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Two limits of creative application of laws

A defence of radical rule scepticism

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The objective of my talk is to explain the distinction between creation and application of laws in a way that is compatible even with the radical rule-scepticism of the decision theory of law. I believe it is pretty safe to say that most of us reject the decision theory of law precisely because most of us think that this is a theory of anything goes. But that is not all. Other familiar objections against the theory in question include the argument from fallibility, the argument from genuine criticism, the argument from self-prediction, and the argument from identification of the competent authorities. As you are going to hear, however, all these objections fall short once we give a proper understanding of the decision theory of law and introduce the distinction between creation and application of laws which fits it.

My line of argument has three parts. The following talking points are meant to facilitate our discussion.

PART ONE
The standard view

In the first part, dedicated to the standard view, I will briefly introduce the decision theory of law and the five objections against it:

1. **The decision theory of law** may accurately be described as stating that even the general norm concerning some matter of legal dispute consists in whatever concrete final judgement a court will issue when the dispute is litigated. This theory is, therefore, not to be confused with the prediction theory of law.

2. **The argument from application of the law** is pretty straightforward: if final judicial decisions constitute even the general norms concerning some matter of legal dispute, it is conceptually impossible for them to apply or misapply those very norms. Speaking of (mis)applications of these norms by final judicial decisions is, therefore, no less than a category mistake.

3. **The argument from self-predication** opens with the question 'What the law is?' or 'What we ought to do according to the law?' Now, on the decision theory of law, to ask 'What we ought to do according to the law?' is to ask 'How will the judge decide the case?' But even if the non-judicial uses of the former question may be understood this way, as Hart (1959: 237) concedes for the sake of argument only, its judicial uses cannot have that meaning. Otherwise, a judge who asks herself what ought she do according to the law turns out to be asking herself, what will she do in fact, which is clearly not the case (*cf.* Leiter 2005: 62 for one recent version of this argument).

4. **The argument from identification of the relevant authorities** goes somewhat along these lines: If there were no legal rules whatsoever before a competent authority chooses the relevant sources of law and interprets them in a final ruling, then it would be impossible to identify the competent authority in advance. However, in most cases, the parties and their lawyers have no problem identifying the competent authorities before getting to a final decision, and the theory in question cannot explain it. This, too, is often understood as a 'fatal' argument against conceptual rule-scepticism and, in particular, the decision theory of law (*cf.* Green 2011: 408 for a recent version of this argument).

5. **The argument from legal fallibility** of final judicial decisions is known to have various forms. While the most sophisticated version of it is included in HLA Hart's famous parable of the game of scorer's discretion, the simplest version of this argument can be summarised as follows: On the decision theory of law, final judicial decisions cannot be incorrect from the legal point of view. However, final decisions are made by judges and judges are human

beings. Human beings are fallible given that they can make mistakes. Consequently, their decisions can be mistaken.

6. **The argument from genuine criticism.** This is also part of HLA Hart's (1961: 142-146) parable of the game of scorer's discretion. In this fictitious game, the score is what the scorer says it is. That is 'the scoring rule'. Moreover, there is no sign of criticism seriously addressed to the scorer for misapplications of the scoring rule. In legal settings, by contrast, genuine criticisms frequently invoke misapplications of the law even when they are addressed to final rulings. The existence of such criticisms indicates a fundamental difference between Scorer's Discretion and legal adjudication. In order to explain the difference in question, one has no other option but to assume that the result of legal adjudication, unlike that of Scorer's Discretion, is bound by rules established in advance. But given that the decision theory of law rejects this assumption, it is unable to explain the existence of genuine criticism in legal discourse.

PART TWO
Conversational presupposition, failure and cancellation

In the second step of this talk, I will draw a distinction between creation and application of laws in a way that is compatible even with the radical rule scepticism of the decision theory of law. Before we will get into the details, however, I will state a few background assumptions of my reasoning:

7. **The ambiguity of 'law'.** The argument presented here assumes the thesis of the ambiguity of the word 'law'. While this word is sometimes used to denote (*a*) the sources of law, it is also often used to denote (*b*) the meanings of the sources of law or (*c*) a special kind of a discursive social practice, namely, legal discourse.

8. **The semantic conception of legal content.** Another (and rather simplifying) assumption of this argument is the semantic conception of norms. According to the semantic conception of norms, these are the meanings of the sources of law.

9. **Four meanings of 'creative application of laws'.** Against this background, one should be able to distinguish two concepts of creation of laws and two concepts of application of laws, to wit: the creation of the sources of law, the creation of norms, the application of the sources of law, and the application of norms. Consequently, we can identify four meanings of the expression 'creative application of laws':

    a) a source-creative application of norms,
    b) a source-creative application of the sources of law,
    c) a norm-creative application of norms,
    d) a norm-creative application of the sources of law.

10. **A norm-creative application of the sources of law.** Notice that the latter of these meanings (*d*) is perfectly compatible with the radical rule-scepticism of the decision theory of law. As we have said above, this theory may accurately be described as stating that even the general norm concerning some matter of legal dispute consists in whatever concrete final judgement a court will issue when the dispute is litigated. However, such a theory need not reject every possible limit to the exercise of this norm-creative function of final judicial decisions. While it is obvious that one cannot explain the fallibility of such decisions in terms of violation of the very norms they constitute, one could arguably separate the fallibility criterion for final judicial decisions from the content of the law and tie it, instead, with the sources of law. According to such a theory, a final judicial decision consists in either *i*) the norm-creative application of the sources of law or *ii*) the norm-creative misapplication of the sources of law.

11. **This is the first limit** of the norm-creative application of the sources of law. It has to do with the applicative character of the act in question. It helps explain genuine criticisms that frequently invoke misapplication of the 'law' (meaning: the sources of law) even when they are addressed to final rulings, the legal authority of which is not disputed. But there is a second limit of the norm-creative application of the sources of law.

12. **The second limit** has to do with the norm-creative character of the act in question. Those who though that an act transgressed this

limit, would no longer speak of a final judicial decision that misapplied the sources of law. Instead, they would claim that the act simply did not count as judicial.

13. **How to capture these limits theoretically?** Both limits of the norm-creative application of the sources of law are captured in the following participation rule of legal discourse:

> ***Participation rule** of legal discourse.* Every interpreter in legal discourse purportedly agrees with the legislator. Judicial decisions, or proposals thereof, are based on the sources of law and are not a mere fiat of discretion.

14. **Conversational presupposition.** The content of this rule of participation is conversationally or pragmatically presupposed by every interpretative intervention in legal discourse. Together with three other rules of discourse (*i.e.* the rules of assertion, objection, and retraction), it is part of the 'rules of the game' and not merely its product. The participation rule serves to define 'law' as a special kind of a discursive social practice, as well as to distinguish legal discourse as conceived by radical rule-sceptics from the game of scorer's discretion imagined by HLA Hart.

15. **Presupposition cancellation as the violation of the second limit.** Conversational presuppositions are cancelled through direct denial. Here is an example. Think of an alleged participant in legal discourse who says something along these lines: 'solution *s* is the right legal answer for the case at hand, although it is contrary to all the relevant sources of law.' This is clearly an explicit denial of conversationally presupposed participation rule which I have mentioned previously. Now, such a cancellation violates the second limit of the norm-creative application of the sources of law. We shall thus conclude that an alleged participant steps out of the game (that is, she steps out of legal discourse) if she denies the content of the participation rule explicitly by saying something like: '*s* is the legal solution for the case at hand, although it is contrary to all the relevant sources of law'. I do not think anyone would say that such a person is a participant in legal discourse.

16. **Presupposition failure as the violation of the first limit.** One speaks of a presupposition failure when what is presupposed

appears to be false or incorrect. However, failures of conversational presuppositions (unlike those of conventional presuppositions) do not affect the correctness of what is said. A failure of the conversationally presupposed content of the participation rule therefore violates the first limit of the norm-creative application of the sources of law. This is why genuine criticisms that invoke misapplication of the 'law' (meaning: the sources of law) even when they are addressed to final rulings, the legal authority of which is not disputed, may well be explained as an expression of a perceived presupposition failure of those rulings. In other words, such criticisms purport to show, contrary to the presupposition in question, that a given ruling is in fact in disagreement with the relevant sources of law (either because the relevant sources are thought to be different from those actually considered by the judge, or because the ruling is deemed to be incompatible with the sources that were rightly considered to be relevant).

PART THREE
Taking radical rule scepticism seriously

Finally, in the third step of my talk, I will reject the rest of the objections against the theory in question: the self-predication argument, the legal fallibility argument, the argument from identification of the relevant authorities, and the argument from genuine criticism.

17. **The self-prediction argument** is a straw man fallacy, as you might have perceived already on your own. It is a straw man because it ignores that on the decision theory of law, the law concerning an event is the *final* ruling of the court – and the status of finality somewhat escapes the will of the judge of the case at hand. The judge who asks herself what ought she do according to the law is thus actually asking what ought she do in order for her ruling to be accepted as final. Accordingly, the question is not what the judge will do. The question is what the community will do. Will the community accept the decision as final or not? When the judge asks herself what ought she do according to the law, she is therefore asking what ought she do in order for the community to accept it as a final judicial decision. The argument from self-predication is therefore refuted.

18. **The argument from legal fallibility** seems to be much more powerful then the self-predication argument – unless you stop to really think about it. Indeed, if it were true that judicial decision can be mistaken because judges are human and therefore fallible, then we should likewise be able to say that whatever is known to the judge is also know to the tribunal. But that is not the case. In almost any system of civil procedure, a clear distinction is made between the knowledge proper to the judge as a human individual and the knowledge proper to the judge as the competent authority to resolve a legal dispute (that is, the court). Consequently, judges are not allowed to motivate their judicial decisions with just any piece of their individual knowledge, unless the same information has been dully presented to the court by one of the parties. Therefore, if we are not allowed to mistake the individual knowledge of the judge for the institutional knowledge of the court, we must also not confuse the human errors of the judge with the institutional errors of the court. In other words, these two types of error (the human and the institutional) have different conditions of existence and, so, we may well be in facing one of these two types of error without facing the other one. A human error of the judge therefore does not always constitute an institutional error of the judicial decision.

19. **The argument from identification of the relevant authorities** is also flawed and can be easily dismissed, in my view, once we are aware of the conversational presupposition mentioned in the second part of this talk. Indeed, one need not refer to the law that identifies the competent authorities in concrete cases to explain successful identification of the competent authorities. Instead, the same can be explained by pointing to the sources of law which are commonly invoked as relevant in similar cases. The sources of law have this guiding function precisely because there is a presupposition to the effect that judicial decisions agree with the relevant sources of law.

20. **The argument from genuine criticism** is another easy victim of the presuppositional account of participation in legal discourse. Indeed, on this account, criticisms of judicial rulings make perfect sense as expressions of a perceived presupposition failure of those

rulings. In other words, genuine criticisms purport to show, contrary to the presupposition in question, that a given ruling is in fact in disagreement with the relevant sources of law (either because the relevant sources are thought to be different from those actually considered by the judge, or because the ruling is deemed incompatible with the sources that were rightly considered relevant). And since we have to do with a conversational presupposition, as has been explained above, the fact that this is not accepted by (some part of) the audience does not affect the ruling's legal correctness as such. This explains why you can also criticise final judicial decisions even if you accept, as the radical rule sceptics do, that final judicial decisions cannot possibly be incorrect from the legally relevant point of view.