# THE ABSENT-MINDED LEGISLATOR

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## Introduction

G. H. von Wright is a leading authority and pioneer in the field of deontic logic. His efforts deserve recognition, but also, in my opinion, criticism on certain points. I shall discuss a view of his, set out in Norm and Action (Routledge and Kegan Paul, 1963). My objections would, however, affect not only this view, but also a large variety of attempts to give a consistent empiricist account of the nature of law and of the meaning of legal statements.

This paper sums up some points developed at greater length in an essay called "Flaws in Laws" (to be published).

Some ideas in this paper can be traced back to Hägerström, in particular to Inquiries into the Nature of Law and Morals, III, 3, (a). I am also greatly indebted to Professor Karl Olivecrona.

## Incompatible laws

Can the law of the state be inconsistent ? In other words, can two incompatible laws coexist ? ([1])

Let us assume that the law of the state depends for its existence on human thought and action. Since human beings are fallible, it is clear that the answer should be in the affirmative. The same follows from von Wright's legal positivist view that the laws of the state depends for their existence on the issuing of prescriptions (commands, permissions, prohibitions) by a (human) norm-authority [7, 15, 120-128] ([2]).

But many statements by von Wright seem to be to the effect that the answer to our original question should not be in the affirmative. If it were, he says, deontic logic would be

impossible [135, 148-149, 205]. But the distinction between valid and invalid deontic inferences is definitely not a spurious one. For this reason, incompatible laws cannot coexist.

I shall argue that this view of von Wright's is incorrect.

According to von Wright, we can distinguish between norms and norm-propositions. The former find their linguistic expression in norm-formulations, the latter in norm-statements [104-105, 130-132].

There are many different kinds of norms. Prescriptions constitute one kind. The laws of the state are prescriptions. They are issued and enforced by a norm-authority [15] ([3]).

A norm, then, is a command or a permission or a prescription. A norm-proposition is a proposition to the effect that a certain norm exists. The existence of a norm is an empirical matter of fact [107]. That a norm exists means that a norm has been issued and is in force. Norm-propositions are either true or false. Norms are neither.

As we saw, it is von Wright's view that if incompatible laws can coexist, deontic logic would be impossible. Given the distinction between norms and norm-propositions, "deontic logic" could mean different things. It could mean a logic of norms (LN). Or it could mean a logic of norm-propositions (LNP).

### Deontic logic as a logic of norms

The laws of LN are about norms in abstraction from their existence or non-existence. Presumably, a thesis of LN might be like this:

> Two norms of the form "A must be done" and "not-A must be done" are incompatible.

Such a thesis can be valid whether the norms in question "exist" or not [165].

## Deontic logic as a logic of norm-propositions

The laws of LNP are about propositions to the effect that a certain norm exists. The theses of LNP license inferences from the existence (or non-existence) of one norm to the existence (or non-existence) of some other norm. Presumably, theses of LNP might be like these:

> If a norm $n_1$ exists, and if $n_1$ is incompatible with another norm $n_2$, then $n_2$ does not exist.

> If a norm $n_1$ exists, and if $n_1$ entails another norm $n_2$, then $n_2$ exists.

## Discussion

When von Wright says that the coexistence of incompatible norms would make deontic logic impossible, he must obviously take "deontic logic" to mean LNP ([4]). There is no reason whatever why LN should be impossible on the hypothesis in question. Von Wright agrees with this ([5]). Moveover, without a LN the notion of incompatibility between norms would not make sense.

Now, it is true that if incompatible norms coexist, LNP would be impossible. Von Wright regards this as a *reductio ad absurdum* of the hypothesis. It must therefore, he suggests, be the case that the legislative will is always consistent.

Von Wright's mistake is to regard it as absurd to claim that a LNP is impossible. So far from being absurd, it is simply true. On his assumptions, that the existence of a law is an empirical matter of fact, constituted by certain actions by a norm-authority, it would indeed be most surprising if the norm-authority (who is not divine) could never make a mistake.

In other words: suppose that a norm-authority issues a norm $n_1$. In a fit of absent-mindedness he also issues a norm $n_2$. What is there to prevent $n_1$ and $n_2$ from being incompatible ? No law of logic can prevent people from being illogical. (It is true that compliance with both $n_1$ and $n_2$ is impossible. This is just what

the hypothesis says, namely, that $n_1$ and $n_2$ are incompatible. But the question is, whether it is logically possible for a norm-authority to issue both norms.)

According to von Wright, we must also be entitled to infer as follows:

$n_1$ exists; $n_1$ entails $n_2$; therefore $n_2$ exists.

But on his view, no norm exists unless it is promulgated. Again, it is possible to promulgate one norm without promulgating another one entailed by it. Indeed, it is not possible to promulgate all norms which are entailed by a norm (since they are infinitely many). von Wright's solution is that the promulgation of norms entailed by a norm which is really promulgated can be "concealed". In my opinion, we should rather say that it never occurred.

This becomes obvious if we compare with this pattern of inference:

A says "p"; p entails q; therefore, A says "q".

The inference is invalid: "p" might have been A's last words. Why should we maintain that A did say "q", concealedly ? Is there any reason to believe that A was whispering to himself ?

Of course, if the law says $n_1$ and if $n_1$ entails $n_2$, then the law does say (in another sense of "say") $n_2$. This is valid, but only as a thesis of LN, not as a thesis of LNP.

Von Wright's argument can be formulated as follows: an acceptable system of deontic logic must be consistent; an acceptable system of deontic logic must be applicable to legal reasoning within a legal system; hence the legal system must be consistent.

That there is a mistake in this argument is obvious if we set up a similar argument e.g. for propositional logic: an acceptable system of propositional logic must be consistent; an acceptable system of propositional logic must be applicable to propositional reasoning within a system of beliefs; hence the system of beliefs must be consistent.

This is clearly a *non-sequitur*.

### Some further remarks

If a person judges that two incompatible legal rules apply to him, different reactions are possible. One is that he considers the incompatibility to be genuine. In this case, it is logically impossible for him to comply with the law. Nevertheless, such a situation is logically possible. It may even be contrived by an evil legislator, who wants his subjects to be on the wrong side of the law, so that they can be prosecuted whatever they do. Another is that he considers the incompatibility to be only apparent: on closer reflection, he finds that he was mistaken as to the "existence" of one of the two legal rules. By applying a rule of precedence, he concludes that of the two incompatible legal rules, one takes precedence over the other by putting it out of existence. Or, by applying some rule of precedence, he concludes that one of the rules forms an exception to the other one.

It is not a truth of logic, however, that a legislator issues rules of precedence which will guarantee that compliance with the law is always logically possible.

### The philosophical treatment of defects in the law

It is tempting to compare von Wright's thesis that incompatible laws cannot "exist" with the Natural Law thesis that there cannot be such a thing as an unjust law (an unjust law is not a law). In both cases, it is said on *a priori* grounds, that there are certain defects which laws cannot possibly have.

But laws can fail in other respects than those of justice and consistency. They may fail to operate towards the end for the sake of which they were made. They may even be counterproductive. They may be defective by causing unnecessary trouble.

We see then that with regard to *some* defects, it is said, on *a priori grounds,* that no law can have them. With regard to other defects, no similar claim is made.

The problem *why* philosophers have denied the possibility of certain defects in laws but admitted the possibility of other defects has not, to my knowledge, been explored. I think it can give rise to interesting observations.

### Positivism and psychologism

There is a certain affinity between von Wright's account of deontic logic, and the psychologistic account of logic. Also there is a certain affinity between Husserl's arguments against psychologistic accounts of logic, and my objections against von Wright's account of deontic logic. In my view, von Wright's account, including those points in it against which I have raised objections, is in line with his effort to give a coherent and consistent statement of a legal positivist view. If some accounts of legal positivism do not give rise to the difficulties discussed, it may well be because these accounts are less consistent. Perhaps any well-considered statement of legal positivism will run into the same difficulties as von Wright's.

Historically, both legal positivism and "psychologism" are off-shoots of empiricism. It is worth exploring whether there is more than a contingent, historical, connection between the two.

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### NOTES

(1) That two laws are incompatible means that compliance with both is impossible in a situation in which both apply. In this essay, "coexist" is to be understood as "coexist in a legal system".

(2) Bracketed numbers indicate pages in Norm and Action.

(3) From here on, "norms" will refer only to norms which are prescriptions.

(4) The actual words are "if no two norms can logically contradict another, there can be no logic of norms either" [148]. That von Wright uses these words can be explained by his view that LNP is more basic than LN. We cannot discuss the relative priority of LN and LNP here.

(5) [165] by implication. But differently elsewhere.