

Is Determinism with regard to the Spheres of Law or Nature Consistent?*

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Probably the most important problem for lawyers is the relationship between cases that confront them and the rules of the legal order that they have to apply. Lawyers want to know whether a certain case falls under a certain rule or, more generally, to which set of cases a certain rule has to be applied. If they are able to answer this question, then those lawyers can tell you fairly precisely what the content of a certain rule is.

If the Criminal Code provides that armed robbery should be punished by a prison sentence of 15 years whereas plain robbery only demands a prison sentence of 10 years, then by way of interpretation the lawyers have to give an answer as to the difference between armed and plain robbery.

At this point, the philosophy of law poses a crucial question: suppose a judge applies these rules in a certain case; is his ruling determined by these rules or do the rules leave him a certain freedom; is he strictly bound by the content of these rules or does he have discretion? If he is strictly bound, then there is one and only one correct ruling. If he has a certain discretion, he is free to choose among several equally correct solutions within the scope of his discretion.

Philosophy of law offers a plethora of answers to the problem at issue¹. The present essay shall be concerned with mainly one set of answers, which this author will call "legal determinism". The main contention of legal determinism is that the legal order properly interpreted offers in each and every case one and only one correct answer. The legal order thus strictly determines its own application and leaves the judges no freedom of decision.

This may seem to you a rather peripheral problem, restricted to a sphere of law that might as well be left to philosophers of law to worry about. The contention of this essay is that this is not the case and that there are structural parallels between the problem expounded here and the question of determinism with regard to human action within the sphere of nature. To prove the point, I shall start with a thought experiment designed to test the assumption of determinism within the sphere of law. In a second step, which I have to reserve for my talk at the symposium, a thought experiment is introduced with parallel structures with a view to testing determinism within the sphere of nature. If this argument proves to be successful, it should show that there are certain parallels between the fundamental problems within the different branches of philosophy.

Consider a legal realm consisting of a lawmaker enacting legal rules, judges and authorities applying these rules to specific cases and persons with legal personality whose behavior is regulated by the rules of the legal order of this realm.

The rules are usually structured in such a way that a legally relevant behavior pattern is connected with a

legal consequence. For instance, armed robbery is linked with a prison sentence of 15 years whereas plain robbery only demands a prison sentence of 10 years.

The judges and officials as well as a certain number of persons belonging to the legal realm are to be considered as lawyers. Lawyers have the ability to envisage behavior patterns of persons belonging to the legal realm. Owing to this ability, they can rehearse possible cases in their minds. In turn, this enables them to give you a certain indication as to what has to be considered as the content of a certain rule. For instance, when asked "What is armed robbery?", they can offer you a few examples which according to them have to be considered as cases of armed robbery and also a few cases which in their opinion are lying outside the scope of this legally relevant behavior pattern. Their list of cases is highly selective and consequently the lawyers are far from certain where the exact boundaries of this legally relevant behavior pattern are situated.

Suppose also that there is a super-lawyer who has a better understanding of the legal order than the other lawyers do. Let us call this super lawyer "Hercules"².

In a gigantic effort, Hercules constructs a theory on the legal order by reconstructing the principles underlying the rules pertaining to that order. By means of this theory, he is able to find for every possible case the right answer or the correct legal consequence. He can only do that by making the rules of the legal order explicit.

Hercules' way to make these rules explicit is to distinguish for instance the legal behavior patterns "armed robbery" and "plain robbery" with the help of some underlying principles of the legal order.

How can Hercules make these rules explicit? Or in other words, how is he going to distinguish between the legal behavior patterns "armed robbery" and "plain robbery"? His way to do this is to find so called hard cases³ that seem to defy the boundaries of the legal behavior patterns. He makes the boundaries tight also with respect to hard cases by resorting to the underlying principles of the legal order. According to his theory, if you interpret the rules in the light of their underlying principles, they become explicit even with regard to hard cases. The added principles make the boundaries of the legal behavior patterns tight, which could for instance enable you to define the term "plain robbery" as "unarmed robbery".

But how do you know that you really succeeded in making the rules of the legal order explicit? In order to test your result, you would have to envisage all possible cases and to put them into distinct sets namely those cases that fall under a certain legal behavior pattern and those that do not.

¹ See for instance *Cohen* (Ed.), *Ronald Dworkin and Contemporary Jurisprudence*, Totowa (1984)

² Compare *Dworkin*, *Hard Cases*, in: *Taking Rights Seriously*, Cambridge Mass. (1977), 105 et seq.

³ See again *Dworkin*, *Hard Cases*, 105 et seq.

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Suppose that Hercules by means of his superior gifts is able to predict how persons belonging to the legal realm may act under every conceivable circumstance. This allows him to rehearse in his theory all possible cases in relation to the rules of the legal order.

He achieves this by constructing a list of all possible behavior patterns that might serve as elements of a possible case. In addition, he puts these behavior patterns into different classes, namely those that have to be subsumed under a legal behavior pattern and those that do not. With the help of this manual, he can always tell whether a given case may be subsumed under a certain rule. Consequently, he is always in a position to give the right answer in a legal case, i.e., point out the correct ruling of the judge.

The superior knowledge of Hercules is founded on his theory regarding the underlying principles⁴ of the legal order and on his manual of possible behavior patterns as elements of possible cases. The theory is reliant on the manual. Without the manual, you cannot be certain whether you have envisaged all hard cases and thus made all rules of the legal order explicit.

This knowledge is in fact what every lawyer is striving for. Therefore, Hercules serves as an ideal that every lawyer strives to achieve. Every lawyer wants to be Hercules, that is to say, to reconstruct his theory together with his manual.

There is, however, a cut⁵ between Hercules and his knowledge on the one hand and the persons and lawyers within the legal realm on the other hand. They lack his knowledge concerning their possible behavior. Because of this, lawyers are unable to envisage all possible behavior patterns. This prevents them from envisaging all hard cases, which in turn makes it impossible for them to make the rules of the legal order explicit. However, they are fellow lawyers with the capacity to reconstruct the superior knowledge of Hercules.

If they are successful and thereby eliminate the cut, both theory and manual are not complete any longer. They now form part of the knowledge of lawyers and certain laymen within the legal realm, which leads to these persons no longer being the same. Their previous behavior patterns were linked to their imperfect knowledge of themselves. Now, in adapting themselves to their enhanced knowledge, they will develop new behavior patterns not foreseen by the manual. The new behavior patterns will lead to new hard cases, which the theory will be unable to deal with.

To put it in a paradoxical way, by acquiring the knowledge on how to make the rules of the legal order explicit, the persons within the legal realm lose the capacity to do so. How is this possible? The knowledge of Hercules only applies to the behavior patterns of persons within the legal realm. It does not involve his own behavior patterns or behavior patterns of persons who share his knowledge. It is true that Hercules can solve all hard

cases, but these are hard cases based on the behavior patterns of persons within the legal realm. It does not include the ability to solve hard cases based on a more extended and refined list of behavior patterns shared by Hercules and persons with the same knowledge.

Let me give you an example:

The original legal realm, i.e., the legal realm beyond the cut contained the two rules that armed robbery is to be punished by a prison sentence of 15 years whereas plain robbery only demands a prison sentence of 10 years. With the help of his theory, Hercules was able to define "plain robbery" as "unarmed robbery". The manual furthermore enabled him to solve any hard case at hand, which made it possible to put any case of robbery in the classes of either armed or unarmed robbery. This result was, however, based on the list of possible behavior patterns of persons within the legal realm.

Now that the theory and manual of Hercules have become common knowledge amongst lawyers and interested laymen, any lawyer can look up the list of behavior patterns with the intention of finding one of his own (newly acquired) behavior patterns or inventing a behavior pattern not contained in this list that defies the boundaries of the legal behavior patterns. For instance, he could ask himself "How could I rob a bank neither unarmed nor armed?" According to the list of behavior patterns pertaining to the original legal realm, this was not possible. You had to be either armed or unarmed. Since the list was complete, it excluded the behavior pattern the lawyer is looking for. The lawyer is interested in this behavior pattern because if found it would be an element of a hard case that could not be solved by Hercules. He could prove both Hercules' theory and manual to be incomplete.

The lawyer finally comes up with the solution that one has to rob the bank with an unloaded gun⁶. An unloaded gun may be considered as a weapon because it is a gun. It may however also be argued that in the present case the gun cannot serve as a weapon because it has not been loaded. This is a hard case because it defies the boundaries of the two legal behavior patterns at hand and more importantly, it is a hard case not foreseen by Hercules, which proves his theory and manual incomplete.

One may argue that this does not prove legal determinism wrong. The lawyer in question may be considered as a sort of Super-Hercules trying to come up with an enhanced and refined theory and manual for the new and more complex legal realm. However, this does not evade the problem because now the cut reemerges between Super-Hercules and his knowledge on the one hand and the persons of the more complex legal realm on the other hand. They do not share the knowledge of Super-Hercules. Only because of that is the enhanced and refined knowledge of Super-Hercules able to determine the right answer or the correct ruling of a judge in a given case. Once this cut is eliminated again, the knowledge of Super-Hercules becomes incomplete.

The problem is caused by the cut or rather by the fact that the cut is dynamic. If the cut is overcome, it is not overcome for good but appears at another point again. Given that, no theory or manual is truly comprehensive. One could counter this tendency either by eliminating the cut or by freezing it in a certain position.

⁴ See *Dworkin*, The Model of Rules I and II, in: *Taking Rights Seriously*, 14 et seq.

⁵ The idea derived from an essay of Putnam, the theory of non-trivial systems as well as Gödel's Incompleteness Theorem. Cp. *Putnam*, Realism with a Human Face, in: *Realism with a Human Face*, Cambridge Mass. (1990), 3; *Foerster*, Prinzipien der Selbstorganisation im sozialen und betriebswirtschaftlichen Bereich, in: *Schmidt* (Ed.), *Heinz von Foerster, Wissen und Gewissen. Versuch einer Brücke* (1993), 252 et seq.; *Foerster*, Lethologie, in: *Kybernetik* (1993), 126; *Gill*, Introduction to the Theory of Finite State Machines (1992); *Gödel*, Über formal unentscheidbare Sätze der Principia Mathematica und verwandter Systeme, I, *Monatshefte für Mathematik und Physik*, 38 (1931), 173. With regard to Gödel's Incompleteness Theorem see also *Nagel-Newman*, Gödel's Proof (1958) and *Hofstadter*, Gödel, Escher, Bach: an Eternal Golden Braid (1979).

⁶ For a different example in a different context see *Putnam's* case of a king ordering his mistress to come to the ball neither naked nor dressed. Her solution is to appear wrapped in a fishnet. Cp. *Putnam*, Rethinking Mathematical Necessity, in: *Words and Life*, Cambridge Mass. (1994), 254.

The elimination of the cut would create a complete and comprehensive legal realm. Assuming the cut between Hercules and his knowledge, on the one hand, and the persons within the legal realm, on the other hand, is to be eliminated then this creates another legal realm, which should be complete and comprehensive by prerequisite. This is only possible, however, if the regress to the enhanced and refined theory and manual of Super-Hercules is disconnected. The knowledge of Hercules needs to be represented as complete, that is to say also covering its own application, i.e., the behavior patterns based on its superior knowledge. This, however, is the enhanced and refined knowledge of Super-Hercules, which does not cover its own application. The application of this knowledge is only covered by the knowledge of a Super-Super-Hercules. The assumption, therefore, leads to a contradiction: The legal realm presupposed to be comprehensive turns out not to be comprehensive after all.

Another possibility would be to freeze the cut in a certain position. Suppose Hercules is to be considered as an ideal that lawyers should seek to achieve, however, without the hope of ever reaching this goal. This would mean that only Hercules could make the rules of the legal order explicit because only Hercules is able to envisage all behavior patterns of persons belonging to the legal realm. Therefore, only Hercules would be in a position to solve all hard cases in order to make the boundaries of the legally relevant behavior patterns seamless. Lawyers could never dream of achieving this simply because they cannot foresee all possible behavior patterns of persons within the legal realm.

This argument does not save legal determinism either. It is not necessary to foresee all possible behavior patterns. Suppose a lawyer reconstructs only part of the manual. Imagine, for instance, that it is the established behavior pattern to rob a bank either armed or unarmed. All he has to do is to invent a behavior pattern that would fall under the category of a bank robbery that is neither an armed nor unarmed bank robbery. If he can come up with such a behavior pattern, he has found the element of a hard case. With respect to this case, the rules of the legal order are not explicit, i.e., do not determine the right answer or the correct ruling of the judge.

If you accept the assumption of the thought experiment that the rules of the legal realm are explicit, i.e., determining the right answer or the correct ruling of a judge in every conceivable case, you have acknowledged the fact that there are lawyers in such a realm. However, if there are lawyers in such a realm it is not possible that all the rules of the legal order are explicit. Your assumption leads to a contradiction.