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From “Bananas” to Radbruch’s Formula

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ABSTRACT:

I shall argue that issue of legal validity or legality (I will use these two terms as synonymous) can be addressed by taking an inferential stand, namely, by considering under what preconditions (antecedents) the legality of a norm can be inferred, and what postconditions (consequences) can be inferred from a norm's legality.

Consequently, I shall consider what form theory of legality can take, where by a theory of legality I mean a set of conditionals (legality policies) which, together with true facts, circumscribes the set of legal norms. In particular, I shall consider to what extent such conditionals need to be positivistic.

KEYWORDS:

law

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Legality Policies and Theories of Legality: From “Bananas” to Radbruch’s formula*

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1 Logical Background: Defeasible Inference

In the following I will assume the defeasible logic of the PRATOR system (see Prakken and Sartor 1997, and for the most recent developments Prakken and Sartor 2007). I cannot provide here an introduction to this logic, but I shall shortly present the main ideas upon which it is based.

The first idea is that there are two kinds of conditionals, indefeasible and defeasible ones. In both cases a conclusion is made dependent upon an antecedent condition, but while the conclusion of a strict conditional (e.g., IF x is bird, THEN x is a vertebrate) can always be derived, once the antecedent condition is satisfied, the conclusion of a defeasible conditional (e.g., IF x is a bird, THEN x flies) may fail to be inferable, even when the conditional’s antecedent is satisfied. This may happen when, on the basis further information, the conditional’s conclusion is denied, or the conditional itself appears to be inapplicable.

The second idea is that conditionals are used in arguments, so that defeasibility can be modelled by considering how arguments are constructed and interact. In particular, the conclusion of a conditional may fail to be inferable when the argument containing the conditional is attacked and indeed defeated by an argument denying the conclusion of the conditional or asserting its inapplicability. In this regard, we distinguish mutual defeat (when the two arguments contradict one another, and none of them can be established to be stronger than the other) and strict defeat (when an argument is contradicted by a stronger one, or is declared inapplicable).

The third idea is that to adjudicate conflicts between arguments, we need to use priority arguments, namely, arguments to the effect that one of the two conditionals leading to conflicting conclusions is preferable to the other, in the given circumstances. Thus, defeasible inference amalgamates reasoning with conditionals and reasoning about conditionals in a unified inferential process.

The fourth idea is that to establish whether a certain conclusion follows from a body of defeasible conditionals (plus related factual information) we need to go beyond the arguments establishing that conclusion: we need to consider whether these arguments have any defeaters and moreover whether these defeaters are defeated by further arguments, and so on. This is because a defeated argument may be reinstated when all of its defeaters are overruled by further arguments.

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The fifth idea is that conditional legal norms are indeed defeasible conditionals (on legal norms as defeasible inference links, see Sartor 2008). They link certain legal conclusions to certain preconditions (operative facts), but this connection only holds under normal circumstances. Thus, a legal norm can be defeated when an exception to it is satisfied, when the norm is inapplicable to the current case, or when it is contradicted by a more important norm.

To clarify these ideas, let me give you an example. Assume that there is legal systems containing the following information on civil liability.¹

- n_{a1} : IF x has intentionally caused damage to another
THEN x is liable
- n_{a2} : IF x has intentionally caused damage to another AND x was
in a condition of incapability THEN x is not liable
- n_{a3} : IF x culpably has put him or herself in a condition of
incapability THEN norm n_{a2} is not applicable to x
- n_{a4} : IF norm x is more specific than norm y THEN x is
preferred to y
- n_{a5} : norm n_{a2} is more specific than norm n_{a1}

Assume also that the following facts are true

- f_{a1} : Tom has intentionally caused damage to another
- f_{a2} : Tom was in a condition of incapability
- f_{a3} : Tom culpably put himself in a condition of incapability

Given this information we can developed Argument A_1 that Tom is liable to compensate the damage' since:

- if a person has intentionally caused damage to another then the person is liable to compensate the damage
- he has intentionally caused damage to another [f_{a1}] [n_{a1}].

However, Argument A_1 is defeated by the argument A_2 that Tom is not liable to compensate the damage since

- if a person causes damages to another while being in a situation of incapacity, then this person is not liable [n_{a2}], and
- he has intentionally caused damage to another [f_{a1}] but he was in condition of incapacity [f_{a2}].

Note that Argument A_2 prevails over Argument A_1 , according to Argument A_3 (a meta-argument), which says that norm n_{a2} (in Argument A_2) is preferred to norm n_{a1} (in Argument A_1), since

- n_{a2} is more specific than n_{a1} [n_{a5}]. and
- more specific norms are preferred to more general ones [n_{a4}].

¹I follow the convention of naming each proposition (conditional or unconditional) with a label. The labels start with n when the proposition is a piece of normative information, and with f when it is a piece of factual information.

Argument A_2 , while prevailing over Argument A_1 , is strictly defeated (overruled) by Argument A_4 that norm n_{a2} is inapplicable since:

- the norm n_{a2} (according to which a person having intentionally caused damage in condition of incapacity is not liable) is inapplicable when the person at issue culpably put him/herself in a condition of incapability [n_{a3}], and
- Tom culpably put himself in a condition of incapability [f_{a3}].

Consequently, Argument A_1 , having been freed from its defeater Argument A_2 (since the latter was overruled by Argument A_4) is reinstated and its conclusion can again be established: on the basis of the above information we can draw the justified conclusion Tom is liable to compensate the damage.

2 Legality Policies

In the present section I shall use the logical model described above to provide a formal analysis a theory of legality (namely, to present what general features all theories of legality should share), where a theory of legality is a set of criteria which should enable one to identify all norms whose legality depends upon one's normative beliefs (in combination with additional true factual information).

First of all, we need to assume that the property of legality, not being directly perceivable, must be inferable on the basis of certain antecedent pieces of information. In general terms, this means that a theory of legality will consist of defeasible conditionals that make the legality of a certain norm dependent upon certain preconditions. I shall call these conditionals *legality policies*. Their preconditions may involve features of, or events concerning, the norm whose legality is being established: the norm must be referred (through the same variable) both in the antecedent of the legality policy and in its conclusion.

Thus, in general, a legality policy, namely a policy for determining the legality of norms (having certain properties or features) will have the form:

lp_s : IF norm n satisfies conditions THEN n is legal

where the locution "norm n satisfies conditions" is a propositional variable standing for any formula indicating possible features or properties a norm may possess, there included events in which it may have been involved. Here is a possible instance of such a conditional:

lp_1 : IF norm n has been enacted by Parliament THEN n is legal

Here is another possible instance of the idea of a legality policy:

lp_2 : IF norm n is required by justice THEN n is legal

As you can see, the idea that a legality theory consists on such policies is purely formal, in the sense that it does not establish any constraints on the content of such conditionals. To illustrate this idea I shall develop an example inspired by the movie *Bananas*, by Woody Allen, Thus I locate my example in San Marcos, the imaginary Central American republic where a revolution takes place, and consider three characters from the movie: Fielding Mellish (Woody Allen), who unexpectedly will take a leading role in the revolution, Nancy, Mellish's activist girlfriend (for whose love Mellish gets involved in the revolution), and Esposito, the head of the revolutionary party. Let us consider the following legality policy, which we may assume to have become generally endorsed after the revolution succeeded to get into power:

n_{b1} : IF x is the head of the revolutionary party AND x has enacted norm n THEN n is legal

Assume that the following is true:

f_{b1} : Esposito is the head of the revolutionary party

f_{b2} : Esposito has enacted the norm `` n_{b2} : all citizens ought to change their underwear every half-hour``

Then the following conclusion can be inferred:

c_{b1} : The norm `` n_{b2} : all citizens ought to change their underwear every half-hour`` is legal

Note that the norm n_{b2} too can be represented as a defeasible conditional in the form, that is as:

n_{b2} : IF x is a citizen THEN x ought to change his/her underwear every half hour

The latter norm, combined with information on citizenship, with enable any citizen of San Marcos to conclude that he or she has the obligation to change his or her underwear as required.

Legality policies themselves can be viewed as norms, if we take a broad enough concept of norm. The concept of a norm, in fact, must not be limited to those propositions expressing obligations (like n_{b2} above), as Hart (1961) observed. It must also include propositions expressing permissions (e.g. “during sleeping time, citizens are permitted to keep their underwear unchanged”) as well as other legal effects (e.g. “if one criticises the revolution, then one ceases to be a citizen of San Marcos”) and in particular, propositions ascribing qualifications (e.g. “socks are pieces of underwear” or “every citizen between 16 and 18 years is a member of the Youth Labor Army”), to which further deontic effects can be linked (such as, in the case of socks, the obligation to wear them outside, namely, over the shoes). Among the qualification norms I would include also legality policies: they establish the qualification of legality, a qualification that, I shall argue, plays a distinctive role in legal reasoning.

Legality policies are “determinative” or “constitutive”, in the sense that they state what feature of a norm are able to produce (justify) its legality. They must be distinguished from those conditional proposition on legality that only have an evidential function. The latter propositions link legality to features that, while being statistically correlated to legality, do not directly determine this qualification. Assume for instance that as soon as Mellish arrives in San Marcos he asks Nancy: “How do I know what are the legal rules in San Marco?” Nancy might reply: “You just have to study the text *Laws of the Revolution*, which forms last chapter Esposito’s fundamental book, entitled *Everything You Always Wanted to Know About Revolution, But Were Afraid to Ask*. Nancy’s statement may be paraphrased in the same conditional form used for legality policies:

IF norm n is contained in Esposito’s book THEN n is legal

This conditional statement, however is not a legality policy, since it links legality to a fact (inclusion in the book) that though correlated with legality (given the way in which the book was produced, it is likely that the norms it contains are indeed legal norms in San Marcos) does not determine it: it is merely descriptive.

3 Internal and External Points of View

The ideas just described enables us to distinguish clearly the external and the internal point of view, following Hart (1994). The internal point of view consists in the functioning of an agent who adopts (accepts or believes in) certain norms and reasons accordingly. Therefore the internal point of view of an agent basically consists of two elements

- a belief set, namely, the set of normative and factual propositions (sentences) accepted by the agent, and
- an inferential mechanism, namely, the inferential procedures (for instance those of the defeasible logic presented above) that enable the agent to derive further propositions from the ones included in his/her belief set, so expanding such belief set.

For instance, assume that the internal point of view of the revolutionary activist Nancy would include propositions n_{b1} and f_{b1} . If Nancy is a logical reasoner (if she accept the logical consequences of what she accepts, or rather, if she is able to form belief in such propositions, when needed), we may assume that Nancy's internal point of view also include the conclusion c_{b1} , which she can derive from n_{b1} , f_{b1} and f_{b2} . In conclusion, a part of the internal point of view of Nancy may be represented by the following set of propositions:

n_{b1} : IF x is the head of the revolutionary party AND x has enacted norm n THEN n is legal
 f_{b1} : Esposito is the head of the revolutionary party
 f_{b2} : Esposito has enacted the norm `` n_{b2} : all citizens ought to change their underwear every half-hour''
 c_{b1} : The norm `` n_{b2} : all citizens ought to change their underwear every half-hour'' is legal

Let us now consider an external (hermeneutical) point of view about Nancy. This will consist, for instance, of the set of propositions that Mellish (while trying to approach Nancy for obtaining her sentimental and sexual favours) could form about her legal/political views, namely, about what she believes or accepts. Mellish perspective on Nancy will consist of propositions like the following:

$B_{Nancy}n_{b1}$: Nancy ACCEPTS that `` n_{b1} : IF Esposito has enacted norm n THEN n is legal''
 $B_{Nancy}f_{b1}$: Nancy ACCEPTS that ``Esposito is the head of the revolutionary party''

If Mellish's external view about Nancy is complete (Mellish is the Hercules of psychologists, the best psychologist that can exist), then his external view on her would include a proposition "Nancy ACCEPTS that P " for each proposition P in Nancy's belief set.

Many finer models could be made of the Nancy's belief or acceptance of such propositions. We may wonder whether acceptance of a proposition requires the current present awareness of that proposition or whether it is sufficient that the proposition is stored in the agent memory, or whether it is sufficient that the proposition is boundedly inferable from the propositions in the memory of an agent (on this see Pollock 1995). Further development of these ideas could be obtained by considering what it means to have a shared or collective belief or commitment, or what it means participate in collective agency (following for instance the views of Tuomela

2000*b* or Pettit 2002). In any case, the logic of the internal point of view of an agent, understood as the rules according to which the agent develops his acceptance set can be mimicked in the logic the external point of view which another agent has over the first one. For instance, if the agent a_1 we are considering is introspective, namely, if the agent functions according to the inference rule of introspection

I_L : from P DERIVE ``I ACCEPT that P''

then the logic of the external point of view can contain the corresponding axiom

IF a_1 ACCEPTS that P THEN a_1 ACCEPTS that ``I, a_1 , ACCEPT that P''

Similarly, if the agent functions according to the inference rule of detachment (modus ponens)

from P and $P \rightarrow Q$ DERIVE Q

then the logic of the external point of view can contain the corresponding axiom

IF a_1 ACCEPTS that P AND a_1 ACCEPTS that `` $P \rightarrow Q$ '' THEN a_1 ACCEPTS that Q

Moreover, from the external point of view we can make considerations about an agent that go beyond what the agent is able to infer from his or her beliefs alone. For instance we may want to assess what propositions one would plausibly obtain by combining one's mental resources with the external information accessible to oneself, in particular by using information technology, together with other more traditional "prosthetic extensions" of our brains (like books and libraries) we find in our social environment.² This would be the kind of exercise we may want to do when we try to anticipate the views of a judge about a new problem he or she is going to address: we are not interested in what the judge would be able to extract from his or her mind if he or she were imprisoned in an isolation cell, but rather what he or she would establish having normal resources at his or her disposal (like a law library, internet access, and clerks who can look for materials).

4 The Kelsenian Heritage: The Inheritability of Legality

The characterisation of legality-policies I gave above does not tell us which ones, among the legality policies we can think about, really hold in the legal domain. In other words, it does not tell us which ones among such policies describe a connections that really obtains, namely, one connecting the legality of a norm to a precondition which really determines the norm's legality (which regard to the legal system of a certain community). Consider the following legality policies:

lp_1 : IF norm n has been enacted by Parliament THEN n is legal

n_{b1} : IF x is the head of the revolutionary party AND x has enacted norm n THEN n is legal

²And which we use for "extruding our own minds [...] into the surrounding world" and "offloading [...] our cognitive tasks into the environment itself" (Dennett 1997, p. 77).

While does the first one (lp_1) hold with regard to the Italian legal system, while the second (n_{b1}) fails to hold? Can a legal reasoner freely endorse whatever legality policies he/she likes most, are there constraints limiting the range of adoptable policies, or is there just one possible correct choice?

Before directly addressing this problem, we need to address a preliminary issue: the connection between a legal legality policy and the legality of the norms it qualifies as being legal. It seems to me that every theory of legality should satisfy the following constraint: if we can derive the conclusion that a norm is legal by applying a legal legality-policy, then that norm is really a legal one. Let us go back to Bananas. Assume all of the following: (a) the legality policy n_{b1} , giving legal effect to Esposito's orders holds in San Marcos; (b) Esposito has enacted norm n_{b2} , requiring that underwear is changed every half an hour; (c) Esposito has also enacted a legality policy giving legal effect to Mellish enactments, (d) Mellish has then enacted a norm requiring that underwear is worn on the outside (in order to facilitate the enforcement of Esposito's command to change the underwear, by facilitating the detection of any violation to that command).³ By combining elements from (a) to (d) we obtain the following set of premises, which we may assume are shared among the people of San Marcos:

- n_{b1} : IF x is the head of the revolutionary party AND x has enacted norm n THEN n is legal
- f_{b2} : Esposito has enacted the norm `` n_{b2} : all citizens ought to change their underwear every half-hour''
- f_{b3} : Esposito has enacted the norm ``IF Mellish had enacted norm n THEN n is legal''
- f_{b4} : Mellish has enacted the norm `` n_{b4} : underwear ought to be worn on the outside''

Given the above information (n_{b1} , f_{b2} , f_{b3} , and f_{b4}) the loyal and law-abiding people of San Marco should be able to conclude that

- c_{b3} : The norm `` n_{b4} : underwear ought to be worn on the outside'' is legal

Unfortunately this conclusion does not follow from the premises we have so far listed. There is a reasoning step that is indeed missing. From the combination of n_{b1} and f_{b3} we can only infer conclusion:

- c_{b2} : The norm `` n_{b3} : IF Mellish had enacted norm n THEN n is legal'' is legal

But this conclusion, in combination with the fact of Mellish enacted n_{b4} (fact f_{b4} above) does not suffice for inferring the conclusion that n_{b4} is legal.

For this purpose we need a further inference step. We need to move from conclusion c_{b2} to a further conclusion, namely, we need to infer from the assertion of n_{b3} 's legality (as expressed by c_{b2}) n_{b3} itself:

- n_{b3} : IF Mellish enacts norm n THEN n is legal

³I take the liberty of departing here from the original Bananas script, where all norms are directly issued by Esposito, whose full statement is: "All citizen will be required to change their underwear every half hour. Underwear will be worn on the outside, so we can check. Furthermore, all children under sixteen years old are now sixteen years old".

This allows us to construct all the following inference chain:

1. n_{b1} : IF x is the head of the revolutionary party AND x has enacted norm n THEN n is legal (premise)
2. f_{b1} : Esposito is the head of the revolutionary party (premise)
3. f_{b2} : Esposito has enacted norm `` n_{b3} : IF Mellish enacts norm n THEN norm n is legal'' (premise)
4. c_{b2} : The norm `` n_{b3} : IF Mellish had enacted norm n THEN n is legal'' is legal (conclusion from from 1, 2 and 3)
5. n_{b3} : IF Mellish has enacted norm n THEN norm n is legal (conclusion from 4)
6. f_{b4} : Mellish has enacted norm `` n_{b4} : underwear ought to be worn on the outside'' (premise)
7. c_{b3} : norm `` n_{b4} : underwear ought to be worn on the outside'' is legal (conclusion from 5 and 6))
8. n_{b4} : underwear ought to be worn on the outside (conclusion from 7)

Note that this inference chain is base upon two inferences which are not included in the usual logical systems (not even in the PRATOR system) , namely the derivation of norm n_{b3} in step 5 and the derivation of norm n_{b4} in step 8. In both cases the inference pattern is the same: from the legality of a norm, the norm itself is inferred. Thus, the inference at issue seems to be the following:

I_L : FROM norm n is legal DERIVE n

I shall argue in the following that it is exactly this inference step, which while required for explaining the inheritance of legality, is also required for understanding the working of legality more generally.

5 Ultimate Legality Policies

We have seen above that that, given a legality-policy and further facts, a reasoner is able to attribute legality to certain norms. Legality policies may enable the concerned reasoner not only to establish the legality of norms conferring obligations or permissions, but also to establish the legality of norms expressing further legality-policies (such as the legality policy n_{b3} , according to which the norms issued by Mellish are legal).

I have also argued that legality must be inheritable, in the sense that if a legality policy is legal, then the norms matching such legality policy will be legal as well. However, to avoid a vicious regress, a reasoner needs to find a set of ultimate⁴ legality-policies, namely, legality policies whose legality does not depend on the fact that they are qualified as legal by further legal legality policies.⁵

Following this idea, to identify a legal system means to identify a set of ultimate legality policies, which enable us to circumscribe (together with true facts) all the norms in the legal

⁴Supreme (uppermost) or fundamental (bottommost) depending on one's preferred spacial metaphor of legal systems.

⁵I do not exclude that one would assume ultimate legality policies that qualify one-another as legal. This does not provide an inadmissible circularity, as long as the reasoner has other grounds for viewing such policies as legal.

system at issue. More precisely, let us say that the *legal closure* of a set of (ultimate) legality policies LP , denoted as $LCl(LP)$, is a minimal set for which both of the following conditions hold:

1. LP is included in $LCl(LP)$. In formula, $LP \subseteq LCl(LP)$.
2. If $LCl(LP)$, together with true factual information F , entails that a norm n is legal, then also n belongs to $LCl(LP)$. In formula, if $(LCl(LP) \cup F) \vdash legal(n)$, then $n \in LCl(LP)$.

The first condition says that the legal system identified by ultimate legality policies LP contains such policies. The second says that such systems contains all norms which are qualified as legal by the (ultimate or not-ultimate) legality policies it contains. The minimality requirement means that it contains no other norm. I will speak of the legal closure of a single legality policy lp to mean the legal closure of the set $\{pl\}$.

Let us consider, for example $LCl(\{n_{b1}\})$, the legal closure of the legality policy n_{b1} (conferring legality to the enactments of the head of the revolutionary party). According to item 1, n_{b1} belongs to $LC(\{n_{b1}\})$. Norm n_{b1} , together with the true facts that Esposito is the head of the revolutionary party and that he has enacted norms n_{b2} and n_{b3} , entails that also the latter norms are legal. Thus, according to item 2, these norms too belong to $LC(\{n_{b1}\})$. Norm n_{b3} , conferring legality to Mellish's enactments, together with the fact Mellish has enacted norm n_{b4} , entails that the latter norm is legal and thus is in $LC(\{n_{b1}\})$. In conclusion, $LC(\{n_{b1}\}) = \{n_{b1}, n_{b2}, n_{b3}, n_{b4}\}$.

We can distinguish different approaches to legality which, while sharing that idea that a legal system is the legal closure of a set of ultimate legality policies, differ in the ultimate legality-policies they identify.

Let us start with Hans Kelsen's approach. As it is well known, Kelsen assumes that at the top of each legal system there is an ultimate norm, the *Grundnorm*, which is an unconditional legality policy ascribing legality to a Constitution, where by a constitution (in a substantive sense) Kelsen means the highest positive legality-policies of a legal system, namely, the legality policies (enacted by a legislator or customarily accepted) that directly (on indirectly, namely, by legalising further legality policies) confer legality to all other norms of the system. For instance a Kelsenian *Grundnorm* for San Marcos could have a form like:

n_b The following norm is legal: `` n_{b1} : IF x is the head of the revolutionary party AND x has enacted norm n THEN n is legal''

Kelsen also provides a general criterion for identifying fundamental norms, namely, the criterion of effectiveness (see Kelsen 1967, Par. 34 (g)). For Kelsen the *Grundnorm* of a legal system must satisfy the condition making effectiveness legal, in the sense that it must enable us to ascribe legality to a set of norms which are by and large effective.⁶

⁶Kelsen is not very clear on the role of effectiveness (*Wirksamkeit*). In Kelsen 1967, par. 34 (g) he affirms that: "The norms of a positive legal order (legal system) are valid *because* the fundamental rule regulating their creation, that is, the basic norm, is presupposed to be valid, not because they are effective; but they are valid only *as long as*, this legal order is effective". One way of understanding the connection between these two conditions is that they jointly sufficient, and separately necessary: thus a set of norm may fail to be valid when satisfying just one of these conditions: either being effective (for the most part) but lacking the presupposition of a Grundnorm, or being supported by a Grundnorm, but failing to be effective. We would be led to such a position if we would view the Grundnorm validating certain effective norms (possibly under certain conditions, such as a minimal respect of human rights and democracy) as expressing a moral (political-ideological) choice, according to standards that are

To make this idea more precise, and transform it into a criterion that uniquely identifies a particular Grundnorm for any given context, we may say that the Grundnorm is to be selected which best provides for the legality of the effectively practiced coercive norms. By “best provides” I mean the outcome of an assessment based on the combination of various (non-moral and non-ideological) criteria: providing a larger set of effective norms with legality, providing a smaller set of non-effective norms with legality, leaving less unresolved conflicts among the legalised norms, using a smaller number of legality policies, etc. Then we, we can express the supreme Kelsenian legality policy (the policy for presupposing Grundnorms) as follows:

lp_K : IF the fundamental norm lp best provides for the legality of the norms effective in community c , THEN lp is legal in c

Thus for instance, consider the following candidate *Grundnorm* for Britain:

n_{Br} : The following ‘‘constitutional’’ norms are legal:
 ‘‘ lp_1 : IF norm n has been enacted by Parliament THEN n is legal’’ AND ‘‘ lp_5 : IF norm n is a *ratio decidendi* of an appellate court THEN n is legal

Now, assume that it is true that n_{Br} best provides for the legality of the norms in coercively practised in Britain (this is a very simplistic assumption, but let us make it for the sake of the argument). Then we can conclude, given the Kelsenian legality-policy lp_K , that n_{Br} is legal in Britain.

Let us now consider the different (but not so much) perspective developed by Hart (1961), which puts at the top of each legal system a rule of recognition practised as a social rule. Thus we can assume that for Hart the ultimate legality policy (the rule for identifying recognition rules) is given by:

lp_H : IF ultimate legality-policy n is practised as a social rule in c THEN n is legal in c

and assume that that the legality policies whose legality is affirmed in n_{Br} above (i.e. are in fact practised in Britain. Then according to lp_H all such policies (all such rules of recognition) would be legal.⁷

Observe that these two ultimate legality policies (the Kelsenian lp_K and the Hartian lp_H) can be taken in various ways:

not necessarily satisfied by all effective sets of coercive norms. However, Kelsen 1967, par. 34 (i), footnote 82 argues that the assumption of a Grundnorm validating the effective set of coercive norms is a necessity for any jurist (even an anarchist, who rejects the legitimacy of any kind of political power) and that such assumption does not entail any ideological commitment. Here I shall make an assumption which seems to me coherent at least with one strand in Kelsen’s thought: the fact that a Grundnorm best provides for the legality of the effectively practiced coercive norms may be viewed (from a Kelsenian perspective) as a sufficient condition for the adoption (in legal thinking) of the Grundnorm validating such norm-set, and thus becomes (though indirectly, namely, by entailing the adoption of the Grundnorm validating it), a sufficient condition for the validity that norm-set.

⁷If you prefer to have just one rule of recognition you just have to restate such rules as a single rule with a disjunctive antecedent (lp_6 : IF norm n has been enacted by Parliament OR norm n is a *ratio decidendi* of an appellate court THEN n is legal). I shall not consider here on what it means for a legality-policy to be practised in a community. In this regard it may be interesting to recall some ideas advanced by Prof. Coleman, from the idea that there needs to be convergence in a coordination game, to the idea that there is a shared cooperative activity (see Coleman 2001).

- as a “normative” claims, namely, as claims that a legality policy having certain properties (maximising the effectiveness function, identifying practised legality-policies) justifies its endorsement in legal reasoning
- as empirical claims, namely, as claims that people in the concerned communities consider as legal the legality-policies which satisfy the indicated criteria

Note, however, that if we take supreme legality policies as empirical claims, we should rephrase them differently, namely as claims about people’s beliefs and attitudes. For instance an empirical interpretation of the Kelsenian legality policy could be expressed as follows.

lp_{K1} : IF legality-policy lp maximises the effectiveness function in community c THEN lp is (usually) taken to be legal in c

Thus Kelsen’s supreme principle would become the empirical statements that people tend to assume the legality of systems of norms that are effective.

6 Inclusive and Exclusive Legality

I think that we need primarily to ascribe positivism or non-positivism to single legality policies rather than to a legal system as a whole (or even to a legal theory). The (degree of) positivism of a legal system is indeed dependant upon the positivism of the legality policies it includes.

Following this idea, we can say that a legality policy is *fully positivistic* if it connects legality to social facts. For instance this is seems to be the case for the legality policy:

n_{b1} : IF x is the head of the revolutionary party AND x has enacted norm n THEN n is legal

A legality policy is *fully non-positivistic* is its antecedent condition contains no reference to social facts:

lp_2 : IF norm n is required by justice THEN n is legal

A legality policy is *partially positivistic* if its antecedent joins social facts and other kinds of preconditions, as in the following examples:

lp_3 : IF x is the head of the revolutionary party AND x has enacted norm n AND n is not absurd THEN n is legal

lp_4 : IF norm n is shared principle of legal culture AND n ’s general adoption contributes to improve legal decision-making THEN n is legal

We can distinguish affirmative and negative legality policies, the first concluding for the legality of the norms matching their antecedent, the latter concluding for the negation of the legality of those norms (or for the inapplicability to them of an affirmative legality policy). As possible negative legality-policies for San Marcos consider norm n_{b5} , denying the legality of norms against the revolutionary values, and norm n_{b6} , excluding the application of policy n_{b1} (attributing validity to the norms enacted by the head of the revolutionary party) to the norms enacted in a state of madness:

n_{b5} : IF norm n is against the revolutionary values THEN n is NOT legal

*n*_{b6}: IF *x* is the head of the revolutionary party AND *x* has enacted norm *n* in a state of madness THEN *n*_{b1} is inapplicable to *n*

It seems to me that the examples of different possible legality policies I have presented should make it clear that we cannot exclude, on purely logical or conceptual grounds, the existence of legality policy of the mixed or non-positivistic kind. In particular, from the external point of view, it should be an empirical issue to determine what kinds of policies people (and in particular legal decision-makers) are accepting.

Thus, an *inclusive* approach to legality, in the sense of an approach which does not *a priori* exclude non-positivistic or partially positivistic legality policies (and therefore does not exclude the possibility of non-positivistic or partially positivistic legal systems) seems preferable to the opposite, *exclusive*, view. We need to distinguish this distinction between these opposite philosophical presupposition with regard to legality, from the empirical issue of whether and to what extent a particular legal system includes non-positivistic or partially positivistic legality policies, and to what extent a legal system is likely to include such policies under certain social, ideological, or cultural conditions. We need to distinguish it also from the evaluative issue whether it would a good thing to have non-positivistic or partially positivistic legality policies in a particular legal system, and from the legal issue of whether a particular non-positivistic or partially positivistic legality policy holds within a particular legal system.

7 Moving at the Top

The view we have been developing in the previous section seems incompatible with the so-called exclusive positivism (see Marmor 2002), understood as the view that all legality policies of any possible legal system must necessarily be fully positivistic.⁸ We need now to consider whether this view is consistent with inclusive legal positivism (see Coleman 2001 and Himma 2002), to be understood as the claim that “whether or not morality is a condition of legality in a particular legal system depends on a social or conventional rule, namely, the rule of recognition” (Coleman 2001, p. 108). We must move now to the ultimate legality policies, and ask ourselves whether all the ultimate determinants of legality (which can validate further legality-policies, acting as “determinants of the determinants” of legal contents, to use an expression recently used by Prof. Coleman in Brian Leiter’s blog) need necessarily be social facts.

Let us first take the internal perspective, namely, let us inspect the acceptance set of a social agent, and consider whether the ultimate legality policies adopted by the agent needs to be of the positivistic kind, or whether they can also be non-positivistic or mixed.

For answering this question, we need to consider what it means for a subject to accept that a norm is legal. So far we have been considering the antecedential side of the concept of legality, namely the conditions and the inferences that enable an agent to conclude that a norm is legal. However, for obtaining a complete picture we also need to address the consequential side of the concepts of legality. We need to ask ourselves what can an agent infer from the fact that a norm is legal, and whether there is any implication we may view as necessary, pertaining to the conceptual role of “legality” (for a discussion of this issue, see Sartor 2008).

⁸Possibly, one might accept such policies even from an exclusive-positivism perspective, by viewing them not as legality policies, but as references to binding non-legal sources, so that the norms validated by non-positivistic policies would be binding upon judges without being legal (see Raz 2004), but this idea does not seem to provide the best account of this phenomenon. For some considerations, Coleman 2001, 110ff, for an attempt to distinguish legal norms and other norms which may be binding upon legal decision makers, see Sartor 2008.

I think that an important clue can come from our above considerations about the inheritance of legality. For having such an inheritance we had to assume that from the proposition that a legality policy is legal:

P_{LP} : norm lp_s : IF norm n satisfies conditions THEN n is legal" is legal

we could infer that very legality policy:

lp_s IF norm n satisfies conditions THEN n is legal

And I have argued that this is an instance of a more general inference we make with legality:

I_L : FROM norm n is legal DERIVE n

This means that within legal reasoning (which I would argue is the kind of reasoning we adopt when we aim at establishing coercible normative conclusions) the conclusion that a norm is legal leads to the acceptance of that very norm for the purpose of legal reasoning: a legal norm is legally binding. We can put this in doxastic-deontic terms, saying that the legality of a norm conceptually entails (as an entailment pertaining to the conceptual role of the very concept of legality) the obligation to use it in legal reasoning (when relevant). This is a doxastic obligation from which the concerned agent should infer the acceptance of the content of that obligation (the content being the norm that one should accept), and thus that very content. Consider for instance this example.

1. IF norm n is legal THEN NECESSARILY n should be accepted in legal reasoning (it is legally binding) (premise, from the conceptual role of legality)
2. norm n_{b4} : underwear ought to be worn on the outside'' is legal (premise)
3. norm n_{b4} should be accepted in legal reasoning (conclusion from 1 and 2), which we could rephrase as follows: IF x is performing legal reasoning THEN NECESSARILY x should accept n
4. I am performing legal reasoning (premise)
5. I should accept norm n_{b4} (conclusion from 3 and 4)
6. I accept norm n_{b4} (conclusion from 5)⁹
7. n_{b4} : underwear ought to be worn on the outside (conclusion from 6)

In the example the "doxastic duty" following from legality concerns the acceptance of a norm expressing an obligation (n_{b4}), but such a doxastic duty can concern all kinds of norms, such those expressing permission or ascribing various qualifications (such as, in particular, legality policies, like n_{b3}). The idea that legality has the implication just described corresponds to the idea of legality which was advanced by Hayek (1976, p. 58), according to whom "the difference between

⁹On the basis of the idea that a reasoner's acceptance of the duty to accept a certain content should lead that reasoner to accept the content, namely, to use it as premise on his/her reasoning. On the concept of acceptance, see, among others, Tuomela (2000a).

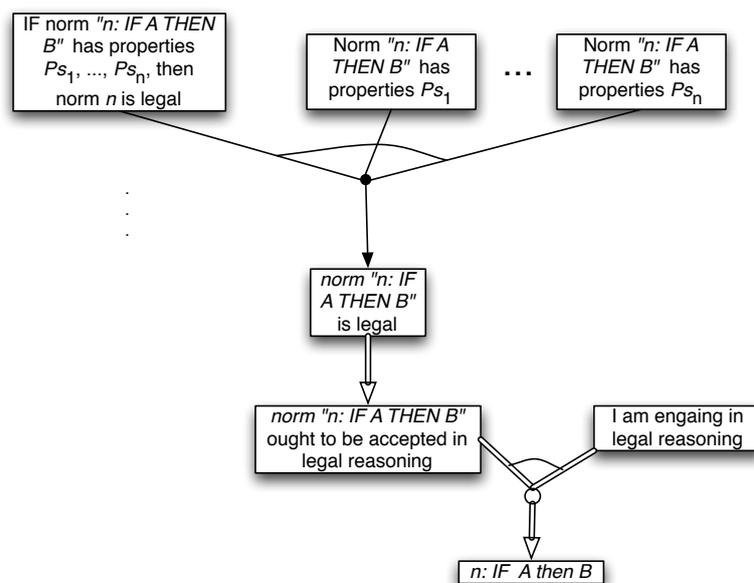


Figure 1: *The view (here adopted) that legality strictly entails acceptance*

moral and legal rules [...] is a distinction between rules to which the recognized procedure of enforcement by appointed authority ought to apply and those to which it should not.”¹⁰

So, it seems to me that legality (or legal validity) exercises the function of a bridge between certain conditions a norm may satisfy and the acceptance of these norm in legal reasoning. It seems also to me that while legality policies are defeasible (and thus they can be trumped by prevailing reasons to the contrary), the connection between legality is a strict or indefeasible one (Sartor 2008). This is represented in Figure 1, where double arrows denote strict implications.

8 Are All Determinants of the Determinants of Legality Positivistic? Radbruch's formula

The account developed in the previous sections shows that legality is an evaluative property, and in particular a deontic one¹¹ since to say that a norm is legally binding means that we have the duty to take this norm into account in legal reasoning, and that consequently we accept it and of reason accordingly.

To illustrate the kind of reasoning which may concern legality, we shall try to model (in a very simplified, but formal way) the reflections of Gustav Radbruch, a famous German jurist who also was a social-democrat politician and opponent of Nazism. As is well known, Radbruch

¹⁰Here I am just considering legality (legal validity). However, it seems to me that this approach to normativity can be taken with regard to the set of norms governing any kind of practices, such as games (tennis, chess, etc.), or the internal activity of associations and institutions (the Word Association of Legal Philosophy, the Internet Society, etc.). In all such cases a reasoner who aims to establish the normative implication of certain events with regard to the norms governing a practice, will have to determine what norms are valid in that practice (what norms the reasoner should accept for the purpose of that practice), and consequently accept and apply the rules resulting from such a determination.

¹¹I use the term *evaluative* in the broad sense, to cover both the deontic qualification of something as obligatory, forbidden or permitted, and the qualification of something as good or bad.

started as a positivist, in the sense, that he believed that the statements of the legislator should be accepted as law (as a legally binding, in the sense above specified), since the values of legal certainty should prevail over that of justice (given the indeterminacy of the latter). He abandoned this kind of undefeasible normative positivism after experiencing the horrors of Nazism, and of Nazi legislation, when he stated his famous formula:

The positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as 'flawed law', must yield to justice (Radbruch 2006, p. 7)

I cannot here consider the huge debate on Radbruch's formula (see for instance Alexy 2003). I shall rather try to model what we can imagine was the reasoning of Radbruch, when facing Hitler's legislation. First, assume that he considered the legal implications he could derive from his premises in case concerning a girl, let us call her Hannah, who happened to be Jewish.

1. n_{c1} : IF x holds political power AND x has enacted norm n THEN n is legal (premise)
2. Hitler holds political power (fact)
3. Hitler issued the norm ' n_{c2} : IF x is Jewish, THEN x ought to be eliminated'' (fact)
4. norm ' n_{c2} : IF x is Jewish, THEN x ought to be eliminated'' is legal (from 1, 2, and 3)
5. IF norm n is legal THEN NECESSARILY n should be accepted in legal reasoning (conceptual premise)
6. norm ' n_{c2} : IF x is Jewish, THEN x ought to be eliminated'' ought to be accepted in legal reasoning (from 2 and 5)
7. I am performing legal reasoning (premise)
8. n_{c2} : IF x is Jewish, THEN x ought to be eliminated (from 6 and 7)
9. Hannah is Jewish (fact)
10. Hannah ought to be exterminated (from 8 and 9)

Assume that Radbruch's belief set also contained certain normative convictions that clashed against this inference. Such convictions pertained to his view of the "morality for the law"—understood in a broad sense, namely, as including what values the practice of publicly coercible norms should serve, under what conditions and with what constraints—a view that was connected with his humanistic values.¹² His view of this "morality for the law" (and in particular his ideas on the link between the practice of the law and values such as human dignity, right to life, and equality) lead him to reject the conclusion that norm n_{c2} ought be used in legal reasoning, namely for establishing publicly enforceable determinations.

¹²I use the expression "morality for the law" (rather than "morality of the law", or "legal morality") to indicate that I am here referring the moral requirement we should correctly address toward a coercive normative system: I do not assume that the contents of such morality are necessarily included in the beliefs that, as a matter of fact, are generally shared in a particular community where coercive norms are enforced or in the institutional setting of that community. Such an assumption would be true in many cases, but false in other cases (as in Radbruch's context, most of us would argue).

11. IT IS NOT THE CASE THAT norm n_{c2} : IF x is Jewish, THEN x ought to be eliminated'' ought to be accepted in legal reasoning (from n_{c1})

Thus he gets a contradiction between propositions 5 and 11. Note also that by contraposition (which I assume to be applicable to strict conditionals) Radbruch can conclude, from 5 and 11, that:

12. norm n_{c2} : IF x is Jewish, THEN x ought to be eliminated'' is NOT legal.

which contradicts conclusion 4. Then we can imagine that Radbruch to restore consistency introduced in his acceptance set the exception to n_{c1} that constitutes his famous formula, namely the claim that n_{c1} (the policy that any norm issued by the political power is legal, i.e., IF x holds political power AND x has enacted norm n THEN n is legal) is inapplicable to unbearably unjust norm.

- 13 n_{c3} : IF a norm n is unbearably unjust THEN legality policy n_{c1} is inapplicable to n ¹³

In fact n_{c3} together with fact 14

14. norm n_{c2} is unbearably unjust

forms an argument which concludes for

15. legality policy n_{c1} is inapplicable to n_{c2}

This argument undercuts (strictly defeats) the argument for the legality of n_{c2} based on items 1, 2, 3 above, so that Radbruch's belief set no longer entails the legality of that norm. In this way Radbruch could succeed in preventing legality conclusions that unbearably violate his humanistic convictions, even under the Nazi regime. However, to achieve this purpose he had to adopt a negative legality policy which was not conventional, not being shared in his legal community (where the *Führersprinzip*, requiring total and blind acceptance of Hitler's commands, was indeed the practised rule). Note that this prevention only took place within Radbruch's own legal reasoning (it did not stop Nazi officers from continuing their horrible business), but he did that from what he viewed as the "common point of view", namely from the perspective he assumed his fellows should as well take (even though many of them were currently thinking and acting in a different way).

9 Conclusion

My starting idea (on which the rest of the arguments here developed depend) is that legality plays a distinctive conceptual role in legal reasoning, acting as a bridge between the assessment of certain features of a norm and the acceptance (and consequent application) of that norm in legal

¹³We could represent Radbruch's change of mind also by embedding the exception within rule n_{c1} , namely by substituting n_{c1} and n_{c3} with the following policy: IF x holds political power AND x has enacted norm n THEN n is legal, UNLESS norm n unbearably unjust. This would be equivalent to the combination of n_{c1} and n_{c3} , since the unless clause is just another way to specify the condition under which the rule containing that clause is inapplicable. I prefer to represent separately the exception to indicate more clearly its negative function (and also because this is the syntax used in the above mentioned PRATOR system).

reasoning, understood as the kind of reasoning which aims at establishing publicly coercible normative conclusions.

Consequently, I have analysed the logic of legality policies, namely, those conditionals meant to guide legality judgements, by linking the a norm's legality to its having particular features.

I have argued that legality policies can be positivistic, but also non-positivist, in the sense that they may make legality dependent upon preconditions that do not consist only of social facts. This kind of non-positivism may also concern legality policies that are positive, in the sense that they are accepted by officers and by people. Moreover, I have argued that the ultimate legality policies one endorses may also be non-positivistic. As an illustrious example of how this can happen I have discussed Radbruch example, whose famous formula consists of the combination of two legality policies, a shared positivistic legality policy (linking legality a norm's legality to the fact that the norm enactor possesses political power) and a non-shared (non-conventional) non-positivistic legality policy, providing for an exception to the positivistic policy (linking the inapplicability of the positive policy to the unbearable injustice of the enacted norm).

From my analysis it emerges that a legality judgement entails practical conclusions (namely the duty to accept and the consequent acceptance of the norm qualified as legal within one's legal reasoning). Thus, I would argue, the decision to endorse certain ultimate legality policies is to be considered as a practical determination. I cannot here provide an analysis on how I think that such a practical determination should be performed¹⁴. I will just list some considerations that appear to be relevant for this purpose.

First of all we must consider that whatever valuable outcomes (values) we believe that the law (the practice of publicly coercible norms) should achieve within a political community, this outcomes are going to be achieved only if there is a significant convergence in adoption of the same norms in legal reasoning, especially by the officials charged with application and enforcement of the law. Since convergence depends on the adoption of the appropriate legality policies, we should give a very high importance to the requirement that ultimate legality policies provide such convergence (that they provide legality to effectiveness, following Kelsen's idea that effectiveness is connected legality), which requires that they are effectively shared (following Hart's idea that norms of recognition must be shared). Moreover the need for convergence requires that different reasoners applying the same legality policy tend to achieve the same legality conclusions (to qualify as valid the same norm). But this presupposes that different reasoners converge in the judgement on whether the preconditions of the policy are satisfied, a convergence which is much more likely when the policy is a positivistic one, since usually it is much easier to agree on the assessment of social facts than on evaluations.¹⁵ Effective convergence in the practice of certain legality policies is both the outcome of the shared endorsement of such policies and a component of the motivation for such an endorsement (an aspect stressed in).

Secondly, we must consider that whatever reasons one may advance for supporting certain ultimate legality policies, one should assume that these reasons apply to every member of the community (not just to oneself), since general adoption of these policies is what one should have in mind. Thus the grounds one advances for the adoption of certain ultimate legality policies must be grounds that one believes might (or should) appeal also to one's fellows, expressing what Hume called "some common point of view, from which they might survey their object, and which might cause it to appear the same to all of them" (Hume 1978 3.3.1.30). Within such grounds the shared need for convergence is likely to be an overriding concern.

¹⁴I have been considering this issue to some extent in Sartor 2008

¹⁵My perspective falls within the so-called normative positivism or ethical positivism, broadly understood. For this idea, see, among the others, Postema 1986 and Waldron 2001. A developed account of positivism as a morally founded limited commitment to positive law, can be found in Scarpelli 1965.

However, this is not the end of the story. There may be exceptional circumstances where the adoption of shared legality policy may cause harms that are so high as to override the values that are provided by convergence. Thus, one may indeed be justified in endorsing a legality policy like the negative component of the Radbruch's formula (lp_R), in order to avoid the commitment to adopt unbearably unjust norms in legal reasoning. To achieve its purpose, such a non-positivistic policy also needs to be non-conventional, in the sense that its adoption should not depend on the fact that it is a social convention (the risk that such unbearably unjust policies are enacted is stronger under conditions where no dissent is allowed, so that a convention like the one considered could not emerge). It seems to me that one's endorsement of non-shared legality policies is much more plausible for negative legality policies, and in particular with regard to those providing exceptions to affirmative legality policies. The application of such a non-shared negative legality policy would in fact usually result only in one's failure to recognise the legality of certain norms (which others believe to be legal), rather than in the adoption of norms incompatible with those adopted by others.

Finally, there may also be some situations where, by the very act of adopting a certain ultimate legality policy that is not currently shared, one may contribute to make it generally shared. Consequently one may base one's determination to endorse the legality policy now on this future prospect. Let us assume that all of the following conditions are satisfied: (a) it is likely that legality policy lp will become shared in the near future (b) one's present adoption of lp would contribute to this outcome (c) this outcome will likely happen in a non-traumatic way, coherently with the rest of the legal system, and (d) the shared adoption of lp would be beneficial to legal practice. Under these circumstances one may arguably be justified in adopting the lp in one's legal reasoning, even though lp is not yet conventional. As an example, consider the recent Italian debate on whether Italian lawyers should assume the legal bindingness (the legality) of the *rationes decidendi* of the Italian Court of Cassation. A judge's choice to adopt this ultimate legality policy may indeed be founded on the kinds of grounds I have above indicated (assume, for instance, that the judge believes that shared adoption of this policy would be beneficial since it would contribute to legal certainty).¹⁶ Thus, under appropriate circumstances, also the adoption of an affirmative not-yet-fully-conventional ultimate legality policy may be justified.

In conclusion, it seems to me that a normative account of legality (like the one I have presented) may provide a satisfactory framework where positivistic and non-positivistic reasons can be satisfactorily accommodated, in a reasonable way. This account only aims at modelling how legality appears to those who take the internal point of view, adopting and implementing legality-policies appropriate to practising the law in a particular legal systems. For different purposes, like for the purpose of sociological investigations, or for inquiries into comparative law, a different notion of legality, deprived of this normative aspect, would be more appropriate.

¹⁶On the contrary the rejection of this policy could be argued on the basis of the idea that its shared practice would have a negative impact on the practice of the law (for instance, by unduly constraining judicial advances).

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