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Legal argumentation in totalitarian societies

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Abstract: This paper explores the relationship between legal argumentation and totalitarianism by examining the legal systems of Nazi Germany and the Soviet Union. It critically assesses Gustav Radbruch's thesis which suggests that Nazi Germany adhered to a system of legal positivism, asserting that laws were governed by logical rules of inference. The paper challenges this view, arguing that legal theorists in Nazi Germany, including Carl Schmitt and others, rejected legal argumentation in favor of party loyalty and ideological conformity. Similarly, Soviet law under Marxism–Leninism substituted legal reasoning with political conviction. Both systems, though differing in ideological content, shared a disregard for legal argumentation, resulting in unjust laws that served the interests of the ruling party. The paper also distinguishes between totalitarian and authoritarian regimes, showing how, in totalitarian societies, legal norms are subordinated to political ideology, leading to a collapse of objective legal reasoning. In authoritarian systems, laws may imitate democratic principles but fail in practice due to a breakdown in the logical consistency of legal argumentation. This emphasizes that legal systems devoid of argumentation undermine justice and legal certainty, regardless of whether they exist under totalitarian or authoritarian regimes.

At the same time, the very first historically attested legal systems that emerged in Mesopotamia (at least from the period of the Ur III dynasty onward) can be characterized as normative systems in which formal consistency constituted a central organizing principle. Legal norms were articulated in a codified and highly formulaic manner, and judicial reasoning was expected to maintain coherence with these established formulations. As a consequence, legal decision-making relied predominantly on deductive patterns of inference, where particular judgments were derived from general normative statements rather than being constructed through analogical or rhetorical reasoning.

Keywords: *Gustav Radbruch, Hans Kelsen, legal argumentation, legal normativism, legal positivism, Ur III*

Introduction

Legal reasoning in court proceedings can be understood as operating in two distinct but interconnected dimensions: (1) a logical dimension, often expressed through forms of classical or deontic logic, and (2) a normative-theoretical dimension, concerned with the meaning of legal norms themselves. The first focuses on how conclusions follow from premises; the second, on what norms are and how they come to have authority to be premises in legal conclusions.

The logical dimension addresses the structure and validity of legal arguments. Here, legal reasoning resembles formal inference: judges and lawyers examine whether conclusions are at least consistent with statutes, precedents and established facts (the so-called confirmation procedure that is plausible) or even follow from them directly (demonstration procedure that is deductive). For instance, deontic logic (Bulygin, 2008), dealing with concepts such as obligation, permission and prohibition, provides tools for analyzing whether a set of norms produces contradictions or coherent outcomes. For example, if a legal system simultaneously holds that an action *p* is permitted and that not-*p* is obligatory, a logical inconsistency arises. In this sense, logic functions as a method for testing consistency, entailment and coherence within legal reasoning rather than as a source of legal authority itself.

The normative-theoretical dimension, by contrast, concerns the expression of norms—what norms are and how they exist in legal discourse. Different theories offer different answers (Weinberger, 1999): (1) Conceptual or “hyletic” views treat norms as abstract entities that exist independently of language and are merely expressed through legal texts. (2) Expressivist views, influenced by speech-act theory, argue that norms come into being through prescriptive acts of language, such as commanding, legislating or promulgating. On this account, the difference between a statement and a command is not primarily semantic but pragmatic: both may share propositional content, yet their legal force depends on how they are used within institutional practices.

These two dimensions intersect in courtroom argumentation. On the one hand, legal actors rely on logical techniques, identifying accepted premises, testing new evidence and ensuring that interpretations do not yield contradictions. On the other hand, they implicitly rely on a theory of norms that explains why certain texts, precedents or decisions count as binding in the first place. Thus, legal reasoning is not reducible either to pure formal logic or to pure normative theory. It is shaped by an ongoing interaction between logical evaluation of arguments and theoretical assumptions about the nature and authority of legal norms.

In legal reasoning, the logical dimension and the normative dimension may be closely integrated within the comprehensive analysis offered by the pragma-dialectical approach to argumentation (van Eemeren and Grootendorst, 1984; 2004). This approach views legal argumentation as a structured form of critical discussion in which participants do not merely exchange arguments but first, explicitly or implicitly, agree on both the applicable norms and the rules of inference that will guide their reasoning. In this way, questions about *what counts as a valid norm* and *what counts as a valid conclusion* are addressed together rather than independently.

Frans van Eemeren and Rob Grootendorst's framework emphasizes that rational dispute resolution depends on shared procedural and argumentative standards. Building on this foundation, Eveline Feteris (1999) developed legal argumentation in greater detail. She argued that legal reasoning typically relies on a small number of basic inferential patterns, among which the most fundamental is *modus ponens*. In legal contexts, this logical rule takes the following form:

Premise 1: If act *A* occurs, then legal decision *B* must follow.

Premise 2: The court establishes that act *A* has, in fact, occurred.

Conclusion: Therefore, the court must issue decision *B*.

In this scheme, the first premise is a legal norm, while the second is a factual determination. The conclusion is a binding legal outcome derived through a standard logical rule. What is distinctive here is that the logical operation (*modus ponens*) and the normative content (the legal rule) function together as a single reasoning structure rather than as isolated components.

It is also noteworthy that this pattern of legal reasoning, combining a general norm with a factual finding to reach a decision, has very deep historical roots. Variants of this structure can already be observed in the legal culture of *ancient Mesopotamia*, where early legal codes formulated proceeding norms in conditional "if–then" forms (Roth, 1997; Charpin, 2010). There are numerous surviving trial records in Sumerian and Akkadian that demonstrate already very strict standards both in legal argumentation and in the formal codification of norms (Culbertson, 2019; Holtz, 2009; 2014; Schumann, 2023a; 2023b). These early documents show that courts relied on structured reasoning, written evidence and clearly formulated legal rules rather than purely oral or arbitrary decision-making.

It is worth noting that the archives of Elephantine (Botta, 2009; Cowley, 1923; Porten, 1996; Yaron, 1958) allow us to observe a clear continuity of legal traditions across several empires and languages. Legal documents appear successively in *Aramaic* (under the Achaemenid Empire), *Greek* (during the Ptolemaic and later Roman periods), and *Latin* (within the Roman administration). This multilingual record reveals an ongoing chain of legal transmission rather than abrupt replacement. Aramaic legal culture preserved and reworked earlier Akkadian practices; Greek revised legal language and documentary forms developed on the basis of Aramaic models and Latin administrative law subsequently absorbed and systematized many Greek legal concepts and techniques. The result is a visible process of cumulative legal development in which each new legal language built upon the institutional and conceptual foundations of its predecessor rather than starting from scratch.

Through this gradual process of translation, adaptation and institutional refinement, legal systems became more systematic and technically advanced. Many of these accumulated practices and conceptual structures were ultimately consolidated in *Roman law*, which later became one of the principal foundations of the Western legal tradition and continues to influence legal reasoning and institutions to the present day.

Roman legal proceedings can be understood as having two closely connected dimensions, as was already the case in legal documents in Sumerian and Akkadian: an argumentative-procedural dimension and a normative dimension.

The argumentative-procedural dimension concerns how cases were organized, argued and decided. Roman civil procedure developed detailed methods for structuring disputes, identifying legal issues and assigning decision-making authority. Although procedures changed over time, Roman litigation for many centuries preserved a characteristic two-stage structure. In the first stage (*in iure*), the parties appeared before a magistrate, usually a praetor (Metzger, 2013). The magistrate's task was to define the legal framework of the dispute. He decided whether the claim fit recognized legal categories and drafted a short written instruction, the *formula*, which set out the exact conditions under which the judge should rule for either side. This stage functioned as a process of legal classification and issue-selection. In the second stage (*apud iudicem*), a private citizen acting as judge examined the facts (Metzger, 2013). Witnesses were heard, documents were produced and advocates presented arguments. The judge relied less on formal procedural rules and more on custom, practical reasoning and persuasion. This stage emphasized factual evaluation and rhetorical argument rather than doctrinal analysis. Together, the two stages created a structured dialogue between law and fact, between legal categories and empirical proof.

Over time, especially in the imperial period, more centralized procedures emerged, in which a state official controlled the entire case. Yet even then, the basic idea remained: legal reasoning in court involved both formal argumentative structure and practical assessment of evidence.

The normative dimension concerns which norms applied and why they were authoritative. Roman law was not a single uniform system, particularly in the provinces. Instead, it functioned within a pluralistic normative environment where Roman legal concepts interacted with local traditions, languages and social practices. Research on the Babatha archive, papyri from the early second century CE, shows that provincial legal life often operated as a *hybrid system* (Dančiaková, 2024). In provinces such as Arabia Petraea, the Roman governor, or his delegates, served as the main judicial authority. Local populations did not always have access to their own communal courts and therefore had to bring disputes before Roman officials. Formally, non-citizens were subject to the *ius gentium*, understood as a "law common to all peoples". In theory, this referred to general principles derived from natural reason; in practice, it was not a detailed code. Because of this, Roman officials frequently relied on familiar concepts from the *ius civile* and adapted them to local conditions. The result was what can be described as a "legal cocktail"—a mixture of Roman doctrine and local customs concerning property, inheritance, agriculture and family relations.

A key instrument of this normative integration was the *stipulatio*, a flexible Roman contractual form created through a formal question-and-answer exchange with identical wording on both sides. In provincial documents, this form was often expressed in Greek through verbs meaning "I promise" or "I acknowledge", and through standard formulaic clauses confirming that the promise had been properly asked and answered. Provincial parties frequently added a stipulation at the end of agreements that were otherwise based on local traditions, such as

Hellenistic harvest arrangements or Jewish property customs. By embedding this Roman form, they ensured that Roman authorities would recognize the obligation as legally binding. The *stipulatio* therefore did not replace local norms; it translated them into a procedural language acceptable to Roman courts.

If we examine trial transcripts in Sumerian and Akkadian, and later in Aramaic and Greek, we frequently observe the use of strict deductive rules of inference, most notably *modus ponens* and *modus tollens* (Culbertson, 2019; Holtz, 2009; 2014; Schumann, 2023a; 2023b). Judicial reasoning in these traditions tends to follow relatively stable conditional patterns in which a general norm is combined with an established fact to yield a legal conclusion. By contrast, Roman courts employed a much broader repertoire of argumentative schemes, extending well beyond formal deduction and including reasoning by analogy, examples, authority and probability. Many of these patterns of legal reasoning were systematized in Cicero's *Topics*, which catalogs diverse argumentative strategies available to advocates. It was precisely this wider spectrum of deductive and non-deductive reasoning that later enabled Chaïm Perelman and Lucie Olbrechts-Tyteca (1958) to formulate the program of *The new rhetoric*, especially oriented toward legal and practical reasoning where persuasion and justification cannot be reduced to strict logical proof.

Section 1 attempts to reconstruct the logic of legal reasoning on the basis of Akkadian court cases. The resulting model is predominantly *deductive*, relying on conditional norms and rule-based inference. Roman judicial practice, however, gradually shifted from such narrowly deductive structures toward a more *general rhetorical framework*. This shift was closely connected to the practical impossibility of expressing the entirety of legal norms in uniform implicational form. As legal systems grew in complexity and diversity, purely deductive logic proved insufficient, and rhetorical reasoning, capable of handling exceptions, analogies and competing values, became the dominant mode of juridical argumentation.

The problem of how law can be both *formally* (or *logically*) *valid* and *morally* (or *politically*) *legitimate* has been one of the central questions of twentieth-century legal philosophy. It was forcefully articulated by Gustav Radbruch (2006 [1946]) after the collapse of the Nazi legal order. So, his postwar reflections gave rise to what later became known as the *Radbruch Formula*, which rests on two key claims. First, the intolerability thesis holds that statutes that deliberately and gravely deny justice, especially by repudiating equality before the law, cease to count as valid law and should not be applied by judges. Second, Radbruch argued for the existence of a supra-statutory right, grounded in justice, that can override positive law when statutory commands perpetrate extreme injustice. Radbruch's intervention was motivated by the failure of legal positivism to explain how laws that were formally enacted could nevertheless be radically illegitimate. In the Radbruch Formula, as we can see, the *logical dimension of legal decision-making is largely set aside*. The emphasis falls almost exclusively on the moral or immoral character of legal norms themselves and on the imperative that judges be guided by considerations of justice, even where this may conflict with the strictly logical conclusions that would otherwise follow from the applicable legal rules.

Subsequently, the Radbruch Formula inspired extensive debate in legal theory concerning the nature and foundations of legal norms. For example, David Dyzenhaus (1999) argues that the collapse of the Weimar Republic exposed structural tensions within liberal constitutionalism that remain unresolved today. He analyzes three influential responses to the Weimar crisis, each representing a distinct jurisprudential strategy: (1) Carl Schmitt advanced a theory of decisionism, according to which sovereignty lies in the power to decide and find exceptions, but by grounding authority in unchecked decision, Schmitt's theory paved the way for authoritarianism. (2) Hans Kelsen offered the opposite response. His legal positivism conceptualized law as a hierarchical normative system whose validity derives from formal conformity with a basic norm (*Grundnorm*). Kelsen's theory preserved the autonomy of law from politics and defended constitutional courts as guardians of legality. However, Dyzenhaus argues that Kelsen's approach ultimately fails to explain why law should command obedience beyond coercion, severing legality from democratic legitimacy. (3) Hermann Heller proposed a third position. He argued that law must be grounded in a shared ethical-political culture while still maintaining formal constraints on power. Heller sought to bridge law and politics without collapsing one into the other. Although historically marginalized and difficult to sustain in deeply pluralistic societies, Dyzenhaus identifies Heller's approach as the most promising alternative to both Schmitt's authoritarianism and Kelsen's formalism. For Dyzenhaus, legality requires not only procedures but also a democratic commitment to constitutional values that constrain power rather than license its suspension.

This concern with legality as a normative practice is further developed in Dyzenhaus's later work *The long arc of legality: Hobbes, Kelsen, Hart* (2021). Against theories that reduce law either to sovereign command backed by force or to morality in disguise, Dyzenhaus reconstructs a tradition running from Hobbes through Kelsen to Hart. In this tradition, law is understood as a practice of reason-giving in which officials, including sovereigns, see themselves as bound by legal requirements internal to the idea of law itself. These constraints are not external moral standards imposed on law but conditions that make law possible as a legitimate enterprise.

However, Dysenhaus, like Radbruch, largely ignores the logical validity of legal decisions, focusing instead on their moral and political justification. For this reason, he prefers Hart to Kelsen. Like Radbruch, Dysenhaus acknowledges that judicial decisions can be logically flawed or even formally contradict legal norms if they nonetheless uphold liberal democratic values. In this perspective, the ultimate measure of a legal decision is not strict deductive consistency, but its contribution to justice and democratic legitimacy.

However, this position gives rise to a significant theoretical difficulty: the problem of criteria. If some degree of political or moral intervention in legal reasoning is permissible, or even necessary, how are we to distinguish legitimate from illegitimate intervention? Legitimate according to whom, and on what grounds? Are we good and others are bad? In other words, what differentiates the value-oriented judicial reasoning associated with Hart's liberal constitutionalism from the authoritarian or decisionist intervention characteristic of Schmitt, who also considered his theory to be a form of constitutionalism? Once logical validity is no longer treated as a decisive constraint, the boundary between principled interpretation and ideological manipulation becomes increasingly difficult to draw.

Thus, the question shifts from the logical consistency of legal norms to political and moral evaluation. Determining whether a judicial departure from strict logical consistency is justified hinges on contested interpretations of constitutional values, democratic obligations and notions of justice. What one theoretical model describes as the necessary protection of rights, another may describe as judicial overreach or the politicization of law. Thus, removing logical validity from the central criteria of legal evaluation does not eliminate the need for standards; rather, it shifts the debate to the realm of normative and interpretive judgment, where disagreements are resolved not by formal inference, but by competing moral and political understandings of the legal order.

These themes intersect with the famous Hart–Fuller debate on the relationship between law and morality (Cane, 2010; Hart, 1958; Fuller, 1958). Hart (1958) defended the separation thesis: the existence of law is one question, its moral merit another. This distinction, Hart argued, prevents both anarchism and blind obedience. It allows societies to maintain legal order while freely criticizing unjust laws. In response to Radbruch and post-Nazi jurisprudence, Hart maintained that acknowledging immoral laws as legally valid preserves moral clarity by forcing us to confront genuine conflicts between values rather than resolving them through conceptual redefinition.

Lon Fuller (1958) challenged Hart by arguing that law possesses an *internal morality*—a set of procedural principles without which governance by law collapses into coercion. Fuller's principles of legality, such as generality, publicity, non-retroactivity, clarity and congruence between rules and official action, are not merely technical virtues but moral requirements internal to the enterprise of law itself. A system that systematically violates them, Fuller argued, does not merely create bad law; it fails to create law at all.

Thus, Fuller can be seen as continuing, in an important respect, the normativist tradition associated with Kelsen (1961; 1979; 1992), insofar as he argues that a legal order, when structured as a coherent and internally consistent system grounded in basic norms, already possesses a form of moral quality. For Fuller, the morality of law is not primarily substantive but procedural and structural: a system of rules that is general, public, stable and logically consistent embodies a minimal morality simply by virtue of its inability to ignore basic moral norms. In this sense, the legal systems of ancient Mesopotamia provide an illustrative example. Mesopotamian law was explicitly organized around a foundational norm or *Grundnorm*, a written code, and legal decisions were expected to remain consistent both with this basic norm and with one another. This represents a more rigorous and formalistic approach to coherence than what was later characteristic of Roman law, where flexibility, equity and rhetorical reasoning gradually assumed a larger role.

By contrast, Carl Schmitt's theory of law (2021; 2024) stands as a sharp rejection of both legal positivism and the use of not only formal logic, but also argumentation as a central mechanism for ensuring the coherence of legal decisions. In Schmitt's view, consistency in judicial outcomes should not be secured through logical inference or systematic normativity but through political unity embodied in sovereign decision. Under National Socialism, this position translated into the claim that ideological conformity, rather than logical or doctrinal coherence, was the true guarantor of legal order. Argumentation, in this framework, was treated as obstructive to the decisive political will.

A similar skepticism toward legal reasoning can be observed among Soviet legal theorists. They criticized logic and argumentation in law as a "bourgeois" or formally limited instrument, incapable of genuine intersubjective validity. Instead of logical consistency, the consistency of judicial decisions was expected to be ensured by adherence to Marxist–Leninist ideology and political expediency. Hence, in both the Nazi and Soviet contexts, the rejection of legal logic/argumentation was linked to the elevation of ideology to the rank of the primary organizing principle of legal reasoning.

This article examines both the Soviet legal approach to argumentation in law (Section 2) and the National Socialist approach (Section 3). This analysis reveals the limitations of Radbruch's proposition that the main danger in totalitarian regimes lies in a form of rigid legal positivism combined with unjust laws. In reality, the problem was often the opposite: not excessive logical formalism, but the erosion of the logical dimension of law itself. Law historically developed in two interrelated dimensions—normative and logical—and this dual structure was already evident in the legal institutions of ancient Mesopotamia. Authoritarian regimes tend to weaken or destroy the logical structure of legal thought, replacing it with appeals to morality, ideology or political necessity. The result is not simply unjust law, but the transformation of law into a realm where consistency is maintained by power and conviction, rather than by shared standards of rational justification.

1. Logical argumentative technique in Mesopotamian trials

The earliest evidence of logically structured reasoning is found in the legal disputes of ancient Mesopotamia, extensively documented through a rich corpus of legal texts written in Sumerian and various dialects of Akkadian. These documents illustrate the foundational development of systematic thought for resolving disputes and demonstrate the use of logical inference rules—such as *modus ponens* ("If *p*, then *q*. There is *p*. Therefore, *q*.") and *modus tollens* ("If *p*, then *q*. There is no *q*. Therefore, not-*p*.")—in conjunction with evidence-based argumentation within judicial practices.

The systematic nature of Mesopotamian legal reasoning is well preserved in primary sources such as legal codes and trial archives (Roth, 1997; Charpin, 2010). Among the most prominent legal codes are the *Code of Ur-Nammu* (c. 2100–2050 BCE) and the *Code of Hammurabi* (c. 1754 BCE). The *Code of*

Hammurabi, in particular, represents a seminal development in legal thought. It comprises 282 laws addressing diverse topics, including family law, property rights, trade, labor and criminal justice. Inscribed on a monumental stone stele and publicly displayed, this code served as a foundational guideline for judicial decisions across the Babylonian Empire (Richardson, 2004).

The structure of the *Code of Ur-Nammu* as well as the *Code of Hammurabi* reflects a causal form of legal norms often stated as: "If *N* did *X*, then *N* deserves *Y*." This format is an earliest example of applying *modus ponens* in legal reasoning:

> *Premise 1*: If an individual (*N*) commits an act (*X*), they are subject to a specific outcome (*Y*).
>
> *Premise 2*: It is verified that *N* has committed *X*.
>
> *Conclusion*: Therefore, *N* deserves *Y*.

While judicial discretion was allowed, the primary aim of the codes was to establish fairness and consistency across legal proceedings, ensuring that similar cases received similar treatment.

Beyond legal codes, court records and trial archives from ancient Mesopotamian cities such as Nippur, Lagash, Umma, Sippar-Amnanum and Larsa (Leemans, 1960) provide additional insight into the practical application of legal norms. Spanning periods such as the Neo-Sumerian (Owen, 1981), Old Babylonian (Lafont, 1995), Old Assyrian, Middle Assyrian, Neo-Assyrian and Neo-Babylonian (Holtz, 2009; 2014) eras, these clay tablets document a range of cases, including disputes over land, debts, trade and family matters. The cases highlight the role of logical argumentation in resolving conflicts and maintaining societal order. Moreover, on the basis of specific tablets, it is quite easy to reconstruct legal argumentation based on purely logical rules of inference.

After analyzing trial records (see Culbertson, 2019; Schumann, 2023a; 2023b), we can assume that each court decision must have taken the form of an inference derived from legal norms. So, let $\{N_i\}_i$ be the set of legal norms, $\{F_j\}_j$ the facts verified by the court and $\{D_l\}_l$ the trial decisions. Then a trial is valid if there is a relation of logical consequence between the sets $\{N_i\}_i$, $\{F_j\}_j$, on the one hand, and $\{D_l\}_l$, on the other (cf. Feteris, 1999; MacCormick, 1978; 1992):

$$\{N_i\}_i, \{F_j\}_j \vdash \{D_l\}_l$$

Under the dynasty of Ur III, the *Code of Ur-Nammu* was promulgated—the very first known law code in the world, of which only small fragments have survived (Finkelstein, 1968; Wilcke, 2002). In this legal code, each norm N_i was formulated as a conditional: "If the fact is F_j, then the judgment is D_l" ($F_j \Rightarrow D_l$). Meanwhile, facts could be understood as propositional compositions in the form of negation, conjunction and disjunction of atomic facts:

$$F_j := \neg F_n \mid F_n \wedge F_m \mid F_n \vee F_m$$

Hence, the relation of logical derivation from norms and facts is understood as follows:

$$\{F_j \Rightarrow D_l\}_{j,l}, \{F_j\}_j \vdash \{D_l\}_l$$

Then the following inference rules are easily reconstructed:

Modus ponens

$$\frac{F_j \Rightarrow D_l \qquad F_j}{D_l}$$

Modus tollens

$$\frac{F_j \Rightarrow D_l \qquad \neg D_l}{\neg F_j}$$

Introduction of Conjunction

$$\frac{F_n, \quad F_m}{F_n \wedge F_m}$$

Elimination of Conjunction

$$\frac{F_n \wedge F_m}{F_n} \qquad \frac{F_n \wedge F_m}{F_m}$$

Introduction of Disjunction

$$\frac{F_n}{F_n \vee F_m} \qquad \frac{F_m}{F_n \vee F_m}$$

Elimination of Disjunction

$$\frac{F_n \vee F_m \qquad \neg F_n}{F_m} \qquad \frac{F_n \vee F_m \qquad \neg F_m}{F_n}$$

Let us consider a court debate (museum number BM 106451. 1913-4-16-1283) from the time of Ur III as an example:

> 1. Geme$_2$-^{d}Suen-ke$_4$ 2. dam Ur-lugal santana-ka 3. 2 ma-na kù-babbar in-da-tuku in-na-du$_{11}$ 4 di-ĝu$_{10}$ Ki-áĝ-e in-⸢ til⸣ bí-du^{11} 5. Lú-^{d}Suen maškim di til-la-ĝu$_{10}$ bí-du$_{11}$ 6. Lú-^{d}Suen-ra en$_8$ ba-na-tar^{ar} 7. lul-àm bí-du$_{11}$ 8. egir-ra dam Ur-lugal-ke$_4$ 9. 10 gín kù in-da-an-tuku-aš 10. in-ge-en$_8$

r. 1. A-lu$_5$-lu$_5$ dumu Ur-lugal-ke$_4$ 2. 5 gín kù in-da-an-tuku-aš 3. in-ge-en$_8$ 4. dumu Ur-lugal-ka 5-⸢bi⸣ 5. nam-erim$_2$-ma ba-ni-dab$_5$ 6. in-ku-ru-uš 7. igi A-kal-la nu-banda$_3$-šè 8. igi Lú-diĝir-ra dumu Lugal-ba-ta-è-šè 9. igi NI-da-mu-šè 10. igi Inim-ma-AN dam-gàr-šè 11. igi Ba-sig$_5$ dumu gala-maḫ-šè

[1–3. Geme-Suen said to the wife of Ur-lugal, the head-gardener, that she (Geme-Suen) had a credit of 2 minas of silver with her (the wife of Ur-lugal). 4–7. She (the wife of Ur-lugal) declared: "Kiáĝ closed my case"; (and) she declared: "Lu-Suen was my commissioner in the concluded case." Lu-Suen was asked (about it and) he declared: "it is a lie." 8-r.3. Later on, the wife of Ur-lugal confirmed that she (Geme-Suen) has a credit of 10 shekels of silver with her. Alulu, the son of Ur-lugal, confirmed that she (Geme-Suen) has a credit of 5 shekels of silver with him. r.4–6. He (Kiáĝ) bound the five children of Ur-lugal to the (declaratory) oath, (but) they refused. r.7–11. Before Akala, the overseer; before Lu-diĝira, son of Lugal-bataè; before NIdamu; before Inima-AN, the merchant; before Basig, son of the chief lament singer.] (Molina, 2010, pp. 201–202)

In this protocol, we see a claim presented by Geme-Suen against the wife of Ur-lugal regarding the payment of a debt of 2 minas of silver. It is assumed that this claim is a fact F_n, presented as a relevant debt agreement between Geme-Suen and the wife of Ur-lugal. This fact can be verified by the court. For example, the document on obtaining a debt must be drawn up according to certain formal rules (including the signatures of witnesses and judges). Only then can it be regarded as an appropriate fact. Meanwhile, in Ur III there was a legal norm that every debt must be paid back in the presence of witnesses and this repayment certified by a judge and a commissioner: N_1 := "If there is a debt F_n, then it must be paid back F_n in accordance with certain legal standards." Thus, by *modus ponens*, the following conclusion is derived:

"If there is a debt F_n, then it must be paid back F_n in accordance with certain legal standards."

"There is a debt F_n."—There is an appropriate legal document.

"It must be paid back F_n in accordance with certain legal standards."

Thus, this conclusion is considered a legal decision, assumed when drawing up a loan agreement.

However, the wife of Ur-lugal argues that this case had already been closed and Kiáĝ acted as judge in this decision and Lu-Suen as its commissioner. Nevertheless, Lu-Suen affirms that it is false and the case had not been concluded. This means that there is another legal norm: N_2 := "If the debt F_n is paid back in accordance with certain legal standards, then the case of F_n is closed." And if the case is not closed, then we infer by *modus tollens*:

> "If the debt F_n is paid back in accordance with certain legal standards, then the case of F_n is closed."
>
> "The case of F_n is not closed."—By the testimony of the commissioner.
>
> ---
>
> "The debt F_n is not paid back in accordance with certain legal standards."

As a consequence, the legal fact F_n remains in force and repayment must occur in accordance with certain legal standards.

The wife of Ur-lugal had six children. Therefore, a further legal norm could be induced: N_3 := "If the debt F_n must be paid back by the wife of Ur-lugal in accordance with certain legal standards, then it must be paid by her or her children." Then by *modus ponens* we have:

> "If the debt F_n must be paid back by the wife of Ur-lugal in accordance with certain legal standards, then it must be paid by her or her children."
>
> "The debt F_n must be paid back by the wife of Ur-lugal in accordance with certain legal standards."—Because the case of F_n is not closed.
>
> ---
>
> "The debt F_n must be paid by her or her children."

This conclusion can be formulated as follows: "The wife of Ur-lugal must pay F_n or the first son/daughter must pay F_n or the second son/daughter must pay F_n … or the sixth son/daughter must pay F_n." Then by *elimination of disjunction* applied five times we have:

> "The wife of Ur-lugal must pay F_n or the first son/daughter must pay F_n or the second son/daughter must pay F_n … or the sixth son / daughter must pay F_n."
>
> (i) "It is false that the second son/daughter must pay F_n" … (v) "It is false that the sixth son/daughter must pay F_n."—Because the five children of Ur-lugal refused the declaratory oath for paying back.
>
> ---
>
> "The debt F_n must be paid by her or her first son/daughter."—In the trial, only Alulu, the son of Ur-lugal, agrees to help his mother to pay back.

At the end of the trial, the wife of Ur-lugal confirmed that she must pay back 10 shekels of silver and Alulu, the son of Ur-lugal, confirmed that he must pay back 5 shekels of silver. We suppose that she was only able to confirm a refund of 105 shekels (2 minas = 120 shekels) earlier.

Thus, we can see that the court transcript in Sumerian reflects the use of *strictly deductive rules of inference* for reaching a judicial decision. In business correspondence, by contrast, we observe many different rhetorical devices, such as reasoning by analogy and *ad hominem* argumentation, whereas in court hearings only formal logical rules were employed. Consequently, a proto-form of legal positivism is easily reconstructed in Ur III judicial acts with propositional-logical techniques for obtaining judicial decisions as automatic conclusions from facts and legal norms. Other examples of legal argumentation in obtaining judicial verdicts in Mesopotamia can be found in (Schumann, 2023a) and (Holtz, 2009; 2014).

The legal tradition of Ur III was inherited in the Old Babylonian Kingdom, where, for example, the *Code of Hammurabi* was proclaimed, and subsequently in all other kingdoms of Mesopotamia and Syria. Akkadian became the language of international trade and diplomacy. Through the expansion of the Achaemenid Empire, this legal culture spread along the trade routes of Eurasia. Legal acts in Aramaic, Greek, Egyptian, Bactrian and Sogdian are drawn up according to the same legal standards (Schumann, 2023b), therefore they have an identical or almost identical structure and equally rely on the use of the propositional-logical argumentation technique described above.

It is worth noting that economic issues frequently played a central role in the trial records in Akkadian (Veenhof, 2018; Renger, 1981). Property disputes often revolved around land ownership, inheritance claims or boundary disagreements, supported by written contracts as evidence. Given agriculture's importance to the economy, disagreements about irrigation systems and crop distribution were common. Similarly, debt-related cases were pervasive, with loan agreements formalizing repayment terms, collateral and interest rates; creditors sought legal recourse when borrowers failed to meet obligations. In urban centers, trade disputes involved breaches of commercial contracts, fraud or unfulfilled goods deliveries, emphasizing the importance of commerce. Labor disputes—including those concerning servitude, slavery and mistreatment—further reflect the complex economic and social dynamics of the time.

The detailed nature of Mesopotamian legal records underscores the advanced argumentative practices of these early societies. The application of structured reasoning, codified laws and evidence-based adjudication laid the groundwork for the evolution of legal and judicial systems worldwide, influencing Greek and Roman law (Westbrook, 2015). The detailed documentation of these practices not only sheds light on the complexity of their legal systems but also reveals their importance in shaping the economic and social structures of the time. By addressing disputes and regulating economic activities, Mesopotamian laws played a crucial role in promoting societal stability and economic prosperity.

Family law also held a central place in Mesopotamian legal systems. Marriage contracts served as formalized agreements that delineated economic arrangements, such as dowries and property rights. Disputes regarding these contractual terms often found their way into court, where they were adjudicated based on the evidence and legal precedents. Inheritance cases were equally significant, frequently involving the division of land and wealth among heirs. Claims of fraud or undue influence were common issues that the courts addressed to ensure fairness and uphold the rule of law.

The principles underlying Mesopotamian legal systems resonate with American conservative views, such as those formulated in *The conservative mind* (Kruk, 1953), which prioritize the protection of economic rights, including property ownership, free trade and morals. American conservative thinkers contend that a robust legal framework that safeguards economic relationships is essential for fostering both personal and collective success, echoing the foundational role that legal systems played in ancient Mesopotamian society. They emphasize that economic rights are vital to a thriving society. They argue that property rights, freedom of exchange and minimal government intervention form the bedrock of individual liberty, social order and collective well-being. Despite differing political and social philosophies, conservatives broadly agree on the necessity of protecting economic freedoms for personal and societal prosperity.

The German Nazis exemplified a far-right totalitarian regime but diverged sharply from conservatism in the American sense. While the Nazis promoted nationalism and order, they sought radical societal transformation rather than preserving existing traditional structures. Their ideology revolved around totalitarian control, racial supremacy and militarization, rejecting democratic institutions such as independent courts and radically reordering society. The Nazi economic approach combined private property with significant state intervention, rejecting principles of free trade.

Similarly, the Bolsheviks, aiming to abolish private property and establish a classless society, put forward collectivist economic policies, centralizing power and nationalizing industry. They stood in direct opposition to conservative values, which prioritize property rights, market-driven economies and limited government intervention.

Both the Nazis and Bolsheviks used totalitarian methods to achieve transformative goals, making them fundamentally incompatible with conservatism's emphasis on economic freedoms and rights. Hence, radical right-wing ideologies (like Nazism) and radical left-wing ideologies (like Communism) share a revolutionary nature, rejecting existing legal and social systems in favor of some political plans. As a result, radical ideologies often view existing legal norms as tools of oppression or obstacles to their goals. Nazi legal practices, such as those exemplified in Carl Schmitt's legal theory, subordinated law to state power and political ideology, dismissing justice and logical reasoning. Similarly, Marxist–Leninist legal theory criticized capitalist legal systems as serving the ruling class, advocating revolutionary action over adherence to traditional legal norms. Both movements manipulated or discarded legal frameworks to serve ideological ends, prioritizing power and transformation over reasoned justice.

American conservatism (Kruk, 1953), by contrast, upholds the rule of law and logical argumentation as essential to preserving societal stability and fairness. While radical ideologies seek to dismantle or radically redefine systems, American conservatism focuses on protecting and improving existing institutions through measured, rational change. This fundamental divergence underscores the incompatibility of conservative principles with the revolutionary goals of radical right-wing and left-wing ideologies.

2. Criticism of legal argumentation by the founders of Soviet law

The founders of Soviet law, much like the architects of Nazi law, fundamentally rejected the importance of legal argumentation—a tradition that traces its origins to the sophisticated judicial practices of the neo-Sumerian period. As shown above, in the Mesopotamian legal system, trials were not merely mechanisms for enforcing authority but served as platforms for logical reasoning and debate (see the previous section). Legal argumentation allowed for a dynamic interplay between evidence, legal norms and judgments, fostering a process of deliberation grounded in fairness and logical rigor.

In stark contrast, Soviet and Nazi legal systems treated trials not as venues for argumentative disputes but as instruments of state power. In these frameworks, the courtroom was stripped of its deliberative essence and repurposed as a stage for enforcing predetermined outcomes dictated by political ideology. The process of law was transformed into an administrative-command mechanism, in which the focus shifted from impartial judgment to the rigid application of ideological norms. This approach undermined the autonomy of legal reasoning and effectively subordinated the judiciary to the imperatives of the state.

The rejection of legal argumentation in Soviet and Nazi law marked a profound departure from the traditions established since the neo-Sumerian period. In ancient Mesopotamia, legal practices emphasized procedural integrity and logical coherence, as seen in their use of propositional reasoning to derive judicial decisions from legal norms, presented as conditionals, and facts. By eliminating such practices, Soviet and Nazi legal systems signaled their disinterest in justice as an ideal separate from ideology. Instead, they prioritized the consolidation of power and the enforcement of political orthodoxy, relegating law to a tool of governance rather than a medium of justice.

Since the very birth of law as a normative theory of argumentative evidence in ancient Mesopotamia, the institution of courts began to protect the right of private property and the inviolability of the person through the mechanism of interpersonal and objective resolution of possible conflicts. Most of the court archives of Mesopotamia in Sumerian, Akkadian and some other languages of the region deal specifically with economic disputes, as an example discussed in the previous section illustrates. The propositional-logical technique turned out to be extremely popular precisely for the reason that it guaranteed interpersonality and objectivity in resolving conflicts. Thus, the development of the world economy of the Bronze Age, centered in Mesopotamia, was possible largely due to a system of law based on legal normativism with a logical argumentative technique of proof in courts.

In Marxism–Leninism, the concept of socialism presupposes a society in which private ownership of the means of production has been abolished. This stage is followed by communism, in which all forms of private property are abolished. In socialist and communist societies, law is considered unnecessary for resolving economic conflicts, since these disputes are presumed to disappear in the absence of private property. Consequently, normative law is characterized as a product of bourgeois society. The transition to a socialist or communist state thus entails not only the end of bourgeois law, but also the eventual disappearance of law altogether. This concept was formulated in particular by Yevgeny Bronislavovich Pashukanis (1891–1937), a prominent Soviet legal scholar who fell victim to Stalin's purges and was eventually executed.

> The withering away of the categories of bourgeois law will under these conditions signify the withering away of law in general, i.e. the gradual disappearance of the juridic element in human relationships. (Pashukanis, 1980, p. 46)

Law and morality primarily serve to safeguard individuals' property rights as economic agents. If a person no longer participates as a subject in economic relations, the need for both morality and law diminishes—or disappears altogether:

> In fact, man as a moral subject, i.e. as an equal personality, is nothing more than a prerequisite of exchange according to the law of value. Man as the subject of rights is such a prerequisite, i.e. as a property owner. Finally, both these definitions are closely connected with a third—man as an egoistic economic subject. (Pashukanis, 1980, p. 101)

The protection of property rights and other individual liberties ultimately serves to reinforce economic disparities between the wealthy and the impoverished. Bourgeois law is designed to uphold social hierarchies rooted in these economic inequalities:

> It is most obvious that the logic of juridic concepts corresponds with the logic of the social relationship of commodity production, and that the history of the system of private law should be sought in these relationships and not in the dispensation of the authorities. On the contrary, the logical relationships of domination and subordination are only partially included in the system of juridic concepts. Therefore, the juridic concept of the state may never become a theory but will always appear as an ideological distortion of the facts.
>
> Wherever the first layer of the legal superstructure exists, we find that the legal relationship is generated directly by the existing material production relationships of people. (Pashukanis, 1980, p. 69)

Consequently, legal positivism does not emerge independently but rather serves the interests of the ruling exploiters who have gained control of the state. The state, in turn, functions as the enforcer and guarantor of the creation and application of these norms:

> In civil law transactions, however, the relationships between the parties assume legal form not only because they derive from the logic of objects (from the logic of the exchange act, more accurately), but also because this form finds real support and defense in the apparatus of judicial and state authority. Legal existence is materialized in a special sphere, partitioned off from the intrusion of naked fact. In his language, the lawyer expresses this by asserting that every subjective right depends upon an objective norm, and that private legal relationships arose because of the public legal order. (Pashukanis, 1980, p. 178)

Pashukanis advocated a society governed directly, without reliance on the protection of rights through legal norms. However, his notion that the state serves as the ultimate guarantor of all legal institutions was further developed by another Soviet jurist, Andrey Yanuaryevich Vyshinsky (1883–1954). Vyshinsky's seminal work, *The law of the Soviet State*, was translated into English shortly after World War II (Vyshinsky, 1948). In this book, he contends that legal norms are neither universal nor absolute but are shaped by the nature of the state. In a capitalist state, the dictatorship of the bourgeoisie prevails, whereas in a socialist state, the dictatorship of the proletariat takes precedence.

> Soviet socialist public law is one of the most important branches of Soviet socialist law, which we have previously defined as the totality of the rules of conduct, established in the form of legislation by the authoritative power of the toilers and expressing their will, the application of said rules being guaranteed by the entire coercive force of the socialist state to the end (a) of defending, securing and developing relationships and orders advantageous and agreeable to the toilers, and (b) of annihilating, completely and finally, capitalism and its survivals in the economy, manner of life, and consciousness of people, with the aim of building communist society. (Vyshinsky, 1948, p. 74)

Pashukanis did not differentiate between bourgeois and other forms of law. In his view, there is only one normativist conception of law (i.e., one legal positivism model), which holds relevance solely for economic actors. According to Pashukanis, the USSR had established a society that functioned not through the classical legal framework of autonomous economic agents but through direct administrative governance. However, this perspective on law was seen as problematic by Soviet leaders, who required the appearance of an imitation of legal system to legitimize their authority. Consequently, Vyshinsky's approach, which emphasized a distinction between two types of law—bourgeois and socialist—was considered more aligned with their political needs and therefore more valuable:

> Only traitors and those who betray the interests of socialism (like Pashukanis, Krylenko and other apostates of our country) could deny the socialist nature of Soviet law, asserting that our law is a mere replica or adaptation of bourgeois law. (Vyshinsky, 1948, p. 75)

Vyshinsky declares in his textbook *Criminalistics. Investigation of crimes: textbook for students of legal higher education institutions* that the criminal court is a form of repression exercised by the ruling class in society. In socialist states, we see dictatorship of the proletariat:

> The tasks of the criminal court are the struggle by the methods of criminal repression for the strengthening of the domination of the class in whose hands the state power is located. (Vyshinsky, 1935, p. 1)

> Soviet criminalistics is the science of investigating crimes, that is, actions that are dangerous for the state of proletarian dictatorship and socialist construction. (Vyshinsky, 1935, p. 6)

In this textbook, Vyshinsky focuses on methods for collecting facts $\{F_j\}_j$ for the courts: (i) *registration and identification of criminals* (fingerprinting, mono-dactyloscopy, comparative study of fingerprints, poroscopy, verbal portraiture, identification photography, registration of tattoos and special marks, registration by objects of crime, registration on the grounds of a criminal act, examination of physical evidence and traces, document research); (ii) *search and seizure* (methodology of searches, registration of a search and seizure, technique of conducting searches, "who or what to look for", "whom to look for", "when to search", "how to search", "where to look", separate types of search, search in open areas, search of rooms, personal search, seizure); (iii) *crime scene inspection* (general provisions, inspection methods, crime-scene inspection production technique, features of certain types of inspection, inspection of rooms, inspection of open areas, inspection of instruments of crime, inspection of clothes, shoes and small items, technical methods of recording the inspection, drafting of an inspection report, drawing up a plan of the area, shooting a plan of the area, drawing up a floor plan, photographic shooting, photographing corpses); (iv) *interrogation* (the role and importance of testimony, causes of errors in testimonies, deliberately false testimony, interrogation of witnesses, interrogation of the accused, interrogation protocol); (v) *expertise production* (the value of expertise, resolution of the issue of the need for an examination, "at what stage of the investigation should an examination be carried out", the choice of an expert, collection of materials for examination, formulation of questions for the examination, development of materials by an expert, expert opinion, evaluation by the investigator of the expert's conclusion, participation of the accused in the examination) and (vi) *identification and confrontation* (the act of identifying a person, confrontation).

In another book, *The theory of judicial proofs in Soviet law*, Vyshinsky analyzes the Soviet procedure for trial proofs on the basis of established facts. The legal norms that bind facts $\{F_j\}_j$ and court decisions $\{D_l\}_l$ are not absolute, but express the will of the ruling class. This assertion radically departs from traditional legal reasoning, where logic and objectivity are fundamental to linking facts to legal outcomes:

> Law expresses what the ruling classes consider just, profitable and pleasing to themselves. (Vyshinsky, 1941, p. 6)
>
> Soviet law pursues tasks fundamentally different from those pursued by bourgeois law.
>
> Soviet socialist law pursues tasks aimed at overcoming the resistance of class enemies and their agents to the cause of socialism, at ensuring the completion of socialist construction and a gradual transition to communism. The same tasks are served by Soviet procedural law, which determines the conditions and procedure for the activities of the investigative, prosecutorial and judicial bodies of the USSR in general and, in particular, in the field of issuing judicial decisions and sentences, as well as determining the methods and forms of their verification and correction. (Vyshinsky, 1941, p. 12)

Vyshinsky emphasizes that in the Soviet legal system, the normative and evidentiary framework is subordinate to ideology and the goals of the proletarian dictatorship. This ideological supremacy means that even fundamental rules of inference, such as *modus ponens*, do not always apply unconditionally. In the Soviet context, the application of logical reasoning is contingent on the ideological nature of the facts and the individuals involved. For instance, consider a situation where D signifies that an accused person is "not guilty" and this conclusion logically follows from fact F, such as an alibi or lack of evidence. In a typical legal framework, the court would be bound to apply the principle $F \Rightarrow D$ to exonerate the accused. However, under the Soviet system, if the accused is deemed an "ideological enemy", political judgment can override the logical conclusion. Even if F is demonstrably true, the decision D could be reversed or ignored to serve the state's interests. This distortion of legal reasoning underscores the role of ideology in Soviet law, where decisions were not determined solely by evidence or normative rules but were also shaped by broader political and class considerations. Vyshinsky's analysis reveals how Soviet jurisprudence prioritized the perpetuation of the ruling ideology over objective fairness or consistency in legal reasoning. It highlights the inherent tension between logic-based legal principles and the political imperatives of a totalitarian regime, where maintaining control and suppressing dissent took precedence over justice.

Thus, legal norms in the Soviet framework resist formalization through logical implications, such as $\{F_j \Rightarrow D_{l}\}_{j,l}$, or any rigid logical schemes. A legal code, such as the criminal code, is not merely a collection of discrete norms $\{N_i\}_i$; instead, it requires a specific ideological interpretation aligned with communist principles. This interpretation transforms the application of the code into a dynamic and politically guided process. In essence, there exists a broader set of possible interpretations $\{\text{Int } N_i\}_i$ that extends far beyond the written norms themselves. The written code $\{N_i\}_i$ forms only a subset of this expansive interpretative framework: $\{N_i\}_i \subset \{\text{Int } N_i\}_i$. The set of formal norms never exhausts the full range of their possible interpretations. On the one hand, this characteristic can already be observed in Roman law, where jurists distinguished not only the literal wording of legal texts but also their *spirit* and purpose. On the other hand, in the Soviet context, $\{\text{Int } N_i\}_i$ often signified a *politically conditioned interpretation* of $\{N_i\}_i$, which in some cases could even amount to the practical negation of certain norms while still presenting this outcome as their “interpretation”.

Under socialism, law is not defined by its text—the “letter of the law”—but by the socialist ideology and political convictions embedded within the interpretative framework. This unlimited set of interpretations ($\{\text{Int } N_i\}_i$) ensures that the application of the law remains fluid and adaptable to the needs of the ruling class and the political goals of the state:

Socialist law is an expression of the unity of the will of the Soviet people, aimed at strengthening and further developing socialist society, at carrying out the task of transition from socialism to communism and the building of communism (Vyshinsky, 1941, p. 114).

Vyshinsky takes this argument a step further, asserting that norms are not only meaningless without beliefs and interpretations, but that facts themselves do not exist in isolation; they are always imbued with their political interpretation.

In his view, judges in court do not deal directly with objective facts $\{F_j\}_j$, but rather with their interpreted forms $\{\text{Int } F_j\}_j$, according to the fundamentals of the Communist Party. These interpretations are inherently subjective, reflecting either proletarian or bourgeois perspectives. Consequently, the set of raw facts $\{F_j\}_j$ is merely a subset of the broader and ideologically influenced set of interpretations $\{F_j\}_j \subset \{\text{Int } F_j\}_j$:

Naturally, the attitude of both judges—the official judge, on the one hand, and the worker judge, on the other—to the "facts that have passed before them" will be different. Their logic will also be different, and the "logic of the process" will be different in either case. (Vyshinsky, 1941, p. 21)

Judicial conclusions drawn from the interpretations of facts $\{\text{Int } F_j\}_j$ are inherently subjective and cannot be founded on a uniform or singular logic:

> It is wrong to think that the system of proofs, like all evidentiary law (principles of proof, methods of finding evidence, classification of proofs, etc.) as a whole, is to some extent a non-class, apolitical category. All evidentiary law is just as saturated with the class spirit as any other law. Like any law, it is a sharp and subtle tool in the hands of the classes ruling in society; it serves class interests completely and undividedly in any society. (Vyshinsky, 1941, p. 22)

Hence, according to Vyshinsky, the scheme of the logical consequence of judgments proposed by the normativists since Ur III—$\{N_i\}_i$, $\{F_j\}_j \vdash \{D_l\}_l$—is not realizable. First, court decisions are made on the basis of Soviet (Bolshevik) interpretations $\{\text{Int } N_i\}_i$ and $\{\text{Int } F_j\}_j$, understood broadly—sometimes extending so far as to permit the practical negation or reversal of the original norms N_i or facts F_j while still presenting the result as their legitimate interpretation. Second, instead of logic, internal conviction is needed to make judicial decisions:

> Soviet procedural law rejects the evaluation of proofs on any formal grounds.
>
> Soviet procedural laws, both criminal and civil, refer the assessment of proofs exclusively to the competence of the court, establishing the only basis for this is the internal judicial conviction, based on consideration of all the circumstances of the case in their totality. (Vyshinsky, 1941, p. 106)

Effectively, this represents the dissolution of the concept of law, aligning with Pashukanis's perspective, in which logical deductions from legal norms based on established facts are replaced by direct governance through a command-administrative system. Vyshinsky redefines law in terms of this very dissolution, framing it as the direct control of society without objective, interpersonal mechanisms for conflict resolution. To justify the legal practices of the Soviet Union, Vyshinsky, first, dismisses the significance of logic and legal argumentation as an objective, interpersonal mechanism for proof, and second, ideologizes law by tying it to the socialist agenda of constructing a society devoid of private ownership of the means of production.

Nevertheless, in articles on international law, when faced with the need for interpersonality in judicial evidence, Vyshinsky already appeals to logic. For example, in his article 'The Greek question. Speech at the meeting of the First Committee on October 28, 1948', we read:

> … and the logic forged in a long investigative work was replaced by superficial conclusions that were not justified by any actual circumstances (Vyshinsky, 1951, p. 298).

This reveals a certain artificiality in Vyshinsky's legal system: legal argumentation began to diminish in law precisely for one thing—to be able to build an administrative system with vague law.

3. Criticism of legal argumentation by the founders of Nazi law

Carl Schmitt (1888–1985), a prominent German jurist and a key figure in the development of Nazi legal theory, was an outspoken critic of legal positivism and normativism from the early stages of his career. In his work *Gesetz und Urteil* (1912), Schmitt contends that law enforcement takes precedence over any abstract system of legal norms. He argues that the ultimate measure of effective law enforcement lies in consistency: if two judges render the same decisions in similar cases, their rulings are correct, even if they deviate from the literal interpretation of the statute. In this framework, it is not the intent of the legislator or the exact wording of the law that defines law enforcement, but rather the uniformity of judicial practice. For Schmitt, this uniformity is what constitutes law itself.

In his monograph *Über die drei Arten des rechtswissenschaftlichen Denkens* (1934, translated in 2004 as *On the three types of juristic thought*, see Schmitt, 2004), Schmitt contrasts three distinct approaches to legal thought. The first, legal positivism, emphasizes adherence to the legislator's will, relying on abstract norms and rules to regulate society. The second, 'decisionism', prioritizes judicial and legal practice over the rules themselves, placing the authority to decide above the letter of the law. The third approach, which Schmitt terms 'concrete-order thinking', emerged with National Socialism. This new legal paradigm seeks to reconcile the dichotomy between abstract legal norms and the realities of societal life, integrating law with the economic and political interrelations of the social order.

Thus, according to Schmitt, we have only three type of legal thinking:

> … concept of *Recht*, conceives of this *Recht* either as a rule or as a decision, or as a concrete order and formation (*Gestaltung*) (Schmitt, 2004, p. 47).

Normativists maintain that judicial decisions should be understood as logical deductions derived from established norms and factual circumstances. This approach can be formally expressed as $\{N_i\}_i, \{F_j\}_j \vdash \{D_l\}_l$, where judicial decisions ($\{D_l\}_l$) logically follow from the norms ($\{N_i\}_i$) and facts ($\{F_j\}_j$) using well-defined rules of inference. In this framework, the process is objective and relies on the systematic application of legal argumentation, ensuring that decisions are consistent with the codified law and the factual evidence.

Decisionists, by contrast, reject the notion of abstract norms as rigid entities. Instead, they argue that norms ($\{N_i\}_i$) and facts ($\{F_j\}_j$) must be interpreted in the context of legal practice. This interpretation ($\{\text{Int } N_i\}_i$ for norms and $\{\text{Int } F_j\}_j$ for facts) determines the outcome of judicial decisions. However, these decisions may not always conform to the strict rules of logical inference. For decisionists, the interpretative process introduces flexibility, allowing judicial outcomes to adapt to the nuances of specific cases while still adhering to the broader aims of justice.

Concrete-order thinking goes a step further by dispensing with the necessity of logic and legal argumentation altogether. In this perspective, the interpretation of norms and facts becomes so deeply integrated into the fabric of legal practice that the distinction between the abstract rule and its practical application essentially disappears. Here, any norm (N_i) is automatically subsumed within its political interpretation ($\{N_i\}_i \subset \{\text{Int } N_i\}_i$ for any N_i), according to the fundamentals of the Nazi Party. This erasure of boundaries means that legal practice itself defines and validates the norms, rendering formal logical deduction and other argumentative techniques irrelevant. The law becomes a dynamic and organic process, inextricably linked with the social, political and economic order, in which judicial decisions are shaped directly by the context rather than by a detached application of rules.

In essence, whereas legal positivism relies on a rigid structure of logic and objectivity, decisionism introduces a degree of interpretative subjectivity, and concrete-order thinking dissolves the abstract framework of law entirely, replacing it with a practice-oriented, context-dependent approach:

> For concrete-order thinking, "order" is also juristically not primarily "rule" or a summation of rules, but conversely, rule is only a component and a medium of order. Norm or rule thinking is accordingly a more limited and indeed a more derivative part of the whole and complete jurisprudential purpose and application. (Schmitt, 2004, p. 48)

Like Pashukanis, Schmitt (2004, p. 91) envisions a new legal system rooted in a command-administrative structure, which he contrasts with the bourgeois legal framework designed for economically autonomous actors within "the individualistic, bourgeois, commercial society". In place of legal subjects relying on interpersonal mechanisms of normativism to resolve conflicts, Schmitt (2004, p. 95) proposes "a new community and its concrete order and formation of life". This vision assumes a homogenization of people in their interpretation of norms and rules. Schmitt expresses admiration for Nazi law, in which the traditional legal categories of employers and employees are replaced by an assumed unity and commonality of purpose:

> However, the National Socialist lawgiver has expressed most clearly the new order thinking in its "Law for the Organization of National Labor" of January 20, 1934. If one recalls the above-mentioned (p. 81) failed attempt in labor law to overcome the private contractual notion with the help of the concept of agreement, at least for the area of "wage agreements", then this new law for the order of national labor appears as a forceful step. With one stroke it leaves behind an entire world of individualistic thinking of contractual and legal relationships. That law speaks intentionally no longer of employers and employees; in the place of wage agreements steps a wage order. Entrepreneurs, employees, and workers are leaders and followers (*Führer und Gefolgschaft*) of a firm, working together for the advancement of the firm's aims and for the common good of Volk and state; both appear as members of a common order, a community with a public-legal character. (Schmitt, 2004, p. 94)

Thus, legal positivism is, first of all, individualism:

> The liberal individualist thinks in terms of the rule of law, normativism, because he trusts no man, no leader (*Führer*) and no king, but sticks to fixed, inviolable, predetermined, calculable established rules (Schmitt, 1934c, pp. 35–42; 2021, p. 133).

Individualism is opposed by National Socialism, which gives the world a full-fledged constitutional state or state of law (*Rechtsstaat*):

> So we do not determine National Socialism from a concept of the constitutional state that precedes it, but conversely the constitutional state from National Socialism (Schmitt, 1934c, pp. 35–42; 2021, p. 139).

In a bourgeois society, the separation of powers ensures the independence of the judiciary from other state institutions. However, in the envisioned new society, there must be complete unity among National Socialism, the people and the state. This creates a society without distinct legal rights, aligning with Pashukanis's vision of a lawless framework:

> … only on the basis and within the framework of the overall structure of our National Socialist state, only on the basis and within the framework of the tripartite unity of state, movement [of National Socialism] and people (*Volk*). Our state, and therefore also our constitutional state (*Rechtsstaat*), is part of this structure, not of the twofold nature of state and civil society. It is a state supported by the state and popular movement [of National Socialism]. The state is only one of several series of orders; it is not omnipotent, not what the eighteenth-century state was. It is as a whole an organ of the [Nazi] leader of the movement (*ein Organ des Führers der Bewegung*). The state organs in the judiciary and administration, which are set up and organized in such a way according to the rule of law, must not allow themselves to be in any doubt or misunderstanding that they are the organs of a state which in turn is an organ as a whole. Within the framework of this German state are the institutions that we call constitutional institutions. As sure as we are a constitutional state in the sense that the legality of the state judiciary and administration and the independence of the courts are beyond doubt, all these institutions are just as safe and self-evident as parts of the National Socialist state supported by the total movement. Therefore, our concept of law in particular is something essentially different from the liberal concept of law based on the separation of powers between the legislature and the executive mentioned above. (Schmitt, 1934c, pp. 35–42; 2021, p. 141)

Only a system of total unity, where the state, the people and the political ideology are fully integrated, can ensure true justice and legal certainty. In this framework, justice is not dependent on abstract legal norms or legal argumentation, as in normativism, but instead flows directly from the unity of the collective will and the state's authority. Under legal positivism, legal certainty depends on logic and legal argumentation. In contrast, in a system that embraces total unity, legal decisions and justice are aligned with the political and ideological goals of the state, eliminating ambiguity and ensuring that all legal outcomes are in harmony with the collective interest. Thus, according to Schmitt, the system of total unity provides a more cohesive and definitive approach to law, where the law is not something external and abstract, but an expression of the unified will of the people and the state:

> If we substitute a system of abstract norms and concepts for the appreciation of the concrete, real order, we destroy not only justice but also legal certainty (Schmitt, 1934b, pp. 225–229; 2021, p. 161).

In the Nazi system, the *Führer* assumes the role of both protector of the law and the supreme judge (Schmitt, 1934a, pp. 945–950; 2021, p. 201). Theodor Maunz (1901–1993) also discussed the Nazi leader's role in his book, elaborating on the centrality of the *Führer* within the Nazi legal system (Maunz, 1934, p. 63). Ernst Forsthoff (1902–1974), a prominent German constitutional scholar and another key figure in Nazi legal theory, referred to this new form of governance as the 'total state' (*der totale Staat*) in his work *Der totale Staat* (1933). This total state effectively bridged the divide between government and the governed, fostering unity between the *Führer* and the people, and creating a society in which the entire nation was homogenized under a singular political and ideological vision:

> *Volk* is a community based on a homogeneity within life and species [*seins mäßigen, artmäßigen Gleichartigkeit*]. The homogeneity arises from the sameness of race and national destiny [*volkliches Schicksal*]. The political people forms in the final unity of will that grows from the awareness of homogeneity within life. The awareness of homogeneity within species and national identity [*volkliche Zusammengehörigkeit*] becomes actual in the ability to recognize the difference of species and distinguish friend from enemy. The issue is recognizing the difference of species when it is not automatically visible. (Forsthoff, 2001, p. 322)

It is important to recognize that the total state envisioned by the Nazis and the total state outlined by Vyshinsky share striking legal similarities. Both systems fundamentally replace traditional legal rights and laws with an emphasis on the homogeneity of legal decisions, which are derived from shared political beliefs. In these systems, the law no longer operates as a set of formal, logical rules but instead reflects the ideological consensus of the ruling regime.

The key difference between the two models lies in their respective ideological foundations. Vyshinsky's conception of the total state is rooted in the idea of the "dictatorship of the proletariat", which aligns with the goals of Marxism–Leninism and emphasizes the supremacy of the working class and the abolition of capitalist structures. On the other hand, Schmitt's and Forsthoff's vision of the total state is centered around the expression of "the will of the German people", as interpreted by Nazi leadership, emphasizing nationalism and the preservation of ethnic and political unity within the framework of National Socialism.

Despite these ideological differences, both systems share a common approach in their treatment of legal reasoning. In both cases, argumentative and logical methods of legal interpretation—such as formal deductive reasoning—are abandoned in favor of decisions grounded in political conviction. Legal norms are no longer viewed as fixed or absolute; instead, they are subject to the interpretations $\{\text{Int } N_i\}_i$ and $\{\text{Int } F_j\}_j$ of judges, which are influenced by the prevailing political ideology of the time. Decisions in these systems do not stem from objective logical deductions or other argumentative techniques but from a shared ideological stance that aligns with the values of the ruling party. Thus, law becomes a tool for enforcing ideological conformity, and legal decisions are shaped not by impartial legal argumentation but by the beliefs and convictions of those in power.

As is evident, the principal architects of Nazi legal theory were vehement opponents of legal positivism, just as the founders of Soviet legal doctrine were. Both intellectual movements rejected the idea that law should be understood primarily as a system of formally valid norms whose authority derives from their position within a structured hierarchy of rules. Instead, they subordinated legality to ideological and political considerations, treating law as an instrument of collective will rather than as an autonomous normative order governed by internal criteria of validity and consistency.

Nevertheless, Gustav Radbruch (2006 [1964]) placed the primary responsibility for the totalitarian machinery of Nazi pseudo-law not on this rejection of legal positivism but, paradoxically, on legal positivism itself. According to Radbruch's postwar diagnosis, the catastrophe of National Socialism resulted from an excessive commitment to the principle of 'law as law' (*Gesetz als Gesetz*), which allegedly led German jurists to obey and apply statutes regardless of their moral content. In this interpretation, the problem was not the collapse of legality, but rather its rigid preservation: Germany, on this view, maintained the rule of law, yet the law in force was profoundly unjust.

> Positivism, with its principle that 'a law is a law', has in fact rendered the German legal profession defenceless against statutes that are arbitrary and criminal. Positivism is, moreover, in and of itself wholly incapable of establishing the validity of statutes. (Radbruch, 2006, p. 6)

This assessment is theoretically controversial because it overlooks the extent to which National Socialist legal practice systematically undermined the very features typically associated with positivist legality, such as stability, generality, predictability and the logical coherence of norms. Instead of strict adherence to a hierarchical and formally consistent legal order, Nazi jurisprudence frequently replaced legal reasoning with ideological directives, discretionary executive power and retroactive or *ad hoc* measures. From this perspective, the failure was not an overabundance of positivist legality but rather its erosion and substitution by political decisionism. The tension, then, lies in whether the collapse of justice under totalitarian regimes should be attributed to an excess of formal legality or, conversely, to the abandonment of the logical and normative structure of law in favor of ideological imperatives.

In totalitarian states there will always be unjust laws, such as the *Nürnberger Rassengesetze* in Nazi Germany, but what is unjust in such societies is not so much the law as the legal practice, which is subordinated entirely not to law but to the dominant political ideology. For example, in 1934, the *Volksgerichtshof* (People's Court) was established as a new type of judicial body with the specific mandate to handle cases of political significance. Despite its official purpose, in practice it operated as a kangaroo court, merely simulating legal process while consistently imposing severe punishments on individuals deemed political enemies of the state. The court was notorious for its show trials, which were designed to provide a façade of judicial legitimacy while ensuring predetermined outcomes. From its inception in 1934 until the end of World War II in 1945, the *Volksgerichtshof* sentenced 10,980 individuals to imprisonment and condemned 5,179 others to death, primarily on charges of high treason. This court was instrumental in the Nazi regime's repression of dissent and elimination of opposition, highlighting the regime's manipulation of the judicial system to maintain totalitarian control. The court had no legal norms in the narrow sense. Instead of norms there was a practice of law enforcement with a very broad and illogical interpretation of existing laws.

An even more monstrous example of a situation in which legal practice had no need for legal norms at all was the Holocaust, which was organized, above all, as a large-scale legal practice, in the implementation of which many law enforcement agencies were involved such as the Security Service, Security Police, Gestapo (Secret State Police) and Order Police, as well as various government ministries, including those of economy, finance and transport, along with local administrations. Through this framework, the state legally orchestrated the forced relocation of individuals, the confiscation of all their property, including personal items, and mass executions. Hence, the Holocaust was not merely a series of random acts of violence but a coordinated bureaucratically and legally managed genocide. The involvement of a wide range of official bodies and government ministries highlights the extent of state organization and involvement in the atrocity. At the same time, this genocide had no legal norm behind it. Not a single law or governmental regulation was issued that would normatively justify the legal practice of mass murder. From the Nuremberg Laws, which significantly limited the rights of the Jewish population of Germany, the mass extermination of Jews did not logically follow. The Holocaust is thus the most terrible example of the legal system of Nazi Germany, in which legal practice could be carried out without any legal norm in the form of a law or regulation. Nazi ideology was enough. This is precisely what the founders of Nazi law Carl Schmitt and others intended to organize—the total state (*der totale Staat*).

The fact that the Holocaust was carried out without any legal norm (law or governmental decree) has been used as an argument for Holocaust denial. Here, Gustav Radbruch's assertion is invoked that the Nazi legal system was organized solely on the basis of legal norms from which legal practice logically followed:

> *Premise 1*: If the legal system of Nazi Germany was based on legal positivism (Radbruch's thesis), then there was no Holocaust (since there are no corresponding legal documents justifying it).
>
> *Premise 2*: Radbruch's thesis is correct.
>
> *Conclusion*: Therefore, by *modus ponens*, there was no Holocaust.

However, here we know from a huge number of facts that the Holocaust did in fact take place. Then, by *modus tollens*, we must conclude that Radbruch's thesis is not correct. In Nazi Germany, the laws were manifestly unjust, yet describing its legal system as an example of legal positivism is problematic. Legal positivism, as traditionally understood, emphasizes the separation of law and morality, asserting that the validity of a law is determined by its adherence to established rules and procedures rather than its moral content[1]. However, legal positivism also presupposes a functioning system of legal argumentation—a framework where legal reasoning, interpretation and debate operate within the boundaries of codified laws and established principles. In Nazi Germany, this critical element of legal positivism—legal argumentation—was effectively dismantled. The legal system was not a neutral arbiter of disputes or a repository of consistent legal principles. Instead, it became a tool of the regime, shaped and manipulated to serve ideological and political goals. Laws were crafted not through a process of deliberative reasoning or consensus but through authoritarian decree. Legal interpretation was subordinated to the *Führerprinzip*, under which the leader's will superseded all legal norms, rendering legal argumentation irrelevant (Schmitt, 2021, p. 201).

This divergence from legal positivism highlights an essential distinction: while legal positivism separates law from morality, it still relies on a stable and coherent system of legal reasoning. The Nazi legal system, in contrast, rejected not only moral considerations but also the fundamental processes of legal argumentation. This breakdown underscores that legal positivism, as a philosophy, cannot encompass a system in which legal reasoning is entirely absent, and laws are mere instruments of political will. In light of this, the Nazi legal system represents not an extreme form of legal positivism but a distortion of law itself—a totalitarian perversion that stripped away the rule of law, reducing it to an apparatus of state control. It serves as a stark reminder that the absence of legal argumentation erodes not only justice but also the very essence of what makes a legal system function as law.

It is crucial to recognize that authoritarian regimes can operate effectively even within the framework of ostensibly democratic laws. For example, modern Russia demonstrates how such regimes may outwardly preserve the appearance of democratic legality, yet undermine the norms of legal argumentation in practice. This shows that authoritarianism is not solely about the content of the laws themselves but also about the processes through which laws are interpreted, applied and enforced. To deepen our understanding of this dynamic, the

[1] Hans Kelsen (1881–1973) developed legal positivism further with his "pure theory of law". He sought to separate law entirely from other social sciences and morality. According to Kelsen, a legal system derives its validity from a fundamental legal norm, or *Grundnorm*, which serves as the ultimate basis for all legal rules (Kelsen, 1911; 1961; 1966, p. 5; 1979; 1992).

treatment of legal argumentation in the Soviet Union and Nazi Germany, two paradigmatic examples of totalitarian society, was examined. The case studies revealed how the deliberate marginalization of legal reasoning facilitated the subordination of law to political and ideological objectives, ultimately eroding the foundations of justice and accountability. Analyzing these historical examples aimed to shed light on the broader implications of the suppression of legal argumentation in authoritarian regimes.

The danger of the legal ideas of Carl Schmitt for contemporary law was clearly articulated by David Dyzenhaus (2020). In Dyzenhaus's view, Schmitt's jurisprudence operates through a recurring argumentative pattern that presents political decisions in the language of legal necessity. This "Schmittean logic" disguises ideological objectives as doctrinal legal analysis, thereby granting executive actions an appearance of constitutional legitimacy even when they in fact undermine democratic institutions and the rule of law.

Dyzenhaus (2020) identifies several core features of this pattern. First, it involves the juridification of political will, whereby openly partisan or ideological aims are reformulated as neutral legal imperatives. Second, it promotes the expansion of executive prerogative, especially in states of emergency, by asserting that the executive must possess discretionary powers unconstrained by ordinary constitutional limits, including the authority to determine when such an emergency exists. Third, it reinterprets parliamentary democracy and political pluralism as threats to state unity, thereby justifying exceptional measures in the name of political survival. Finally, and most importantly, "Schmittean logic" lacks any principled internal limitation; once accepted, it provides no stable boundary preventing a gradual slide from constitutional democracy toward authoritarian rule.

Dyzenhaus further emphasizes that this mode of reasoning is not confined to Schmitt's own intellectual legacy. He traces its historical continuity to earlier legal justifications of extraordinary powers, such as nineteenth-century colonial defenses of martial law, and argues that similar argumentative structures continue to reappear in contemporary constitutional debates. At the same time, a critical reservation may be raised against Dyzenhaus himself: his acknowledgment that some degree of political intervention by liberal-democratic authorities in judicial reasoning can be legitimate may also carry risks. If not carefully delimited, such intervention could endanger judicial independence and unintentionally facilitate the very authoritarian tendencies that his critique seeks to prevent.

Conclusion

In conclusion, the critique of normativism and legal positivism, presented by thinkers such as Pashukanis, Vyshinsky, Schmitt, Radbruch, Hart and Dysenhaus, reveals a profound shift in the understanding of law and legal practice, with the possibility of political intervention in the legal system. These critiques challenge the notion that law can be grounded in a logical, objective interpretation of norms and facts. Instead, they argue that legal decisions are ultimately shaped by political ideology and the convictions of the ruling class, which replace traditional logical reasoning with an emphasis on ideological homogeneity—whether Bolshevik or Nazi. This rejection of logical and argumentative techniques in favor of politically aligned interpretation leads to a legal system that is less concerned with the universal principles of justice and more with maintaining the power structures of the state. Both the Soviet model under Vyshinsky and the Nazi legal system, as articulated by Schmitt and Forsthoff, exemplify this shift towards a "total state", in which legal decisions are determined not by logic but by the uniformity of beliefs that align with the state's ideology. In these systems, legal conflicts are not resolved through objective reasoning or the application of universal rules, but through the enforcement of the convictions of the judges.

As can be seen, Radbruch's thesis—that Nazi Germany had a normal legal system grounded in legal positivism and containing standard rules of inference such as *modus ponens* and *modus tollens*—is not accurate. The theorists of Nazi law, including Carl Schmitt and others, explicitly denied the role of legal argumentation in their system. Instead, they replaced logical reasoning and the application of legal norms with the primacy of party loyalty and ideological alignment. The notion that legal decisions could be derived from a consistent, logical structure was undermined by the political goals of the regime, which dictated that the law serve the needs of the state and the party, rather than any universal principles of justice or fairness. The same pattern is evident in the Soviet Union, where legal norms were subordinated to the ideological dictates of the Communist Party and legal decisions were determined not by impartial legal reasoning but by political considerations.

In totalitarian regimes, this disregard for the logical consistency of legal argumentation results in laws that are inherently unjust, often failing to follow from a *Grundnorm* as theorized by Hans Kelsen (1961; 1979). A *Grundnorm*, or foundational norm, serves as the ultimate source of legitimacy in a legal system, and it is through logical deduction that laws are made consistent with this norm.

However, in totalitarian regimes like Nazi Germany and the Soviet Union, the law does not function in this manner. Instead, laws are often arbitrary, serving the needs of the ruling party rather than any consistent legal or moral framework. Thus, while these regimes may create laws, those laws are not based on rational, logical argumentation but rather on the whims of the ruling authority, leading to a fundamentally unjust legal system.

In authoritarian societies, the situation is somewhat different. While these regimes may adopt laws that resemble democratic or legal norms, there is often a stark contrast between the laws on paper and the laws in practice. In such systems, laws may be structured in ways that appear fair or just, mimicking democratic frameworks or constitutional protections. However, they often fail in practice due to the breakdown of legal argumentation. In these societies, the appearance of justice is maintained, but legal reasoning, which depends on strict logic, ceases to function effectively. Laws may be enacted, but they are applied selectively, depending on the political climate or the whims of the state, rather than through a consistent and logical application of legal principles.

Thus, the key distinction between totalitarian and authoritarian legal systems is that in the former, legal norms are subordinated entirely to ideology and the very possibility of legal argumentation is eliminated in favor of party loyalty. In the latter, laws may still exist and be enforced, but their effectiveness and fairness are undermined by the erosion of legal reasoning and its replacement with political power. In both cases, the result is a legal system disconnected from justice and rationality, with laws that either serve political ends or remain ineffective due to the breakdown of objective legal reasoning.

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