an increasing number of jurisdictions – both international and national – across the global environment.
ENVIRONMENTAL GOVERNANCE AND LEGAL REASONING

Environmental governance seeks to accommodate a wide range of interests. These include:

- the interests of a state as a member of the international community
- the interests of a state and its governmental institutions in how it exercises its rights of sovereignty in accordance with international law within its jurisdictional boundaries
- the collective interests of communities within a state
- the private interests of individuals and corporate institutions within a state
- the interests of the environment itself independently of these other interests.

This diversity of interests is reflected in the wide range of instrumental rules designed to facilitate environmental governance. These include:

- rights of sovereignty
- rights of ownership or property
- procedural and substantive duties limiting the exercise of these rights
- protection of these rights and enforcement of these duties through liability regimes.

This set of rules – here described as legal rules – has been complemented over recent years by a range of instruments that have traditionally been regarded as beyond the boundaries of the law. These include statements of fundamental value, of strategy, of policy, of principle, of purpose, and of objective. While instruments of this kind are not unique to environmental governance, they are performing increasingly important functions in the context of environmental governance. Not only that – in many instances these instruments perform formal functions within the system of environmental governance. These are here described as paralegal rules.

The relationship between these two types of rules is an important issue in the context of environmental governance not only in relation to the capacity of the system to be enforced, but also in relation to the capacity of the system to comply with the rule of law. At the very heart of this conundrum lies the concept of ecologically sustainable development which together with its associated principles is increasingly becoming
Law, language and reasoning

part of the textual fabric of the international and national arrangements for environmental governance.

What forms of reasoning are appropriate to this matrix of legal and paralegal or textual and contextual rules? Much depends not only upon the structure and the language of these rules but also upon the function they perform within the overall system. For example, a rule may be structured as a right or a duty and the language may be specific or general. Language is often neither specific nor general but somewhere between the two. A duty that is formulated in precise language is intrinsically capable of enforcement. A rule structured in general language may require contextual justification to enable it to be applied in particular sets of circumstances. Even though the interpretation of the text is meaningful, it is by no means axiomatic that its application to particular sets of circumstances is beyond dispute. Then there is the function to be performed by the rule. Is it procedural or substantive? Is it permissive or mandatory? Does it provide guidance? Does it inform the interpretation and application of a textual rule? Perhaps the proposition stated in the rule performs no function within the overall framework of textual and contextual rules.

Human beings engage in conduct and make decisions in the knowledge of applicable rules. The intellectual processes undertaken by human beings are reflected in the techniques of reasoning used by them to support their activities or decisions. Just as environmental governance is a matrix of legal, paralegal, textual and contextual rules, so the intellectual processes justifying activities and decisions comprise a matrix of a range of techniques of reasoning. How is it proposed to address these issues? The first step in the process is to review the range of techniques of legal reasoning. The second step is to examine the techniques of legal reasoning that are likely to support effective environmental governance. The third step is to analyse the structure and language of the range of instruments relevant to environmental governance. The fourth step is to review how courts, tribunals and other enforcement and adjudication institutions interpret and apply these several rules. The final step is to determine whether there is any coherent approach to legal reasoning in the context of environmental governance.

THE NORMATIVE FRAMEWORK OF A LEGAL SYSTEM

The law is a social institution. It enables the exercise of power – rules of competence – and it controls the exercise of power – rules of limitation.
‘In Western thinking,’ it has been suggested, ‘law has sometimes been considered to be, by its nature, an institutional power order.’ It is more than that. For instance, ‘from a legal theoretical point of view, it is more common to interpret law as a system of norms.’ In this sense it is a system of power and of norms: in other words rules of competence and rules of limitation. Consistently with this, in the context of the exercise of discretionary power, it has been suggested that the various forms of discretionary power ‘can be likened by analogy to legally recognised forms of power and thus brought within the ambit of the legal world by being regulated in accordance with general standards.’ The juxtaposition here is the exercise of power in accordance with general standards – in other words in accordance with normative arrangements.

A norm or a standard sets parameters of behaviour and decision-making and it may assume the form of a legal rule or a paralegal rule. A legal rule is a traditionally enforceable rule while a paralegal rule informs and explicates a legal rule. Norms, it has been suggested, ‘differ from values’. Values are not part of the legal order while norms are part of the legal order. A norm tells a person what the person ‘ought to do’. Consistently with this, it has been noted that ‘laws guide conduct by prescribing lawful behaviour: that is, they are normative’. But norms perform more than prescriptive functions. Traditionally, there have been two types of legal norms: regulative norms and constitutive norms. Regulative norms set standards of behaviour. Constitutive norms are essentially creative. They have been divided into competence norms, procedural norms and legal definitions. Significantly, it has been at the same time noted that different types of norms are emerging in modern law: namely weighing norms and goal norms. The importance of the normative framework within which the law operates is this. Norms of various types and norms which perform different functions inform and explain each other in different ways and from different perspectives so that ultimately the lawful quality of activities or decisions can be determined on the basis of sound reasoning.

Although norms are distinguished from values, it has been suggested that a legal system or a valid law is fundamentally based upon what has been described as a grundnorm. A grundnorm exists independently of the legal system. Nevertheless it represents the criterion according to which a law or a rule of law can be valid. It is not a matter of deduction. It is a matter of inference. This approach has been described in these words:

Use of the term ‘valid law’ presupposes an inference rule, a basic norm. Using Kelsen’s terminology, Peczenik calls this basic norm the Grundnorm. The
Grundnorm is an inference rule or transformation rule because the conclusion that certain rules belong to a particular normative system and should be observed from a legal point of view does not follow deductively from the assertion that there are certain social facts and non-legal values. An example of a grundnorm is a constitution. A constitution, in whatever form, written or unwritten – in practical terms is the foundation upon which the legal system is constructed. Why should a constitution be observed? If a constitution is a basic norm or a grundnorm, its recognition and hence its validity derive from criteria outside or external to the legal system. Legislation and judicial decisions state rules of law simply because they are either explicitly or implicitly elements of these constitutional arrangements. The community either accepts or does not accept a constitution. Its validity does not derive from the legal system but from another source. The point has been put in these terms:

The decision that the constitution is a source of valid law ... is based on a criteria transformation: a jump is made from social facts and non-legal values to the conclusion that the constitution is a source of valid law. A grundnorm is thus a matter of political rather than legal ideology.

The substance of a grundnorm is infinitely variable. The constitutional arrangements accepted by a community may include a range of grundnorms. A constitution, for example, may provide for the relationship between the legislative, executive and judicial functions performed with a state. A constitution may state fundamental values such as liberty and equality. It may also acknowledge the existence of 'rights': for example, in relation to life or property. These 'rights' are not susceptible to direct legal protection: rather they are values to which the community subscribes. Is a regime of law one such value? In other words, is the principle of the rule of law a grundnorm? Alternatively, does a system of law have intrinsic value? It has been suggested that 'law can function as a reasonably just institutional system.' And further:

This ... aspect of law's instrumental value suggests that, in order for a legal system to be reasonably just, it must instantiate a group of values often grouped under the rubric 'the rule of law'. The rule of law has been described as a value. What is the source of its legitimacy? One answer:

Modern emphasis upon the rule of law as a value draws strongly upon the ideas underpinning the modern state (as a neutral arbiter between, or
framework for, competing interests in a given territorial society) and democratic institutions. The rule of law gives effect to rules laid down by institutions which are legitimised as part of the state and as democratic.¹⁵

The function of the rule of law has been described in a number of ways. One is that it ‘provides navigational coordinates by which politicians, judges and officials can distinguish acceptable from unacceptable public action.’¹⁶ This function is performed in two ways: first ‘as a norm of institutional morality guiding and legitimating public action’ and, second, ‘as a supranational concept representing the ultimate principle of legality.’ It is then described as a ‘shared grundnorm’.¹⁷ Clearly it is a concept but it is also a norm. Not only is it a norm – it is also a basic norm. The rule of law has similarly been described as ‘the most important of the general principles of law’ and as ‘absolutely fundamental’.¹⁸ The subject matter of the rule of law has been much debated. It may be procedural or substantive or somewhere in between.¹⁹ The principles comprising the rule of law have been stated to include at a relatively general level:

- access to justice
- limited government
- separation of powers
- the law must achieve a certain quality
- the law must guarantee certain basic rights.²⁰

Ultimately ‘the rule of law is the foundational norm and ultimate principle of legality, by which all laws ultimately stand to be judged.’²¹ It is accordingly a constitutional principle which sets the standard for the totality of the legal system.

The rule of law acknowledges the existence of basic rights and the need for their protection. But what is a right? A statement of a right may be a statement of a desirable value: a right to free speech or a right to personal liberty. The existence of a right may correlate with the existence of a power or a range of powers: for example rights of sovereignty or rights of property. A right may be couched in more specific terms: for example, a right not to have one’s reasonable use of land unreasonably interfered with by someone else. Significantly this right correlates with a duty imposed upon someone else. Where a right correlates with a duty, the right is protected by enforcing the duty.

It has been the emergence of human rights recognised by international law and by an increasing number of national jurisdictions that has inspired debate about these issues. This is relevant in the context of environmental governance. A human right inheres in everyone and
everyone is under a duty to respect it. In this sense there is no precise correlative duty. If there were a duty, it would be a duty owed to everyone – *erga omnes*. This is important in relation to the environment. The environment has no status by itself within the legal system – although this may in some jurisdictions be changing. A person may have a right to a healthy environment and this correlates with a duty upon everyone not to harm the environment. If there is such a duty, it is a duty owed to everyone – *erga omnes* – but to no one in particular. In this sense it is a duty owed to the environment. Does this correlate with a right inhereing in the environment itself not to be damaged? A difficult philosophical question but worthy of consideration.

How might this work out in practice in relation to environmental governance? Much depends upon the concept of adjudication. This is the starting point:

> The judicial process is structured around the paradigm cases of disputes either between individuals or between the individual and the state, which necessarily focus attention on issues of rights. The typical legislative and administrative processes are more flexible and generally more suited to the wide range of issues involved in the determination of the collective welfare.  

*Inter partes* adjudication is all about rights and correlative duties. In this sense the rights are protectable and the duties enforceable. However the ‘collective welfare’ is not about protectable rights and enforceable duties. Hence the greater importance of ‘legislative and administrative processes’. It is, however, the concept of collectivity that is important in the sense that it distinguishes between protecting the rights of individual persons and securing the collective interests of the community. A dialogue about rights is intrinsically different from a dialogue about interests. In the context of environmental governance, a person may have a right not to have this person’s environment harmed while the community has an interest that its environment is not harmed. The concept of environment is different in each of these two cases: one personal and the other communal. What are the correlative duties? In the case of the former one person is under a duty not to harm another person’s environment and in the case of the latter everyone is under a duty not to harm the environment at large. Thus the structure of the norm and the terminology of the norm are equally important. The use of a word such as ‘right’ can be important but it may also be misleading. Nevertheless words are important.
THE FUNCTION OF LANGUAGE

Language, the meaning of words and the relationship between words are critical in legal reasoning. Undoubtedly, norms – including legal norms – are ‘expressed in language’. Similarly, ‘language is the medium through which the law acts’. But the law revealed through language is more than language. In this way:

Even an initial analysis of a definition which holds law as an aggregate of ‘rules’ reveals that rules are both linguistic units as well as ideas or meaning – contents.

So the language expressing rules explains ideas and indicates meaning. Then there is the relationship between language and meaning:

Logical deduction, grammatical interpretation, conceptual analysis and reconstruction of legal concepts ... are all language-games in which individual expressions acquire their meaning.

The meaning of a rule, in other words, is derived from the language of the rule but also from sources extrinsic to the language of the rule. Legal reasoning is more than a matter of language and language-games. More specifically:

Though the linguistic expressions in which rules appear may have a penumbra of uncertainty [sic], it is possible through legal interpretation to arrive at the correct meaning by referring the ambiguous expression to something beyond it, for example a drafter intent, textual or social context or some idea of justice.

The issue then becomes the meaning of the rule created by language, explicated by reference to wider and potentially non-linguistic sources and ultimately applied to a particular factual situation.

The meaning of a word or words may be found anywhere in a ‘continuum’ from clarity through ambiguity to obscurity. A rule may be expressed in language that is specific or general, narrow or wide, or even pragmatic or conceptual. The meaning may be clear even if the language is conceptual while the meaning may be obscure even if the language is precise. It has been suggested that ‘no language is prepared for all possibilities. To deplore the insufficiency of language would be merely misguided.’ The indeterminacy or open-texture of the language used to express rules is not a new phenomenon. It applies as much to rules enacted in legislation and in codes as to rules recognized by the common
law. It is similarly an issue in international law. Accordingly 'international normative language is loaded with expressions which are indeterminate in this sense': for example, 'the common heritage of mankind' and 'sovereignty'. When a practical issue arises for determination, 'each of such expressions must be translated into normative language, that is language claiming to provide a justification for one or another solution.' Similarly national legal systems are replete with adjectival standards such as equitable, reasonable, necessary, excessive and expedient together with nominative standards such as honesty, good faith, equity, national interest, public interest and perhaps even sustainability. Indeterminacy of language is thus no stranger to international legal arrangements, constitutional arrangements within states and national legal arrangements.

Despite the specification of rules in either specific or general language, indeterminacy of meaning – as distinct from indeterminacy of language – is a reflection of the function to be performed by the rule in question. Two types of indeterminacy have been identified – particularly in relation to legislation. But these are probably applicable to common law rules in similar fashion. This is the first:

One type [of indeterminacy] is a consequence of a vague or imprecise statute that furnishes virtually no answers by itself.

The second is this:

Words that seem precise, and words that are precise for most applications, will become imprecise in the context of some particular application.

The first contemplates vague or imprecise words in a particular context and the second contemplates precise words in an unclear context. In either event, the words are given meaning and then application by phenomena extraneous to the words in question. The issue has been identified in this way:

Not all legal rules, not even all legislative rules 'in fixed verbal form', can always give a clear answer to every practical question which arises. Almost any rule can prove to be ambiguous or unclear in relation to some disputed or disputable context of litigation. Rules being formulated in language, they are … both open textured and vague in relation to some contexts at least.

This does not explain how the rule is applied. This appears to be an answer to this question:
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Rules can be ambiguous in given contexts, and can be applied one way or the other only after the ambiguity is resolved. But resolving the ambiguity in effect involves choosing between rival versions of the rule; once that choice is made, a simple deductive justification of a particular decision follows. But a complete justification of that decision must hinge then on how the choice between the competing versions of the rule is justified.35

This takes the analysis to the final point – justification of the decision. What has emerged so far is this:

- the language used to express the rule
- the meaning of the language
- the application of the meaning
- the justification for its application in the circumstances in question.

This points to the proposition that:

The role of language in 'easy' cases is thus at best as one factor among many, for the clarity of a legal rule's application to some case as a matter of language is neither sufficient nor necessary for the case to be an easy one.36

Language is thus the point of commencement of legal reasoning – whether in relation to international instruments, constitutional instruments, statutory instruments or common law concepts – but clearly not the terminal point of legal reasoning. The function of language in legal reasoning is in many respects a reflection of the nature and function of the law in the wider jurisprudential sense. One analysis reviewed three jurisprudential approaches of this kind:

- Hart saw language as placing a limit on legal formalism and explaining the inevitability of judicial discretion
- Dworkin believed that any problems created by language could be circumvented
- Moore viewed language, alternatively, as a path to finding the correct result and as a temptation towards the wrong result that must be overcome.37

From any perspective this reinforces the view that the language of a rule is by itself neither sufficient nor necessary to reach a conclusion about its application.
LOGIC AS A FORM OF REASONING

The identification of the meaning of the words of a rule is no more than the first step in the intellectual processes associated with legal reasoning. The next step is to identify the intellectual processes involved in moving towards a concluded application of the rule to particular sets of circumstances. This involves a number of questions. What is the range of logical processes that may be relevant? What forms of legal reasoning are relevant? Does any coherent pattern of legal reasoning emerge from these approaches? The range of logical systems or processes includes these:

- syllogistic logic
- propositional logic
- predicate logic
- deontic logic
- dialogical logic.

A system of syllogistic logic is the oldest and is the basis from which the others have developed.

A syllogism consists of a statement of a major premise, a minor premise and a conclusion. The major premise is the rule of law; the minor premise is a statement of fact or circumstance; and the conclusion automatically follows by applying the major premise to the minor premise. For example, every person who pollutes the environment commits a punishable offence; this person has polluted the environment; therefore this person has committed a punishable offence. This is based upon the assumption that the major premise states a valid rule of law and that the minor premise is in fact true. If neither premise is valid, then the conclusion is invalid.

Propositional logic and predicate logic introduce additional elements. This is a broad description:

The propositional calculus deals with propositions joined by words like ‘and’, ‘or’, ‘if … then’, but it ignores differences between kinds of propositions. The predicate calculus (ie, roughly, calculus of things one can say about something) takes things further by distinguishing between different kinds of propositions. ‘All cats are black’ and ‘some cats are black’ are different propositions, but with similarities. The predicate calculus takes account of these similarities, which the propositional calculus ignores.

The use of propositional logic in the context of the law has been described in this way:
Because legal rules can be seen as a description of the conditions under which a particular legal consequence follows, an argument of the ‘if ... then’ form can be used for reconstructing a legal argument.\(^{40}\)

For example, a rule may state this. If a person pollutes the environment, this person must be convicted of this offence and imprisoned for a minimum term of five years. If a particular person has in fact polluted the environment, then this particular person should be convicted and imprisoned for five years. Predicate logic takes this one step further. It has been explained in this way:

> The system of predicate logic is an elaboration of the system of propositional logic. In addition to arguments whose validity depends on the meaning of terms such as ‘if ... then’, predicate logic uses quantifying expressions such as ‘any’, ‘all’ and ‘some’ as well as predicates.\(^{41}\)

In this way the subject of the sentence is expanded to include a range of persons while the predicate of the sentence remains the same. For example, a rule in this form of language. All persons who pollute the environment must be convicted of this offence and imprisoned for a minimum term of five years; this person has polluted the environment; therefore this person should be convicted for polluting the environment and imprisoned for a minimum term of five years. This example goes further because of the use of the words ‘must’ and ‘should’. This takes us to deontic logic.

Deontic logic has been described in this way:

> Deontic logic studies logical relations between propositions containing terms like ‘obliged’, ‘commanded’, ‘permitted’, ‘forbidden’, though the term tends to be confined to the construction of formal systems using deontic terms and the problems these systems raise.\(^{42}\)

This is particularly relevant in the context of the legal system. This is simply because the law is intrinsically normative in character. While syllogistic, propositional and predicate forms of logic are static in the sense of their formality, deontic logic necessarily introduces an element of dynamism by prescribing standards of behaviour and decision-making. For example, a person must not pollute the environment; this person has polluted the environment; therefore this person has failed to comply with this obligation. This in itself has no legal consequence. Accordingly a further proposition needs to be included. For example, if a person has failed to comply with this obligation, then any person may bring an application before a court for a remedy.
Arguably the dynamic nature of the legal system points in the direction of dialogical logic. The literal meaning of a dialogue is a discussion between representatives of two groups. The legal system is essentially a normative framework stating the relationships between individuals, groups of individuals, institutions and the community. This almost necessarily involves dialogue – discussion – and if dialogue is not successful in settling the issues, then there may be a referral of these issues to some form of adjudication. There may be a dispute about the relevance of the rules of law, their meaning, their application, and the consequences of their application. Ultimately this is a matter of judgment. It has been expressed in this way:

In a recently developed dialogical logic, various authors extend existing logical systems to make them more suitable for analysing and evaluating legal arguments ... Because a legal decision involves a choice between various rules, a system of logic is necessary for reconstructing a legal argument in which these choices can be expressed. In a reason-based system of logic arguments for or against a decision can be weighed. For example, ... arguments from analogy. Thus the process of weighing reasons for and against a conclusion always takes place in the context of a dialogue. Thus a dialogical system of reason-based logic must be developed to reconstruct arguments ensuing from an argumentative dialogue about a legal standpoint.43 This is particularly significant in relation to environmental governance. Environmental governance is a dynamic system. It seeks to accommodate a range of potentially competing and ultimately conflicting interests. Decisions are being made about future activities as well as past activities. It is essentially predictive and evaluative in character. Choices often have to be made between equally desirable outcomes. Syllogistic, propositional, predicate or deontic logic may well provide the basis for a conclusion. An additional form of logic may often be required.

RATIONALITY AS A FORM OF REASONING

Legal reasoning goes beyond an identification of the relevant form of logic. Additionally it addresses forms of rationality. Formal logic is not enough. More is required. But what?

Logical validity is a necessary condition for rationality, though not sufficient in itself. Formal logic only relates to the formal relation between the premises and the conclusion, but leaves open the question of whether the premises are acceptable from a material point of view and whether the choice between various legal rules is justified. In a logical approach, rationality is not
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tantamount to formal validity. A thorough evaluation of legal argumentation, apart from logical criteria, requires material criteria.44

And the reason for this is simple:

Logic does not offer norms by which to evaluate the material and procedural aspects of legal argumentation.45

The question then becomes how a set of norms can be incorporated within a rational system that ensures compliance with the law and its effective implementation.

Three approaches to the achievement of this outcome have been suggested. To some extent they are a reflection of the range of relevant forms of logic. But these are extrapolated to create a theory of legal rationality. These are:

- the logical approach
- the rhetorical approach
- the dialogical approach.46

The focus of the logical approach is formal validity 'as a criterion of rationality for legal argumentation.'47 An example of this approach to rationality is syllogistic logic according to which an argument is logically valid if the conclusion follows from the legal rule – the first premise – and the facts – the second premise. The focus of the rhetorical approach is 'the content of arguments and the content-dependent aspects of acceptability.'48 The issues include the validity of the legal rule and the substantiation of the facts but within the context within which both the legal rule and the facts have effect. The rhetorical approach moves towards the substantive as well as the logical justification for the conclusion. The focus of the dialogical approach is even wider. In this respect the dialogical approach is similar to but not the same as dialogical logic. The dialogue contemplated by the dialogical approach is the discussion about the arguments relevant to 'the acceptability of a legal standpoint'49 put in support of the conclusion advocated by those participating in the discussion. In these ways the logical approach limits the analysis to matters of form while the rhetorical and dialogical approaches confront matters of substance.

Although it may be possible to distinguish these three approaches, in practice they are often likely to be linked. Distinctions have been drawn, for example, between two types of legal reasoning: substantive reasoning and formal reasoning. A substantive reason is a 'moral, economic,
political, institutional, or other social consideration.\textsuperscript{50} The use of the noun ‘consideration’ is important. It contemplates a norm that is not strictly binding. On the other hand, ‘a formal reason is a legally authoritative reason on which judges and others are empowered or required to base a decision or action.’\textsuperscript{51} To the extent that it is binding – as it is likely to be – it takes precedence over substantive reasons. But in practice a rational approach is likely to combine each of these two. Thus ‘a formal reason usually incorporates or reflects substantive reasoning.’\textsuperscript{52} In other words, formal reasoning relates for the most part to \textit{intrinsic logical} validity while substantive reasoning relates to \textit{extrinsic rational} validity.

The combination of these various approaches has been incorporated in this figure\textsuperscript{53} which brings together formal validity and substantive validity.

![Diagram of Rationality]

\textit{Source:} Aarnio (1997).

\textbf{Figure 1.1 \ Forms of reasoning}

Aarnio explained it in these words:

The concept of rational acceptability refers to two different constituents, i.e. to: (1) rationality of the reasoning procedure (discourse), and to (2) the final result of this procedure to be substantively acceptable.
This rationality of the reasoning procedure can, on the one hand, concern either the *internal* justification, where the deductive form of reasoning is essential (L/rationality), or the *external* justification, i.e. the procedure confirming the premises at issue (D/rationality).\(^{54}\)

The reference to the deductive form of reasoning is a reference to formal validity – internal justification. The reference to the procedure confirming the assumptions underlying the major and minor premises that are part of formal validity is a reference to substantive validity – the external justification. The concept of rationality in the legal system incorporates a set of intellectual processes that analyse the words, the grammar and the syntax that comprise the rule and the wider normative context of the rule in ways that are justified both formally and substantively.

The point has been made that formal reasoning may almost imperceptibly move in the direction of substantive reasoning. This arises particularly in the context of interpretive techniques. A formal approach 'focuses on literal meanings of words or on the narrow confines of normative conduct or other phenomena to be interpreted.'\(^{55}\) A substantive approach focuses upon:

- the underlying purposes and rationales of the provision in question
- the political morality of the decision-maker
- the political morality attributed to the legislature or to the public.\(^{56}\)

Arguably formal and substantive reasoning may be limited – or perhaps expanded depending on the relevant perspective – by any perceived fundamental values inherent in the legal system – for example, the rule of law. Hence the potential relevance of the concept of formal justice. The concept of formal justice may be seen to operate as a counterpoint to the exercise of discretion – whether legislative, executive or judicial. This is a contested issue. There is on the one hand the capacity for judicial creativity in the performance of the adjudicative function and on the other hand the capacity for judicial creativity to be constrained by the principle of the rule of law. The concept of formal justice is in the first instance a matter of procedure. However the function of the judicial protection of individual and human rights approaches a concept of substantive justice. There may be no clear distinction between procedural justice and substantive justice. According to one view:

The emphasis laid on formal justice relates to the importance of the notion of rationality in the liberal-world view: faith in the idea that openness, rationality, consistency, generality, and predictability (values centrally located in the rule-of-law ideal) will conduce to fairness.\(^{57}\)
Judicial creativity, it has been pointed out, impacts not only upon activities that have taken place in the past but also upon activities that may take place in the future and the link between them may be the doctrine of precedent. The doctrine of precedent is an element of the concept of formal justice. But in any case:

Judges ought to adhere to the principle of formal justice, as a minimal requirement of doing justice at all, and a fortiori 'justice according to law'.

However formal justice may be observed by following a precedent but substantive justice may not be achieved in the later set of circumstances. Perhaps the notion of formal justice should be taken to a higher level. Namely:

It is that the notion of formal justice requires that the justification of decisions in individual cases be always on the basis of universal propositions to which the judge is prepared to adhere as a basis for determining other like cases and deciding them in the like manner to the present one.

It is thus the existence of universally accepted propositions of law that enables a conclusion in a particular set of circumstances to be justified not only internally but also externally. There is no one form of legal reasoning. The range of techniques available in the context of legal reasoning brings together not only the language of the law but also the function of the law.

CONCLUSION

The normative framework of a legal system comprises a matrix of related legal and paralegal rules which inform each other in the context of statements of value, strategy and principle and statements of rights and duties. The former statements are informative and the latter descriptive and ultimately enforceable in the form of protectable rights and enforceable obligations leading potentially to liability for a failure to comply. All are expressed in language of relative determinacy or relative indeterminacy. Language is one element of the reasoning process. Equally important are the structure and form of the sentences created by the language and the logical relationship between them. The forms of logic vary from the formality of syllogistic logic to the greater complexity of dialogical logic. Neither form of logic addresses directly the substance of the logical processes leading to a specific conclusion. This is achieved by linking form and substance in a rational way that justifies the
conclusion. This involves a process of reasoning that brings together both the internal justification and the external justification of the conclusion. What emerges is a set of legal and paralegal rules within their wider normative context. It is the function of the processes of legal reasoning to bring together coherently in relation to a particular decision all of these rules within the limits of their application.

NOTES

2. Ibid.
5. Ibid (pp. 156, 157).
8. Ibid (pp. 163–165).
9. Ibid (p. 166).
11. Ibid (p. 144).
12. Ibid (pp. 145, 146).
15. Sales (2011, p. 204).
17. Ibid.
31. Ibid.
33. Ibid.
35. Ibid (pp. 67, 68).
37. Ibid (p. 1).
39. Lacey (1976, p. 113).
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