Law and Legal Science

An Inquiry into the Concepts *Legal Rule* and *Legal System*

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CLARENDON PRESS · OXFORD

Oxford University Press, Walton Street, Oxford OX2 6DP
London Glasgow New York Toronto
Delhi Bombay Calcutta Madras Karachi
Kuala Lumpur Singapore Hong Kong Tokyo
Nairobi Dar es Salaam Cape Town
Melbourne Auckland
and associate companies in
Beirut Berlin Ibadan Mexico City Nicosia

First published 1979
Reprinted 1982

British Library Cataloguing in Publication Data
Harris, James William
Law and legal science.
1. Legal rules 2. Law
I. Title
340.1'1 K237 78–41121

ISBN 0–19–825353–2

Printed in Great Britain
by Ashford Press
Shedfield
Southampton

To
Jose

Abbreviations

C.A.L.	O. Hood Phillips: *Constitutional and Administrative Law*, 5th edn., 1973.
C.L.	H. L. A. Hart: *The Concept of Law*, 1961.
C.L.S.	J. Raz: *The Concept of a Legal System: an Introduction to the Theory of Legal System*, 1970.
C.U.	D. H. Hodgson: *Consequences of Utilitarianism: a Study in Normative Ethics and Legal Theory*, 1967.
D.N.	A. Ross: *Directives and Norms*, 1968.
E.H.K.	*California Law Review: Essays in Honor of Hans Kelsen*, 1971.
E.L.M.P.	H. Kelsen: *Essays in Legal and Moral Philosophy*, 1973.
E.L.P.	R. Summers (ed.): *Essays in Legal Philosophy*, 1968.
G.T.	H. Kelsen: *General Theory of Law and State*, 1945.
I.P.M.	J. Bentham: *An Introduction to the Principles of Morals and Legislation* (J. H. Burns & H. L. A. Hart, eds.), 1970.
J.D.	R. A. S. Wasserstrom: *Judicial Decision: Towards a Theory of Legal Justification*, 1961.
L.C.	G. Gottlieb: *The Logic of Choice: an Investigation of the Concepts of Rule and Rationality*, 1968.
L.F. (i)	K. Olivercrona: *Law as Fact*, 1939.
L.F. (ii)	K. Olivercrona: *Law as Fact*, 2nd edn., 1971.
L.M.S.	P. M. S. Hacker and J. Raz (eds.): *Law, Morality, and Society: Essays in Honour of H. L. A. Hart*, 1977.
L.V.	S. Munzer: *Legal Validity*, 1972.
N.A.	G. H. Von Wright: *Norm and Action*, 1963.
O.E.J.	A. W. B. Simpson (ed.): *Oxford Essays in Jurisprudence*, 2nd Series, 1973.
O.L.G.	J. Bentham: *Of Laws in General* (H. L. A. Hart, ed.), 1970.
O.L.J.	A. Ross: *On Law and Justice*, 1958.
P.E.L.	R. Cross: *Precedent in English Law*, 2nd edn., 1968.
P.J.D.	J. Austin: *The Province of Jurisprudence Determined, and the Uses of the Study of Jurisprudence*, 1954.
P.T.L.	H. Kelsen: *Pure Theory of Law*, 1967.

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I

Introduction

1. THE CULTURAL SIGNIFICANCE OF THE CONCEPT LEGAL RULE

IN ANY developed society, discourse about the functioning of the legal process includes reference to 'rules'. This is true of discourse at every level of generality—from the friend who advises a motorist where it is 'safe' to park, to the essayist in comparative national constitutions. Talk about the police, the legal profession, the courts, or the constitution would be unimaginably different from what actually occurs if, *per impossibile*, the concept *legal rule* were banished from the societies in which it is now an implanted cultural datum.

This cardinal fact about legal discourse is not denied—though it is sometimes bemoaned—by those theorists who, in their analyses of legal processes, seek to play down the concept. They deny or qualify one or other, or both, of two assumptions which go hand in hand with everyday discourse about the law: first, that legal rules control decisions on the part of officials; second, that they ought to control them.

The first of these assumptions underlies two major legal enterprises; namely legislation and legal science. The commonest immediate objective of enacting statutes and legal regulations is to change patterns of decisions by judges and other officials, the ultimate objective being the advancement of some policy goal. This commonest immediate objective would be senseless if it were the case that official decisions are in no way controlled by legal rules. If judges and other officials always, or even generally, make the decisions they do as a result of a complex of

motives which do not include accurate appraisal by them of the meaning-content of legislative materials, statute-making would be an inexplicably persistent social farce.

Legal science is that activity, widespread in countries with developed legal institutions, whose necessary objective is the systematic exposition of some corpus of legislative materials. A piece of legal science, to be such, must seek to describe what the law is on a topic by reference to relevant authoritative legislation. It may also offer historical explanations for the state of the law, or doctrine-based or policy-based criticisms of it, and recommendations for interpretation where the law is uncertain or for legislative amendment where it is unsatisfactory. Legal science is to be found in textbooks and treatises, in solicitors' advice and counsels' opinions and, commonly, in the reported decisions of courts.

If the decisions of officials were in no way controlled by legal rules appearing in legislative materials, legal science would be a pointless enterprise. Its basic data would not have the social relevance which its authors suppose them to have. It would also be a deleterious enterprise, since all those who rely on its products as guides to official decisions affecting them, would be wasting time, effort, and resources. Authors and consumers alike would be the victims of a 'high-class racket', a gigantic conceptual 'hoax',[1] the hoax that legal rules do actually govern, at least in the sense that official decisions would not be the same if they did not exist.

The second assumption which goes hand in hand with legal discourse—namely, that legal rules *ought* to control decisions by officials—is the foundation of the specific value of *legality*. When it is clear to all who know the contents of a rule and are acquainted with the facts, that the rule requires an official to make a particular decision, then it is contrary to legality if the official fails to make that decision.

The value of legality is a constituent element of the roles of all officials in societies with developed legal institutions. In this respect it is to be contrasted with the values attached to more specialized roles, such as those of judicial and legislative craftsmanship. It only applies to a situation in which an official

[1] Cf. F. Rodell: *Woe Unto you Lawyers*, 1959.

knows of a rule and its application is beyond doubt. Breach of legality must therefore be a conscious act.

So much is observance of legality an accepted part of the role of officials, that an announced departure from it rarely occurs, at least in the day-to-day domestic administration of a state. An official would not be performing his office if he were heard to say: 'I have no doubt that this legal rule which is binding on me requires me to do X, but I intend to do Y.' Such an announced breach with legality, if made by an important official, would be seen as precipitating a constitutional crisis.

A breach with legality will therefore normally involve either concealment or sham. Secret breaches of legality may occur in any society. An open breach with legality, in which an official pretends that rules have an effect which everybody knows they do not, is likely to occur often only in a terroristic society whose rulers think it worth while to make a pretence of legality—for instance, by staging sham trials.

The assumption that legal rules ought to control official decisions is the foundation of the value of legality. It is this fundamental aspect of it which is generally immune from announced violation. The value of legality is also commonly invoked in connection with the procedure by which officials ascertain whether a rule applies to a particular case. It is said to be contrary to legality, for instance, if a disputant before a tribunal is not given an opportunity to advance evidence.

These assumptions about the relation of legal rules to official decisions are of different logical types: the one empirical and causal, and the other evaluative and justificative. Yet the value of legality would be empty if either were ill-founded. So also would be the closely associated value of constitutionality, which, among other things, requires officials to choose among conflicting rules according to certain criteria, and which requires legislatures, in laying down rules, to observe certain procedures. These aspects of the value of constitutionality would be robbed of their present significance if it were not assumed both that legal rules ought to, and that they do, control decisions on the part of officials.

If these assumptions were not well-founded, the practices of legislation and legal science, and the values of legality and constitutionality, would dissolve into pointless charades. Against

this fact there must be set the following stark truth: in any particular case in which an official has made a decision, it cannot be *proved* (logically, or as a matter of fact) that he could not consistently, or would not, have made that decision if legislative source-materials binding on him had not contained a particular rule. The application of pre-existing rules to subsequently arising facts always, in theory, involves purposive elements, so that the official is always, logically, free to make more than one decision, and in consequence the decision he does make does not express a proposition which is logically entailed by the rule. The actual motives operating on an official—if 'motive' is taken to include subconscious predilections of all kinds—are unwitnessable both by others and by the official himself, so that it can never be shown as a matter of fact that the rule *caused* his act of deciding.

It is a commonplace that the application of rules is often unclear and that officials may have conscious or unconscious biases which lead them into particular interpretations. The point here is that it can never be shown that an official came to the decision he did solely because of a rule.

That this is so as a matter of strict logic can be illustrated with an extreme, hypothetical example. A statute provides: 'No child under the age of ten years may be convicted of any criminal offence.' A child is arraigned on a charge of theft. During the trial, undisputed evidence is adduced to prove beyond any doubt that (a) the child committed all the elements of the offence, but that (b) he is only seven years old. The judge discharges the child.

The statute says: 'No child . . .' But supposing the point had been taken that the statute had made no mention of race, so that it was open to the court to interpret the legislative intention to have been to exclude from conviction only children of a favoured race and not those of the race to which the defendant belonged. If the court had taken this point and had convicted the child, legality would manifestly have been breached, because the judge would have found that the rule did not apply to the case when it was clear to all that it did. Such a decision would be possible only in a society in which sham legality was practised.

And yet the decision to exclude such an interpretation is not

strictly logical, but purposive, in nature. Words like 'no', 'any', or 'all', when appearing in legislative materials, do not have the function of categorical symbols in a deontic logic, because one can never rule out the possibility that reasons could be found for interpreting them as being subject to exceptions. (Consequently, symbolic logics have little practical relevance to legal interpretation; and computerization of legislative source materials is unlikely ever to be of assistance in the application, as opposed to the storage, of the law.)

The reason why, in the example given, no interpretation of the statute which limited its scope to children of the more favoured race could be given, without contravening legality, is that it would be clear to everyone that that was not the purpose of the rule. That its purpose was to remove *all* young children from the ambit of the criminal law could not be genuinely disputed.

This would be true even in present-day societies which practice legal discrimination against racial or other groups. Even in these, distinctions are likely to be expressed in legislation rather than implied by way of interpretation. And where sham legality is alleged to take place in such societies, the accusation usually is, not that unsupportable purposive interpretations were given to rules, but that rules were only made applicable by findings of fact which plainly contradicted the evidence. In our example, this sort of sham legality would occur if, despite voluminous evidence that the child was born only seven years ago, the judge ruled that he was aged ten.

One could of course imagine a society in which the persecution of a particular racial group was such an announced and accepted social goal that the suggested interpretation of the statute would not contravene legality. It would have to be a society in which some such plea as the following could genuinely —that is, without indulging in sham legality—be urged: 'It would be absurd to suppose that the legislature intended that children of the (less favoured) race should be exempted, because their peculiar aptness to form criminal intent is notorious, and therefore the court ought to interpret the statute by reading "No child" to mean "No child of the (more favoured) race".' Universal agreement about the purpose of a particular kind of legal rule excludes the possibility of such an argument being

upheld, without contravention of legality, in any present-day society.

If the contingent fact of unanimity in the rejection of certain purposive interpretations of rules is recognized, then deontic logic becomes a legitimate species of deductive logic, and it follows deductively that a child below the minimum age cannot be prosecuted. If two people agree that if a tossed coin comes down heads, X has first innings in a game of cricket, and the coin comes down heads, no one would describe an assertion by Y—'Ah yes, but the rule was only applicable when the sun was shining'—as anything else than a cheat. (It would be otherwise if the parties lived in a society where it was accepted by some that chance only operated properly in the sunshine.) Similarly, a purposive application of the minimum-age rule so as to exclude its application from children of the less favoured race would universally be regarded as contrary to legality.

It might be objected that literal 'unanimity' in rejection of certain purposive interpretations can never be relied upon. Might there not always be at least one crank found to argue, for example, that, in view of the extraordinary criminal propensities of infant redheads, it cannot have been part of the legislative purpose to exclude them? If this objection were valid, it would apply to every attempt to explain the intellectual processes of any social-scientific discipline. The criteria of relevance of points taken within a social-scientific debate must have an outer limit fixed by general assumptions about human institutions, even though the limit varies with time and place. 'Unanimity' refers to the opinions of those whom one can expect to be accepted as serious participants in such a debate.

It is necessary to distinguish two quite different roles which 'purpose' plays in the law. Where the application of the law is clear, where only one decision can be given consistently with legality, unanimity about the purpose of particular kinds of rules operates negatively to exclude interpretations which would be contrary to legality. Here no evidence of the Legislature's, or anyone else's, individual purpose is required. In unclear cases, however, one class of reasons sometimes advanced for advocating an interpretation relates (as we shall see in chapter five) to the particular, proven 'purpose' of some person or persons involved in the legislative process. Here 'purpose' operates

positively, and what the purpose was is often a matter of serious debate.

Thus, if the judge discharges the seven-year-old child, one cannot, strictly, assert that the logical force of the rule compelled him so to do and in that sense *prove* that the rule controlled his decision. Even with the rule, he might (as a matter of strict logic) have come to a different decision. Nevertheless, the decision can be described as a practical deduction if certain universal purposive assumptions are added to the rule as grounds of his decision.

The second sense in which it may be urged that one cannot prove that an official makes a particular decision because of the content of a particular rule relates to the possible operation of subconscious motives. The judge might have discharged the seven-year-old child even if the statutory rule had not existed, by employing legal or sham legal purposive interpretations of other rules. He might have been predisposed to do so because of all kinds of predilections which urge him in that direction, of which neither he nor any observer is conscious.

If a judge discharges one child, giving the statutory rule as his reason, we cannot be sure that he would not have convicted another child, nor that he would not convict the first child on another occasion, because it might be that predilections operating on him on this occasion would not operate on other occasions. Such suggestions seem incredible but cannot be disproved simply because the circumstances of such a decision-making process cannot be exactly reproduced, so that no strictly authenticated verification is possible.

We are thus left with a seeming paradox. On the one hand, important legal practices and values presuppose, and every day legal discourse takes for granted, that legal rules do and ought to control decisions on the part of officials. On the other hand, that any particular such decision was controlled by a rule can never be proved by logic alone, nor by experimental test. The only arbiter is 'common sense', that is, assumptions based on generalizations from personal experience and not falsified by counter-instances.

But common sense is likely to vary in its judgments. In the example given above of the discharged child, it will adjudge that legal discourse, practices, and values are right to give

unique importance to the operation of the rule and to discount theoretical bars to proof of its effective operation. If the legislature introduces a new rule changing the minimum age of criminal liability, with the immediate purpose of securing that officials will not convict children below that age, no one would express the least doubt that its objective would be attained through the effective application of the new rule. If anyone seeking information as to the content of the law reads in a textbook that there is a rule fixing a minimum age, no one could doubt that he had thereby acquired useful knowledge.

On the other hand, if the rule under consideration were one which made it a criminal offence to 'conspire to corrupt public morals', the fact that a conviction or acquittal cannot be proved to be controlled by the rule is significant. Conflicts between different purposive interpretations, any of which could be accepted without contravening legality, must arise. And when the *protasis* of the rule was adjudged to apply to a particular case, it would be, even from a commonsense standpoint, extremely difficult to assess whether or not subconscious predilections had operated.

The importance of the actual meaning-content of such a rule would accordingly be reduced. By enacting such a rule, a legislature could not hope to produce any predictable shift in patterns of official decisions, unless account were taken of known official views about purpose and known official biases. The legal scientist would convey minimal information if he merely set out the content of the rule. The charge of contravening legality would scarcely be possible in the case of any decision 'applying' the rule. It would be otherwise if we were informed that, as well as the general rule, there was, subsumed under it, a more specific rule making it an offence to publish a directory advertising the services of prostitutes.[1] The more specific rule could be applied in situations in which its applicability could not be sensibly controverted.

In the case of any particular legal rule, it would be extremely difficult to keep a tally of the number of occasions on which it clearly applied, and to compare this with the number of occasions on which its possible application raised questions of pur-

[1] Cf. the decision of the House of Lords in *Shaw* v. *Director of Public Prosecutions* (1962) A.C. 220, approved in *Knuller (Publishing, Printing and Promotions) Limited* v. *Director of Public Prosecutions* (1973) A.C. 435.

posive interpretation. No evidence whatever of the correlation can be expected to be reflected in the reports of litigated cases. The mistaken assumption that it can, lies at the root of many of the sceptical views about rules expressed by writers considered in the next chapter as representatives of the disputes theory of law.

Where disputes are settled by judges following arguments about the law, there is a good chance that different purposive interpretations of rules will be arguable without contravening legality. A disputes theory of law fastens on such occasions as typical of the application of rules. But outside the courts, before there is any dispute, legal rules apply deductively (given unanimity in purposive interpretation) to countless situations.

Where a notice by a roadside specifies a speed limit, streams of passing motorists know that to exceed it will constitute an offence, and decide whether or not to risk being caught. Every time that one of them registers what the law is and how it applies to him, law is applied deductively. After 999 such motorists have passed the sign, the thousandth comes by carrying a passenger to hospital. He may not know whether, if he speeds, he will be committing an offence. A lawyer sitting at his elbow who knows the relevant regulations may not be able to tell him either, because although the definition of the offence is baldly stated, a purposive interpretation which excludes such a case may be arguable. If there is a prosecution, there may then, perhaps, be a dispute.[1] The example of the discharged seven-year-old child is extremely unlikely to occur in practice precisely because everyone would assume that the rule would control the court's decision, and there would therefore be no point in the prosecution.

There are enough rules approximating to the minimum-age-liability type or to the speed-limit type, rather than to the conspiracy-to-corrupt type, to place the usefulness of rule-based

[1] The defence of necessity has a very limited scope in English law. The Court of Appeal has held that drivers of fire engines crossing red traffic lights would be technically guilty of an offence, however great the emergency, because nothing in the wording of the relevant legislation indicates an exception. Nevertheless, it was said that it would be proper for the police never to prosecute or if they did, for Justices always to grant an absolute discharge; and the Court held that an order from the chief officer of the fire brigade directing this 'unlawful' conduct to be undertaken was a lawful order—*Buckoke* v. *Greater London Council* (1971) Ch. 662. Cf. *Johnson* v. *Phillips* (1975) 3 All E.R. 682.