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Legal Reasoning when the Supreme Court is Corrupt

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ABSTRACT: This paper suggests a way of thinking about the legal reasoning done by conscientious judges working in a legal system during periods when those judges believed that their Supreme Court was malfunctioning. Seeing a legal system as a shared cooperative activity allows us to best understand how legal decision-making can remain consistent when it contains elements at the highest level which are believed not to be functioning properly.

KEYWORDS: Argentina, corruption, legal reasoning, shared cooperative activities, Supreme Court

1. INTRODUCTION

How should non-corrupt judges alter their legal reasoning when the legal system they operate within is generally acceptable but has a Supreme Court that they believe to be not following proper standards in making its decisions? I argue that if we view judges seeking to maintain the rule of law as engaged in a shared cooperative activity, this illuminates the options available to decent judges in difficult circumstances. The experience of Argentina helps to illustrate these features.

Since my claims here are primarily designed to illustrate the advantages of thinking of legal cultures in certain ways and of the implications of so characterizing them for issues concerning the nature of legal reasoning in difficult circumstances, those who doubt my empirical claims can simply move to the closest possible world where they are roughly true.

2. THE NATURE OF A LEGAL SYSTEM

I take a legal system to be a system of norms (rules and principles) having authority over a group of spatio-temporally identifiable individuals. The norms consist of both primary rules (which state duties and obligations), secondary rules (which grant powers and state how to create, change, and abolish primary rules, and state what procedures are to be used in interpreting the norms within the system), and a rule of recognition (which is adopted by those who operate the system of norms) and where it is not obviously morally inappropriate to have a system of punitive enforcement of such norms.

Anything that claims to be a legal system claims authority over people and anything that actually is a legal system actually has such authority. One of the most

puzzling problems in the philosophy of law is how to explain the source of legal authority. Claiming authority over people is not unique to legal systems; moralities, religions, and superstitions also make such claims. However, legal systems get their authority in a somewhat complex way.

Ordinary laws imposing duties on citizens are usually (following H.L.A. Hart) called primary rules. Then there are secondary rules that grant powers to change our duties and those which establish procedures and persons authorized to make authoritative determinations about legal disputes. (Hart calls these rules of change and rules of adjudication.) There is a further secondary rule known as the rule of recognition. This rule states how potential laws become actual laws in a given legal system. Accordingly, primary rules get their authority by having been made in the way the rule of recognition states is the authoritative way to become a legal rule. (A similar and slightly more complex story can be told regarding rules of change and adjudication.)

Of course, this raises the question of how the rule of recognition gets *its* authority. Hart's response—the most important insight in the entire history of the philosophy of law—is that the rule of recognition gets its authority by being *recognized* by those who operate the legal system as the authoritative way to make, change, and adjudicate laws. While the issue of what it is for legal officials to recognize the rule of recognition remains an uncompleted philosophic project, Hart said that when we look at officials from the *internal* point of view (from the perspective of someone working within the legal system) we see that they must have a “critical reflective attitude” toward the legal system. He offered some insightful observations about just what is required to have a group of people have the sort of critical reflective attitude toward the operation of a set of rules and principles to make it into a legal system, but his remarks fall far short of a systematic account of this essential feature. Since it is only when a sufficient number of people coordinate on the *same* rule of recognition that a legal system comes into existence, we need to understand what are the necessary conditions for *creating* a legal system or for having one *come into existence*.

The most promising approach to developing Hart's insight into a rigorous account is that taken by a group of philosophers—Scott Shapiro and Jules Coleman being the most prominent—who have been working to provide a more rigorous and systematic account of what it is for a group of officials to have the critical reflective attitude toward the actions of each other necessary for the formation and maintenance of a legal system. They have argued that legal officials must be engaged in (what Michael Bratman called) a shared cooperative activity (SCA) that gives rise to the accepted rule of recognition. On this view the critical reflective attitude Hart claims legal official must have to create and sustain a legal system arises (or consists in) a group of people engaging in a SCA, the success of which makes them into legal officials.

It might be objected that the rule of recognition cannot be a SCA, since it, like all rules, is an abstract object and social practices are not abstract objects. While it is true that the rule of recognition comes into existence only if it is practiced, this does not mean that it is *merely* a cooperative social phenomenon, such as deciding to go for a walk with a partner, or playing a duet. If the rule of recognition just consisted in the behaviour of the officials whose acting in such a way brings a practice into existence, then it could not serve as a standard by which their actions (attributing legal authority to, or changing, or removing a law) are criticisable. If the behaviour of officials is the only content of the

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rule, then no behaviour could possibly deviate from the rule. If the rule is nothing more than the practice, then going against common practice could not be criticisable. The rule of recognition *guides* the behaviour of officials and serves as a *standard* by which they *evaluate* their own actions. It is logically impossible for there to be the entire content of the rule of recognition—the rule that sets standard for valid criticisms of the actions themselves. (Since Wittgenstein and his commentators have spilled a lot of ink on this matter and since I have nothing to add to the issues involved here, I will only note that it does not really matter what one's favourite interpretation of rules is, since all plausible accounts allow that rules can and typically do have a range which exceeds that of the behaviour which they govern.)

There are two aspects to the normativity of the rule of recognition: its being a reason for action *and* its being the case that the way others operate within the rule gives one a reason for modifying the way one understands and follows the rule oneself. The normativity of the rule of recognition is revealed both by its capacity to coordinate behaviour and, through general acceptance of the rule, its promotion of the belief that officials do and must take the appropriate critical reflective attitude (the internal point of view) toward the rule. The internal point of view leads to the convergence of behaviour between officials and allows for the authority that makes legal systems possible. This is usually referred to as the conventionality thesis. Convergence of behaviour can be seen if we recall Margaret Gilbert's helpful example of the case of two people going for a walk together, as opposed to two people who just happen to be walking beside each other to the same destination. In the former case, but not the latter, the behaviour of each person provides the other with reasons to alter her own behaviour. (One person turning left is a reason in itself for her partner to turn left, provided they are taking a walk together. If two people are just each out walking, one person turning gives the other no reason to alter her course.) Similarly, if you and I are both judges and you decide a case in a certain way—say by ruling that once there has been relevant legislation, custom is less important than it is in cases where there is no relevant legislation—that gives me a reason for doing the same thing when a similar case comes to my court.

It has long been understood (thanks mainly to Hobbes) that without a legal system we all find ourselves in a prisoner's dilemma, and that having a legal system (a kinder solution than Hobbes's authoritarian Leviathan) solves the prisoner's dilemma for us. This seems like an easy fix, but law can solve the prisoner's dilemma if, and only if, law is possible. Law is possible on this view only if some people come to a consensus on the proper rule of recognition. The problem is that (would-be) legal officials find themselves in a game known as the battle of the sexes. Each (would-be) official has her favoured way of running the legal system (her favourite rule of recognition), but she prefers having some rule or recognition to no rule at all and hence no legal system (which will result if no consensus can be reached). Without coordination on a particular rule of recognition, there is no legal system and, hence, society is in a state of anarchy. Since the typical way to solve the battle of the sexes games is to have a coordinating convention, we can think of a legal system as a solution to a game of partial conflict. Current thinking is that if we see legal officials as engaged in an SCA, we will have a clearer and more rigorous account of Hart's insights.

The three characteristics of shared cooperative activities are those that, if a SCA is successfully entered into, result in creating and maintaining consensus:

- (i) *Mutual responsiveness*: Each participating agent attempts to be responsive to the intentions and actions of the other [...] Each seeks to guide her behaviour with an eye to the behaviour of the other, knowing that the other seeks to do likewise.
- (ii) *Commitment to the joint activity*: The participants each have an appropriate commitment (though perhaps for different reasons) to the joint activity, and their mutual responsiveness is in pursuit of this commitment.
- (iii) *Commitment to mutual support*: Each agent is committed to supporting the efforts of the other to play her role in the joint activity [...] These commitments to support each other put us in a position to perform the joint activity successfully even if we each need help in certain ways. (Bratman, p. 328; Coleman, p. 96)

The work remaining is to see to just what extent Bratman's ideas about SCA's need to be tweaked to make them fit legal systems. (For instance, I have argued in "From MADness to SANity" that all solutions to prisoner's dilemmas must solve assurance games also and, while SCAs obviously do this, the proper characterization of this accomplishment awaits completion.)

Characterizing judges and other legal officials as engaged in a SCA such that if and when, but only if and when, they succeed in their SCA is there actually a functioning legal system makes it much easier to see how the legal positivist view of law captures two leading features of law which natural law theorists have long pointed to as underappreciated by legal positivists. Since SCAs must, by their very nature, meet certain formal conditions, this type of positivist account can easily accommodate the insightful observations made by Lon Fuller in *The Morality of Law*. First, we can see both that Fuller is correct in thinking that anything which is a legal system must meet certain formal conditions (and that those conditions by their very nature rule out certain forms of immorality) and how this is perfectly compatible with the positivist view that law and morality are conceptually distinct. Second, the idea (which is at least as old as Aquinas) that law necessarily serves to promote and protect the common good, while ultimately untenable, is shown to have the plausibility that it obviously has and the appearance of being such a deep insight about the nature of law. If only by engaging in a certain kind of SCA do those who engage in that activity both allow for the existence of law and the value of the rule of law, then it is going to look to observers as though law necessarily serves the common good. Positivists now have a way of showing why this mistake is so prevalent. (An alternative understanding would be that the concept of the rule of law exhausts the idea of the common good. This would go a long way toward collapsing the distinction between legal positivism and natural law theory.)

Finally, it is important to note that all legal systems we know of include coercive enforcement. Though this is not a *necessary* condition for something being a legal system, it *is* the case that anything that is a legal system must at least make the *idea* of coercive enforcement of its rules open as a legitimate moral possibility.

3. TWO DIFFICULT PERIODS IN ARGENTINA

Argentina has been an independent nation with a more or less fully functioning legal system since the 1850s. The constitution adopted in 1912 models the Argentine government on a combination of American and German/French ideas. From the American model is taken the idea of three distinct branches, a congress providing the

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legislative function, a president and vice-president heading the executive branch, and a judicial system concerned with protecting constitutional rights, interpreting legislation, and coordinating legal decisions.

Though the Argentine judiciary has frequently been maligned and has often been characterized by observers as thoroughly corrupt, this, I believe, is inaccurate. There are, and always have been, many fine judges working in Argentina, people who (sometimes at considerable personal cost and risk) have worked hard to help establish and maintain the ideals of the rule of law. It is this group that I wish to focus on. How can we understand the behaviour of a good judge in circumstances where many other judges are corrupt, or at least are *believed* to be so? I will look at two periods in Argentina's history where most judges *believed* (correctly, in my view, but the truth of the belief is not essential here) that members of the Supreme Court were corrupt. I want to show that seeing the non-corrupt judges as engaged in the SCA of preserving the legal system and the rule of law in the face of what they take to be a very serious threat is an illuminating way to understand their behaviour.

What follows is a very truncated account of two periods when the Argentine Supreme Court was believed to be seriously corrupt. It is fortunate that the accuracy of these descriptions does not matter a great deal to the conceptual points I wish to make. Those readers who have radically different views about the history of Argentina should simply substitute their own views for the account below; all that matters is that most decent judges believed that the Supreme Court was operating inappropriately during these periods:

Period I: In 1976, after a period of economic hardship, political instability, and widespread violence by non-government agencies on both the left and the right directed toward the government, businesses, trade unions, and individuals, the Argentine military took power in a coup. This led to a *guerra sucia* (or dirty war), during which there were about 30,000 *desaparecidos*, people who simply “disappeared.” Following an Argentine invasion in 1982 to recapture Las Islas Malvinas from the British, the United Kingdom attacked Argentina and the Argentine military suffered a humiliating defeat. Shortly thereafter, in 1983, democracy was restored with the surprise election of Raúl Alfonsín to the Presidency.

During the military dictatorship, from 1976 to 1983, it was widely believed by those operating the Argentine legal system that the country's Supreme Court was not performing its legal duties in a manner compatible with its legal responsibilities. (Again, though there is compelling evidence that this was the case, the relevant point here is that other legal officials, particularly honest judges working at other levels, *believed* it to be the case.) It was not long after the return to democracy that legal officials throughout Argentina came to have a somewhat higher opinion of the work of the Supreme Court.

Period II: In 1989, after a period of economic hardship, civil unrest, and hyperinflation, Carlos Menem was elected President of Argentina. In a stealthy and dramatic move whose legality was highly questionable, President Menem (and his Congressional supporters) increased the size of the Supreme Court and appointed new justices who regularly and almost automatically sided with the president on all issues. (They became known as the “automatic majority” because they always decided—usually without giving reasons—that whatever President Menem had done was constitutionally legitimate.) Other legal officials came to *believe* that the Supreme Court was not performing its role

in the proper manner. (This belief lingered long after Menem left office in 1999. Indeed, proceedings were still underway years later to remove the last of the Menem appointees.)

3. COOPERATION WITHOUT COOPERATORS

The question before us, then, is how does the neo-Hartian characterization of a legal system sketched above allow us to understand the behaviour of those legal officials during the two periods just described. In what follows I will concentrate on judges, but I believe that everything I say applies to other legal officials (jailors, police, patent officials, and so forth).

How can a legal system be a SCA that one can properly, in good conscience, support when a leading component of the SCA is (at least as one sees it) undermining the SCA itself? This might seem like an impossible account of what judges could do, but a moment's reflection reveals this is not so. Consider other examples of SCAs, such as performing a symphony. If the conductor goes wildly off tempo, the musicians are faced with a problem: should they follow the conductor? Stick to a strict interpretation of the score? Do something in between? As a matter of fact, I understand that when this happens the musicians usually try to pay lip-service to the actions of the conductor but collectively try to produce the best performance they can without obviously defying the conductor's instructions. Indeed, after a little hesitation, orchestral players usually revert to the default interpretation of the work in question and simply try to perform as well as possible in the circumstances. If, say, the conductor shows up drunk, then as soon as the performers realize this they try to work as much as they can independently of "the directions" they are receiving from the conductor.

Of course, there is the following complication: part of what makes a orchestral performance a good one is that the orchestra at least appears to follow the directions of the conductor. So a problem for the musicians is how to simultaneously play the music as well as possible while not appearing to be completely disregarding what the conductor is doing. And the same is true in a legal system. Judges who have decided that the decisions of their Supreme Court are not compatible with the ideal of the rule of law have, like our imagined musicians, both to perform the tasks of standard legal and legislative interpretation as well as possible and to still appear not to be completely ignoring the pronouncements of the Supreme Court since part of their job—part of the SCA they are engaged in—is preserving the rule of law which requires lower court judges to pay some attention to the decisions of higher courts and, in particular, the Supreme Court.

This is just what happened in the case of the Argentine legal system. A good judge is one who both follows the standards of legislative interpretation and who takes guidance in so-called "hard cases" from the interpretive decisions of higher courts. In the Anglo-American system the doctrine of *stare decisis* requires judges to adhere to the principles used by higher courts in all their subsequent decisions to which those principles apply. In systems like Argentina's, where the doctrine does not apply, there is still the pressure of expected compliance that being engaged in a SCA exerts on a judge who is committed to maintaining the rule of law. She wants both to be faithful to the way other courts are deciding cases and to be maintaining the traditional standards of statutory interpretation. Some circumstances require weighing one value more heavily than another. In those circumstances where there is a widespread belief that the Supreme

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Court is corrupt, the good judge—the judge who wishes to contribute as much as she can to the shared cooperative activity that is the legal system within which she operates—will devote less (or no) attention to the Supreme Court’s decisions and more to those of her fellow judges who she believes share her dedication. (Just how far she can go in deviating from what the Supreme Court has decided without doing more damage than good to the SCA of maintaining the legal system that she and other conscientious judges are engaged in is, of course, a very difficult issue.)

During the military dictatorship and during (and right after) President Menem was in power, many judges found themselves in this predicament. The majority treated their Supreme Court in much the same way that professional musicians do when they think that the conductor is taking gross musical liberties—they sought the best way to carry on in difficult circumstances, looking more to each other for guidance and less to the source they normally would. It is fortunate that Argentina’s legal system survived both these challenging periods and, despite the strains imposed upon it, provided the people of Argentina with something that properly deserves to be called a legal system.

4. AN ADVANTAGE OF SCA UNDERSTANDING OF POSITIVISM

A major philosophic advantage of this way of looking at the law is that it shows why the standard alternative to legal positivism—the various versions of natural law theory—have such a strong hold on so many legal theorists’ imagination. If the role of the judge is seen as a SCA and that SCA constitutes the existence conditions for the rule of law, then the idea, so dear to natural law theorists, that there is a conceptual connection between law and morality (and that the nature of that conception is that law serves to further the so-called “common good” of the community) becomes much more plausible. The common good, at least if understood as being the preservation of the rule of law, is something that is part of what it is to create and maintain a legal system. Of course, the positivist idea, that law and morality are conceptually distinct is also preserved on this view. A nation might well have judges (and others) engaged in the SCA needed to preserve a legal system—that needed to create and maintain the rule of law—and nonetheless be oppressing large parts of the population in grossly immoral ways. (Not all SCAs are good things. Criminal gangs are SCAs.)

5. CONCLUSION

Working within a legal system when the executive branch of government has corrupted the highest court within that system poses great difficulties for those faithful to the values of the rule of law. This is especially so when police forces have been corrupted and the military is usurping powers for evil ends. Such circumstances require honest faithful judges to find creative means to keep the rule of law intact. Seeing a legal system as a SCA helps illuminate both the difficulties faced by such people when former cooperators defect. It also serves to illuminate how, despite the obstacles they face, they are able to achieve their goal. That this way of looking at legal reasoning must be (at least close to) correct is shown by the fact that those sceptics who hold that the rule of law broke down during either or both of the aforementioned periods in Argentine history are claiming that, because the executive branch was so corrupt and so successful at interfering with the

normal workings of the legal system, the rule of law broke down. But that is just to claim that the military dictatorship and/or President Menem succeeded in making it the case that those operating the legal system were, despite many brave and valiant efforts, unable to find a way to maintain a SCA in such difficult circumstances. Perhaps that is so. But that too serves to confirm my main contention: that we should look at the operation of a legal system as the successful functioning of a SCA. The sort of practices that it takes to construct and sustain a legal system are ones that require the judges and other officials who operate the system see themselves as engaged in a project which we who analyse those systems will see as shared cooperative activities.

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[Link to commentary](#)

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